UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 22-10306
	)	
Plaintiff-Appellee,	)	DC: 1:20-cr-00044-LEK-3
	)	
vs.	)	
	)	
JONATHAN TAUM,	)	
	)	
Defendant-Appellant.	)	
	)	
	)	
_____	)	

DEFENDANT-APPELLANT'S OPENING BRIEF

The Honorable Leslie E. Kobayashi
United States District Court Judge
District of Hawai'i

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CUSTODY STATUS

Defendant-Appellant Jonathan Taum ("Taum") is in federal custody at FCI Big Spring. His projected date of release is September 5, 2032.

STATEMENT OF JURISDICTION

On November 17, 2022, the United States District Court for the District of Hawai'i entered its judgment against Taum for Count 1 (Deprivation of Rights Under Color of Law, in violation of 18 U.S.C. § 242 and § 2; Count 3 (Conspiracy to Obstruct Justice, in violation of 18 U.S.C. § 371, and Count 6, (Obstruction of Justice in violation of 18 U.S.C. § 1519). [1-ER-2].[1]

On November 28, 2022, Taum filed his notice of appeal. [4-ER-589]. This Court has jurisdiction of this matter pursuant to 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291. This appeal is timely pursuant to Fed.R.App.Pr. Rule 4(b).

ISSUES PRESENTED

A. Because Taum's right to confront witnesses under the Sixth Amendment was violated, a new trial should be ordered.

B. Count 1.

1. Because Taum did not act "maliciously and sadistically" for the purpose of causing harm, his Conviction for Count 1 cannot stand.

[1] "ER-" refers to the Excerpts of Record filed with Defendant-Appellant's Opening Brief pursuant to Ninth Circuit Rule 30-1.6(a).

2. Because the jury was improperly instructed as to the elements of 18 U.S.C. § 242, Taum's conviction for Count 1 must be vacated.

3. Because Taum did not violate the Kaili's 8th amendment rights, Taum's conviction for Count 1 must be vacated.

C. Count 3.

1. Because there was insufficient evidence to convict Taum of Count 3, his conviction should be vacated;

2. Because the jury was improperly instructed as to Count 3: Deprivation of rights under color of law, his conviction should be vacated.

D. Because prosecutorial misconduct in the Government's closing statements denied Taum a fair trial, this case should be remanded for a new trial.

E. Because the Court erroneously applied a two-level increase for obstruction of justice under USSG §3C1.1, this case should remanded for resentencing.

F. Cumulative error requires a new trial.

STATEMENT OF THE CASE

Taum was tried with co-Defendants Jason Tagaloa and Craig Pinkney. All three defendants were employed by the Hawaii Department of Public Safety at Hawaii County Correctional Center ("HCCC"). Sgt Taum was the supervisor of Tagaloa and Pinkney, both Adult Corrections Officers (ACO's). In regard to Count 1, on June 15, 2015, while Pinkney and Tagaloa were transporting prisoner Chawn Kaili ("Kaili") from one area of HCCC to another, Pinkney and Tagaloa allegedly

used excessive force (improper strikes and kicks) on Kaili to handcuff him, and Taum allegedly failed to stop them from doing so. In regard to Count 3, all the Defendants were accused of taking steps by themselves, and in concert with others, to cover up this use of excessive force. In regard to Count 6, Taum is alleged to have omitted material information in his incident reports concerning Kaili's transfer. [4-ER-497].

At trial, the first witness to testify was ACO Frank Baker. Baker testified on June 15, 2015, he was manning the desk at the Waianuenue building, part of the Hawaii Community Correction Center. At approximately 12:30 a.m., Kaili approached him and asked "to make bail." [2-ER-36] Baker thought that Kaili was not in his right mind, and was acting "strange." *Id.* He contacted his Sgt., Defendant Taum, who advised that he was going to come get Kaili to bring him to another unit of HCCC, the Punahele Building. [2-ER-39].

ACOs came to get Kaili, who was not handcuffed, and Baker watched the video as the ACO's took Kaili into the yard between the two buildings. [2-ER-41]. He saw the ACOs in his view abusing Kaili and imposing a "beatdown" on Kaili. [2-ER-43]. Baker stated that Taum, as supervisor was present, and did not attempt to stop the force used. [2-ER-45]. Baker testified that ACO Tibayan was in the control room with him and Baker had sent him out into the courtyard. Baker testified,

"ACO Tibayan went out there and he laid on Kaili's legs, which is what you're supposed to do, so they can control his arms because they needed to cuff him or control him." [2-ER-46].

ACO Jordan Demattos testified that Defendants Pinkney and Tagaloa, escorted Kaili from Waianuenue Complex to the rec yard. Demattos and Taum went from Punahele Complex to the rec yard and saw them crossing. [2-ER-51-52]. Kaili was "unsteady, hesitant," and when Kaili saw Taum and Demattos, he backed into ACO Tagaloa who bear hugged him and took him down. [2-ER-52].

Demattos stated that Taum "helped holding" Kaili down by holding Kaili's legs. [2-ER-57]. Demattos stated, "I punched Mr. Kaili and ACO Tagaloa kicked him." [2-ER-65]. Demattos also identified Tagaloa as a person in the video who kicked Kaili in the head. [2-ER-66].

ACO Demattos also testified that after Kaili was transported to F7, while still in his handcuffs, Tagaloa punched Kaili in the face with his left hand. This was the same side of his face that Kaili had been hit earlier. [2-ER-86]. Taum was not alleged to be present.

Demattos testified that he was present during a meeting with Taum, Pinkney and Tagaloa at Taum's residence a few weeks after this incident occurred, and indicated that they discussed "All the strikes that we had given and that we would

say that we had used trained strikes, that they were ineffective, so we had to resort to untrained strikes," but indicated this was not truthful. [2-ER-148-150].

A cell phone video of the meeting at Taum's house, taken by co-Defendant Pinkney, was also played for the jury. [2-ER-152].

Demattos indicated that all Taum did was to hold Kaili down. [2-ER-158-159]. Demattos stated that while Taum had ordered him to kick Kaili in the shoulder, Kaili was refusing to give up his hands to be handcuffed, and that the purpose of the order was so that they could loosen Kaili's shoulder to get him to relent. Indeed, Demattos indicated that this had previously been done in a "similar situation." [2-ER-160-161].

Chawn Kaili testified that on 6/15/15, while a prisoner at HCCC, he had taken methamphetamine and was in "a major state of paranoia." [2-ER-172]. He wanted to separate from others in his unit because he was "afraid of what would happen." He recalled asking Pinkney to be allowed to go to "the hole," but was told that if he persisted in his requests, he might be sent to "medical" which to him was an implied threat. [2-ER-176]. He was eventually taken from the chute to the yard, and saw lots of ACOs. This concerned him as they usually take only 2 ACOs to do a transfer. [2-ER-178]. He asked Tagaloa "where we going" and then was taken down and suffered

numerous strikes from the guards. [2-ER-179-185]. He did not indicate Taum was one of those who struck him.

Kaili testified that Taum came to see him once Kaili was taken to F7, and, after much cajoling, agreed to be taken to the hospital for treatment. Taum was only able to convince Kaili to go after Taum took a picture of Kaili with his phone and showed it to him. [2-ER-187-188].

Kaili indicated that had been using drugs for 2-4 days prior to the incident, and had not slept for three days. [2-ER-204]. Kaili admitted he had walked around a little bit prior to be moved on 6/15/15, and had been often told to return to his cell. [2-ER-204]. He admitted he had to be handcuffed to the gurney while at the hospital. [2-ER-223].

Kaili admitted he did not agree to "cuff up" when he was taken down in the rec yard. [2-ER-226, 232]. He also agreed he wanted to go to the hole prior to being transported as he might hurt someone as he had a paranoid mind. [2-ER-233].

Through the testimony of F.B.I. Special Agent Robert Nelson, the Government introduced numerous exhibits, including:

a. Government Exhibit 23 was the 7/17/24 DPS questionnaire of co-Defendant Tagaloa concerning this incident. In this document, among other things, Tagaloa

wrote numerous statements about Taum, including "Inmate backed into my chest. Sgt. Taum ordered me to take him down" and "Sgt Taum supervised the use of force incident. Supervisory commands were used numerous times."[2]

Exhibit 23 was admitted over Taum's attorney's objection that to admit such evidence would violate "his client's confrontation rights." [2-ER-255, 256]. The following day, the Court indicated it was going to "de-admit" Exhibit 23 and replace it with a redacted version that had no details of what Tagaloa had put in his response. The court indicated it also would do a curative instruction. [2-ER-263-264]. A redacted exhibit 23 was admitted as 23B with no objection. [2-ER-280; 4-ER-591]. A curative instruction was later given advising the jury not to consider Exhibit 23, and "it must be treated as if you no knowledge of it," and the jury "should not speculate about Exhibit 23." [3-ER-32].[3]

b. Government Exhibit 71C was an audio excerpt from Tagaloa's interview at a Department of Public Safety ("DPS") disciplinary proceeding. [2-ER-237-238; 253]. The transcript of this audio was Exhibit 71D and was admitted into evidence.

[2] Exhibit 23 is not part of the record in this case. On October 27, 2023, Defendant-Appellant filed a *Motion to Supplement The Record On Appeal*, which contains Exhibit 23, attached as Exhibit "A." *See* Ninth Cir. Docket #20.

[3] The Final Exhibit List is attached as [4-ER-585].

