

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.

APPELLANT'S REPLY BRIEF

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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I. INTRODUCTION

Why was trial **delayed for seven years? Kaili's lawsuit!**

Kaili sentenced 10 years for **assault in the first degree** 2007; paroled 2012; violated parole 2014; returned to HCCC. On night of incident, high on meth; hadn't slept for three days. (3-ER:303-306)

Kaili had unusual strength, violent; filed a lawsuit re: June 15, 2015 incident; money an incentive. (3-ER: 301)

January 2017, FBI received DPS' Internal Affairs investigation. (3-ER:322) Nelson, lead investigator **May 2021**. (1-ER:15)

II. ARGUMENT

A. **DEMATOS' FALSE TESTIMONY DENIED TAGALOA A FAIR TRIAL**

Government claimed Tagaloa never presented Napue claim to the district court, therefore, his claim must be reviewed for plain error pursuant to United States v Houston, 648 F.3d 806, 813 (9th Cir. 2011).

In Houston, there were two issues - the government's failure to disclose exculpatory and impeaching evidence under Brady, the Court stated had to be reviewed for plain error.

The second issue was the Napue issue. This was not reviewed for plain error; using the Mooney-Napue analysis found in Hayes v. Brown, 399 F.3d 972, 978 (9th Cir. 2005)(en banc).

The Opening Brief discussed the Napue issue in depth. (OB pp 15-33) The government prepared the questions and responses for the testimony of Demattos during the Grand Jury proceedings and the trial; Demattos was testifying to facts prepared by the government as agreed by his plea agreement.

The government was questioning Demattos on his redirect examination, he responded to a question by the government regarding what he agreed to in his Plea Agreement was to be truthful. However, Demattos further defined what being truthful meant by stating, "...to agree with the government." (2-ER: 259)

That statement was true because Demattos testified before the Grand Jury and the trial using statements and information provided by the government and statements also included in his plea agreement that were written by the government.

Government stated Demattos was consistent in his testimony, was exposing himself to criminal liability by admitting he had lied to state investigators for years. (AB: 23) During the government's questioning of Demattos he stated, "...and of course majority of the statements that I told Internal Affairs was untrue."

The government responded, "...Well, I didn't ask you about that. I'm just asking you what you told them." (1-SER- 122)

During cross-examination, Demattos continued to state that he lied during the various hearings, Internal Affairs and he knew he was lying at that time. Demattos testified that lied to save his job. (1-SER 132-133)

If Demattos admitted to lying at that time, then what would preclude him from continuing to lie to receive a lesser sentence? If Demattos did not say what the government wanted him to testify to, his plea agreement would not be in effect, and he would be exposed for a higher sentence. (2-ER: 260)

After the government completed its redirect examination, Tagaloa's attorney, asked the court if he may recross; the court asked if something new was brought up and he stated, "well, yeah." The court stated, "I think he addressed everything that was on cross-examination, so I don't see any basis for a recross."

Tagaloa's attorney responded: All right. Then you're going to deny me?" The court said "Yes." (2-ER: 261)

The new issue was Demattos admitted he was not telling the true facts and only testifying to what the government required him to state. The court denied any clarification of what Demattos stated. To cover up that statement, the government repeated that same question. (2-ER: 260)

For his cooperation with the government and lying to the court regarding the actions of his fellow defendants, **Demattos received a sentence of 12 months and one day** with two years supervised release. (2-ER: 39-40)

1. Tagaloa Established A Mooney-Napue Violation

To establish a Mooney-Napue violation, a defendant must show: (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 . See United States v. Zuno-Arce, 339 F.3d 889 (9th Cir. 2003)

The government knew the testimony of Demattos was false during his testimony before the Grand Jury and during the trial. (2-ER-67-71)¹

Demattos' testimony before the Grand Jury on **June 10, 2020**, lasted the entire day. (2-ER: 65-134) The **Indictment was filed June 10, 2020, at 5:20 p.m.** based on the Grand Jury testimony that day.

The **trial started June 22, 2022**, two years after Demattos' testimony before the Grand Jury. Demattos was not incarcerated during that time; the government had plenty of time to prepare Demattos for his testimony. Demattos knew to receive the promises in his Plea Agreement he would have to testify to satisfy the government. Demattos' false testimony had a direct effect on the jury

¹ Refer to examples in Opening Brief that contradicted the facts. (pp19-25)

and its verdict. Tagaloa did not receive a fair trial or a verdict worthy of confidence because the government relied entirely on Demattos' false testimony.

