No. 22-10318

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JASON TAGALOA,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF JURISDICTION

Defendant Jason Tagaloa appeals his judgment of conviction. The district court had jurisdiction under 18 U.S.C. 3231 and entered final judgment on December 5, 2022. 1-ER-2. Tagaloa filed a timely notice of appeal on December 9, 2022. 4-ER-686; Fed. R. App. P. 4(b)(1)(A)(i) and (3)(A). This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether Tagaloa fails to show that the government knowingly elicited false testimony from cooperating witness Jordan DeMattos.

2. Whether the court properly admitted surveillance video footage of the assault.

3. Whether sufficient evidence supported Tagaloa's convictions.

4. Whether the court properly allowed into evidence (before later removing from evidence) a *Garrity*-protected questionnaire Tagaloa completed during an internal investigation, after finding that Tagaloa had validly waived his *Garrity* rights when speaking to the Federal Bureau of Investigations (FBI) years later.

STATEMENT OF THE CASE

Tagaloa, a former Adult Corrections Officer (ACO) at the Hawaii Community Correctional Center (HCCC), appeals his convictions stemming from his and other ACOs' vicious beating of inmate Chawn Kaili and their ensuing

cover-up. Tagaloa was tried before a jury along with two co-defendants, Craig Pinkney and their supervisor, Jonathan Taum. Another co-defendant, Jordan DeMattos, pleaded guilty. Tagaloa was convicted of depriving Kaili of his right to be free from the use of excessive force under color of law, in violation of 18 U.S.C. 242 and 2; conspiracy to obstruct justice, in violation of 18 U.S.C. 371; and obstruction by false report, in violation of 18 U.S.C. 1519.

A. Factual Background

1. Tagaloa is trained on the use of force.

Jason Tagaloa joined the Hawaii Department of Public Service (DPS) as an ACO at HCCC in 2014. 3-ER-597; 1-SER-215-216. Tagaloa took over two months of basic correctional training upon joining DPS. 1-SER-198-199, 214. From his training, and from the Standards of Conduct booklet provided to all new ACOs, Tagaloa knew that using excessive force on inmates violates their constitutional rights; that ACOs cannot kick or punch inmates in the head or while they are on the ground; that ACOs must not follow illegal orders; that ACOs cannot falsify or omit information in written or oral reports; and that ACOs cannot cover up the use of excessive force on an inmate. 1-SER-42-45, 165-166, 205.

Less than six months before the assault on Kaili, HCCC's warden issued a memo to all ACOs regarding use of force. 1-SER-4-5, 166-167. The memo reminded ACOs that "every effort shall be made to avoid confrontations" and

admonished that the goal "should be to defuse or deescalate situations." 2-SER-491. It reiterated the rule all ACOs learned in their basic training: that they were permitted to use only "the amount" of force "needed to gain control of the situation or inmate." 2-SER-491. The memo warned ACOs that anyone using force on inmates that causes serious injury will be investigated and disciplined. 1-SER-8; 2-SER-491.

2. Tagaloa is ordered to rehouse inmate Kaili.

Tagaloa was on duty on the night shift at HCCC from June 14-15, 2015. 2-SER-498. Around 12:30am, Kaili approached the ACOs in the control center of the Waianuenue housing complex. 3-ER-453-454; 1-SER-12-13, 227-228. The ACOs could tell that Kaili "wasn't in the right frame of mind" and sought to place him in the building's visitation room. 1-SER-13-16, 229-230. One ACO called Taum, a sergeant and the supervisor on duty, to inform him of this plan. 1-SER-16-17. Taum instead decided to send other ACOs to retrieve Kaili and rehouse him in another building. 1-SER-16-17, 34-35.