[2-ER-249-254]; [4-ER-593]. Exhibit 71D indicated the entire recording was as follows:

> MS. YOUNG: Did at any point, you used your legs or feet to strike the inmate in his face?
> MR. TAGALOA: No.

Defense counsel objected to the admission of Exhibit 71C on Sixth Amendment grounds. [1-ER-11]; [1-ER-15-17]. This objection was overruled and 71C and 71D were admitted into evidence. [1-ER-11-12]; [1-ER-29].

c. Exhibit 71E was a 12/20/16 recording of Tagaloa testifying at a DPS hearing. It indicated:

> MS. NADAMOTO: Anything else then that you want to add to that?
> MR. TAGALOA: You know, during the whole incident, all my strikes that I did, I did not hit the head.

Defense counsel objected to 71E at the same time, and for the same basis, that he objected to 71C, *supra*. [1-ER-11]; [1-ER-15-17]. This objection was overruled and 71E was admitted into evidence. [1-ER-11-12]; [1-ER-29].[4]

[4] Government's Exhibit 71F is a transcript of Government's Exhibit 71E. It was not entered into evidence in this case. On October 27, 2023, Defendant-Appellant filed a *Motion to Supplement The Record On Appeal*, which contains Exhibit 71F, attached as Exhibit "B." *See* Ninth Cir. Docket #20.

f. Government's Exhibit 77A is a recording of an audio interview with co-defendant Pinkney and FBI Agent Radzicki. It provides:

> Mr. Pinkney: . . . So they were pretty much there, like, as ACO Tagaloa and the inmate Kaili fell to the ground and they assisted in their various ways. I was not at not-at any point in time during this counter was aware of what the other ACO's were physically doing to the inmate. I was not privy to that until months and months and months later, maybe years later, when I actually saw the video for the first time at the UPW office, and I was like wow.
> Mr. Radzicki: What's UPW?
> Mr. Pinkney: United Public Workers, the local office.

The Government move to admit 77A against "all defendants." [1-ER-13]. This was admitted into evidence over the objection of Defendant Taum on 6th Amendment grounds. [1-ER-12-14]. Government Exhibit 77B is a transcript of this recording, but was not offered or admitted into evidence.[5]

g. Government's Exhibit 77C is another excerpt of an audio interview of co-defendant Pinkney by FBI Agent Radzicki. That recording provided,

> Mr. Pinkney: . . . . If I had to guess because I don't - it, was so long ago, I would have walked past this cell at least two or three times.
> Mr. Radzicki: Right.
> Mr. Pinkney: And the second occasion is when I actually see him jump from the floor to the middle of the bunk. He's up there banging his head against

[5] Government's Exhibit 77B is a transcript of Government's Exhibit 77A. It was not entered into evidence in this case. On October 27, 2023, Defendant-Appellant filed a *Motion to Supplement The Record On Appeal*, which contains Exhibit 77B, attached as Exhibit "E." *See* Ninth Cir. Docket #20.

> the window. And then in the process of jumping back down- oh that's what I left out earlier. Sorry. He was jumping from that spot in the middle of the cell, back and forth.
> Mr. Radzicki: Right.
> Mr. Pickney: So I don't know how he was able to do that, but he was doing it. And when I was at the cell, I believe it was the second time, I saw him slip. Most likely I can assume it was blood dripping. All right. And he fell into the toilet and into the metal sink.

The Government offered 77C against "all defendants." [1-ER-13]. This was admitted into evidence over the objection of Defendant Taum on 6th Amendment grounds. [1-ER-12-14]. Government Exhibit 77D is a transcript of this recording, but was not offered or admitted into evidence.[6]

f. Government's Exhibit 77E is another excerpt of an audio interview of co-defendant Pinkney by FBI Agent Radzicki, which was admitted into evidence. It provides,

> Mr. Radzicki: Did you guys meet after the fact at Taum's house? So what was that meeting all about?
> Mr. Pinkney: That's interesting. I'm not going to confirm or deny, but can I ask a question? Mr. Radzicki: Yeah please.
> Mr. Pinkney: Your information is coming from what source?
> Mr. Radzicki: Well I can't tell you. Just like we would have gone, say that we got information you provided us to someone else. That's not the way it works. Yeah.

[6] Government's Exhibit 77D is a transcript of Government's Exhibit 77C. It was not entered into evidence in this case. On October 27, 2023, Defendant-Appellant filed a *Motion to Supplement The Record On Appeal*, which contains Exhibit 77D, attached as Exhibit "F." *See* Ninth Cir. Docket #20.

> Mr. Pinkney: OK. Well you can't be blamed me for asking. OK. So yeah we did. We went to Taum's house and the basic gist of that.

The Government offered 77E against "Defendant Pinkney only." [1-ER-13]. This was admitted into evidence over the objection of Defendant Taum on 6th Amendment grounds. [1-ER-12-14]. Government Exhibit 77F is a transcript of this recording, but was not offered or admitted into evidence.[7]

g. Government's Exhibit 77G is another excerpt of an audio interview of co-defendant Pinkney by FBI Agent Radzicki, which was admitted into evidence. It provides,

> Mr. Pinkney: Yeah. So yeah, we went go over there and discuss what happened, and he discussed the IA packet. That's the first time for us, that anything like that has ever happened.
> Mr. Radzicki: Okay.
> Mr. Pinkney: So I can't say whether that was out of the ordinary or not, but it happened.
> Mr. Radzicki: Okay. What was discussed at the meeting?
> Mr. Pickney: He had a copy of the video.
> Mr. Radzicki: Okay.
> Mr. Pickney: And he showed it.
> Mr. Radzicki: So the video, you said there were a couple of different videos, right? So the video of the rec yard is what we're talking about?
> Mr. Pinkney: Correct.
> Mr. Razicki: OK so not the video of F7- not the camera in front of F7?

[7] Government's Exhibit 77F is a transcript of Government's Exhibit 77E. It was not entered into evidence in this case. On October 27, 2023, Defendant-Appellant filed a *Motion to Supplement The Record On Appeal*, which contains Exhibit 77F, attached as Exhibit "G." *See* Ninth Cir. Docket #20.

> Mr. Pinkney: No, not the camera in front of F7.
> Mr. Radzicki: Okay.
> Mr. Pinkney: And there was another video of- several videos of the inmate in medical.
> Mr. Radzicki: Okay.
> Mr. Pinkney: So specifically, I'm referring to the Waianuenue rec yard video.
> Mr. Radzicki: Okay.

The person who is described as "he" is undoubtedly Defendant Taum as the showing of videos were only allegedly at Defendant Taum's house. The Government offered 77G against "Defendant Pinkney only." [1-ER-13]. This was admitted into evidence over the objection of Defendant Taum on 6th Amendment grounds. [1-ER-12-14]. Government Exhibit 77H is a transcript of this recording, but was not offered or admitted into evidence. [8]

h. Government's Exhibit 77I is another excerpt of an audio interview of co-defendant Pinkney by FBI Agent Radzicki. It provides,

> Mr. Pinkney: And he was discussing what was going on and how it related to the investigation and what he saw or didn't see, there's a video of that too.
> Mr. Radzicki: Okay. There's a video of that meeting?
> Mr. Pinkney: Mh-hm.
> Mr. Radzicki: So how do you know that there is a video of the meeting? Did you take it or?
> Mr. Pinkney: Yes.

[8] Government's Exhibit 77H is a transcript of Government's Exhibit 77G. It was not entered into evidence in this case. On October 27, 2023, Defendant-Appellant filed a *Motion to Supplement The Record On Appeal*, which contains Exhibit 77H, attached as Exhibit "H." *See* Ninth Cir. Docket #20.

Mr. Radzicki: Okay: You have a video of the meeting?
Mr. Pinkney: Yes, I do.
Mr. Radzicki: Okay. Would you be willing to share that with us?
Mr. Pinkney: Yeah.
Mr. Radzicki: You would? OK. Do you have it today?
Mr. Pinkney: I don't have it on me.
Mr. Radzicki: OK.
Mr. Pinkney: but I can get it by you.
Mr. Radzicki: OK. Did you take it on your cell phone? Did everyone know?
Mr. Pinkney: no.
Mr. Radzicki: so you took that recording?
Mr. Pinkney: Mm-hm.
Mr. Radzicki: And you still have it?
Mr. Pinkney: Mm-hm.

Again, the person who is described as "he" is undoubtedly Defendant Taum as the showing of videos were only allegedly at Defendant Taum's house. The Government offered 77I against "Defendant Pinkney only." [1-ER-13]. This was admitted into evidence over the objection of Defendant Taum on 6th Amendment grounds. [1-ER-12-14]. Government Exhibit 77J is a transcript of this recording, but was not offered or admitted into evidence. [9]

g**.** Government's Exhibit 77K is another excerpt of an audio interview of co-defendant Pinkney by FBI Agent Radzicki. It provides,

[9] Government's Exhibit 77J is a transcript of Government's Exhibit 77I. It was not entered into evidence in this case. On October 27, 2023, Defendant-Appellant filed a *Motion to Supplement The Record On Appeal*, which contains Exhibit 77J, attached as Exhibit "I." *See* Ninth Cir. Docket #20.

Mr. Radzicki: OK. So why did you record it?
Mr. Pinkney: to protect myself in case stuff like this happened?
Mr. Radzicki: So you had an . . .
Mr. Pinkney: An inkling?
Mr. Radzicki: A gut feeling.
Mr. Pinkney: Mm-hm.