The government knew or should have known that Demattos' testimony was false. The government'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)

Tagaloa was denied due process of law when the government "...either knowingly presents false evidence or fails to correct the record to reflect the true facts when unsolicited false evidence is introduced at trial." See Hayes v. Brown, 399 F.3d at 984.

Assessing materiality under Napue, the Court determines 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." Belmontes v. Woodford, 350 F.3d 861, 881 (9th Cir. 2003) (quoting United States v. Agurs, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

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)) (emphasis added)

Demattos' false testimony affected the judgment by the jury for all charges against Tagaloa. He was the government's key witness and centerpiece of the government's case; he testified for two days of the trial. (2-ER:175-296) The government's closing argument emphasized the role Demattos played by giving false testimony. (3-ER: 547-566, 574)

There was a miscarriage of justice by Demattos' false testimony and evidence presented by the government. The plain error review is not required by a Napue claim of false testimony and evidence, but it was plain error to permit Demattos to lie under oath with the government's knowledge and consent; that error was plain; it affected the Constitutional rights of each defendant of due process to a fair trial. The error seriously affected the fairness, integrity, and public reputation of the trial (judicial proceedings). Not recognizing the impact of the false testimony and tactics of the government during the trial, was a miscarriage of justice.

Under Napue, a conviction must be set aside “**whenever there is ‘any reasonable likelihood that the false testimony could have affected the judgment of the jury.’**” Napue v. Illinois, 360 U.S. 264, 79 S.Ct.1173, 1076, 3 L.Ed.2d 1217 (1959). (emphasis added)

Demattos' statement being truthful in accordance with his Plea Agreement meant his testimony had "**...to agree with the government.**" That was an absolute indication his testimony was false and misleading to the jury. The court prohibited defense counsel from further pursuing Demattos' statement.

Any reasonable likelihood Demattos' false testimony could have affected the judgment of the jury, requires Tagaloa's conviction be reversed.

B. THE GOVERNMENT MISSTATED FACTS CONCERNING THE VIDEO

The defendants challenged the admissibility of the DVD in its motions in limine (4-ER: 705) The government stated Tagaloa challenged the video taken by the HCCC officials and never entered as evidence. (AB-25) That was a false accusation by the government!

The various motions in limine regarding the subject of the video were described in the Opening Brief (pp34-35) The government first stated the DVD was unavailable after an exhaustive search. However, after the court ordered an evidentiary hearing on the DVD's unavailability; then the government 'readily found that DVD.' (4-ER: 707-708)

The government was permitted to introduce a video of the incident without any verification the video was the original or a verified copy. **The**

government falsely stated Tagaloa did not preserve that issue. (AB-32 footnote)

The issue was preserved through the many motions in limine and once the court made its order, the defendants no longer had the ability to pursue that issue; however, **that issue was still preserved.**

The defendants objected 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 court overruled the 403 objections. (2-ER: 179-182)

The government falsely stated that the video challenged by Tagaloa was the HCCC video; forfeiting any challenge to the admissibility of the video that was admitted. (AB-25)

Demattos was shown a video during his Grand Jury testimony: the government stated prior to showing Exhibit 1-the silent video that was recorded of the incident, that the video was a "video of a video!" (2-ER:80) **That was the same video that was shown during the trial.** The government failed to mention where this video originated.² The government failed to make a prima facie showing of authenticity of that video.³

² Government's claims unsupported by evidence cited. (AB-28) (2-ER-174-175, 176). No evidence of the chain of custody of that video as stated by the government.

³ Government misstated Baker could have introduced Exhibit 1 into evidence, citing OB at 44; (AB-30-31)

If the FBI had a copy of the original version from HCCC, why wasn't that version used? Warden Cabreros had viewed the original video and could have been called as a witness to verify the video. The government was aware of that information; government's motion filed on May 3, 2022, included that information. (4-ER: 699, DKT 126 - Response by USA of admissibility of DVD)(OB p 40-44; 4-ER:700, DKT 140)

Cabreros was the only person that could authenticate the actual video. Government was aware Cabreros could have verified the video during the trial.⁴

The government asserted Demattos appeared in the rec yard mere seconds after the video began, not depriving him of firsthand knowledge. (AB-32) **False:** Demattos was on suicide watch in the Punahele section; Kaili was located at the Waianuenue section, across the rec yard.

