

CA NO. 22-10318  
CR 20-00044 LEK  
(District of Hawaii)

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellee

v.

JASON TAGALOA

Defendant/Appellant.

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APPELLANT'S OPENING BRIEF

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

HONORABLE LESLIE E. KOBAYASHI  
UNITED STATES DISTRICT COURT JUDGE

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**TABLE OF CONTENTS**

	<b><u>Page</u></b>
TABLE OF AUTHORITIES.....	5
I. <b><u>STATEMENT OF ISSUES PRESENTED FOR REVIEW</u></b> .....	9
II. <b><u>STATEMENT OF THE CASE</u></b> .....	10
A. NATURE OF THE CASE	
1. JURISDICTION OF THE DISTRICT COURT .....	10
2. BASIS FOR JURISDICTION IN THE COURT OF APPEALS.....	10
3. NOTICE OF APPEAL WAS TIMELY .....	10
B. PROCEEDINGS AND DISPOSITION OF THE TRIAL COURT.....	10
C. BAIL STATUS.....	11
III. <b><u>STATEMENT OF THE FACTS</u></b> .....	12
IV. <b>STANDARDS OF REVIEW AND ARGUMENT</b> .....	14
A. GOVERNMENT WITNESS DEMATTOS' TESTIMONY WAS FALSE AND MISLEADING.....	14
1. Standard of Review.....	14
2. Summary of Argument.....	15
3. Legal Analysis.....	16
a. Demattos' Testimony Was False And Misleading.....	16

b.	False Testimony Is Fundamentally Unfair And Affected The Jury's Verdict .....	31
B.	THE GOVERNMENT'S VIDEO USED AS EVIDENCE AGAINST TAGALOA WAS NOT AUTHENTICATED PROPERLY .....	33
1.	Standard of Review.....	33
2.	Summary of Argument.....	34
3.	Legal Analysis.....	36
a.	The DVD Was Not The Original Recording Or Authentic Copy.....	36
b.	Demattos Was Not Qualified To Authenticate The DVD.....	38
c.	The Warden Had Viewed The Original Video And Had A Copy .....	40
C.	INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT TAGALOA VIOLATED ANY OF THE CHARGES IN THE INDICTMENT. ....	45
1.	Standard of Review.....	45

2.	Summary of Argument.....	46
3.	Legal Analysis.....	47
a.	Count 1 Deprivation of rights under color of law. (18 U.S.C. §§ 242, 2).....	47
1.	Appellant Tagaloa Did Not Use Excessive Or Unnecessary Force.....	48
2.	Tagaloa Did Not Act Maliciously Or Sadistically.....	58
3.	The Majority Of Kaili's Injuries Were Self-Inflicted.....	62
b.	Count 3 Conspiracy to Obstruct Justice .....	66
c.	Count 4 Obstruction by False report .....	69
D.	THE GOVERNMENT VIOLATED APPELLANT TAGALOA'S GARRITY RIGHTS.....	72
1.	Standard of Review.....	72
2.	Legal Analysis.....	72
V.	<b><u>CONCLUSION</u></b> .....	78
	<b><u>CERTIFICATE OF RELATED CASES</u></b> .....	79
	<b><u>CERTIFICATE OF COMPLIANCE</u></b> .....	80
	<b><u>CERTIFICATE OF SERVICE</u></b> .....	81

**TABLE OF AUTHORITIES**

<b><u>CASES</u></b>	<b><u>PAGE</u></b>
<u>Alcorta v. Texas</u> , 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957).....	19
<u>Bearchild v. Cobban</u> , 947 F.3d 1130, 1142 (9th Cir. 2020).....	48, 49
<u>Briceno v. Scribner</u> , 555 F.3d 1069, 1079 (9th Cir. 2009).....	71
<u>Commonwealth of the Northern Mariana Islands c. Mendiola</u> , 976 F.2d 475, 486 (9th Cir. 1992).....	18
<u>Furnace v. Sullivan</u> , 705 F.3d 1021, 1028 (9th Cir. 2013).....	49
<u>Garrity v. State of New Jersey</u> , 385 U.S. 493, 499, 87 S.Ct. 616, 86 L.Ed.2d 562 (1967).....	72, 73, 77,78
<u>Graham v. Connor</u> , 490 U.S. 386, 397, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1898).....	48
<u>Hall v. Director of Corrections</u> , 343 F.3d 976, 983-84 (9th Cir. 2003).....	33
<u>Hayes v. Brown</u> , 399 F.3d 972, 980 (9th Cir. 2005) (en banc).....	18, 32
<u>Hoard v. Hartman</u> , 904 F.3d 780 (9th Cir. 2018).....	58
<u>Hudson v. McMillian</u> , 503 U.S. 1, 6, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992).....	49, 59, 60
<u>Jackson v. Virginia</u> , 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d. 560 (1979).....	46

<u>Juan H. v. Allen,</u> 408 F.3d 1262, 1277-79 (9th Cir. 2005).....	71
<u>Kingsley v. Hendrickson,</u> 576 U.S. 389, 397, 135 S.Ct. 2466, 192 L.Ed.2d 416 (2015).....	48, 49
<u>Kyles v. Whitley,</u> 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).....	33
<u>Minnesota v. Murphy,</u> 465 U.S. 420, 434, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984).....	77
<u>Miranda v. Arizona,</u> 384 U.S. 436, 464-465, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).....	73
<u>Mooney v. Holohan,</u> 294 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed. 791 (1935).....	18
<u>Napue v. Illinois,</u> 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).....	18
<u>Strickler v. Greene,</u> 527 U.S. 263, 282, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).....	17
<u>United States v. Agurs,</u> 427 U.S. 97, 103, 96 S.Ct.2392, 49 L.Ed.2d 342 (1976).....	33
<u>United States v. Alvarez,</u> 831 F.3d 1115, 1120 (9th Cir. 2016).....	33
<u>United States v. Bagley,</u> 473 U.S. 667, 678, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1965).....	31
<u>United States v. Benamor,</u> 937 F.3d 1182, 1186 (9th Cir. 2019).....	45
<u>United States v. Del Toro-Barboza,</u> 673 F.3d 1136, 1144 (9th Cir. 2012).....	71

<u>United States v. Duran</u> , 189 F.3d 1071, 1080 (9th Cir. 1999).....	67
<u>United States v. Estrada-Eliverio</u> , 583 F.3d 669, 672 (9th Cir. 2009). .....	34
<u>United States v. Fluker</u> , 698 F.3d 988, 999 (7th Cir. 2012.).....	37
<u>United States v. Katakis</u> , 800 F.3d 1017, 1023 (9th Cir. 2015).....	70
<u>United States v. Kvashuk</u> , 229 F.4th 1077 (9th Cir. 2022).....	34
<u>United States v. Mendoza</u> , 25 F.4th 730, 735 (9th Cir. 2022).....	46
<u>United States v. Nevils</u> , 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc).....	45
<u>United States v. Oriho</u> , 969 F.3d 917, 923 (9th Cir. 2020).....	72
<u>United States v. Pacheco</u> , 997 F.3d 765, 767 (9th Cir. 2020).....	45
<u>United States v. Rodriguez</u> , 971 F.3d 1005, 1017 (9th Cir. 2020).....	14
<u>United States v. Salcido</u> , 506 F.3d 729 (9th Cir. 2007).....	36
<u>United States v. Singh</u> , 979 F.3d 697, 715 (9th Cir. 2020).....	67, 70
<u>United States v. Tuan Ngoc Luong</u> , 965 F.3d 973, 980–81 (9th Cir. 2020).....	45

<u>United States v. Wells,</u> 879 F.3d 900, 914 (9th Cir.2018).....	15
<u>United States v. Zuno-Arce,</u> 339 F.3d 886, 889 (9th Cir. 2003).....	32
<u>Whitley v. Albers,</u> 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986).....	58, 59
<u>Wilkins v. Gaddy,</u> 559 U.S. 34, 130 S.Ct. 1175, 175 L.Ed.2d 995 (2010).....	59
<u>Wood v. Beauclair,</u> 692 F.3d 1041, 1051 (9th Cir. 2012).....	49, 50

**STATUTES AND RULES**

18 U.S.C. § 3231.....	10
28 U.S.C. § 1291.....	10
Amendment XIV Section 1.....	18
Fed.R.Crim.P.29.....	47
Rule 901(a).....	37
Rule 901(b)(1).....	36, 39
Rule 901 (b)(9), (10).....	37



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**I.**

**STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Government witness, Demattos' testimony was false and misleading.
2. Improper verification of video.
3. Insufficient evidence to prove Counts 1, 3, and 4 against Appellant Tagaloa.
4. The government violated Appellant Tagaloa's Garrity rights.

## II.

### **STATEMENT OF THE CASE**

#### **A. Nature of the Case**

##### 1. Jurisdiction of the District Court.

This appeal is from the District Court's Judgment entered and filed on December 05, 2022. The District Court had jurisdiction pursuant to 18 U.S.C. § 3231.

##### 2. Basis for Jurisdiction in the Court of Appeals.

Appellant Tagaloa is appealing his judgment and sentence, and jury verdicts. This Court has jurisdiction over appeals from final judgments under 28 U.S.C. § 1291.