The Government offered 77K against "Defendant Pinkney only." [1-ER-13]. This was admitted into evidence over the objection of Defendant Taum on 6th Amendment grounds. [1-ER-12-14]. Government Exhibit 77L is a transcript of this recording, but was not offered or admitted into evidence.[10]

F.B.I. Special Agent Robert Nelson also testified he believed that the only time he saw Taum hit Kaili in the video was in Kahili's thigh, and "[t]hat specific strike, if isolated, may not appear as excessive force[.]" [2-ER-257]. Nelson also agreed that Kaili was resisting being handcuffed, that it was appropriate to order Kaili to submit to being handcuffed, and that force was appropriate to try and get handcuffs on Kaili. [2-ER-258-259]. Nelson admitted that there were reports that Kaili "either

[10] Government's Exhibit 77L is a transcript of Government's Exhibit 77K. It was not entered into evidence in this case. On October 27, 2023, Defendant-Appellant filed a *Motion to Supplement The Record On Appeal*, which contains Exhibit 77L, attached as Exhibit "J." *See* Ninth Cir. Docket #20.

did dive or fell into the toilet" in his cell after he had been handcuffed. [2-ER-265-267].

ACO Kyle Fernandez-Wise testified that he was on the floor when Kaili was placed in his cell after being handcuffed. Starting at 3:00 a.m., Fernandez-Wise observed Taum and his supervising Lt. Waikiki speaking to Kaili after Kaili had been placed in his cell, to try to get Kaili to go to the hospital. [2-ER-270-271].

Fernandez-Wise denied seeing Kaili slip or fall or hurt himself, but did see Kaili jump up to the top bunk one time. [2-ER-272-273]. He admitted that he had lied when he had earlier told a hearing officer that he had observed Kaili injure himself while in cell F7. [2-ER-274-277].

ACO Avery Gomes testified that he worked for DPS as a Basic Correctional Training ("BCT") instructor and trained ACOs Tagaloa, Demattos and Pinkney. He did not testify he trained Taum. [2-ER-281]. Gomes was qualified as an expert, and testified that in the use of force, "the objective must be lawful. Reasonableness of your use of force is going to be reliant on the perceived threat." [2-ER-282]. He later stated, that taking an inmate down to cuff him when he refused to go in the requested direction would be an acceptable use of force. [3-ER-288].

Whether to use deadly force on someone who is actively resisting "depends on the circumstances." [3-ER-290]. In this case, once Kaili was restrained, the ACOs

stopped using any kind of force and helped him stand up. [3-ER-291]. It was acceptable for officers to be in the same room and write reports and to talk to make sure to get time sequences correct. [3-ER-292-293].

ACO Roger Tibayan testified that he had met Kaili before while they were "trying out for an alumni football team." [3-ER-295]. On June 15, 2015, he was working at HCCC, and, through a video feed, was able to see the take down of Kaili. Tibayan stated that he then ran to the yard and told Kaili to stop resisting and observed Pinkney attempting to get Kaili's other arm out from under him to handcuff him. [3-ER-296]. He also pinned Kaili's legs, after Taum got up and circled off to the side. [3-ER-297].

Tibayan was one of the officers who escorted Kaili back to his cell and saw Kaili jump off his bunk, and heard the sound of contact with an object. [3-ER-298]. Kaili jumped back up on the bunk, spitting blood apparently from the contact. [3-ER-298]. Later, Taum talked to Kaili for a few hours to try and calm him down and leave his cell to go to the doctors. [3-ER-304].

ACO Andy Ahuna-Alofaituli testified that he was with Sgt. Taum at the Punahele building when a call came over from Officer Baker at the building concerning Waianuenue an inmate who "acting erratic" and "probably high." [3-ER-305-307]. After the altercation in the rec yard where Kaili was taken down and placed in

handcuffs, Kaili was brought into the Punahele building and placed in cell F7. [3-ER-308-309].

Ahuna-Alofaituli testified that Kaili was kept verbalizing they were coming for me, and "banging his head against the walls, the doors, the bunk." [3-ER-309]. Ahuna-Alofaituli testified Kaili "jumped off the bunk and he literally smacked into the sink." [3-ER-310]. Taum was there and it took them over two hours to calm Kaili down so he could be transported to the hospital. [3-ER-313]. Taum was concerned that if they forced themselves into Kaili's cell, he would suffer more injuries. [3-ER-313-314] Later, he testified that Taum said he would "take down" the Warden and the department should his employers persist in attempting to remove Taum from his position. [3-ER-314].

Defendant Taum testified that Kaili looked like he was about to run, when he was brought into the rec yard. [3-ER-333]. Kaili was real strong. [3-ER-337]. Taum was taught he could use kicks to someone's mass muscle area, but not to the head area, to loosen the shoulder. [3-ER-337].When he left the yard, Tibayan took his place on Kaili's legs and Kaili was not yet handcuffed. [3-ER-340].

Taum testified that the purpose of the meeting at his house was "To ask them basically to tell the truth because if felt like they did nothing wrong and they did the best can, then just tell the truth." [3-ER-341]. Taum denied that during these

meetings, he instructed the Defendant Pinkney, Defendant Tagaloa and ACO Jordan Demattos to leave out information from the questionnaires presented to them by their supervisors in an interdepartmental investigation. [3-ER-344-345]. At a second meeting at this house, Taum stated, "They came to my house, we sat outside, there was a table I set up for them, and I frisked them and I put their phones and put it in containers, and I took my phone. I had I think [ACO] Alo first meeting making sure that nothing was recorded because I just wanted the truth from them[.]" [3-ER-346]. While Taum admitted he ordered his men to use strikes to subdue Kaili, he denied telling Demattos to kick Kaili. [3-ER-348].

The jury was given Instruction #21 regarding the elements of Counts 1 and Count 2[11], which included "Fourth, the charged conduct resulted in bodily injury to Chawn Kaili, or the offense involved the use of a dangerous weapon." [4-ER-534]; [3-ER-365]. This instruction was not objected to by Defendant Taum.[12] [3-ER-319-320].

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[11] Count 2 was a charge of Deprivation of Rights under Color of Law (18 U.S.C. § 242) directed at Defendant Jason Tagaloa only. [4-ER-3]. He was acquitted of this offense.

[12] On June 8, 2022, this instruction was presented by the Government as their proposed instruction #33. *See* Docket #270-1, page 45. On June 30, 2022, the court by minute order gave an amended inclination regarding jury instructions, including that it would give Government's proposed instruction #33 "as modified by the court." *See* Docket #305, page 1. Later on June 30, 2022, the Court provided a Second amended EO re jury instructions, noting that it would give the Government's

> The jury was also provided Instruction #26:
>
> The fourth and final element of Counts One and Two requires the government to prove either that the offense resulted in bodily injury to Chawn Kaili, or that the offense involved the use of a dangerous weapon. . . .
>
> The dangerous weapon the defendants are charged with using is a shod foot, which is a foot covered by a shoe or boot. A shod foot is a dangerous weapon if it is used in a way that is capable of causing death or serious bodily injury. The government does not need to prove that the shod foot *actually caused* death or serious bodily injury. The government must prove only that the shod foot was used in the charged offense, and that it was capable of inflicting death or serious bodily injury.
>
> The government has to prove either that the offense resulted in bodily injury or that a dangerous weapon was used.

[4-ER-545]; [3-ER-371]. Taum objected to this instruction and this objection was overruled. [3-ER-321-323]. [13]

Instruction #29 was given to the jury regarding the two bases for Count 3 (Conspiracy):

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instruction #33, "as modified by the Court." *See* Docket #306, page 1. The Defendant did not object to this instruction. [3-ER-318].

[13] On June 8, 2022, this instruction was presented by the Government as their proposed instruction #38. See Docket #270-1, page 62. On June 30, 2022, the court by minute order gave an amended inclination regarding jury instructions, including that it would give Government's proposed instruction #38 "as modified by the court." *See* Docket #305, page 1. Later on June 30, 2022, the Court issued a Second amended EO re jury instructions, noting that it would give the Government's instruction #33, "as modified by the Court." *See* Docket #306, page 1.

> a. To knowingly falsify, conceal, coverup, or make a false entry in a record or document with the intent to impede, obstruct, or influence the investigation or proper administration of a matter within federal jurisdiction, or in relation to or in contemplation of such a matter, in violation of 18 U.S.C. § 1519; and
>
> b. To knowingly engage in misleading conduct toward another person with the intent to hinder, delay, or prevent the communication to a federal law enforcement officer or judge of truthful information relating to the commission or possible commission of a federal offense, in violation of 18 U.S.C. § 1512(b)(3).

[4-ER-550]; [3-ER-376]. Taum did not object to this instruction. [3-ER-324].

The jurors were given only a general verdict for all counts. [4-ER-577]. Defendant Taum did not object to the Government's closing argument or rebuttal.

The district court sentenced Taum to 120 months of imprisonment on Count 1; 144 months of imprisonment on Count 2; and 60 months of imprisonment on Count 3, all sentences to run concurrently. [1-ER-2].

SUMMARY OF ARGUMENT

First, Taum raises 6th Amendment error as the trial court improperly admitted various statements of his non-testifying co-defendants. Second, Taum argues that his conviction for Count 1 (Eighth Amendment right violation under 18 U.S.C. § 242) fails because 1) there was insufficient evidence to convict Taum of Count 1; 2) the jury was improperly instructed as to the applicable standard for conviction and 3) per Justice Thomas' dissent in *Hudson v. McMillian*, 503 U.S. 1 (1992), Taum

did not violate Mr. Kahili's Eighth Amendment rights. Third, Taum argues that his conviction for conspiracy under Count 3 fails as 1) there was insufficient evidence to convict him of that offense, and 2) the jury was improperly instructed as to the elements of that offense.