Kaili was already through the chute and entered the rec yard before Demattos exited the other side of the facility. Demattos did not have actual knowledge of all the events shown on that video; his attention would be on what he was doing, not what the others were doing as it all happened very quickly.

⁴ See (4-ER:699-DKT 126)

United States v. Panaro, 266 F.3d 939 (9th Cir. 2001), government cited case. (AB-29) Evidence Rule 901's authenticity requirement is satisfied "by evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed.R.Evid. 901(a). For a recording to meet the authenticity requirement, a trial court, in the exercise of its discretion, must be satisfied that the recording is "**accurate, authentic, and generally trustworthy.**" (emphasis added)

There was no stipulation able to establish those facts of the video the government presented to the jury, especially by Demattos. (Refer to Id. at 951) The government failed to meet that burden stated under Panaro.

No chain of custody or how the video (exhibit 1) was retrieved or from what original device. The court permitted the government to use a video as crucial evidence without any type of verification of its authenticity.

The government stated they recently located the original DVD of the camcorder recording. (See court's minute order of June 3, 2022; 4-ER: 708) **If the government had a copy of the original DVD, why was a video of a video used during the Grand Jury testimony by Demattos? (2-ER: 80) That same video was used during the trial.**

Agent Nelson testified the FBI had a video of the assault in the rec yard that **was the video taken on HCCC's official camcorder.** (1-SER- 161)

Nelson testified pursuant to a search warrant on Taum's residence, the FBI found a personal copy of the rec yard assault that was different than the official version. **That version was government's Exhibit 1 instead of the original.** (1-SER 161-162) **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.**

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

The government claimed Tagaloa failed to renew his Rule 29 (a) motion in a post-trial motion for judgment of acquittal; therefore, he must review his claim by plain error. (AB-32-33)

That was incorrect! It is not a requirement to renew a Rule 29 motion post-trial. The Rule states, a defendant **may** move for a judgment of acquittal, or renew such a motion. (Fed.R.Crim.P. 29)

The government claimed the jury's conviction on the 'willfulness' element was not challenged in the Opening Brief. (AB-33) **Incorrect!** Each element outlined by the court was explicitly defined and described by Tagaloa. The element 'willfully' was outlined in the Opening Brief on pages 60-61.

Tagaloa has NOT forfeited any challenge to the sufficiency of the evidence alleged by the government. (AB-33-34) Each element for each charge

was explicitly defined and outlined in the Opening Brief. Each element was supported by facts and case law. (Refer to OB -45-71)

1. Tagaloa Did Not Use Excessive Or Unnecessary Force

Tagaloa followed the policies, procedures, and his training while trying to control Kaili to handcuff him and successfully transport to the other facility. **No evidence Tagaloa acted intentionally to deprive Kaili of his Eighth Amendment rights to be free from cruel and unusual punishment.** If the defendant acted through mistake, carelessness, or accident, then the defendant did not act willfully. (OB-60-61)(3-ER:534-36)⁵

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).

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

⁵ Government Errors -cites to Appellant's Excerpts of Record; AB-33 (3-ER-509-510); p35 (3-ER-370); p37 (2-ER-170) (USA said holding down Kaili and did nothing to stop others; however, that cite was Baker re: the lighting)

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.

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.

Contrary to the government's assertions, (AB-34-35) Tagaloa detailed each factor of excessive force analysis. (See OB-47-60)

The government alleged the elements of the Eighth Amendment violation were not challenged by Appellant Tagaloa. (AB-34) Count 1 deprivation of rights under color of law (18 U.S.C. §§ 242, 2) had many elements which were thoroughly discussed in the Opening Brief and the Eighth Amendment was part of Element 2 given by the court during jury instructions. **The government's allegations are false.** (See OB pp 47-65)

Eighth Amendment excessive force claims arising out of prison guards' efforts to suppress disturbances or restore discipline, "prison officials must make 'decisions in haste, under pressure, and frequently without the luxury of a second chance.'" Bearchild, at 1144.

Kaili was high on drugs and paranoid and causing disturbances among the other inmates in that section of the prison. The decision was made to transfer Kaili to the other facility to be housed in a separate cell, but he was not handcuffed prior to Tagaloa escorting Kaili to the other facility. It was not Tagaloa's decision to handcuff Kaili at that time, just to transport him.