##### 3. Notice of Appeal was Timely.

The district court entered sentence and judgment against appellant on December 5, 2022. The Notice of Appeal was filed timely on December 9, 2022. (4-ER: 689)<sup>1</sup>

#### **B. Proceedings and Disposition of the Trial Court.**

On June 10, 2020, a sealed Indictment was filed; was unsealed on June 30, 2020. (2- ER: 28)

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<sup>1</sup> ER refers to Excerpt of Clerk's Record, PSR refers to Presentence Report, DK refers to Court Docket Sheet

The Indictment charged Tagaloa, Craig Pinkney ("Pinkney"), and Jonathan Taum ("Taum") for Count 1, Deprivation of Rights under Color of Law (18 U.S.C. §§ 242 and 2), Count 2, Deprivation of Rights under Color of Law (18 U.S.C. §§ 242 and 2) only charged against Tagaloa. Count 3, Conspiracy to Obstruct Justice (18 U.S.C. § 317). Count 4, Obstruction by False Report (18 U.S.C. §1519) -Tagaloa; Counts 5 and 6 were the same as Count 4, but against Pinkney and Taum separably. (2- ER: 28)

The District Court entered judgment and sentence on December 5, 2022. Appellant Tagaloa was sentenced for Counts 1 and 4 to 96 months imprisonment as to each count, and for Count 3 60 months, all to run concurrently; with 3 years of supervised release to run concurrently for all three counts.<sup>2</sup> Tagaloa was found not guilty of Count 2 by the jury. (1-ER: 2)

**C. Bail Status**

Appellant Tagaloa is presently serving his sentence at the FCI Tucson, in Tucson, AZ. His release date is presently scheduled for April 29, 2029

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<sup>2</sup> Tagaloa's total offense level was 31 with a criminal history 1.

### III.

#### STATEMENT OF THE FACTS

On March 17, 2014, Appellant Tagaloa commenced his employment with Department of Public Safety ("DPS") in Hilo, Hawaii, as an Adult Corrections Officer ("ACO"). He had successfully completed his Basic Corrections Training ("BCT") on May 16, 2014. However, this training did not include how to handle an inmate high on drugs.

On June 15, 2015, Appellant Tagaloa after completing his first shift of eight hours and into his second shift of eight hours, was ordered to escort inmate Chawn Kaili ("Kaili") from Waianuenue housing unit for sentenced inmates, to Punahale facility that had individual cells for special needs inmates.

Kaili was high on methamphetamine and had not slept for three (3) days. He was also known to have unusual strength; he played center on his high school football team.

Another ACO, Pinkney, was ordered to help with this transfer. Kaili was not handcuffed at that time; he was compliant until he hit the bright light in the rec yard, and he started to resist and backed into Tagaloa. Tagaloa didn't know what to do and saw his supervisor, Taum coming from across the yard, and he was told to 'take him down.'

Appellant Tagaloa was following orders to try to get Kaili handcuffed and to the next facility along with Taum, Pinkney, and Jordan Demattos ("Demattos"). Later ACO Roger Tibayan ("Tibayan") joined them and Taum left.

The rec yard had only one spotlight, so it was difficult to see what was happening even on the monitor in the control center at the Waianuenue facility that was recording this incident. Kaili was resisting and moving around, and they needed to cuff his hands behind his back; he was flipped onto his stomach and Kaili put his hands underneath his body. When the cuffs were finally on Kaili, he stopped resisting and the ACOs were able to lift him up and walk him the rest of the way to the other facility without any problems.

Appellant Tagaloa had no prior juvenile adjudications or adult convictions, no arrests, no pending charges, and no other criminal conduct. His total criminal history score was zero. He had never tried any illegal drugs, including marijuana and rarely drank a few beers. He was very involved with his local church.

Appellant Tagaloa has a large extended family that is very supportive of him; however, he had a difficult childhood. He graduated from high school in Hilo in 2009, where he played football. He attended the

University of Hawaii, Hilo campus after graduation until May 2011. He was a few credits short of obtaining an associate degree in applied science in Automotive Mechanics Technology. He has been in a relationship with his fiancé since 2012 and they have two young children together. (Refer to PSR §80 employment history)

The trial commenced on June 22, 2022, seven years after this incident occurred. Appellant Tagaloa was only 24 years old at the time of this incident; he did very well on pretrial release for three years and was employed during that period to support his family.

#### IV.

### ARGUMENT

#### A. GOVERNMENT WITNESS DEMATTOS' TESTIMONY WAS FALSE AND MISLEADING

##### 1. Standard of Review

The Court reviews a district court's admission of lay opinion testimony for abuse of discretion. However, the Court reviews de novo a district court's "construction or interpretation of the Federal Rules of Evidence." United States v. Rodriguez, 971 F.3d 1005, 1017 (9th Cir. 2020). When the district court does not engage in explicit balancing of the probative

value of the evidence against its prejudicial effect, its determination is reviewed de novo. United States v. Wells, 879 F.3d 900, 914 (9th Cir.2018)

Appellant Tagaloa filed a motion to dismiss the Indictment on May 16, 2022, based on the testimony of Demattos during the grand jury investigation hearing on June 10, 2020. (4-ER:701) The government filed its opposition on May 23, 2022. (4-ER:705) Tagaloa's reply was filed May 26, 2022. (4-ER:706) On May 27, 2022, the court denied the motion.

## **2. Summary of Argument**

Demattos was a co-defendant in the events that transpired on June 15, 2015. However, he was not indicted with the other three co-defendants, Tagaloa, Pinkney, and Taum.

Demattos testified before the Grand Jury on June 10, 2020. His testimony mirrored the facts found in his Plea Agreement that was executed by the government. In this agreement Demattos agreed to testify truthfully at ...all trial, hearings, ...and grand jury proceedings.

Even though this agreement was not signed by all parties until December 2, 2020, most likely this agreement was in effect and known to Demattos prior to his grand jury testimony. The factual stipulations in this agreement included the major facts that were testified to in both the grand jury proceedings and trial. (2-ER: 47-56) These facts were not true.

The grand jury testimony by Demattos concluded at 12:32 p.m. on June 10, 2020. The government filed the 11 page Indictment on June 10, 2020, at 5:20 p.m. The alleged facts coincided with the testimony given by Demattos and the basic facts cited in the Plea Agreement. The very detailed Indictment mirrored the facts testified by Demattos during the grand jury investigation hearing.

The Information for Demattos was filed November 23, 2020, with another judge - CR. No. 20-00121 HG. Demattos was charged the same three (3) Counts.(2-ER: 57-64)

Demattos was sentenced on January 17, 2023, to 12 months and one day; was not in custody until he reported February 28, 2023. (2-ER:39) He complied with his Plea Agreement and received the government's significant downward departures for his cooperation.

Demattos' testimony at trial contradicted the testimony of other witnesses.

### **3. Legal Analysis**

#### **a. Demattos' Testimony Was False And Misleading**

In Demattos' Plea Agreement he agreed to testify truthfully at ...all trial, hearings, ...and grand jury proceedings. (2-ER: 55)



During Demattos' testimony on redirect by the government he was asked this question: "What did you agree to, in generally speaking, in paragraph 21A?

Demattos responded: To be truthful.

The attorney for one of the defendant's objected, "Your Honor, I'm going to object..."

Before the objection could be completed, Demattos stated: **"I'm sorry...to agree with the government."**

It appeared that Demattos felt the objection was his statement, so he clarified it. The attorney continued with his objection. No one seemed to notice what Demattos had said, or the government chose to ignore it. (2-ER: 258,259,260)

Demattos was explaining that according to the plea agreement he had to be truthful; however, **to be truthful he had to say whatever, the government wanted him to say.** If not, his plea agreement would not be in effect. Therefore, Demattos' false testimony was required via his plea agreement.

The Supreme Court has long emphasized "the special role played by the American prosecutor in the search for truth in criminal trials." Strickler v. Greene, 527 U.S. 263, 282, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).

In Hayes v. Brown, 399 F.3d 972, 980 (9th Cir. 2005) (en banc), the Court stated: "The prosecuting attorney represents a sovereign whose obligation is to govern impartially and whose interest in a particular case is not necessarily to win, but to do justice.... It is the sworn duty of the prosecutor to assure that the defendant has a fair and impartial trial. (See Commonwealth of the Northern Mariana Islands c. Mendiola, 976 F.2d 475, 486 (9th Cir. 1992).

"One of the bedrock principles of our democracy, implicit in any concept of ordered liberty, is that the State may not use false evidence to obtain a criminal conviction." Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

Deliberate deception of a judge and jury is "inconsistent with the rudimentary demands of justice." Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed. 791 (1935). Thus, "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." Napue, at 269.<sup>3</sup> (citations omitted).

In addition, the Supreme Court held that a prosecutor's failure to correct a material false impression also violates due process. See Alcorta v. Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957)(per curiam)

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<sup>3</sup> **Amendment XIV Section 1.** "...nor shall any state deprive any person of life, liberty, or property, without due process of law..."

**Demattos Grand Jury Testimony:**

Demattos met with government prosecutors and two F.B.I. agents several times the week prior to his testimony before the Grand Jury to discuss facts and circumstances of the June 15, 2015, incident. Demattos had to cooperate with their investigation and part of that cooperation was his testimony that day. (2-ER: 67-71)

Demattos detailed the incident on June 15, 2015, regarding the rehousing of inmate Kaili. Demattos responded to questions regarding the use of excessive force and the polices involved. (2-ER:72-79)

The government's questions asked for a legal opinion that the conduct engaged was not 'lawful' and make a legal conclusion on whether the force used was 'excessive.' (2-ER:84-91; 130)<sup>4</sup>

Government question: was Kaili aggressive or violent; or physically aggressive while the ACOs were trying to cuff Kaili? Demattos said **No**.

Government question: about the strikes and training. The government **showed Exhibit 1 - the silent video that was recorded of this incident**; the government said, "**I will tell you it's a video of a video**" (2-ER:8083; 84-93)

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<sup>4</sup> Just an example.

Demattos lied during the Grand Jury hearing and jury trial. He lied about what happened when Kaili was put into cell F7. He testified at trial that Tagaloa hit Kaili in the head while he was being helped down so they could take off his cuffs. That lie was Count 2 in the Indictment. It was proven by other testimony that Tagaloa did not strike Kaili in that cell and the jury found Tagaloa not guilty of that heinous lie by Demattos. (2-ER:96-102)

Demattos testified, "Kaili is a little unsteady on his feet, it seems...he kind of pauses, and Tagaloa bear-hugs him from the back and takes him down." (2-ER:77)

Prior to the takedown, the government asked Demattos if Kaili was **aggressive** or **violent**; or **physically aggressive** while the ACOs were trying to cuff Kaili? Demattos said **No**. Was there an attempt to walk away or escape? **NO**.