Taum also raises three additional bases for relief: 1) prosecutorial misconduct in closing argument; 2) the trial court erroneously applied a two-level guideline increase for obstruction of justice under USSG §3C1.1 and 3) cumulative error.

STANDARDS OF REVIEW

The Ninth Circuit's review of the sufficiency of evidence is governed by *Jackson v. Virginia*, 443 U.S. 307 (1979). *United States v. Nevils*, 598 F.3d 1158, 1163-64 (9th Cir. 2010). "First, we consider "the evidence presented at trial in the light most favorable to the prosecution." *Id.* at 1164. We then "determine whether this evidence, so viewed, is adequate to allow 'any rational trier of fact [to find] the essential elements of the crime beyond a reasonable doubt.'" *Id*. (quoting *Jackson,* 443 U.S. at 319).

"We review 'de novo whether a trial court's jury instructions correctly stated the elements of a crime.' *United States v. Miller*, 953 F.3d 1095, 1101 (9th Cir. 2020). But even if we find instructional error, we affirm the conviction if the error was harmless beyond a reasonable doubt. *See id.* at 1103." *United States v. Saini*, 23

F.4th 1155, 1160 (9th Cir. 2022). If the instructions are not objected to, they are reviewed for plain error. *United States v. Nobari*, 574 F.3d 1065, 1080 (9th Cir. 2009).

"[B]efore an appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain, and (3) that 'affects substantial rights.' . . . If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *Johnson v. United States*, 520 U.S. 461, 466-467 (1997)(citations omitted).

Confrontation Clause rulings are reviewed "de novo." *United States v. Fryberg*, 854 F.3d 1126, 1130 (9th Cir. 2017).

"A claim of prosecutorial misconduct must be viewed in the entire context of the trial. Reversal is justified only when such misconduct denies the defendant a fair trial." *United States v. Christophe*, 833 F.2d 1296, 1300-01 (9th Cir. 1987)(citations omitted).

ARGUMENT

A. Because Taum's right to confront witnesses under the Sixth Amendment was violated, a new trial should be ordered.

" 'The Sixth Amendment's Confrontation Clause guarantees the right of a criminal defendant 'to be confronted with the witnesses against him.' As we have explained, this 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. *See Crawford v. Washington,* 541 U.S. 36, 53-54 (2004)." *Samia v. United States*, 143 S. Ct. 2004, 2012 (June 23, 2023). Here, for a number of reasons, the admission of the statements of his co-defendants violated Defendant Taum's Confrontation Clause rights.

To begin, the statements of Tagaloa at a DPS hearing and FBI interviews of Pinkney are testimonial under the Sixth Amendment. *See United States v. Latu*, 46 F.4th 1175, 1180 (9th Cir. 2022)("Testimonial statements resemble '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' . . . Examples can include affidavits, depositions, prior testimony, or police interrogation.") (citations omitted).

Second, because these statements "facially, expressly, clearly or powerfully" implicate Mr. Taum, their admission is barred by the Sixth Amendment. *See United*

States v. Angwin, 271 F.3d 786, 796 (9th Cir. 2001), *overruled on other grounds by United States v. Lopez,* 484 F.3d 1186 (9th Cir. 2007)("[U]nder *Bruton* and its progeny, admission of a statement made by a non-testifying codefendant violates the Confrontation Clause when that statement facially, expressly, clearly, or powerfully implicates the defendant").

Many of these recording expressly refer to Taum, and/or, at least according to the Government's closing arguments, "powerfully implicate" him as evidence that he had the ACO's to his house to conspire to cover up the assault on Kaili. For example, in regard to the "willfulness" portion of Count 1, the Government argued,

> Another reason you note the defendants were acting willfully is they immediately tried to cover it up. It's common sense that if you honestly believe you did the right thing, there's no need to cover it up. The evidence is clear that these defendants knew what they did was wrong, which means they acted willfully. It's the final element of Count 1.

[3-ER-411]. In regard to the conspiracy, the Government argued, "Let's start with the who. Mr. DeMattos identified Defendants Taum, Tagaloa, and Pinkney as being members of the conspiracy, which makes sense because they were all part of the rec yard incident; they all had something to hide." [3-ER-419]. Further, the Government argued, "You also learned about it from defense witness Mr. Alofaituli. He admitted what DeMattos already told you, that the defendants met up to get their stories

straight, to try and justify their excessive force and come up with a plausible excuse for Mr. Kaili's injuries, which brings me to the what of the conspiracy." [3-ER-419].

In regard to the false reports, the Government argued "It's the only reason to omit all of the use of force in a use of force report because you knew it was wrong and you don't want to get caught." [3-ER-420]. More specifically, the Government commented on Pinkney's discussion with the F.B.I.:

> I'm going to get to that cover-up video in a minute, but before I do, I want to address Mr. Taum's claim that he called a series of meetings at his house to instruct his men to tell the truth. That is absurd. You do not call a three-hour meeting during a pending investigation to tell your men, "Tell the truth." And you certainly don't call a second meeting, frisk everybody beforehand to make sure they're not recording you because you're worried that you're going to be recorded, telling people to tell the truth. Taum was worried about being recorded because he was coaching these men to lie. He was doing exactly what DeMattos and Alofaituli testified he was doing. And you know those witnesses were not making it up because long before these defendants got indicted, they were all texting about how Taum had coached them. Exhibit 66B, Pinkney is talking about how Taum had coached them in that meeting.
>
> The reason Taum frisked everybody before that second meeting is the same reason gangsters frisk each other before their meetings: He was part of a conspiracy; he didn't want to get caught with more evidence.
>
> **It's the same reason that when the FBI asked Defendant Pinkney about that meeting, this is what he said:**
>
> **(Audio played.)**
>
> **[The Government]: "I'm not going to confirm or deny it."** That's not something you say about an innocent get-together when your boss told you to

> tell the truth. That's what you say when the FBI's asking you about a conspiracy that you're a part of.
>
> You know from the evidence and from your common sense that these meetings weren't friendly get-togethers. Their purpose was to watch the video and to come up with excuses for their use of excessive force.
>
> Why did they need excuses? Well, at that point they were under investigation; they had all been given investigation packets. The investigator had seen them -- the video of them pummeling Mr. Kaili and he demanded they explain themselves.
>
> Now, if they had simply used reasonable force for a legitimate purpose, they would have had no need to meet up for three hours to get their stories straight. But they knew what they did was wrong. They knew that if they didn't want to get in trouble, they'd have to make up excuses to justify it. They also knew that those excuses had better match or they were going to get in more trouble. So they met up at Taum's house to brainstorm excuses to get their stories straight. You heard all about it from Mr. DeMattos, you heard all about it from Mr. Alofaituli, a defense witness.

[3-ER-421-423].

The audio played by the Government here is Exhibit 77E, a recording of a statement made to the F.B.I. that Pinkney would not "confirm or deny" meeting at Taum's house. As noted above, it was admitted against "Defendant Pinkney only." [2-ER-239]. However, the Government played 77E not only during the trial, but during closing, highlighting its importance against all defendants.

The other testimonial recordings either refer to Taum directly or also fall under Governmental theories used against Taum and the other defendants in closing. In Exhibit 71C, Tagaloa denied using feet to kick Kaili in face and in Exhibit 71E,

Tagaloa denied hitting Kaili in the head. As noted *supra*, Demattos identified Tagaloa as a person in the video who kicked Kaili in the head. [2-ER-37]. The Government argued that this lying was part of the overall conspiracy (Count 3), that includes Taum: "Just look at these reports by Tagaloa and DeMattos. Both men use identical language in sections G and H of their reports. Both men omit all of the strikes they had seen and all the strikes they had used. You could conclude from the reports alone that they had conspired to cover it up." [3-ER-418].

Turning to the other statements of Mr. Pinkney, they are replete in references to Taum. In Exhibit 77A, Pinkney stated he did not see the video of take down of Kaili for "maybe years later." That is contradicted by the Demattos' testimony that Pinkney was present when they all viewed the video of the incident shortly after the incident at Taum's house. [2-ER-146-148].

Again, the Government used this to show that Pinkney lied as part of an overall conspiracy- and this was used not only against Pinkney, but all defendants in the Government's closing: "The defendants were confident they'd get away with it. After all, who was going to believe an inmate over them? If they got their stories straight, if they gave investigators the same excuses, they figured they'd be fine. And if worse comes to worst, they'd resort to blackmail. But there are a few things the defendants weren't counting on. **They weren't counting on their cover-up being**

recorded. But thanks to Defendant Pinkney, you got to watch a conspiracy unfold before your very eyes"). [3-ER-402].

The other Pinkney recordings fall under this umbrella. In Exhibit 77C, Pinkney testified that he saw Kaili slip and injure self. This is contrary to testimony of Fernandez-Wise, who denied seeing Kaili slip or fall or hurt himself. [2-ER-272].