While only two ACOs would typically escort an inmate for rehousing, and while Kaili was not considered a "problem inmate" (2-SER-340), Taum chose a team of four ACOs to rehouse Kaili: Tagaloa, Pinkney, DeMattos, and himself (1-SER-34-35). Tagaloa and Pinkney escorted Kaili from the Waianuenue housing complex into the recreation (rec) yard. 1-SER-17-18, 38, 230-231; Ex. 1-A at :01-

:15.[1] The ACOs did not place Kaili in handcuffs because he did not resist and posed no threat. 1-SER-18, 24, 209-210, 256-257. As Tagaloa and Pinkney walked Kaili out into the rec yard, Taum and DeMattos entered the yard from the Punahele housing complex on the yard's other side to receive Kaili. 1-SER-38; 2-SER-309-310; Ex. 1-A at :15-:20. Kaili, who was high on methamphetamine and paranoid about being harmed, recoiled at the sight of the additional ACOs and backed up slightly into Tagaloa. 1-SER-19, 39, 136-137, 141-142; 2-SER-311; Ex. 1-A at :20-:25.

3. Tagaloa attacks Kaili.

Taum ordered Tagaloa to tackle Kaili to the ground, and Tagaloa complied. 1-SER-19, 39, 143; 2-SER-311-312; Ex. 1-A at :25-:28. Suddenly slammed to the asphalt, Kaili lay on his back, wriggling, his knees and hands raised to ward off a pummel of blows from the ACOs who had launched themselves on top of him. 2-ER-169-170; 1-SER-20-21. At the time, Taum weighed approximately 260 pounds, Pinkney and DeMattos about 300 pounds each, and Tagaloa between 360 and 380 pounds. 1-SER-35-36. Tagaloa was about 6'4" tall, and Pinkney was about 6'1". 1-SER-35-36. Kaili was approximately 5'8" tall and weighed less

[1] Pending before this Court is the United States' motion to transmit Exhibits 1, 1-A, 1-B, 1-C, 1-D, 1-E, 2, 2-C, 2-D, 2-E, 2-F, 3, 4, and 29-E as part of its supplemental excerpts of record. *See* Motion, C.A. Doc. 26 (filed Jan. 8, 2024).

than 200 pounds. 1-SER-36, 144. The ACOs took turns pressing themselves on Kaili and striking him with their hands and feet as they attempted to flip him onto his stomach to handcuff him. 2-ER-170; 1-SER-20, 40; 2-SER-312.

After the ACOs flipped Kaili over, Taum held down Kaili's legs and directed the other ACOs to strike him. 2-ER-171-172. Kaili kept his hands near his face to ward off the strikes. 1-SER-145-146. The ACOs spent several more minutes kicking, punching, and pounding a prone Kaili as they pressed themselves on top of him, before eventually handcuffing him. 2-ER-171-172; 1-SER-21-22. At no point did Kaili aggressively resist, attempt to escape, or threaten the ACOs. 1-SER-20-21, 44-45, 50; 2-SER-357-358. Kaili repeatedly screamed for help, asked the ACOs why they were attacking him, and told them to stop. 1-SER-54, 260-261. Kaili feared that he was going to die. 1-SER-146.

Tagaloa played the most violent role in the assault. He began by kicking Kaili while Kaili was crouched on his side in a fetal position. 1-SER-40-41; Ex. 1 at 1:24-1:26. After the ACOs flipped Kaili onto his stomach, Tagaloa escalated his behavior. He punched Kaili multiple times. 1-SER-42; Ex. 1 at 1:33-1:36; Ex. 1-B, 2-C. He then kicked Kaili in the head with his heavy work boots. 1-SER-42, 221; Ex. 1 at 1:52-1:54; Exs. 1-C, 2-D. About 20 seconds later, Tagaloa punched Kaili on the same side of the face. 1-SER-42-43, 220-221; Ex. 1 at 2:14-2:16; Exs. 1-C, 2-D. Around 35 seconds after that, Tagaloa threw a series of "hammer

fists"—a closed fist brought downward—onto the back of Kaili's head, knocking his head into the asphalt. 1-SER-44, 218; Ex. 1 at 2:48-2:52; Exs. 1-E, 2-F. Tagaloa also struck Kaili three or four times in the spine with his forearm. 2-SER-352-356, 488.