2. Tagaloa Did Not Act Maliciously or Sadistically

In the context of an Eighth Amendment excessive force claim, only "**malicious and sadistic**" use of force will rise to the level of a constitutional violation. Wood v. Beauclair, 692 F.3d 1041, 1050 (9th Cir. 2012). (emphasis added) The core 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 restore discipline**, or maliciously and sadistically to cause harm." Hudson v. McMillen, 503 U.S. 1, 6-7, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992). (emphasis added)

The extent of the injury suffered by Kaili is one factor relevant to this analysis, as are "the need for the 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.'" Id. at 7.

Tagaloa was ordered to escort Kaili from the Waianuenue section to the Punahale special needs housing; Kaili became aggressive and fought the officers trying to handcuff him during this process. Tagaloa was performing his job in a good faith effort to maintain or restore discipline. There was no evidence that Tagaloa used excessive force based upon the circumstances and facts in this case. The officers were faced with an inmate high on drugs and acting paranoid. Tagaloa and the other officers involved were not trained to handle such a situation.

Government stated, "several witnesses testified that Kaili did not actively or aggressively resist the ACOs once on the ground." (AB-35) **False and misleading statements.** Avery Gomes ("Gomes") was the trainer and not involved in the transfer of Kaili. Demattos lied in order receive a very much reduced sentence. Taum did not testify as stated by the government. (See 2-SER-349-353)

In Wilkins v. Gaddy, 559 U.S. 34, 1340 S.Ct. 1175, 175 L.Ed.2d 995 (2010), the Court held, "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 at trial that Tagaloa's actions trying to handcuff Kaili were malicious or sadistic. **Tagaloa's actions were performed to the best of his ability in a good-faith effort to maintain or restore discipline.**

The officers are permitted to use force if it is reasonable for the situation, if there is aggressive behavior acted upon them, such as Kaili's actions. The officers had every right to use reasonable force to get Kaili under control. (Refer to Gomes' testimony: (3-ER: 382-85; 389-90; 431-438, 451-456; 4-ER: 616)

Once Kaili was handcuffed, all actions by the officers ceased; Kaili no longer was resisting. (Gomes: 3-ER:456)

Tagaloa's conduct was not unreasonable under the circumstances and his conduct adhered to his training

The government's conclusion was false and misleading to the jury: the video and testimony of government witnesses interpreting the video was ample evidence Tagaloa's conduct was unreasonable. (AB-35) Demattos was the government witness that interpreted the video and provided the evidence against Tagaloa. **Demattos' testimony was false and misleading and guided by the government on every step during the trial.**

Taum's testimony was misinterpreted by the government. The government stated that "several witnesses testified that Kaili did not actively or aggressively resist the ACO's once on the ground, merely struggling to protecting

himself against their strikes without lashing back." (**citing Demattos** at 1-SER-44-45, 50; and Taum at 2-SER- 357-358) Incorrect testimony, **Taum stated that Kaili was being 'resistant,' by refusing to give up his hands to be handcuffed.**

(AB:35)

The government incorrectly stated Taum's testimony that Tagaloa's strikes were unwarranted. (**citing Demattos** at 1-SER-40-45; Taum at 2-SER-341-342, 344-345, 349-353)

Government stated, "Kaili was high on methamphetamine at the time does not fundamentally alter the security risk to a set of ACOs..." (AB 36) **False statement.** Much greater risk dealing with an inmate high on drugs; someone on meth has unusual strength and difficult to control. **None of the ACOs had any training on how to handle an inmate high on drugs.** (Gomes- 3-ER:432, 455)

The government failed to cite evidence that Tagaloa smashed Kaili's head into the asphalt. (AB-36) Taum testified that he observed Kaili rub his face into the pavement back and forth and after that there's a blood spot. (2-SER 340-341)

Taum was questioned regarding Tagaloa's alleged hits to the head, Taum could not tell from the many times he was shown the videos. (2SER-344-351) ⁶

⁶ Government relied on Demattos' testimony.

There was no evidence that **Tagaloa acted maliciously and sadistically to cause harm to Kaili. Tagaloa was performing his duties in a good-faith effort to maintain or restore discipline** when ordered to transfer Kaili, an inmate high on drugs and paranoid, to another facility. Refer to Hudson v. McMillen, 503 U.S. at 6-7.