In Exhibit 77G, Pinkney testified that a meeting took place at Taum's house and Taum showed the video but "can't say whether that was out of the ordinary or not, but it happened." In Exhibit 77I, Pinkney described that during this meeting, Taum was "discussing the investigation," again a foundation of the conspiracy charge against Taum. In Exhibit 77K, Pinkney testified that he took the video of the meeting at Taum's house as he had an "inkling" that he needed protection, i.e., that there was wrong doing afoot. These recordings directly implicate Taum, and should have been barred from admission as Pinkney never testified, and thus Taum's Sixth Amendment Rights were violated.

This evidence was especially damaging as it supported the Government's conspiracy theory against Taum and the other defendants. As the Government stated in closing, *"*You know these weren't innocent mistakes because the defendants met up at Taum's house to talk about it to get their stories straight. There's nothing innocent about that. And finally you know these weren't innocent mistakes because

DeMattos was there and told you all about it. He told you it wasn't a coincidence they have left everything out of this report. That was something they discussed and agreed to do so they wouldn't implicate each other. Since the defendants wrote false and misleading reports and acted with obstructive intent, they were guilty of Counts 4, 5, and 6"). [3-ER-432].

Compounding the error of the admission of these recordings is that fact that the Court gave no limiting instruction. As the Supreme Court has stated,

> Nonetheless, the Confrontation Clause applies only to witnesses "against the accused." *Crawford*, 541 U.S., at 50. And, "[o]rdinarily, a witness whose testimony is introduced at a joint trial is not considered to be a witness 'against' a defendant if the jury is instructed to consider that testimony only against a codefendant." *Richardson*, 481 U.S., at 206. This general rule is consistent with the text of the Clause, historical practice, and the law's reliance on limiting instructions in other contexts.

Samia, 143 S. Ct. at 2012.

Here, no limiting instruction was given concerning these recordings. The trial judge did not at any point say that these recordings were limited to being used against only one defendant, nor was such an instruction given in closing. The statements of Tagaloa and Pinkney were never limited to only them. This is true for even the recordings the Government said were to be used against Pinkney alone. [2-ER-239]. *See Richardson v. Marsh,* 481 U.S. 200, 211 (1987) ("We hold that the

Confrontation Clause is not violated by the admission of a non-testifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendants name, but any reference to his or her existence") (footnote omitted). Indeed, the only limiting instruction was given as follows: "Policies, procedures, and training from the Hawaii Department of Public Safety have been received in evidence. This evidence has been admitted for the limited purpose only to assist you in determining whether any defendant acted willfully." [3-ER-469].

In *United States v. Esparza*, 791 F.3d 1067 (9th Cir. 2015), a defendant was convicted of importing marijuana, and the only contested issue was the critical fact of who specifically owned the car he was driving. *Id.* at 1068. The trial court admitted two hearsay statements of the car's registered owner that she had sold the car to the defendant six days before the arrest. *Id.* The Government argued that, even if these statements were protected under the Sixth Amendment, the admission of the them was harmless. *Id.* at 1074. In rejecting this argument, this court noted,

> The government bears the burden of proving that the error was harmless beyond a reasonable doubt, see *Bustamante*, 687 F.3d at 1195, and we assess this issue by considering "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, ... and, of course, the overall strength of the prosecution's case," *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). Even when the government's case is "strong," a Confrontation Clause violation is not

> harmless where the erroneously admitted evidence could have "significantly altered the evidentiary picture." *Bustamante*, 687 F.3d at 1195.

Esparza, 791 F.3d at 1074. In reversing, this court noted, "the government's heavy reliance on [the previous owner's] statement shows that it was 'very important to the prosecution's case,' and the statement's admission 'may have significantly altered the evidentiary picture.' . . . Therefore, the violation of Esparza's Confrontation Clause rights was not harmless." *Id.* at 1074 (citation omitted).

In *United States v. Young*, 720 Fed.Appx. 846 (9th Cir. 2017)(Mem. Op.), an inculpatory statement of a co-defendant member of a gang was allowed into evidence over a Confrontation Clause objection in a RICO murder case. The statement that the co-defendant "got one" was admitted, and testimony was given that this meant that they had "shot somebody in retaliation" for an earlier murder. This co-defendant did not testify. *Id.* at 848.

In overturning the conviction, this court noted this evidence should not have been admitted under the Confrontation Clause, and was not harmless error using the *Esparza* standard, noting that "even when the government's case is strong, a Confrontation Clause violation is not harmless where the erroneously admitted evidence could have 'significantly altered the evidentiary picture.' " *Id.* (citation omitted). In *Young*, the court noted that there was limited evidence of Young's

involvement in the shooting and his gang involvement, but "however, we need not decide not decide the Confrontation Clause violation was harmless on its own[.]" *Id.* This court recognized other problems, noting "[c]ollectively, the Confrontation Clause, *Miranda* violations and the erroneous jury instructions were not harmless," and remanded for a new trial. *Id.* at 850.

In the present case, the Confrontation Clause prohibited the admission of the numerous recordings implicating Taum. The Government's arguments are clear as to their theory of this case, in which all of these statements, especially those of Pinkney, were used to argue Taum and the others were guilty of the assault, conspiracy and false report counts. Compounding this was the lack of limiting instructions. And, as to be shown *infra*, other errors add to a basis for a new trial to be granted.

Here, as in *Esparza*, and *Young*, these numerous recordings, entered over objection, with no limiting instruction, may have "altered the evidentiary picture," and reversal of Taum's convictions on all counts is warranted.

B. Count 1

1. Because Taum did act "maliciously and sadistically" for the purpose of causing harm, his Conviction for Count 1 cannot stand.

"[A] convicted prisoner's excessive force claim under the Eighth Amendment requires a subjective inquiry into 'whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.' *Hudson v. McMillian*, 503 U.S. 1, 7, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992)." *Rodriguez v. Cnty. of L. A.*, 891 F.3d 776, 788 (9th Cir. 2018). Here, there simply is not enough evidence to prove beyond a reasonable doubt that Taum "maliciously and sadistically" used force to cause harm to Kaili.

Chawn Kaili testified he had taken methamphetamine and was in "a major state of paranoia." [2-ER-172]. He wanted to separate from others in his unit because he was "afraid of what would happen." Kaili testified that Taum came to see him once Kaili was taken to F7, and, after much cajoling, agreed to be taken to the hospital for treatment. Taum was only able to convince Kaili to go after Taum took a picture of Kaili with his phone and showed it to him. [2-ER-187-188].

Demattos indicated that all Taum did was to hold Kaili down [2-ER-158-159]. Demattos stated that while Taum had ordered him to kick Kaili in the shoulder, that Kaili was refusing to give up his hands to be handcuffed, and that the purpose of the

order was so that they could loosen Kaili's shoulder to get him to relent. Indeed, Demattos indicated that this had been done in a "similar situation." [2-ER-160-161].

Gomes testified that whether to use deadly force on someone who is actively resisting "depends on the circumstances." [3-ER-289]. In this case, once Kaili was restrained, the ACOs stopped using any kind of force and helped him stand up. [3-ER-290]. Ahuna-Alofaituli testified that Kaili was kept verbalizing they were coming for me, and "banging his head against the walls, the doors, the bunk." [3-ER-308]. Taum was there and it took them over two hours to calm Kaili down so he could be transported to the hospital. [3-ER-312]. Taum was concerned that if they forced themselves into Kaili's cell, he would suffer more injuries. [3-ER-313].

As noted in *Hudson*, the question is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.' *Hudson*, 503 U.S. at 7. Here, there was no plan to attack Kaili prior to the take down in the rec yard. Kaili was not compliant with orders of the ACOs and resisted being handcuffed. There is no indication that the strikes were done in any manner that suggested a personal animosity toward Kaili and the strikes stopped once Kaili was placed in handcuffs. Kaili, a former football player, was admittedly high on methamphetamine, and it took hours before Taum could talk him into going to the hospital and he had to be tied to gurney as he was so agitated. Because there

is no indication that Taum "maliciously and sadistically" intended to cause harm to Kaili, Taum's conviction on Count 1 cannot stand.

2. Because the jury was improperly instructed as to the elements of 18 U.S.C. 242, Taum's conviction for Count 1 must be vacated.

Defendant-Appellant Taum claims two instructional errors in regard to Count 1: First, the jury was given Instruction #21 regarding the elements of Counts 1 and Count 2, which provided in part, "Fourth, the charged conduct resulted in bodily injury to Chawn Kaili, or the offense involved the use of a dangerous weapon." [4-ER-534]; [3-ER-365]. This instruction was not objected to by Defendant Taum. [3-ER-319-320]. Second, the jury was also provided Instruction #26 which provided in part, "The fourth and final element of Counts One and Two requires the government to prove either that the offense resulted in bodily injury to Chawn Kaili, or that the offense involved the use of a dangerous weapon. . . . The government does not need to prove that the shod foot *actually caused* death or serious bodily injury. The government must prove only that the shod foot was used in the charged offense, and that it was capable of inflicting death or serious bodily injury. . . . The government has to prove either that the offense resulted in bodily injury or that a dangerous weapon was used." [4-ER-545]; [3-ER-371]. Taum objected to this instruction and this objection was overruled. [3-ER-321-323].