When Kaili was flipped over, other than his hands under his stomach, does he do anything **that..resists the force** you guys are using?  
**NO**

When he is on the ground any time prior to being cuffed, does he **do anything physically aggressive** toward any of the four ACOs? **NO**

Does he attempt **to hit, kick, or attempt to escape** prior to being cuffed? **NO** (2-ER:78, 79)

The Factual Stipulations in Demattos' Plea Agreement were stated in paragraphs 8 a to d:

"During much of the assault, **inmate 1 was not resisting**...and the officers had no legitimate reason to use force against him...; The officers conspired to cover up the assault...; the officers met to submit false reports ...; the officers met to justify their use of excessive force..." These stipulations corresponded to the facts he testified to before Grand Jury and the trial. (2-ER:51-54)

During Demattos' testimony before the Grand Jury and trial, there was no mention that Kaili was high on methamphetamine and other drugs or that he had not slept for approximately three days; nor that there was no training on how to deal with an inmate high on drugs. <sup>5</sup>

**Demattos Trial Testimony:**

Demattos agreed with the government that **as part of his plea agreement he had to cooperate with the government.** (2-ER:184)

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<sup>5</sup> Refer to training section.

Demattos entered the rec yard with Taum from the Punahale side, he saw Tagaloa, Pinkney, and Kaili entering the rec yard from the Waianuenue side. Demattos testified that Kaili's gait was unsteady, and he backs into Tagaloa; Tagaloa bear hugs him from the back and takes him down on the ground. (2-ER:186-87)

The government asks Demattos if prior to the takedown **was Kaili violent? NO**

Was he **physically aggressive? NO.**

Was he **verbally aggressive? NO.**

Was he **attempting to walk or run away? NO. Or trying to escape? NO.**

(2-ER: 187-89)

When asked what happened when he ran over to assist Tagaloa, Demattos testified that 'we throw punches, kicks, and knees to...any attempt to restrain him. Kaili is on his back squirming around and they are attempting to turn him over on his stomach. They are all holding him down. Once down they are all punching, kicking, and kneeling him to restrain him.'

At some point Tibayan came into the rec yard and relieved Taum holding Kaili's legs down. (2-ER:190-92)

The government asked Demattos if at any time while Kaili was prone, did **he attack you; attack others; yelling** at any of you, do you see him trying to get up and **try to escape? NO.**

Was he **aggressive** while he was prone? **NO.**

While Kaili was down did he observe strikes or kicks by Tagaloa? His response was YES. (2-ER:192)

**Demattos said he was present for the entire incident with Kaili.**(2-ER:193)

Demattos had viewed Exhibit 1 many times prior to the the Grand Jury hearing. The government entered Exhibit 1 at the trial with Demattos authenticating the video. (2-ER:194-95)<sup>6</sup>

Tagaloa's attorney asked to voir dire because the time stamp on that video stated 2:43:32 - or 2:43 a.m. and then objected to its introduction which was overruled. The incident happened approximately 1:30 a.m. (2-ER: 195-96; 4-ER:576)

Demattos' testimony involved what was happening on this video. Demattos testified that they stood up and kicked Kaili in his shoulder and Tagaloa threw a hammer fist to his neck and back of the head. The

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<sup>6</sup> Entering this video without proper authentication was an issue in the Defendants' motion in limine.

government asked if Kaili was **trying to escape**, or **attacking** him or other guards, or **injuring any of them**, or being **physically violent**. Demattos responded **NO**. (2-ER:197-98)

Another video shown that Demattos had watched before depicted exiting the rec yard to Punahale. At the completion of that video the government asked Demattos if he saw Kaili **attack** other ACOs, see him **attempt to flee, or run**, or did he act **violent** or **aggressive** to others? Demattos said **NO**. (2-ER: 200-202)

Demattos said Tagaloa was on Kaili's left and Tibayan was on his right as they were escorting him to cell F7. Demattos said Pinkney was behind him. Demattos said that the door to cell F7 was open all night.

**Demattos testified that Tagaloa and Tibayan took Kaili into cell F7 while he stood in the doorway.** <sup>7</sup>

They "...start to lay Kaili down to get him prone to take off the handcuffs... Kaili's at maybe at about a 45 degree angle and ACO Tagaloa punches him in the face with his left hand. This was on the same side that

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<sup>7</sup> Demattos lied about what happened in that cell.



Tagaloa kicked and punched in the rec yard. After the punch they lay him down and take off the restraints."<sup>8</sup> (2-ER: 203-08)

Demattos said he was at the doorway, and Kaili was not moving on his own, he was kind of struggling. Demattos testified, "...he was **not attempting to flee**, or **lashing out** at the others, or **violent**, or **physically or verbally aggressive**; he wasn't **threatening** anyone or **yelling**, or **out of control**." Demattos said Kaili was still shackled at that time. (2-ER: 209-10)

Demattos lied about the events for Count 2 against Tagaloa only; other testimony proved that they were false. The jury acquitted Tagaloa on Count 2.

**Other Witnesses Negated The Demattos' Statements:**

Frank McClure Baker ("Baker") was the government's first witness in the trial. Baker was an ACO. He described the three different shifts. First watch goes from 11:00 p.m. to 7:00 a.m., second watch goes from 7:00 a.m. to 3:00 p.m. and third watch goes from 3:00 p.m. to 11:00 p.m. Each officer was assigned a post, a certain work area. (2-ER:149,151, 57)

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<sup>8</sup> (Demattos' testimony contradicts the testimony of Tibayan, an eyewitness to the incident in cell F7.)

The government asked Baker, " To orient the jury, is the Waianuenue rec yard the place where the defendants used force against Chawn Kaili?"

The witness asked USA to repeat the question, which he did. That question was objected to by defendants and sustained by the court. That was a blatant effort by the USA to state facts not in evidence. (2-ER: 151)

Baker testified to the events of June 15, 2015: he was posted in the Waianuenue control room, Kaili was housed in A side Waianuenue. Kaili came up to the A side control window about 12:20 a.m. and demanded to make a bail call in the middle of the night. "...he needed to **throw off his aggressive behavior** and have him reset his thinking; " **'cause he wasn't in the right frame of mind.'**" Kaili was just **acting strange**.

It was decided to put Kaili in the visitation room, where a camera was located to be able to watch him. Baker couldn't have Kaili walking through the dorms disrupting other inmates because then it would escalate. (2-ER:150, 161-64)

Baker notified Taum and told him, "I have an inmate here, **I feel is high**. ...other inmates are really getting upset with him being on night

walker, ...walking around all night...I'm going to put him in the visitation room... " Taum called Baker back and told him "they're coming to get him."

When Tagaloa and Pinkney took custody of Kaili, he wasn't resisting, and he wasn't restrained. Kaili was okay with the officers as he knew Tagaloa from high school.

Baker continued to watch the monitor as the officers were escorting Kaili and he jerked when they hit the light; Baker saw another ACO coming at him from the darkness. (2-ER:165-67)

During cross, Baker was not watching the incident in the rec yard directly because he could not see it from the control room. He watched it on the video. When asked why he did not call Lt Waikiki regarding what he was watching, Baker said, "I was busy securing my housing unit."

The control room did not have audio so Baker could not hear any noise from the rec yard because of the noise from the dorm on B side as they were screaming at Baker and pounding on the windows. These windows looked directly out into the rec yard. A riot on the B side dorm. (2-ER:170-74)

No one talked with Baker concerning the investigation into this incident!

Tibayan, defense witness, said he contracted COVID June 10, 2021, and suffered lung damage and was oxygen-dependent. He was unable to attend court in person and appeared via video teleconference. (3-ER:469,472)

He was in the same training class with Pinkney. He knew Kaili as they met prior to becoming a corrections officer through playing alumni football. Kaili played center in high school football.

The incident on June 15, 2015, happened 'not even a year after graduating from recruit school in August 2014. Tibayan was assigned Waianuenue complex as a rover. (3-ER: 473)

Tibayan was on his second shift (total of 16 hours) working in the control. Between 11:00 pm and 1:00 am, the first time Kaili came to the window he said he needed to get up to the main 'cause he was getting released. He was kind of agitated. Pinkney was one of the first to speak with Kaili. Baker checked for his release date, and it was 'months more.' When asked how Kaili was acting, Tibayan responded , ".he was acting not in his right state of mind. He was very agitated and real fidgety, kind of mumbling."

Baker was senior officer and decided to put Kaili in the fore visit room; that room had a camera to keep watch on him. Before Kaili had

been moved to the visit room, Tagaloa and Pinkney were told to escort Kaili out of Waianuenue. Tibayan did not know who made that decision. (ER:452-457)

Tibayan helped to escort Kaili to door 1 and proceeded back to control. That door led to the first gate into the chute, and then the second gate that led into the Waianuenue rec yard. At that time there was a camera towards the door 1 chute. Tibayan then returned to control.

The angle Tibayan saw was at the bottom part of the rec yard coming out of Waianuenue towards Punahale...he saw movement that looked like struggling and informed Baker. Then Tibayan told Baker that he was going to investigate in case something was going on. He grabbed the key to open the inside of the chute and proceeded out the control door into the next door into B side unit, opened several gates before he was in the rec yard.

When he reached the rec yard, he saw five people instead of three. Kaili was prone face first on the ground t...**Tibayan could hear them yelling for him to stop resisting and they were trying to get him secured.** (3-ER:474-481)

Tibayan ended up going towards Kaili's legs and Sergeant Taum told him to secure his legs. Kaili's left hand was cuffed, his right hand

was under his chest area. Kaili was face down on the ground. They were trying to pull his arm out to secure the cuffs behind his back.

Tibayan said he secured Kaili's legs because they were active. He crisscrossed them and pressed them up against the back of his thighs.. Tibayan was focused on what he had to do and not what the others were doing at that time.

Once the cuffs were secured on Kaili's wrists, they all stood up. Kaili was escorted to the Punahale building without any more problems. (3-ER:482-83; 501-504)

**Only Tagaloa and Pinkney escorted Kaili to the main (Punahale)**

**Demattos was not** with Tagaloa, Pinkney, and Tibayan. as they completed the escort to Punahale gate. Kaili was still agitated, it took two ACOs to control and walk him. When asked where Demattos was at that point, Tibayan didn't know, as far as he knew he could still be in the rec yard as he did not accompany them to Punahale.