3. Tagaloa Did Not Use His Boot As A Dangerous Weapon

A shod foot is a dangerous weapon **IF IT IS USED** in a way that can cause death or serious injury. (Jury instructions 3-ER:536)

The government failed to prove Tagaloa used his boot in the charged offense, that it was capable of inflicting death or serious bodily injury. (3-ER:537)

Government stated Tagaloa kicked Kaili in head. (AB-40-41) **No evidence established that allegation.** The angles and number of people moving around to try to handcuff Kaili would make it impossible to prove Tagaloa kicked him in the head. Kaili would have sustained some head injury if he was kicked in the head with the boot; **medical evidence did not show any such injuries to the head or neck.** (2-ER:270-285; 4-ER: 608-614)

The PPCT training manual described approved pressure points and various strikes, showed permissible areas where to strike the nerve pressure and motor points, including to the neck very close to the head. (4-ER: 616). Stun strike

location of the motor point at the top of the shoulder at the junction where it connects to the side of the neck. (4-ER:635)

Brachial stuns can be delivered with the palm heel with strikes to the neck; or backhand brachial stun delivered to the side of the neck; or the inside forearm brachial stun delivered with the strong-arm forearm to the side of the neck. (4-ER: 639). Strikes with the leg with the point of contact should be the **toe of the shoe** or instep; the **kick** should be practiced by stepping in, kicking, and stepping out... (4-ER-640-641) These were all approved methods taught to the officers during training. **The officers only watched and did not participate in practicing these strikes or stuns.**

Gomes testified strikes to the neck were okay. (3-ER: 427-29) **Gomes was asked how much force can you apply? He responded, "As much force necessary to gain compliance of the situation, control the situation.** (3-ER:436-438; 451)

The government failed to produce sufficient evidence to prove Tagaloa willfully deprived Kaili free from cruel and unusual punishment or Tagaloa physically assaulted Kaili resulting in bodily injury or involved the use of a dangerous weapon.

4. **Kaili's Injuries Consistent With His Behavior In Cell F7**

Demattos **assigned to suicide watch was not supposed to leave his post**; but he testified when Kaili was in cell F7 he left his post and checked on Kaili a ' couple times.' Demattos testified from 'roughly 1:30 to 4:30 to 5:00 am, he checked "three or four." times. (1-SER-85) Dr. Fitzgerald examined Kaili at 5:00 am. (2-ER: 265)

Demattos testified he saw on one of his checks on Kaili, "there was his sweatshirt was tied to the bunk. Another time he was kind of crouching down on the bunk in the corner of the cell." (1-SER-85)

ACO Fernandez-Wise ("Wise"), part of his job was doing his checks on Kaili in cell F7, saw "his sweater tied around the top bar on the bunk and around his neck." Wise walked into the cell and eventually got the sweater from him. (3-ER:364) Wise testified while he was still in Kaili's cell, he witnessed Kaili jump up from a standing position with one hand on the wall and one hand on the top bunk, "jumped up backwards to the top bunk." Kaili "is crouched down because cannot stand up on the top bunk without hitting your head."(3-ER:366, 369-373)

Roger W. Tibayan ("Tibayan") was standing in front of cell F7, observing Kaili, waiting if he was needed to assist with Kaili. During that time, he observed Kaili jumping, banging back against the wall and diving off the bunk.

Kaili appeared to still be agitated and walking around the cell making "grunting noises, almost kind of like one caged animal." Kaili did not look mad, "he just didn't look in the right state of mind."

Tibayan also saw Kaili jump up on the bunk. He saw "him jump headfirst towards where the toilet and sink are located, and I heard a sound of hitting like metal, like...contact was made." (3-ER:506-07) Kaili stood up and looked at Tibayan through the window; something happened to Kaili, 'cause he started spitting blood' and kept on banging...'⁷ (3-ER:507)

Dr. Fitzgerald stated "Kaili's right upper and lower eyelids were swollen, swelling around right side of the eye, some dried blood on his face. Kaili appeared to have a mandible fracture (broken jaw) on the left side; nasal bone fractures, some chronic, may have broken his nose in the past. Kaili was agitated as shown by his high white blood cell count, his urine tox screen tested positive for amphetamines and cannabinoids." (2-ER: 261-70)

Kaili's swollen eye lids and eye, broken jaw, and nose could have easily been caused by his banging his head against the cells walls, jumping from the top bunk into a toilet or sink or even the cell floor. There was no evidence that any of the guards transporting Kaili across the rec yard to cell F7 caused those

⁷ (audio froze)

injuries. Kaili's bloodily nose and some parts of his face scratched and bloodily from the rocks in the asphalt rec yard were not serious injuries; otherwise, he would have been immediately transferred to the hospital since the medical unit was closed.