Because the jury was instructed that "the government has to prove either that the offense resulted in bodily injury or that a dangerous weapon was used," these instructions were erroneously given. An 8th Amendment violation must contain an allegation of injury, and there is no provision that a defendant can be convicted for an 8th Amendment violation merely by being in possession of a dangerous weapon. *See Furnace v. Paul Sullivan*, Co., 705 F.3d 1021, 1028 (9th Cir. 2013)("We have previously identified five factors set forth in *Hudson* to be considered in determining how the above question should be answered; namely, "(1) the extent of injury suffered by an inmate[ ] . . ."")(citation omitted). *See Spann v. Rainey*, 987 F.2d 1110, 1115, n.7 (5th Cir. 1993)("*Hudson's* implications for Fourth Amendment excessive force claims are not entirely clear, but we need not decide that question. Certainly some injury is still required, *Hudson*, at ----, 112 S.Ct. at 1000;..."); *Stribling v. Brock*, 2017 WL 9500803 at *14 (N.D. Cal. Mar 10, 2017)("However, at a minimum, Plaintiff must show that he suffered some injury as a result of Defendants' conduct to state a constitutional claim. *See Hudson v. McMillan*[.]").

In *United States. v. Lavallee*, 439 F.3d 670, 686 (10th Cir. 2006), the trial court gave the following instruction in an 18 U.S.C. § 242 prosecution involving an alleged violation of a prisoner's 8th Amendment rights:

> ONE: The defendant whose case you are considering deprived an inmate or inmates of a right which is secured or protected by the Constitution of the United States; namely the right not to be subjected to cruel and unusual punishment;
>
> TWO: The defendant acted willfully to deprive the inmate of such right;
>
> THREE: The defendant acted under the color of law;
>
> FOUR: The inmate suffered bodily injury as a result of the defendant's conduct.

Lavallee, 439 F.3d at 686.

The trial court in *Lavallee* correctly instructed the jury that an 8th Amendment violation must include some type of bodily injury caused by the Defendant. The instructions given in this case did not. Further, the *Lavallee* court made no mention of the use of a "dangerous weapon" as being an alternate way to prove a prosecution under 18 U.S.C. § 242 arising from a violation of a prisoner's 8th Amendment rights.

It should be noted that this was no harmless error- the Government relied upon these erroneous instructions and cited to them twice in their closing. First, Government argued, "The fourth element requires the government to prove one of two things: Either the offense resulted in bodily injury, or the offense involved the use of a dangerous weapon. The government has to prove only one of those things, but the evidence proves both." [3-ER-404]. Second, the Government argued,

"Again, the government's only required to prove one of those two factors, dangerous weapon and bodily injury, but the evidence has proved them both." [3-ER-405-406].

Another point against a finding of harmless error is that there is no way to know what part of the jury instruction the jury determined was proven when it found Taum guilty of Count 1. If it found that the there was a "dangerous weapon" present, but that no injury occurred caused by Taum, then it made its decision on an inaccurate standard of proof. This is important as there were at least two other possible sources of injury to Kaili: 1) ACO Demattos testified that after Kaili was transported to F7, while still in his handcuffs, Tagaloa punched Kaili in the face with his left hand. This was the same side of his face that Kaili had been hit earlier. [2-ER-68] and 2) Ahuna-Alofaituli testified that Kaili was kept verbalizing "they were coming for me," and "banging his head against the walls, the doors, the bunk." [3-ER-308]. Because there are at least two possible ways for Kaili to have suffered injury outside of the strikes when Taum was on Kaili's legs during the takedown, this instructional error is not "harmless error, and should result in the reversal of Defendant Taum's conviction for Count 1.

Here, since error was preserved on instruction 26, plain error review is not appropriate. Here the elements provided to the jury were not correct, and were inadequate to guide their deliberations, and Count 1 should be vacated. *See United*

States v. Tuan Ngoc Luong, 965 F.3d 973, 986 (9th Cir. 2020) (“[T]he question on appeal is whether the instructions as a whole are misleading or inadequate to guide the jury's deliberation") (citation omitted).

However, even in a “plain error” case, this court has recently held, “An instructional error is plain if it was " ‘sufficiently clear at the time of trial’ that the district court’s ... instruction was impermissible." *Hoard v. Hartman*, 904 F.3d 780, 790 (9th Cir. 2018), quoting *Draper v. Rosario* , 836 F.3d 1072, 1086 (9th Cir. 2016). This court will usually find sufficient prejudice to warrant reversal where "it is impossible to determine from the jury’s verdict and evidentiary record that the jury would have reached the same result had it been properly instructed." *Id.* at 791 (quoting *Sanders v. City of Newport* , 657 F.3d 772, 782–83 (9th Cir. 2011)).”

Because the jury was given a “non existing element,” i.e., that Taum could be found guilty if he did not cause injury but that he or another co-defendant possessed a dangerous weapon, error under any standard occurred and the jury’s verdict on Count 1 must be vacated.

3. Taum's conviction for Count 1 should be overturned as Taum did not violate the 8th amendment rights of Kaili

18 U.S.C. § 242 provides in part: "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, . . . shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section . . . imprisoned not more than ten years, or both[.]"

Count 1 alleged a violation of Kaili's Eighth Amendment rights as the basis for this § 242 charge. [4-ER-497]. In *Hudson v. McMillian*, 503 U.S. 1 (1992), the Supreme Court held, "[t]he Eighth Amendment's prohibition of cruel and unusual punishments " 'draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society,' " and so admits of few absolute limitations. . . . The objective component of an Eighth Amendment claim is therefore contextual and responsive to 'contemporary standards of decency.' " *Id.* at 8. (citation omitted).

Respectfully, because *Hudson* interprets rights that accrue under the 8th Amendment by relying upon "contemporary standards of decency," as opposed the original intent of the framers, it was wrongly decided and should be overturned.

Justice Clarence Thomas, joined by Justice Antonin Scalia, commented on these problems in his dissent in *Hudson*. Justice Thomas wrote, "Until recent years, the Cruel and Unusual Punishment Clause was not deemed to apply at all to deprivations that were not inflicted as part of the sentence for a crime. For generations, judges and commentators regarded the Eighth Amendment as applying only to torturous punishments meted out by statutes or sentencing judges, and not generally to any hardship that might befall a prisoner during incarceration." *Hudson*, Dissent of Thomas, J. 503 U.S. at 18. Justice Thomas continued, citing to *Weems v. United States*, 217 U.S. 349 (1910) and other sources, "[n]owhere does *Weems* even hint that the Clause might regulate not just criminal sentences but the treatment of prisoners. Scholarly commentary also viewed the Clause as governing punishments that were part of the sentence." *Id.* at 18-19 (emphasis added).

Justice Thomas continued, "Surely prison was not a more congenial place in the early years of the Republic than it is today; nor were our judges and commentators so naive as to be unaware of the often harsh conditions of prison life. Rather, they simply did not conceive of the Eighth Amendment as protecting inmates from harsh treatment. Thus, historically, the lower courts routinely rejected prisoner grievances by explaining that the courts had no role in regulating prison life." *Id.* at 19 (citation omitted). Justice Thomas later stated, "Abusive behavior by prison

guards is deplorable conduct that properly evokes outrage and contempt. But that does not mean that it is invariably unconstitutional. The Eighth Amendment is not, and should not be turned into, a National Code of Prison Regulation." *Id.* at 28.

"The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself; and, when the text of a constitutional provision is not ambiguous, the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument." *Lake County v. Rollins*, 130 U.S. 662, 670 (1889). Here, there is no guess what "cruel and unusual" means: "For generations, judges and commentators regarded the Eighth Amendment as applying only to torturous punishments meted out by statutes or sentencing judges, and not generally to any hardship that might befall a prisoner during incarceration." *Hudson*, Dissent of Thomas, J., 503 U.S. at 18.

As pointed out by Justice Thomas, the framers did not intend for the 8th Amendment to apply in situations like this- when a guard allegedly subjected a prisoner to abuse while in custody. Because the historical tradition of the 8th Amendment does not protect a prisoner for injuries received by a prison guard, Kaili's 8th Amendment Rights were not violated by Taum's actions. Because of this,

Count 1, the 18 U.S.C. § 242 charge against Taum, based on his alleged violations of Kaili's 8th Amendment rights, must fail.

In the alternative, even if Kaili's 8th Amendment rights could be violated if he was "tortured" by a prison guard, because Taum did not "torture" Kaili, his conviction on Count 1 must be overturned. In regard to Count 1, as indicated *infra*, Taum was alleged to (i) have held down Kaili's legs as other officers delivered illegal strikes in an attempt to subdue Kaili who was resisting being handcuffed, and that (ii) did not stop the other officers from making these strikes. This is not enough to qualify as "torture," which is what the 8th Amendment, at most, was meant to protect. *See Weems*, 217 U.S. at 369-370 ("Punishments are cruel when they involve torture or a lingering death").

C. Count 3.

1. Because there was insufficient evidence to convict Taum of Count #3, Taum's conviction should be vacated

Here, Count 3 alleged:

> On or about and between June 15, 2015 and December 20, 2016, both dates being approximate and inclusive, within the District of Hawaii, JASON TAGALOA, CRAIG PINKNEY, JONATHAN TAUM, the defendants, and Officer A knowingly and willfully combined, conspired, and agreed with one another and with other correctional officers known and unknown to the Grand Jury to commit the following offenses against the United States:

> a. To knowingly falsify, conceal, coverup, or make a false entry in a record or document with the intent to impede, obstruct, or influence the investigation or proper administration of a matter within federal jurisdiction, or in relation to or in contemplation of such a matter, in violation of 18 U.S.C.§ 1519; and
>
> b. To knowingly engage in misleading conduct toward another person with the intent to hinder, delay, or prevent the communication to a federal law enforcement officer or judge of truthful information relating to the commission or possible commission of a federal offense, in violation of 18 U.S.C.§ 1512(b)(3).