**When they reached cell F7 Demattos was not with them.**

Tagaloa and Pinkney put Kaili into cell F7 and Tibayan waited outside of the cell. The cell was small and hard to see over them. Tibayan was the only person outside that door. They both came out of the cell and closed the door. The door locked just by closing it. (3-ER: 484-90;504)

**Tibayan's testimony contradicted the testimony by Demattos regarding the assault by Tagaloa.**

Demattos gave false and misleading testimony regarding Counts 3 -Conspiracy to Obstruct Justice and Count 4 - Obstruction by False Report. Demattos also testified regarding the alleged coverup at the Grand Jury; at the trial regarding the reports.

**b. False Testimony Is Fundamentally Unfair And Affected The Jury's Verdict**

In United States v. Bagley, 473 U.S. 667, 678, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1965) the Supreme Court noted the “well-established rule that ‘a conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.’ ” (Citation omitted).

"Thus, the rule has been clear for decades: a criminal defendant is denied due process of law when a prosecutor either knowingly presents false evidence or fails to correct the record to reflect the true facts when unsolicited false evidence is introduced at trial." Hayes v. Brown, 399 F.3d at 984.

Was the constitutional violation material? See United States v. Zuno-Arce, 339 F.3d 886, 889 (9th Cir. 2003) (“To prevail on a claim based on Mooney-Napue, the petitioner must show that (1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known

that the testimony was actually false, and (3) ... the false testimony was material.”) (citations omitted).

(1) Demattos' testimony was false as it contradicted other witness testimony.

(2) The government knew it was false as Demattos' testimony confirmed what was detailed in Demattos' Plea Agreement and his testimony at the Grand Jury which resulted in the Indictment that was filed that same day.

(3) Demattos' false and misleading testimony was material as the jury convicted Tagaloa on Counts 1, 3, and 4. (1-ER:9-12)

In Hayes v. Brown, 399 F3d at 984, the Court stated that, "In assessing materiality under Napue, we **determine whether there is “ ‘any reasonable likelihood that the false testimony could have affected the judgment of the jury;’ ”** if so, then **“the conviction must be set aside.”** (quoting United States v. Agurs, 427 U.S. 97, 103, 96 S.Ct.2392, 49 L.Ed.2d 342 (1976) (emphasis added)

Under this materiality standard, “ ‘[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.’ ” Hall v. Director of Corrections, 343 F.3d 976, 983-84 (9th Cir. 2003)(per curiam) (quoting Kyles v. Whitley, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)).



The government relied almost entirely on the testimony by Demattos to prove all the elements of each count. (3-ER: 546-50, 558-56, **573**) Both under Napue and Alcorta, the false evidence presented by the testimony of Demattos was material to all three counts that the jury found Tagaloa guilty. Therefore, Appellant Tagaloa's conviction must be reversed.<sup>9</sup>

**B. THE GOVERNMENT'S VIDEO USED AS EVIDENCE AGAINST TAGALOA WAS NOT AUTHENTICATED PROPERLY**

**1. Standard of Review**

The trial court's decision regarding the authenticity of evidence is reviewed for abuse of discretion. United States v. Alvarez, 831 F.3d 1115, 1120 (9th Cir. 2016). A district court's acceptance of evidence as authentic is also reviewed for abuse of discretion. Id. (referring to United States v. Estrada-Eliverio, 583 F.3d 669, 672 (9th Cir. 2009)).

The Court also reviews the ruling on a motion in limine for abuse of discretion. United States v. Kvashuk, 229 F.4th 1077 (9th Cir. 2022), (citing

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<sup>9</sup> Kaili filed lawsuit for monetary reasons.(2-ER: 281-282)

Alvirez, 831 F.3d at 1120.) However, the Court reviews de novo whether the ruling precluded the presentation of a defense. Id.

## 2. Summary of Argument

The defendants objected to the admissibility of the DVD of the incident June 15, 2015, by filing a motion to determine the admissibility of DVD on April 18, 2022. The defendants had "genuine concerns about the authenticity, identification, chain of custody, and content of the DVD. This DVD was of the incident on June 15, 2015. (4-ER:DK:697)

On May 3, 2022, the government filed its response to this motion. (4-ER:700) On May 24, 2022, the defendants filed a Motion in Limine regarding the Recreation Yard Video which was also the subject of the DVD. (4-ER:706)

On May 19, 2022, the court ordered an evidentiary hearing for June 7, 2022.

On June 1, 2022, the district court filed its Minute Order of the court's inclination on the motion to determine admissibility of the DVD. The defendants had stated that the original surveillance recording was unavailable, the original DVD of the camcorder video recording was missing and therefore unavailable; the video recording sent by the DPS to the F.B.I. pursuant to subpoena was also missing and unavailable. The defendants requested an

evidentiary hearing to be held; and discovery produced by the government regarding the missing items. (4-ER:708)

On June 3, 2022, the defendants filed a motion for leave to Withdraw the Motion to Determine admissibility of DVD under FRE 1002 challenge. **The government initially represented that the camcorder DVD was unavailable after an exhaustive search but was readily found after the court ordered an evidentiary hearing on the DVD's unavailability.** As a result of the FBI's discovery of the DVD, Defendants' objection to the admissibility of the DVD was rendered moot. In the motion, the defendants asked the court to consider hearing from FBI agent Kevin Boswell, to determine whether government bad faith factored into the reported unavailability. (4-ER:709)

In the court's Minute Order of June 3, 2022, regarding the Motion in Limine by the defendants, it stated that ..."**the government has recently located the original DVD of the camcorder recording.**" (4-ER:709)

In a separate court order, on June 3, 2022, **the court denied the defendants' request to further question Agent Boswell on the issue of the DVD.** The evidentiary hearing was also vacated. (4-ER:709)

The government was now permitted to introduce a video of the incident without any verifications that the video was the original, or a verified copy of the original.

**3. Legal Analysis**

**a. The DVD Was Not The Original Recording Or Authentic Copy**

The government's response to the defendants' motion on the admissibility of the DVD stated the camcorder video may be authenticated by any witness with knowledge that it is 'what it is claimed to be,' Rule 901(b)(1), including a witness who was present when it was created or a witness who can testify that it accurately depicts the charged assault..."(4-ER:700)

However, Rule 901(b)(1) states that, "Testimony that an item is what it is claimed to be." There was nothing in that section of Rule 901(b)(1) that included the rest of the government's assertion. Authentication of evidence is describing a process or system, showing that it produces an accurate result. Rule 901 (b)(9); any method of authentication or identification allowed by a federal statute, or a rule prescribed by the Supreme Court. Rule 901(b)(10).

In United States v. Salcido, 506 F.3d 729 (9th Cir. 2007), the Court found the government, "properly authenticated the videos and images under Rule 901 by presenting detailed evidence as to the chain of custody, specifically how the images were retrieved from the defendant's computers.

There was no evidence of chain of custody or how the video (Exhibit 1) was retrieved or from what original device.

There should be testimony of a witness with knowledge or evidence showing that a process or system produced accurate results. Fed.R.Evid 901(a). There was no such evidence during this trial.

For video recordings, like tape recordings, the proponent should also show that the camera functioned properly, the operator was competent in operating the equipment, and the recording fairly and accurately represented the scene depicted. See United States v. Fluker, 698 F.3d 988, 999 (7th Cir. 2012.)

The defendants challenged the admissibility at trial of evidence to determine the admissibility of the DVD in its motion in limine. (4-ER:706)

The government indicated that it intended to present a copy of the camcorder video recording to the jury with the testimony of witnesses who were present during the events depicted on the recording; therefore, the best evidence rule does not apply at all. (4-ER:700)

"The court is therefore inclined to find that the government is not required to present the original CCTV recording, or its duplicate or to

explain its absence, as long as a witness who was present and observed the actions depicted testifies as to what is depicted on the DVD." (4-ER:708)

The court permitted the government to use a video as crucial evidence without any type of verification. The government never offered any evidence to prove or substantiate exactly how this video was created or by whom.

**b. Demattos Was Not Qualified To Authenticate**

**The DVD**

The defendants objected that the video coming in through Demattos would be more prejudicial than probative of ...what occurred because he was not responsible for taking the video and lack of foundation.

**The video was to be offered for the truth of the matter that the video itself was evidence of the cruel and unusual punishment.**

The court denied the motion "...it's not hearsay if offered through Demattos as he was an individual who was present when the actual events were captured on videotape, and therefore, it can be introduced through him." The court also overruled the 403 objections. (2-ER:179-182)

On June 23, 2022, Demattos testified he was personally present for the entire incident with Kaili. (2-192-93) However, he entered from the Punahale side after Kaili was already through the chute and had entered the

rec yard. Demattos was **NOT PRESENT** during the entire time frame of this video.

The government entered Exhibit 1 - the video of the incident with Demattos as the witness to enter the video into evidence without any testimony that the video was a true and correct copy of the recorded incident. (Rule 901(b)(1))

During the Grand Jury testimony of Demattos, the government had Demattos review a video; the government showed Exhibit 1 - the silent video that was recorded of this incident; the government said, "I will tell you **it's a video of a video**" (2-ER:80)

During trial, this same video was shown to the jury. After the video was shown, Tagaloa's attorney requested a voir dire examination regarding the time stamp on that video: the time stamp ..." that says 02:43:32. Does that indicate it's 2:43 in the morning?" Demattos responded that "I'm not certain as to what the system....if the system was calibrated for that time." The defendants objected due to the discrepancy in the time stamp, which the court overruled. The incident on that video happened approximately at 1:30 a.m. (ER:195-96; 4-ER:576)

Demattos had no idea where that video was created or by whom as no information was given by the government when it was introduced as evidence.