D. COUNT 3 CONSPIRACY TO OBSTRUCT JUSTICE (18 U.S.C. § 371)

The government stated, "evidence at trial showed that Tagaloa and his co-conspirators agreed to work together for a single purpose: to cover up the ACO's use of excessive force on Kaili" (AB-42) **False**

Government falsely stated the night of the 'assault' "Tagaloa, Pinkney, and Demattos 'huddled together afterward,' aided by Taum, "to come up with an agreed upon story that would justify their actions..." (AB 42)

False assertions not supported by any evidence in the record. (AB-42:1-SER-65-68) (testimony by Demattos)

Government falsely stated "Tagaloa's agreement with Demattos and the other defendants to omit information established the conspiracy." (AB-42) The government failed to establish facts an agreement was made to conspire to report false facts. **No evidence of agreement made by Tagaloa.**

Demattos lied; no evidence to prove Tagaloa lied on his report or during the investigations.

After Kaili was in cell F7, each ACO had to return to their previously assigned workstations. **Demattos** testified, he went back to his post at **suicide watch, located outside the visiting room.** (See Exhibit 10 (4-ER:585) (1-SER-65; 2-ER: 230-32))

Tagaloa's position was the logbook and desk position located in the Multi-Purpose room. (See Exhibit 10, 11P- 4-ER: 590) Exhibit 10 was a diagram of the Punahale facility. Suicide watch was called a red post, the officer should not be taken off that post; the officer had to stay line of sight as required to log every 15 minutes regarding the inmate's activity. (2-ER: 157-58) That meant **Demattos had to stay at his assigned job location.** Tagaloa had to stay close to his job location as well, making it impossible to 'gather together in one location'.

The visit room was not close to the multi-purpose room. (See Exhibit 10). Reports had to be submitted prior to the end of their shifts. There were three shifts, Tagaloa was on his second shift of the day - 3:00-11:00 pm; 11:00 pm -7:00 am. (2-ER:157)

No evidence cited to support the government's false allegations that Tagaloa, Pinkney and Demattos met and agreed upon stories for their reports. Demattos lied during his trial testimony; a logical assumption Demattos lied about the reports. (1SER-90-91, 98-107) (**Demattos' testimony**); (274-276)

(recross by government of Ahuna-Alofaituli, the government tried to make him state they met to 'get their stories straight' but he testified "NO".)

Government said the footage Pinkney recorded showed Taum coaching Tagaloa on how to explain away some of the strikes. (AB-43 (1SER-95-97; Ex. 29-E) **Incorrect:** recording was meeting at Taum's house, but most of the discussion was a voir dire regarding the video. **Nothing showed any coaching.**⁸

The government failed to prove a conspiracy. There was **no evidence of any agreement**, or any evidence Tagaloa was part of a conspiracy.

Demattos testified on cross-examination on trial day 3, that **his incident report and other reports were not true and at the time he prepared them, and he knew they were untrue.** (1-SER 132, 133) Demattos testified he gave false information, admitted he lied to accommodate the government's case.

NO evidence established Tagaloa participated in a 'coordinated cover-up' as alleged by the government. (AB-43) **There was no evidence of any agreement by Tagaloa to conspire to obstruct justice.**

⁸ EX. 29-E was never on the government's Exhibit list.

E. 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.” United States v. Singh, 979 F.3d 697, 722 (9th Cir. 2020), (citing United States v. Katakis, 800 F.3d 1017, 1023 (9th Cir. 2015)). (emphasis added)

Government alleged Tagaloa charged with omitting or falsifying information on his incident and use of force reports. (AB-43) (2-ER: 122-123) **Demattos testified** "that the ACOs, including Tagaloa, worked together to align their statements to avoid investigation. (AB-44-45)(1-SER-67, 134) (**Demattos' testimony**)

Government alleged "Tagaloa's reports omitted his many uses of force." (AB-44) (1-SER-90-91, 98-107)(**Demattos' testimony**).

Government stated Tagaloa falsely stated Kaili was 'aggressive' citing to (1-SER-71-72, 179)(**Demattos' testimony**); **Demattos stated that Kaili was aggressive**. (See (2-SER-496, (f), (h))

Demattos testified Tagaloa and Pinkney "all sat around and made sure that our reports sounded similar." (1-SER-65-66; AB-44) Tagaloa was very

conscientious person and would not leave his assigned post to work on his reports with Demattos.⁹ Demattos testimony regarding anything done or said by Tagaloa must be considered false.¹⁰

There was no evidence Tagaloa left his assigned post or met with Demattos to write the reports.