[4-ER-500].

Count 3 alleges that Taum conspired with others to violate § 1519 and § 1512 and that is what the Government should have had to prove to secure a conviction. *See Alternative Energy v. St. Paul Fire Insurance*, 267 F.3d 30, 35 (1st Cir. 2001)(" 'And' is not an ambiguous term. Although 'and' might, in rare circumstances, be construed to mean 'or,' see Black's Law Dictionary 86 (6th ed. 1990), to the ordinary or average person 'and' means 'and.' 'And,' in its conjunctive sense, also appears to be the plain meaning in the 1998 Settlement Agreement").

This is important because there is insufficient evidence that Taum conspired to violate 18 U.S.C.§ 1512(b)(3) as there was no evidence that any defendant attempted to prevent a communication with a federal law enforcement officer as provided in 18 U.S.C.§ 1512(b)(3).[14]

[14] *See* 18 U.S.C. § 1512: "(b) Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading

In *United States v. Johnson*, 874 F.3d 1078 (9th Cir. 2017), this Court held, "we conclude that the Government failed to present sufficient evidence to show that there was a reasonable likelihood that the communication would reach a federal officer. Government's evidence established nothing 'more than [a] remote, outlandish, or simply hypothetical' possibility that Johnson's reports could have reached a federal officer. *Fowler [v. United States],* 563 U.S. [668 (2011)] at 678, 131 S.Ct. 2045. Viewing the evidence in the light most favorable to the Government, no rational trier of fact could have found the federal nexus element of the crime." *Johnson*, 874 F.3d at 1082.

Here, there is simply is no "federal nexus" concerning the actions of Mr. Taum in allegedly conspiring with the other co-defendants to cover up the facts of assault upon Kaili. Because the Government did not establish even "[a] remote, outlandish, or simply hypothetical" connection between the actions of the alleged conspirators

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conduct toward another person, with intent to— . . . . (3) 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 or a violation of conditions of probation supervised release, parole, or release pending judicial proceedings; shall be fined under this title or imprisoned not more than 20 years, or both."

and a federal law enforcement officer to cover up this facts of this alleged assault, a conviction for a conspiracy to violate 18 U.S.C. § 1512(b) fails.

"[T]he proper rule to be applied" in this situation "is that [the] verdict [must] be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." *Yates v. United States*, 354 U.S. 298, 312 (1957) *overruled in part on other grounds by Burks v. United States*, 437 U.S. 1 (1978). *See also United States v. Fuchs,* 218 F.3d 957, 962 (9th Cir. 2000) (same). In this case, the jury's verdict on Count 1 might be based on either a conspiracy to violate of 18 U.S.C. § 1512(b) or 1519. It is impossible to know which one they picked, as no interrogatory was presented to the jury to clarify this issue and only a general verdict form was provided. [4-ER-577]. Here, because Taum was charged with conspiring to violate both 18 U.S.C. § 1519 and 18 U.S.C. § 1512, and because the Government did not prove both of these theories, Taum's conviction on Count 3 must fail.

2. Because the jury was improperly instructed as to Count 3: Deprivation of rights under color of law. (Conspiracy to Obstruct Justice, in violation of 18 U.S.C. § 371), this conviction must be vacated.

In Instruction #29 given to the jury, it indicates two bases for Count 3 conspiracy:

> a. To knowingly falsify, conceal, coverup, or make a false entry in a record or document with the intent to impede, obstruct, or influence the investigation or proper administration of a matter within federal jurisdiction, or in relation to or in contemplation of such a matter, in violation of 18 U.S.C. § 1519; and
>
> b. To knowingly engage in misleading conduct toward another person with the intent to hinder, delay, or prevent the communication to a federal law enforcement officer or judge of truthful information relating to the commission or possible commission of a federal offense, in violation of 18 U.S.C. § 1512(b)(3).

[4-ER-550]; [3-ER-376]. Taum did not object to this instruction. [3-ER-324]. The jurors were given only a general verdict for all counts. [4-ER-580] ("With respect to Count 3, the conspiracy to obstruct justice, in violation of 18 U.S.C. 371, we find the Defendant JONATHAN TAUM . . . X Guilty").

"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). "The Supreme Court has held that instructional errors are generally subject to harmless error review." *United States v. Reed*, 48 F.4th 1082, 1088 (9th Cir. 2022). "[A]n instructional error . . . is prejudicial

. . . if the error 'had substantial and injurious effect or influence in determining the jury's verdict.' " *Id.* (citations omitted).

In *United States v. Gordon*, 844 F.2d 1397 (9th Cir. 1988), the defendants were convicted of conspiracy and other counts arising out of an alleged agreement between them and others to direct Lockheed subcontracts for the Trident Missile to Edler Industries to the exclusion of other potential subcontractors. *Id.* at 1398. Appellants appealed, argument that their conspiracy convictions should be reversed because Count I of the indictment was duplicitous "because it impermissibly charged two conspiracies in a single count." *Id.* at 1400.

This court held that the duplicity objection was waived as it was not made prior to trial, but noted that the Appellants had "a right under Article III, sec. 2 and the sixth amendment to a unanimous jury verdict. *See United States v. Echeverry*, 698 F.2d 375, 377 (9th Cir.), modified, 719 F.2d 974 (9th Cir.1983)." *Id.* at 1400.

In reversing the conviction for Count 1, this court held, "When there is such a genuine possibility of jury confusion or that a conviction may occur as the result of different jurors concluding that the defendant committed different acts, the trial judge is obligated to give curative instructions or submit special interrogatories to ensure a unanimous verdict. *See Echeverry*, 719 F.2d at 975." *Id.* at 1401. Here, the trial court should have given special interrogatories so that the jury could indicate

which of the underlying counts the jury determined that each defendant conspired to violate. Without such interrogatories, Taum's right to unanimous jury verdict was violated.

Additionally, it should be noted, by the fact this instruction listed two separate statutes as objects of the conspiracy was in effect conceding that multiple conspiracies took place. Because the instruction, coupled with the general verdict form, was ambiguous, reversal again is necessary. *See United States v. Payseno*, 782 F.2d 832, 836 (9th Cir. 1986)("In *Echeverry*, we reversed a drug conviction because an ambiguous instruction permitted the jury to convict without unanimous agreement on the existence and duration of a single conspiracy or multiple conspiracies. *Echeverry*, supra, at 377. We explained in that decision that: 'We are not free to hypothesize whether the jury indeed agreed to and was clear on the duration of a single conspiracy or of multiple conspiracies.' *Id.*").

D. Because prosecutorial misconduct in the Government's closing statements denied Taum a fair trial, this case should be remanded for a new trial.

In its closing, the Government argued time and again that Defendant Taum had lied or was dishonest about his version of events. In regard to Taum's statements about the purposes of the meetings at his house, the Government argued, "Taum was worried about being recorded because he was coaching these men to lie." [3-ER-

421-422]. The Government added, in regard to the Pinkney video of the meeting, "You got to see Taum coaching his men to lie. Let's watch a few clips of that video together." [3-ER-423]. Later, the Government added, "In each of those clips, Taum is coaching his men to say things that weren't true, and his men were happy to take his advice and repeat it at the DPS hearings." [3-ER-424]. The Government also called Taum "immoral:" "But now you've seen the evidence, so you know the truth, that [Taum] was so immoral he would threaten to blackmail the warden." [3-ER-429].

In rebuttal, the Government continued to accuse Taum of lying in regard to his statement that he gave the warden a copy of the video of the assault: "The big deal is that Mr. Taum testified that under oath, swore under oath to all of you that he personally made a copy of that video and he gave it to the warden. Well, you know from the evidence that is false. Exhibit 102, Exhibit 69, several other exhibits, I made a big deal about that because I think it's a pretty big deal when evidence shows that a defendant has just lied under oath to all of you." [3-ER-439].

It was highly improper for the Government to state its opinion that Taum lied throughout the course of the trial as "any statement of personal belief jeopardizes the integrity of the trial process." *United States v. Woods*, 710 F.3rd 195, 203 (4th Cir. 2013)(citation omitted). In *United States v. Sanchez*, 176 F.3d 1214 (9th Cir.

1999), this court noted, "in closing argument, the prosecutor vouched for the Government's witnesses and denigrated the defense as a sham." *Sanchez*, 176 F.3d at 1224. This included telling the jury "the defense in this case read the records and then told a story to match the records. And, ladies and gentlemen, I'm going to ask you not to credit that scam that has been perpetrated on you here. And to find these two defendants guilty of the charges against them." *Id.* The Prosecutor also stated: "Ladies and gentlemen, in order to find these defendants not guilty in this case, you have to discredit all of the testimony that the government witnesses gave to you, and you will have to believe what the two people who have the most to lose here have said happened," and "that you as jurors do your duty and well consider this matter and find these defendants guilty." *Id.* at 1224.

In regard to imploring the jury to do its "duty" and convict, *Sanchez* found prosecutorial misconduct in part because the prosecutor "did not tell the jury that it had a duty to find the defendant guilty only if every element of the crime had been proven beyond a reasonable doubt." *Id.* at 1225. In finding reversible error had occurred, this court noted: "[C]redibility is a matter to be decided by the jury. *See Sanchez-Lima*, 161 F.3d at 548; *United States v. Barnard*, 490 F.2d 907, 912 (9th Cir.1973). 'As a general rule, a prosecutor may not express his opinion of the defendant's guilt or his belief in the credibility of government witnesses.' *United*

States v. Molina, 934 F.2d 1440, 1444 (9th Cir.1991)." *Sanchez*, 176 F.3d at 1224-1225.