Who created Exhibit 1, the video? **NO evidence was provided by the government on any of the videos shown during the trial.** There were videos enhanced by more light, blown up for dramatic effect, and close-up versions. There was a total of **31 separate videos** of exhibit 1 presented by the government at the trial; never authenticated. (4-ER: 657-688)

**c. The Warden Had Viewed The Original Video  
And Had A Copy**

The government stated that ACO Watanabe at the direction of Warden Cabreros, attempted to download a copy of the original surveillance video of the 'assault.' Without succeeding, he recorded the entire original video with a camcorder. The government included excerpts of the **testimony of Watanabe at Grand Jury Investigation hearing on February 17, 2021**, in their Response to the Defendants Motion on Admissibility of the DVD. <sup>10</sup>(4-ER: 700);(2-ER:41-46)

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<sup>10</sup> Why was there another Grand Jury Investigation in 2021 when the investigation was in June 2020?



The government stated that they may call Watanabe to verify the video. However, that never happened. (4-ER: 700)<sup>11</sup>

Warden Cabreros sent a memo to Lt. Cravalho, the investigator from DPS, on June 22, 2015, asking him to review the video and if that could be an excessive use of force. (4-ER: 653)

June 29, 2015, to July 10, 2015, Cabreros was alerted by Watanabe that the old surveillance system set up in the Waianuenue Control had a video of the incident. **Watanabe was tasked to download. After several attempts, he reported that it couldn't be done.** Cabreros instructed Watanabe to blow up the screen on the T.V. monitor and use the Watch Commanders camcorder to record the video.

The Warden downloaded that video on to DVD disk. A few days later after ensuring the DVD disk was viewable, he retrieved the camcorder to delete the video, but the sim card was missing. COS Mahoe recalled it was missing around July 2015. (4-ER: 656)

On December 30, 2016, the Warden sent information to Laurie Nadamoto regarding the Kaili investigation. Based on reports and the video, what he perceived are two ACOs tasked to transfer Kaili to special needs as his behavior was unusual and they suspected he was under the influence of

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<sup>11</sup> Page 13)

drugs. The transfer was in accordance with procedures; however, Kaili should have been restrained first. The ACOs were inexperienced and may not have known that.

**Inmate Kaili was known to have unusual strength; being under the influence of meth/ice creates a more serious and difficult situation. The ACOs intent was not to beat this inmate up, but to transfer him to the Special Needs. The incident escalated when inmate appeared to get away from ACOs; attempt to gain control of him was unsuccessful. (2-ER:143)**

On April 11, 2018, Mr. Cabreros was called to testify before the State of Hawaii Labor Relations Board. These excerpts were included in the Government's Response to the Defendants' Motion. (DK 126); (2-ER: 135-142)

Only parts of his testimony were included in the government's exhibit 2. Mr. Cabreros' testimony: "I first became aware of a possible video, so I had instructed on of my officers to try to record the video. The officer was ACO Watanabe. The video was on the...one of our older systems that's connected to our education building. I...because they couldn't download, I had them use a camcorder to record the television showing the incident. It was just one video I recall. **I had inquired if there were videos of the**

**incident a couple weeks prior. I was told there were none...by my investigator Lt Cravalho."**

When asked the question if there were cameras stationed or positioned so you could track an inmate between housing areas, Cabrerros responded "that there are cameras out there ...it's been a while...to see how it covers, because I know there are blind spots. "They gave the video to me, and I tried download it to a disc. I did make it but wasn't sure it was going to save. I returned the camcorder back to the watch commander's office. **The copy was kept and was utilized as part of the investigation.**

**Cabrerros actually reviewed the video.** Lt Cravalho may have been with him when he reviewed the video. (2-ER: 136-142)

**Cabrerros should have been called as the witness to verify the contents of the video as he had reviewed the original recording of the incident and had a copy of video, and he was familiar with all the participants and inmate Kaili.**

The government was very aware that Cabrerros could have verified the video during the trial. **The government's motion that included that information was filed May 3, 2022, well before the trial started at the end of June 2022.** (4-ER:700)

From the government's motion, including all exhibits, the court should have been aware that Cabrerros had personally viewed the original video and had a copy of the original video, and was very knowledgeable of all the events that transpired during that incident on June 15, 2015. (4-ER:700)

The court abused its discretion by permitting Demattos to testify regarding the video that was not the original or even a copy of the original. The court stated that the government was not required to present the original CCTV recording or its duplicate or to explain its absence, if a witness who was present and observed the actions depicted on the DVD.

However, Demattos was not that witness as he was neither present for all that was recorded on the video nor aware of all that was going on during that incident. Demattos only reviewed a copy of copies of a video, without knowledge of its origin.

On June 15, 2015, Demattos was on suicide watch in the Punahuele section of the facility. (2-ER:230-31) The video was recorded from the control room in the Waianuenue section which was on the other side of the prison complex. Therefore, how would Demattos be able to verify the authenticity of that video if he was not even in the same location when it was being recorded or where the incident commenced? Until Demattos was sent

out with Taum to help control Kaili, he was not in the same location to see the events happening in the rec yard close to the Waianuenue facility, not Punahale.

Demattos failed to testify truthfully and as a result Appellant Tagaloa was convicted wrongfully based on false and misleading testimony. His conviction must be reversed.

**C. INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT TAGALOA VIOLATED ANY OF THE CHARGES IN THE INDICTMENT**

**1. Standard of Review**

The Court reviews de novo the sufficiency of the evidence. United States v. Tuan Ngoc Luong, 965 F.3d 973, 980–81 (9th Cir. 2020); United States v. Benamor, 937 F.3d 1182, 1186 (9th Cir. 2019). The interpretation of a statute is reviewed de novo. United States v. Pacheco, 997 F.3d 765, 767 (9th Cir. 2020).

The Court reviews a challenge to the sufficiency of the evidence with a two-step analysis. First, the Court considers "the evidence presented at trial in the light most favorable to the prosecution." United States v. Mendoza, 25 F.4th 730, 735 (9th Cir. 2022)(quoting United States v. Nevils, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc)).

Next, the Court must determine whether the evidence, including any “evidence of innocence” or “lack of evidence of guilt,” “could allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt.” Id. at 1164-65 (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d. 560 (1979)).

Appellant Tagaloa preserved his claim of insufficient evidence by moving for a judgment of acquittal at the close of evidence.

Fed.R.Crim.P. 29 (ER:397, 444-446) The court denied the motion for acquittal, relying on the testimonies of Demattos and Kaili. (ER:447-449)

## **2. Summary of Argument**

All the counts in the Indictment were based upon of Demattos' Grand Jury testimony; no other evidence. Demattos was less than trustworthy to be able to support the Indictment or his testimony during the trial. **The government in its closing arguments referred to what Demattos testified to as evidence for each count.** There was no other evidence to prove beyond a reasonable doubt that Appellant Tagaloa was guilty of any of the counts in the Indictment. There was a witness to contradict Demattos' testimony for Count 2, which the jury acquitted.

**3. Legal Analysis**

**a. Count 1 Deprivation of rights under color of law.  
(18 U.S.C. §§ 242, 2)**

The court detailed the elements of each count against the defendants in the jury instructions.<sup>12</sup> However, the evidence was insufficient to prove that Appellant Tagaloa deprived Chawn Kaili of his rights under Count 1. (3-ER: 529-37)

The court stated the four (4) elements for Count 1:

**Element 1** defendant acted under color of law.

A government employee acts under the color of law by virtue of his employment was described by court. (3-ER: 530)

**Element 2** defendant deprived Kaili of his Eighth Amendment right to be free from cruel and unusual punishment.

The court further explained that the government must prove the following beyond a reasonable doubt:

1. A defendant used excessive and unnecessary force under all the circumstances;

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<sup>12</sup> The court gave basic jury instructions. (3-ER: 521-29)

2. A defendant acted maliciously and sadistically for the purpose of causing harm and not in a good faith effort to maintain or restore discipline; and

3. The act or acts of a defendant caused harm to the prisoner.

(3-ER: 530-32)

**1. Appellant Tagaloa Did Not Use Excessive Or Unnecessary Force**

In assessing a claim of excessive force, courts ask “whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them.” Graham v. Connor, 490 U.S. 386, 397, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1988). A court cannot apply this standard mechanically. The Court must assess the reasonableness of force “from the perspective of a reasonable officer on the scene, using the facts known to the officer at the time and considering the legitimate security interests of the jail.” Kingsley v. Hendrickson, 576 U.S. 389, 397, 135 S.Ct. 2466, 192 L.Ed.2d 416 (2015) The inquiry “requires careful attention to the facts and circumstances of each particular case.” Graham, 490 U.S. at 396.

In Bearchild v. Cobban, 947 F.3d 1130, 1142 (9th Cir. 2020), the Court enumerated five factors that bear on the excessive force analysis in a typical Eighth Amendment claim: “(1) the extent of injury suffered by an



inmate; (2) the need for application of force; (3) the relationship between that need and the amount of force used; (4) the threat reasonably perceived by the responsible officials; and (5) any efforts made to temper the severity of a forceful response.” (citing Furnace v. Sullivan, 705 F.3d 1021, 1028 (9th Cir. 2013)). See also, Kingsley, 576 U.S. at 397.

In considering these factors, the jury should give deference to prison officials in the adoption and execution of policies and practices that in their judgment are needed to preserve discipline and to maintain internal security in a prison. However, the government failed to take any of these factors into consideration and just relied on the testimony of Demattos for its evidence against Tagaloa.

In Eighth Amendment excessive force claims arising out of prison guards’ efforts to suppress disturbances or restore discipline, observing that when prison disturbances arise, “prison officials must make ‘decisions in haste, under pressure, and frequently without the luxury of a second chance.’” Bearchild, at 1144, (citing Wood v. Beauclair, 692 F.3d 1041, 1051 (9th Cir. 2012)) (quoting Hudson v. McMillian, 503 U.S. 1, 6, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992)).

That context requires courts to afford prison staff significant deference in their use of force; only “**malicious and sadistic**” use of force

**will rise to the level of a constitutional violation.** Wood, 692 F.3d at 1050. (emphasis added)

The government failed to produce evidence that Tagaloa used excessive force based on the facts and circumstances of this case as explained in the cases above.