Government failed to prove 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 § 1519.¹¹

F. TAGALOA NEVER WAIVED HIS CONSTITUTIONAL GARRITY RIGHTS

Government erroneously argued Tagaloa waived his Garrity rights; appellate review must be plain error (AB-45-46) **That argument is false.**

⁹ The testimony by Nelson not what government stated: " Tibayan and Demattos both testified that the assaulters gathered together to draft their reports together..."(AB-44 (3-ER:336-337)

¹⁰ Demattos' Grand Jury false testimony (AB-43, 2-ER: 122-123)

¹¹ Gomes training advice regarding written reports after **physically exhausting or challenging event**. 3-ER: 445-448

May 24, 2022, the defendants filed their Motion in Limine re: Garrity Evidence. This motion requested that the court, "to preclude the government from introducing or otherwise stating to the jury the Defendants' compelled responses to questions asked by internal affairs investigator, Michael Cravalho, or information derived therefrom, pursuant to Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616, 86 L.Ed.2d 562 (1967). (DKT 186)

June 07, 2022, the government filed its response stating defendant Tagaloa relinquished his Garrity rights by signing a written waiver with the FBI on May 11, 2020. (Ex 1-the consent form by the FBI) (DKT 262, p2; 262-1 (Ex 1)

June 19, 2022, the court GRANTED the defendant's motion re: Garrity evidence. (DKT 280)

With regard to Tagaloa, he gave a written waiver of his rights (Consent form dated 5/11/20). The statement given falls entirely within the prohibited class of statements. (See Aguilera v. Baca, 510 F.3d 1161, 1171 (9th Cir. 2007)(a constitutional violation occurs "when [an] employee was required to waive his privilege against self-incrimination while answering his employer's legitimate job-related questions.") (citing Gardner v. Broderick, 393 U.S. 272, 278, 88 S.Ct. 1913 (1968)).

June 20, 2022, the government filed its Motion for Reconsideration of Garrity Order (DKT 281). Government argued the FBI Consent Form Tagaloa

signed waived his rights conferred upon him by the signing of the Advice of Rights form in July 2015. (See pp 3-4 of DKT 281)

The court filed a **Minute Order Denying the Government's Motion for Reconsideration of Garrity Order on June 27, 2022 (DKT 297)**, Day 4 of the trial. (4-ER: 717)

Excerpts from the Court's Order stated the following:

"The Government submits that the Court is mistaken because Tagaloa filed a written waiver of rights **before** he filed his responses to the investigative questionnaire, see Reconsideration Motion, Exh. A (State of Hawaii Department Public Safety, Advice of Rights, dated 7/17/15) "DPS Advice of Rights"), and the Federal Bureau of Investigation ("FBI") had him sign a written waiver of rights **after** he filed his response to the investigative questionnaire. (Reconsideration Motion at 3; *id.*, Exh. B (Consent Form, dated 5/11/20) (DKT 262) (Minute Order)

The Court addressed the Reconsideration Motion with counsel on June 23, 2022. "As a result, the Government filed a further memorandum in support of its Reconsideration Motion specifically addressing whether Tagaloa's waiver given to the FBI was knowing and voluntary. (See DKT 289) Tagaloa given the opportunity to address whether his waiver was given "knowingly and voluntarily." (See DKT 290, filed June 24/ 2022)

In the Court's Order it stated: "[I]n a thorough and thoughtful decision, a district court examining the question as to when, in the context of an employee who was asked to waive Garrity rights during an investigation, such waivers are effective:

Taken together, Garrity and Gardner stand for two related propositions: When the government threatens to punish an employee for silence, it has in effect elected to inhabit its role as employer. Thus, for any testimony it thereby secures, the employee has use and derivative-use immunity (Garrity immunity") against the government as prosecutor... United States v. Goodpaster 65 F. Supp. 3d 1016,

1026 (D. Or. 2014).

Goodpaster explained that "a waiver is effective and the prohibition against using any of the employee's statements pursuant to Garrity is removed if the employer excises the "classic penalty situation" that threatens the employee with punishment for remaining silent:

Where the state has created a penalty situation but wishes to elicit testimony for use in criminal proceedings, it has an easy and effective remedy: Retract the employment-related threat that created the penalty situation..."

The Court found that, "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 affairs questionnaire are protected. Because his**

responses are protected by Garrity, the subsequent execution of the FBI's **Consent Form cannot change that protection."**

Tagaloa's attorney need not have objected to the introduction of Exhibit 23 to preserve his Garrity rights as alleged by the government. (AB-48) Tagaloa has not waived his right to his Garrity arguments.