Similarly in *Woods*, the prosecutor said during closing, "So, Mr. Woods was right in the middle of getting these $500 payments for fake dependents and he lied about it under oath when he testified this morning." *Id.* at 202. This was not objected to during closing, and the court applied plain error review.

In rejecting the Government's claim that this statement was "neither improper nor prejudicial," the Fourth Circuit noted, "Twenty years ago, in *United States v. Moore*, 11 F.3d 475 (4th Cir.1993), we strongly criticized a prosecutor's statement during closing argument that the crime was 'compounded when the defendant ... comes into a federal court, takes the oath on the Bible, and lies.' 11 F.3d at 480. We explained unequivocally that 'it is highly improper for the government to refer to a defense witness as a liar,' and further noted that we had 'continually admonished the government not to engage in such conduct. *Id.* at 481. (emphasis added)." *Woods*, 710 F.3d at 202.

The *Woods* court then discussed the additional danger that is present when such comments are directed that a defendant that has testified: "The gravity of these risks is amplified in the case of a criminal defendant exercising his constitutional right to testify in his own defense. Here, by stating that Woods lied under oath, the

prosecutor suggested to the jury that Woods abused this constitutional right and attempted to manipulate the outcome of the trial to avoid being held responsible for his true actions. Based on these grave concerns, we reiterate our holding in Moore that error that is plain results when a prosecutor states that a defendant has lied under oath during trial, and we conclude that such an error occurred here." *Woods*, 710 F.3d at 203.

Sanchez and *Woods* are directly on point. By the Government commenting again and again that Taum lied, and coached others to lie, it was improperly injecting its own opinion as to the Taum's guilt, and plain error occurred. Adding to gravity of the error is that Taum testified at trial, and "by stating that [Taum] lied under oath, the prosecutor suggested to the jury that [Taum] abused this constitutional right and attempted to manipulate the outcome of the trial to avoid being held responsible for his true actions." *Woods*, 710 F.3d at 203.

Additionally, the Government argued that in order for the Constitution to be enforced, they must vote to convict: "Constitutional rights aren't self-enforcing. Constitutional rights must be enforced in courts of law like this one by juries like you. The right to be free from cruel and unusual punishment doesn't mean anything. It's 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." [3-ER-433].

Further, the Government argued, "You can make sure that the Constitutional rights means something. You can enforce them in this case by finding the defendants guilty." [3-ER-433].

In rebuttal, this type of argument continued: "Now, if we were in Russia or some other country where officers act with no oversight or accountability, that would be true; an officer could abuse his power and nothing would happen to him. But we're not in Russia; we're in America, and in America we have a Constitution and that Constitution has a Bill of Rights and those Bill of Rights say that you have a right to be free from cruel and unusual punishment and you have a right to a trial by jury. When you put those rights together, it means when officers use excessive force, it's your duty to judge their actions. In this country everyone's accountable, even officers." [3-ER-438-439].

The Government added in its rebuttal "And to illustrate why it doesn't make sense, I'll use an example of one of the oldest methods of controlling a big group of disorderly people: decimation. Decimation got its start in ancient Rome, and it means just what it says, removal by intent. When a large group of Roman soldiers became rowdy, they would be lined up and one out of every 10 would be killed. And the message is get in line, stay disciplined, or else." [3-ER-449].

These arguments again are improper as the Government asked the jury to convict, not based on the facts of the case, but on outside factors. "[I]t is settled law that 'a prosecutor may not use the bully pulpit of a closing argument to inflame the passions or prejudices of the jury or to argue facts not in evidence.' " *United States v. Khatallah*, 41 F.4th 608, 636 (D.C. Cir. 2022)(citation omitted). And, as indicated by this court, "In particular, prosecutors `may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence.' " *United States v. Nobari*, 574 F.3d 1065, 1076 (9th Cir. 2009) (citation omitted).

Additionally, a review of the record in this case does not show "decimation" was ever brought up or was at issue in this case. Further, this argument is not a logical response to an argument raised by Taum's attorney during his closing.[15] Nor

[15] In his closing, Taum's attorney Hoke stated, "[A]re they beating him sadistically, maliciously? Or are they trying to accomplish in good faith a task? Even though they might be using excessive force, but they don't have the criminal mind. It's the reaction to the situation, the spontaneous combustion. It just happened. No one predicted it. It wasn't planned." [3-ER-436-437]. Taum's attorney does not mention "grossly excessive force" being used, nor that the use of such force was a valid prison control technique. Nor, of course, "decimation."

does this analogy make sense. As described by Wikipedia: In the military of ancient Rome, decimation (from Latin *decimatio* 'removal of a tenth') was a form of military discipline in which every tenth man in a group was executed by members of his cohort."[16] Nothing like that occurred in this case.

Although a prosecutor "may strike hard blows, he is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935). For all these reasons, the prosecutorial misconduct occurred in this case requiring a new trial.

E. The Court erroneously applied a two-level increase for obstruction of justice under USSG §3C1.1.

Paragraph 56 of the draft PSR added a two-level increase for obstruction of justice for Taum's alleged giving false testimony at trial under USSG §3C1.1. [PSR-20]. Taum objected to the factual underpinning to this increase in his objection to PSR paragraph 47, but he did not specifically object to this enhancement. [PSR-40]. This enhancement appeared in paragraph 56 of the final PSR. [PSR-69]. No objection was made at sentencing to this enhancement, but Judge Kobayashi did not make any findings concerning this two-level enhancement. [3-ER-453-495].

[16] https://en.wikipedia.org/wiki/Decimation_(punishment).

In *United States v. Ruiz*, No. 22-50175 (9th Cir. 10/24/23)(mem op.), this court remanded for resentencing when the district court imposed a sentencing enhancement for obstruction of justice based on the defendant's trial testimony, without expressly finding on the record that the testimony was willfully false and material to the case. The *Ruiz* court noted, "the imposition of an obstruction enhancement on the basis of perjury, without express findings supporting that enhancement, constitutes reversible plain error even when the sentence imposed falls below the range the Sentencing Guidelines would have recommended absent the enhancement. [*United States v.*] *Herrera- Rivera*, 832 F.3d [1166 (9th Cir. 2016] at 1175." *Id*. at *5.

In the present case, since the trial court made no such findings, following *Ruiz* and *Herrera-Rivera*, this case should be remanded "for the district court to make express findings as to the willfulness and materiality of [Taum's] trial testimony . . . in order to determine whether the obstruction enhancement applies, and to resentence accordingly." *Id.* at *5-6 (citation omitted).

F. Cumulative error

"In some cases, although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant." *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir.1996). The totality of the trial errors in this violated Taum's Fifth Amendment due process rights. [17] As stated by this court,

> "[T]he combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair." *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) (citing *Chambers v. Mississippi*, 410 U.S. 284, 298 (1973)). Thus, "[t]he cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal." *Id.* To evaluate a due process challenge based on the cumulative effect of multiple trial errors, "a reviewing court must determine the relative harm caused by the errors." *Id.* at 927-28. If the evidence of guilt is overwhelming, the errors may well be considered harmless, while trial errors are more likely to be prejudicial if the state's case is weak on a critical element. *Id.* at 928.

Sechrest v. Baker, 603 Fed.Appx 548, 550-551 (9th Cir. Mar 05, 2015). Here, these errors warrant a new trial as, as shown *supra*, the evidence against Taum was not "overwhelming" and was weak on number of points. The admission of the

[17] *See Castillo v. McFadden*, 399 F.3d 993, 1002, n.5, (9th Cir. 2004)("The Fifth Amendment prohibits the federal government from depriving persons of due process[ ]").

recordings of his co-defendants, the lack of evidence showing Taum treated Kaili in an inhumane way, the erroneous jury instructions and the Government's outrageous closing argument, and other issue raised in this document, lead to no other conclusion. *See United States v. Bushyhead*, 270 F.3d 905, 911 (9th Cir. 2001) ('A constitutional error may be disregarded only if it is harmless beyond a reasonable doubt.')."

Because the cumulative effect of these errors have deprived Taum of a fair trial, a new trial should be ordered.

CONCLUSION

Based on the arguments above, Defendant-Appellant requests this court to remand this case to the district court for new trial and/or resentencing.

DATED: October 30, 2023 Honolulu, Hawai'i

Respectfully submitted,

/s/ Lars Robert Isaacson
LARS ROBERT ISAACSON
Attorney for Defendant-Appellant

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Defendant-Appellant, through his undersigned attorney, hereby certifies the following pending appeals arising out of the same facts as this case:

a. *United States v. Jason Tagaloa*, 22-10318

b. *United States v. Craig Pinkney*, 23-10005

DATED: October 30, 2023 Honolulu, Hawai'i

Respectfully submitted,

/s/ Lars Robert Isaacson
LARS ROBERT ISAACSON
Attorney for Defendant-Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Fed. R. App. P. 32(a)(7) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains 13986 words.

DATED: October 30, 2023 Honolulu, Hawai'i

Respectfully submitted,

/s/ Lars Robert Isaacson
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CERTIFICATE OF SERVICE

I hereby certify that, on the dates and by the methods of service noted below, a true and correct copy of the foregoing was served on the following at their last known addresses:

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