The government argued during closing statements, that the defendants used excessive force they had no legitimate reason to. The first factor, the extent of injury, next the need to use force. The government stated that "**the officers had every right to use reasonable force to get Mr. Kaili under control.** But once they got him under control, the strikes should have stopped. The government stated that once Kaili was pinned face down, he wasn't fighting back. (3-ER:524, 556-57)

However, that was not what happened. Kaili continued to resist being cuffed while he was on the ground as he kept his hands under his body so the officers could not reach them to cuff. The officers stopped all actions once Kaili was cuffed.<sup>13</sup> (3-ER: 483)

The first witness in the trial was Baker who was working the night of the incident in June 2015 as control officer.<sup>14</sup>

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<sup>13</sup> Tibayan's testimony

<sup>14</sup>Baker's testimony is discussed in section A.

The events of June 15, 2015, as testified by Baker: Kaili was housed in A side Waianuenue. Kaili came up to the A side control window about 12:20 am and demanded to make a bail call in the middle of the night. Baker could tell by looking at Kaili "that he wasn't in the right frame of mind." Baker said he needed to **throw off his aggressive behavior** and have him reset his thinking; " 'cause he wasn't in the right frame of mind." "Baker couldn't have Kaili walking through the dorms disrupting other inmates because then it would escalate." (3-ER: 161-62)

#### **Government Witness Avery Gomes**

Avery Gomes ("Gomes") worked for DPS as a Basic Correctional Training ("BCT") instructor. He was the trainer for new employees who will perform correction officer duties. Gomes was a lay witness and expert witness in BCT. (3-ER:351, 399)

Exhibit 45 was the Department's welcome letter with all the correctional officers listed for that class. Tagaloa, and Demattos were trained in the same class, BCT 14-04, and Exhibit 48 was the training schedule. They had eight (8) weeks of basic training and three (3) days of new employee orientation. Tagaloa's class commenced on March 17, 2014, and the last day was May 16, 2014. (4-ER:643, 644-52)

New recruits are taught physical techniques to execute the rules concerning the use of force which are from the PPCT system. These are called 'strikes.' These strikes were taught in a static motion. (3-ER:389-90; 370-371; 617-643) The government failed to ask questions on how to handle someone high on drugs.

In Exhibit 41 under Key Definitions, it stated: "Force: The use of hands, other parts of the body, objects, instruments, chemical devices, firearms or other physical methods to restrain, subdue, intimidate, or compel persons to act in a particular way, or to stop acting in a particular way."

**"...are permitted to use force, so long as they do so 'reasonably.'**

**Reasonable depends on the particular situation."** (4-ER:616)

The government claimed that the use of unauthorized strikes comprised the use of excessive force.

Gomes stated some legitimate purposes for use of force: to prevent escape, **if they feel threatened or aggressive behavior is done upon them to protect others**, to protect offenders, ...to protect against property damage which will lead to maybe escape or great bodily injury to someone else." (3-ER: 382-85)

Gomes did not recall any hand-on training with the officers in Tagaloa's class. **This program does not even address how to deal with**

**people high on ice (drugs).** The lessons in the PPCT doesn't explain how to react to people on Methamphetamine. (3-ER:432, 455)

Kaili was high on drugs and aggressive and paranoid and that was the reason he was ordered to be transferred to the special needs facility. When two large guards were unable to control Kaili in his present state, then two more went out to the rec yard to help restrain Kaili. If he was not being aggressive that would not have been necessary.

During the trial Gomes demonstrated the various strikes on one of the government attorneys. The attorney just stood perfectly still while Gomes performed various strikes. A person standing perfectly still and permitting strikes to parts of his body without any reaction is hardly what happens when dealing with an aggressive prisoner in real life. (3-ER:390-96)

**Gomes demonstrated the brachial stun in front of the jury and that strike was to the subject's neck.** Gomes had said the neck was a stay-away area because it is just like the head and included the neck and spine during the government's case. But during cross, **Gomes said a strike to the neck was okay.** <sup>15</sup>(3-ER:427-29)

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<sup>15</sup> Further questions asked regarding strikes (3-ER:401-414)

Question : ..Would you agree that if depends on how the person is situated to exposing his neck that it could make a difference between...the size of his neck that it's exposed to...the correctional officer is trying to strike that portion of the neck? Response: It would be difficult depending on the position, **yes**. (ER: 388)

When you hit somebody on the side of the neck because the neck is connected to the head, the head's going to move as well; isn't that right? Response: It could, **yes**.(3-ER: 428-29)

Exhibit 43A, B, C, described the PPCT training for nerve pressure and motor points.(4-ER:617-643) Pressure points to the neck and head are shown (4-ER: 621-624); nerve pressure points, including to the head, neck (4-ER: 633-636); defensive counterstrikes, brachial stuns (4-ER:640-641); **strikes with legs- thrust kick**, specifically states the "point of contact should be **toe of the shoe** or the instep, delivery should be made with the Fluid Shock Wave principle"<sup>16</sup>(4-ER: 382-395; 640-642)

During cross examination, Gomes was given a hypothetical situation like the facts in this case regarding the situation with Kaili:

"When someone decides maybe we should be cuffing him, that would be an acceptable objective or use of force, cuffing this person.

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<sup>16</sup> Tagaloa was charged with the use of a dangerous weapon -his shoe.(Ct 1)

Gomes agreed that to cuff the person **because the person is resisting, the order is given, take him down, and that would be an acceptable use of force at that time.**

Gomes again agreed that if this person is struggling and not wanting to be down there or to be cuffed, it would be acceptable to try and turn him over on his stomach and get his hands out behind his back, since cuffing with hands behind his back is the preferred method. The objective would be to get the cuffs on.

You can apply pressure points, joint locks, things of that nature whatever position he is in. But if his hands are unexposed and trying to turn him over and he's wiggling around so you can't turn him over, what pressure point is there exposed that's going to make him turn over?

Gomes replied that it matters on the situation presented to the officers the options they may have available while being in this struggle. So eventually they strike him maybe in his brachial tie-in, which is near his armpit, and eventually the ACOs turn him over on his stomach. (3-ER:434-41)

Gomes explained the One Plus One theory, the stages that an inmate might show and theory of how you treat them.

**The officer does one step more than the inmate is exhibiting.**

So, when a person is actively resisting, this theory authorizes the use of deadly force, depending on the circumstances. If defensive resistance, then the officer may use intermediate weapons.<sup>17</sup>

If everyone there is trying to distract the inmate or to get his compliance, how much force can you apply? **Gomes replied, " as mush force necessary to gain compliance of the situation, gain control. (3-ER:448-52)**

**If the inmate has backed up into the ACO and trying to resist going forward; he's in the officer's reactionary gap. There's potential danger there? (3-452-54)**

On the video, Kaili was resisting, stops, and started backing into Tagaloa. A takedown was not taught in these classes when the rear position of a person struggling going backwards into the guard, i.e., where Tagaloa grabs Kaili from the back because Kaili is backing up into him and there was a closing of the reactionary gap.

When the gap closed, Tagaloa's front of his body was touching Kaili's backside. When ordered to take down Kaili, grabbing him and putting him on the ground, was okay under the circumstances. Gomes agreed.

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<sup>17</sup> These officers do not have any weapons.



(3-ER:433-37)<sup>18</sup>

Gomes testified that no class was taught how to deal with inmates high on drugs. (3-ER:431-32).

**"At the end of the video, (Exhibit 1), Mr. Kaili was restrained, correct?" Gomes responded, "Yes."**

**"Once he's restrained, did the ACOs basically stop using any kind of force and help him to stand up?" Gomes replied: Yes. (3-ER:456)**

The government alleged that "Tagaloa punched and kicked Kaili in the head over and over and over again as the defendants held him down and failed to intervene."

This video was taken some time during 1:30 a.m. forward, and the area of the rec yard had only one light at that time. (Exhibit 11G) The FBI took their own videos of the facility in April 2022. (shown as exhibits the 11H -11J) In 2015 there was only one light on the rec yard. (3-ER: 129-30; 4-ER:587-90)

With the darkness of that area and the four guards trying to control an aggressive, drug induced Kaili, it would have been nearly impossible to see exactly where any of the strikes struck Kaili. <sup>19</sup>

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<sup>18</sup> **This was not excessive force as argued by the government.**

<sup>19</sup> Exhibits 1G-J, 4A-B, 5N-P: the pictures are blurry and difficult to see any strikes. (4-ER:576-585)

There was no evidence produced at the trial to prove that the strikes by Tagaloa were to his head. Additionally, the boots all ACOs wore were just regular leather and not steel toed.<sup>20</sup> There was no evidence that Tagaloa used excessive force during the takedown or while trying to cuff Kaili.

## **2. Tagaloa Did Not Act Maliciously Or Sadistically**

In Hoard v. Hartman, 904 F.3d 780 (9th Cir. 2018), the Court stated that, "Cruelty distilled is harm inflicted without reason: pain for the sake of pain, violence in the name of violence. For this reason, the Supreme Court has long held that the Eighth Amendment forbids the application of force by officers against an inmate 'for the very purpose of causing harm,' citing Whitley v. Albers, 475 U.S. 312, 320-21, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986), without regard to the officers' emotional enjoyment. Hoard, 904 F.3d at 782.

Whenever a prison official is accused of using excessive physical force in violation of the Eighth Amendment, "the core judicial inquiry" to determine if there was unnecessary and wanton infliction of pain is "**whether force was applied in a good-faith effort to maintain or**

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<sup>20</sup> According to PPCT, using the boot was acceptable method to use a strike.

**restore discipline**, or maliciously and sadistically to cause harm.” Hudson v. McMillen, 503 U.S. at 6-7 (citing Whitley v. Albers, 475 U.S. at 319.

(emphasis added)

The extent of the injury suffered by the inmate is one factor relevant to this analysis, as are “the need for application of force, the relationship between that need and the amount of force used, the threat ‘reasonably perceived by the responsible officials,’ and ‘any efforts made to temper the severity of a forceful response.’” Hudson, 503 U.S. at 7.