The Court's Order negates all the government arguments regarding the Garrity issue and reliance on United States v. Smith, 821 F.3d 1293 (11th Cir. 2016) (AB-45-57, 50-52)

The critical issue in the United States v. Smith, **where there is no direct threat, the mere possibility of future discipline is not enough to trigger Garrity protection.** Id. at 1302.

When the FBI asked for Smith to sign a waiver of his Garrity rights, **he had none at that time.** The court found there was no violation of Garrity by the federal government prior to Mr. Smith signing the FBI consent form. Id. at 1305.

Tagaloa never waived his right to argue that issue and never waived his Garrity Rights. (3-ER: 342-50)

1. Tagaloa Was Prejudiced By The Government Entering Exhibit 23 Before The Jury

Through Nelson, the government entered evidence Exhibit 23, the Internal Questionnaire from DPS, and published to the jury. (1-ER: 22-23)(4-ER: 598-607)

Exhibit 23B was entered outside the presence of the jury and NEVER shown to the jury prior to deliberations. Exhibit 23 had been withdrawn by the court, but the jury had already seen the information that was prejudicial to Tagaloa and cannot be undone just by the court stating as such. (3-378-79; 4-ER: 595-96)

July 5, 2022, trial day 8, the court 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:511-514)

Tagaloa's right to a fair trial was violated by information that never should have been discussed or introduced as evidence against him. Tagaloa's rights under Garrity were violated; the curative instruction was not sufficient to remedy the damage already caused by the erroneous admission of the Garrity protected questionnaire and published to the jury.

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. (emphasis added)

The Court in Garrity, held that "**the prosecution 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 Tagaloa's conviction must also be reversed for these Constitutional violations as well.

G. GOVERNMENT FAILED TO PROVE THE CONSTITUTIONAL ERRORS WERE HARMLESS BEYOND A REASONABLE DOUBT

The publication of Exhibit 23, attempts to remedy with replacement with Exhibit 23B, and the delayed Curative Instruction, is "a constitutional error [rendered] harmless beyond a reasonable doubt that rests with the government."

United States v. Lopez, 500 F.3d 840, 845 (9th Cir. 2007), citing United States v. Williams, 435 F.3d 1148, 1162 (9th Cir. 2006).

Trial errors are discrete mistakes that "occur during the presentation of the case to the jury." Arizona v. Fulminante, 499 U.S. 279, 307, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). They are subject to harmless error review. Id. at 308.

The errors that Tagaloa suffered was a denial of rights guaranteed against invasion by the Fifth and Fourteenth Amendments, rights rooted in the Bill of Rights, and that 'independent' federal courts would be the 'guardians of those rights.' Chapman v. California, 386 U.S. 18, 21, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)

The introduction of Exhibit 23 seriously affected Tagaloa's substantial rights. The later replacement of **Exhibit 23B did not erase the information from the jury's minds and there was no information on how it may have affected the jury's verdict.** Exhibit 23B was never introduced before the jury; therefore, there was no information if the jury ever saw Exhibit 23B.

The government argued that the jury 'never saw the remainder of the questionnaire' of exhibit 23. (AB-56) However, the entire questionnaire was

published to the jury on a large screen when it was entered as an exhibit. The government scrolled to certain questions and answers that were given.

Exhibit 23 admitted on trial Day 4 by Nelson. (1-SER-180-182)

Count 3 the Obstruction charge was based on the questions found in Exhibit 23.

These charges were fully explained to the jury. Even though the jury never had the actual document during deliberations, they had already heard testimony, viewed Exhibit 23 during the trial; and the government also questioned witnesses regarding the charges in the Indictment that related to Tagaloa's responses in Exhibit 23.

These Constitutional errors and questions during the trial that related to Exhibit 23, **were not harmless and affected the jury's verdict against Tagaloa.** By entering Exhibit 23 into evidence, shown to the jury, **was a violation of Tagaloa's Garrity rights;** even though that exhibit was recalled later it had still been seen by the jury and discussed before the jury.

That was a constitutional error that **cannot be held harmless beyond a reasonable doubt** and Tagaloa's conviction must be reversed.

III

CONCLUSION

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

Dated: February 7, 2024, at Dana Point, California

s/DeAnna S. Dotson
Attorney for Appellant
JASON TAGALOE