"When prison officials maliciously and sadistically use force to cause harm." the court recognized, "contemporary standards of decency always are violated...whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury." Hudson, 503 U.S. at 9.

In Wilkins v. Gaddy, 559 U.S. 34, 130 S.Ct. 1175, 175 L.Ed.2d 995 (2010), the Court held that "the core judicial inquiry when a prisoner alleges that the prison officers used excessive force against the prisoner is not whether a certain quantum of injury was sustained, **but rather whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.**"

There was no evidence during the trial that Tagaloa acted maliciously and sadistically to cause harm. He was ordered to transfer Kaili from the Waianuenu section to the Punahale special needs housing as he was high on methamphetamine, acting paranoid, and when being escorted across the rec yard, Kaili became aggressive and fought the officers trying to handcuff him.

Tagaloa was only trying to gain control of Kaili and handcuff him to be able to complete his assignment not for the pleasure of possibly hurting Kaili.

**Element 3 defendants acted willfully**

The court stated in the jury instructions: willfully means that a defendant acted voluntarily and intentionally with the intent not only to act with a bad or evil purpose, but specifically to act with the intent to deprive Kaili of his Eighth Amendment right to be free from cruel and unusual punishment.

An officer acts with that specific intent if he intentionally uses force that he knows to be unlawful or in open defiance or in reckless disregard of the right to be free from cruel and unusual punishment.

By contrast, if you find a defendant acted through mistake, carelessness, or accident, then the defendant did not act willfully.

**If Tagaloa followed policies, procedures, and his training, then the jury may conclude that he acted in good faith and did not act willfully. (3-ER: 534-36)**

**Element 4 the charged conduct resulted in bodily injury to Kaili, or the offense involved the use of a dangerous weapon. (3-ER:536-37)**

The government must prove that the bodily injury resulted from the charged offense...was a natural and foreseeable result of the offense conduct.

The dangerous weapon defendants are charged with 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 can cause death or serious injury. (3-ER:536-37) There was no concrete evidence that Tagaloa used his boot in a way to cause death or serious injury. Kaili was not seriously injured in the rec yard and most of his injuries were caused because he was resisting and moving along the asphalt ground to get away from the guards.<sup>21</sup>

### **3. The Majority Of Kaili's Injuries Were Self Inflicted**

ACO Fernandez-Wise ("Wise") was the only ACO to testify regarding the condition Kaili was in when he entered Punahale. He saw Kaili

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<sup>21</sup> The asphalt had little rocks going into your hands. (2-ER:237-38)

when he was being escorted to cell F7. Kaili "had some road rash, some blood on his sweater and on his face." Kaili was face down on the asphalt rec yard which had pieces of stones imbedded and he was resisting and moving around. He most likely also had his nose bleeding at that time from hitting the asphalt. That was the extent of Kaili's injuries from the incident in the rec yard; none were serious. (3-ER:362-63)

When Wise was making his rounds, he went into cell F7 to get the sweater that was tied to the bar on the top bunk and around Kaili's neck. Wise asked Kaili for the sweater and he eventually untied it and gave it to Wise. Wise also witnessed Kaili jump up from a standing position with his right hand on the wall and left on the bar onto the bunk. "He's crouched down 'cause he cannot stand up on the top bunk without hitting your head." Wise was on his way out of the cell at that time.

Tibayan was waiting in front of the closed cell F7 if he was needed to assist with Kaili; he saw Kaili jump from the bunk; he landed in the direction towards where the toilet and sink area and heard a sound of that contact. Tibayan saw Kaili stand up and look straight through the window. Then he saw Kaili jumping around into the wall, real sporadic, jumping back onto the top of the bunk, jumping off - he literally just sprang, jumped... spit out blood, backed up, and sprang right back onto the top bunk

from a standing position. Once on the top the top bunk he was almost in a crouching position. (3-ER:366-371-74)

There was no evidence that Appellant Tagaloa caused any of Kaili's injuries during the incident in the rec yard.

### **Testimony From Doctor Fitzgerald**

Kaili was transported to the hospital on June 15, 2015; Tagaloa went for the injuries he sustained on his hands while trying the cuff Kaili. (3-ER:515-18)

Dr. Judith Fitzgerald ,a physician specializing in emergency medicine at the Hilo Medical Center. She examined Kaili at approximately 5:00 am on June 15, 2015. Kaili was discharged that same day at 6:56 am.

Kaili's right upper and lower eyelids were swollen. He had swelling around the right side of the eye, including the eyelids, some dried blood on his face. She didn't see any blood behind his eardrums; did not notice any cerebral spinal fluid from either his nose or ears. His mid face when she palpated it was stable to palpation. He did not have any tenderness on his back of his neck.

Basic lab work, blood tests, and urine tests were done; some imaging of the head and neck because he had apparent facial trauma and needed to make sure if there were any injuries.

Dr. Fitzgerald testified that when she saw Kaili, "his behavior was not normal, and I wanted to make sure there was no underlying issue." On the first page she noted that, "Patient presents in restraints from prison, agitated, mental status change." (2-ER: 261-67)

When the government questioned what she meant by 'agitated,' she responded, "he wasn't sitting quietly and calmly. He ...appeared to be responding to some sort of internal stimuli of some sort, so he was restless and moving around."

**Kaili 's urine tox screen tested positive for amphetamines and cannabinoids.** Kaili also had a high white blood cell count. Agitation, or a stress reaction or illness like the flu could cause that. (2-ER: 267-70)

A CT scan was ordered to check for injury to the brain. The CT scan showed no signs of bleeding in the brain; On the maxillofacial area, Kaili did appear to have a mandible fracture (a broken jaw) on the left side.

The C spine had no fractures; the maxillofacial area there were nasal bone fractures, possibly some chronic. (Chronic means in this instant that he may have broken his nose in the past; three CT scans of the head. No intracranial abnormality according to the radiologist - his brain was okay. (2-ER: 252-255, 259)



**There was no skull fracture, there was no injury or tenderness to the neck; no injuries to his neck. No injuries to Kaili's right outside leg; or his ribs, or any bone in his body. (2-ER: 270-285; 4-ER: 609-615)**

Dr. Fitzgerald was asked to explain what using the term 'agitated' meant. "Kaili wasn't able to answer direct questions. He was responding to something going on elsewhere of which we were not privy... Agitated usually describes repetitive movements just around. Some people pace, walk in circles, rock back and forth. These behaviors could also be caused by the amphetamines. (2-ER: 287-88)

None of the evidence produced by the government was sufficient to prove that Appellant Tagaloa willfully deprived Kaili of the right to be free from cruel and unusual punishment or that Appellant Tagaloa physically assaulted Kaili that resulted in bodily injury or involved the use of dangerous weapons. There no was evidence of an injury to Kaili's head to substantiate the charge that Tagaloa kicked him in the head.

Appellant Tagaloa was acquitted of the wrongfully charged Count 2.

**b. Count 3 Conspiracy to Obstruct Justice (18 U.S.C. §371)**

The government must prove beyond a reasonable doubt :

First, during the period beginning on or about June 15, 2015, and ending on or about December 20, 2016, there was an agreement between two or more persons to commit at least one of the crimes listed in Count 3 of the indictment;

Second, the defendant became a member of the conspiracy knowing of at least one of the objectives and intending to help accomplish it; and; Third, one of the members of the conspiracy during the conspiracy performed at least one overt act listed in Count 3 of the indictment and did so for the purpose of carrying out the conspiracy. The defendants are charged with conspiring to violate two federal obstruction statutes: 18 U.S.C. §1512(b)(3) and 18 U.S.C. 1519. (3-ER: 517-523)<sup>22</sup>

**"A single conspiracy can only be demonstrated by proof that an overall agreement existed among the conspirators.** Furthermore, the evidence must show that each defendant knew, or had reason to know, that his benefits were probably dependent upon the success of the entire

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<sup>22</sup> Defendants charged separately for violation of Section 1519. Tagaloea's was Count 4. (3-ER:544)

operation. Typically, the inference of an overall agreement is drawn from proof of a single objective ... or from proof that the key participants and the method of operation remained constant throughout the conspiracy. The inference that a defendant had reason to believe that his benefits were dependent upon the success of the entire venture may be drawn from proof that the coconspirators knew of each other's participation or actually benefitted from the activities of his coconspirators." United States v. Singh, 979 F.3d 697, 715 (9th Cir. 2020), (quoting United States v. Duran, 189 F.3d 1071, 1080 (9th Cir. 1999). (emphasis added)

On the other hand, **one who has no knowledge of a conspiracy but happens to act in a way which furthers some object or purpose of the conspiracy does not thereby become a conspirator.** A person does not become a conspirator **merely by associating with one or more persons who are conspirators**, nor merely by knowing that a conspiracy exists. (3-ER: 543-44)

The government argued that going to Taum's house was an act showing a conspiracy. However, associating with his fellow workers when asked by his supervisor does not form a conspiracy. There was no form of an agreement made during that meeting.

Throughout the government's closing arguments regarding Count 3, **there was no evidence that expressly identified an agreement between two or more person to establish a conspiracy** or that Tagaloa was part of this 'conspiracy.'

The government stated that, "a conspiracy can be proven solely through the acts of the conspirators... "The defendants' use of force reports alone that they had conspired to cover up excessive force." (3-ER: 564-66)

The government used Demattos' and Tagaloa's reports as an example. However, there was no evidence that Appellant Tagaloa discussed or copied from Demattos' reports - Incident or Use of Force reports. FBI agent Robert Nelson ("Nelson") testified regarding Tagaloa's reports. (3-ER: 320-22; 4-ER:592-595)

On June 15, 2015, Demattos was on suicide watch in Punahale; that station was outside of the visitor's room (2-ER:230-32) Tagaloa's position was the logbook and desk position at Punahale located in the Multi-Purpose room.<sup>23</sup> Exhibit 10 was a diagram of the Punahale facility. Tagaloa's position used the desk in the Multi-Purpose room. (Exhibit 11P) (4-ER: 586, 591)

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<sup>23</sup> Wise's assignment on June 15, 2015, was security and rover for the Punahale complex; however, when Tagaloa had to leave to escort Kaili, Wise took over his position until he returned.

The visitor's room was not close to the multi-purpose area. Additionally, an officer assigned to a red post such as the suicide watch, was not permitted to roam. (2-ER: 160) Demattos had to leave his post to go where Tagaloa was located which not permitted.

The government failed not only to identify the agreement to form a conspiracy, but failed to state any evidence to prove that Tagaloa was part of a conspiracy.

**c. Count 4 Obstruction by False report (18 U.S.C. § 1519)**

“In order to prove a violation of § 1519, the Government must show that the defendant (1) **knowingly** committed one of the enumerated acts in the statute, such as destroying or concealing; (2) towards ‘any record, document, or tangible object’; (3) **with the intent to obstruct** an actual or contemplated investigation by the United States of a matter within its jurisdiction.” Singh, 979 F.3d at 722, (citing United States v. Katakis, 800 F.3d 1017, 1023 (9th Cir. 2015).

The government stated during closing statements: defendants, "exaggerated Kaili's behavior in order to make their force used sound more reasonable." Other accusations - "the defendants lied about what prompted their use of force to make it appear justified; defendants lied about the type

and amount of force they used." (3-ER: 554) There was NO evidence in the record to support those allegations.

To secure a conviction, the Government was required to prove that Tagaloa **knowingly falsified**, destroyed, or concealed and made up a false entry in his reports with the **intent to impede or obstruct** within the meaning of § 1519.

Tagaloa wrote his reports immediately after returning to his position at Punahale. He used plain and simple statements to complete his reports. He had been working almost 16 hours by that time and had been involved in an emotional situation.

ACO's were required to submit their reports before the end of the shift. During PPCT training, it was encouraged to rest for one day before writing your report. <sup>24</sup> (3-ER:446-47)

Tagaloa wrote the facts as he recalled at that moment and there was nothing in his reports that were false. Shortly after his reports were turned in Tagaloa left for the hospital with Kaili as his hands were injured. (3-ER: 496-497)

The appellate Court initially construes all evidence in favor of the government, the evidence so construed may still be so supportive of

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<sup>24</sup> Refer to Gomes' testimony.(3-ER:443-45)

innocence that no rational juror could conclude that the government proved its case beyond a reasonable doubt.

The Courts have held, that evidence is insufficient to support a verdict where mere speculation, rather than reasonable inference, supports the government's case, See Juan H. v. Allen, 408 F.3d 1262, 1277-79 (9th Cir. 2005); or where there is a “total failure of proof of [a] requisite” element, Briceno v. Scribner, 555 F.3d 1069, 1079 (9th Cir. 2009).

“[A] reasonable inference is one that is supported by a chain of logic, rather than mere speculation dressed up in the guise of evidence.” United States v. Del Toro-Barboza, 673 F.3d 1136, 1144 (9th Cir. 2012).

The government failed to provide any evidence that Tagaloa **knew the information in his reports were false**, or that he concealed or covered up **with the intent to impede or obstruct**. The information in Tagaloa's reports were his understanding and the truth of what happened during the transfer of Kaili.

The government relied on the testimony of Demattos which was insufficient to prove beyond a reasonable doubt that Tagaloa was guilty of Counts 1, 3, or 4.

**D. THE GOVERNMENT VIOLATED APPELLANT TAGALOA'S  
GARRITY RIGHTS**

**1. Standard of Review**

A violation of Fifth Amendment rights is reviewed de novo.

United States v. Oriho, 969 F.3d 917, 923 (9th Cir. 2020).

**2. Legal Analysis**

The U.S. Supreme Court addressed in Garrity v. State of New Jersey, 385 U.S. 493, 87 S.Ct. 616, 86 L.Ed.2d 562 (1967), "whether a State, contrary to the requirement of the Fourteenth Amendment, can use the threat of discharge to secure incriminatory evidence against an employee.

The Court stated that, "[T]he choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or remain silent. That practice, like interrogation practices we reviewed in Miranda v. Arizona,<sup>25</sup> is likely to exert such pressure upon an individual as to disable him from making a free and rational choice." Id. at 497-498.

There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price. The Court held in Garrity that,

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<sup>25</sup> 384 U.S. 436, 464-465, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)



" Fifth Amendment protections apply to public employees..." and "the protection of an individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under the threat of removal from office, and that it extends to all, whether they are policeman or other members of our body politic." Garrity at 499-500.

Tagaloa signed a **State of Hawaii Department of Public Safety, Advice of Rights** form on July 17, 2015. This form included a statement that stated if he refused to testify or answer questions, "**...you will be subject to departmental charges which could result in your dismissal.**"

Also included, **..."neither your statement nor any information or evidence which is gained by reason of such statement can be used against you in any subsequent criminal proceeding."** (4-ER: 598) (Emphasis added)

This Advice of Rights was signed by Michael Cravalho, the same day Exhibit 23 was given to Tagaloa to complete, July 17, 2015.

Tagaloa filled out the form for the HLRB Hearing. (Exhibit 23) Questions related to the incident with Kaili, a work related incident and not a

criminal investigation. Tagaloa signed this form on July 24, 2015. (4-ER: 599-608)

However, the Indictment alleged that, **Internal Affairs** was an investigative and administrative branch of DPS responsible for investigating violations of policy or law by employees of HCCC and DPS."

"During an **Investigation by Internal Affairs**, investigators could require employees involved in or witness to potential violations of policy or law to complete Internal Affairs Questionnaires relating to the potential violations." (2-ER:29)

Why did the FBI become involved in a matter that was not criminal, but job related? The Indictment stated that The Federal Bureau of Investigation had jurisdiction to investigate civil rights violations. (2-ER:30)

FBI Agent Nelson testified that, "we investigate violations in federal statutes. Nelson became the lead investigator about May 2021. He worked on the white collar squad which handled civil rights cases - hate crimes and color of law violations. Nelson stated such violations would include state correctional officers. Nelson was investigating allegations of excessive force in a prison and attempts to obstruct an investigation into that excessive force. (1-ER:16)

Tagaloa's forms were introduced as evidence, Ex 21, 22. And when Exhibit 23 was entered Nelson stated it was an **Internal Affairs** questionnaire; that 'questionnaire was filled out to further the charged conspiracy'. (1-ER: 17-22; 4-ER: 594-595, 599-608)

There was never an Internal Affairs questionnaire, Exhibit 23 was an **Internal Questionnaire as it was job related issues and not a criminal investigation**. They were Interview Questions for the HLRB hearing from the DPS. This document should never have been shown to the jury as it violated Tagaloa's **Garrity Rights**. (1-ER: 22-25)

The court denied the government's numerous attempts to use the information from Tagaloa's investigative questionnaire protected by Garrity. The Federal Bureau of Investigation ("FBI") had Tagaloa sign a written waiver of rights after he filed his response to the investigative questionnaire. The consent form, dated May 11, 2020, made Tagaloa waive his rights that were guaranteed under Garrity.

Exhibit 23 was entered into evidence, Tagaloa's internal questionnaire from DPS. Exhibit 23 was then published to the jury. (4-ER: 599-608)

The court's ruling on the government's reconsideration motion, filed on June 27, 2022, stated: "It is clear that Tagaloa's employer used the

"classic penalty situation" - either answer the questions or face dismissal from employment. Therefore, the Garrity protection remains in force, and **Tagaloa's responses to the internal questionnaire are protected.** Because his responses are protected by Garrity, the subsequent execution of the FBI's Consent Form cannot change that protection." IS SO ORDERED (3-ER: 342-50)

On day Five of the trial, outside the presence of the jury, the court addressed the issue of Garrity with regards to Tagaloa and the admitted Exhibit 23. The court stated that it 'would deem it not admitted.' The court would give a curative instruction to the jury not to consider the evidence or testimony regarding the internal questionnaire. The government agreed to replace Exhibit 23 with a redacted version, 23B. (ER:330-332) Exhibit 23 was already shown to the jury; however, the redacted version **Exhibit 23B was entered outside the presence of the jury and never shown to the jury prior to deliberations.** Exhibit 23 was withdrawn by the court; but the jury had already seen information that was prejudicial to Tagaloa and cannot be undone by a court stating as such. (3-ER:378-79; 4-ER: 596-97)

It wasn't until day Eight that the court finally gave the instruction to the jury that Exhibit 23 was withdrawn and not to be

considered or any testimony regarding the information in that document. (3-ER: 514)

The Garrity reconsideration order by the court was entered after the Garrity Questionnaire was admitted into evidence and published to the jury. Tagaloa's right to a fair trial was violated by information that never should have been discussed or introduced as evidence. His rights under Garrity were violated; the curative instruction was not sufficient to remedy the damage already caused by the erroneous admission of the Garrity questionnaire and published to the jury.

The Supreme Court has delineated a prophylactic rule parallel to that of Miranda. The government may not threaten substantially to penalize a person for asserting his Fifth Amendment privilege. Minnesota v. Murphy, 465 U.S. 420, 434, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984); Garrity, 385 U.S. at 497-98. Where it has threatened to do so, the government has created a “classic penalty situation,” and any answers given by the suspect are “deemed compelled and inadmissible in a criminal prosecution.” Murphy, 465 U.S. at 435.

The Court in Garrity, held that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of

removal from office, and that it extends to all, whether they are policemen or other members of our body politic." Garrity, 385 U.S. at 498. Garrity reversed for this violation and Appellant Tagaloe's case must be reversed for this Constitutional violation as well.

V.

**CONCLUSION**

Based on the foregoing and that Appellant Tagaloe's Constitutional rights and due process right to a fair and impartial trial were violated, respectfully requests that this Court reverse his judgment and vacate his conviction and sentence.

Dated: August 22, 2023, at Dana Point, California

s/DeAnna S. Dotson  
Attorney for Appellant  
JASON TAGALOE

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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- I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.
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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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- 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**

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

**Date**

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**9th Cir. Case Number(s)**

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