4. Kaili suffers serious injury.

By the time the ACOs picked Kaili back up and began to exit the rec yard, his face was swollen and wet with his own blood, which also stained his prison uniform. 1-SER-47-49. A pool of his blood "the size of a pizza" remained on the ground. 1-SER-31.

Tagaloa and DeMattos, joined by ACO Fred Tibayan, walked Kaili out of the rec yard and deposited him in a jail cell in the Punahele complex. 1-SER-47-49, 54-55, 59; Ex. 4. Tagaloa then walked to the medical room to wash Kaili's blood off his hands. 1-SER-63-64. Several hours passed before Kaili became calm enough for the ACOs to lead him to a medical facility. 1-SER-83, 85, 232, 265; 2-SER-313. The ACOs then transferred Kaili to a van and transported him to the hospital for further treatment. 1-SER-265; 2-SER-313.

An initial examination revealed that Kaili had "apparent facial trauma." 2-ER-249. After a CT scan of his head, doctors determined that both Kaili's jaw and the bone of his right eye socket were broken. 2-ER-253-255. Those broken bones,

in turn, pushed some of the fat cells surrounding Kaili's eye into his sinuses. 2-ER-255. Kaili also had new nasal fractures. 2-ER-259-260.

The attending physician prescribed several medications to reduce the swelling. 2-ER-257-258. Kaili was told not to blow his nose, as doing so would increase pressure that could further swell his right eye. 2-ER-257. Kaili was told not to chew because of his broken jaw, and to consume only liquids. 2-ER-262. The physician referred him to an oral surgeon, and Kaili had to have his jaw wired shut for somewhere between four and six weeks. 2-ER-262; 1-SER-147.

5. Tagaloa conspires with his fellow ACOs to cover up their uses of excessive force.

All ACOs are required to submit incident reports whenever they are involved in an incident with an inmate. 3-ER-341, 369. They likewise must complete use-of-force reports documenting any force used. 1-SER-66. Tagaloa, Pinkney, and DeMattos were required to complete both incident and use-of-force reports after their assault on Kaili. 1-SER-66-67. Those reports then had to be submitted to their supervisor on that shift: Taum. 1-SER-69.

DPS policy required ACOs to complete incident and use-of-force reports by themselves to avoid one ACO's views tainting another's report. 1-SER-176. However, Tagaloa, Pinkney, and DeMattos decided to fill out their reports together. 3-ER-336-337; 1-SER-65-67. Their purpose was "[t]o maintain consistency throughout all of [their] reports so that no red flags are raised" and "to

not implicate anybody so we wouldn't get in trouble." 1-SER-67, 134. To accomplish this purpose, Tagaloa, Pinkney, and DeMattos spoke with one another about the content of their reports and reviewed one another's reports. 1-SER-68, 80; *see* 3-ER-337.

Tagaloa, Pinkney, and DeMattos agreed to and did omit almost any mention of their strikes on Kaili, even where the forms requested specifics regarding the force used during the incident; instead, all three employed vague and misleading language about the events in the rec yard and the fact that they had used force after taking Kaili down. 1-SER-68, 72-77, 134, 176-180, 182-188; 2-SER-492-497. Instead of stating that Taum had ordered some of the force used against Kaili, they explained that any force used was "reactive." 1-SER-76, 134, 186; 2-SER-492, 494, 496. They also agreed to and did state, falsely, that Kaili was "aggressive" to justify both Tagaloa's initial takedown and any ensuing use of force. 1-SER-71-72, 179; 2-SER-492, 494, 496. DeMattos and Tagaloa's use-of-force reports featured near-identical answers to several questions. *Compare* 2-SER-496 (answers to questions (f), (g), and (h)), *with* 2-SER-494 (same).

At the end of their shift, Taum collected everyone's incident and use-of-force reports. 1-SER-69-71, 88. He signed off on Tagaloa's, Pinkney's, and DeMattos's reports (2-SER-367, 369, 373, 496-497), even though he knew at the

time that the ACOs' reports had omitted any detail about or justification for any of their uses of force after taking down Kaili (2-SER-365-373).

Tibayan, who had entered the rec yard during the assault and helped restrain Kaili's legs, also completed incident and use-of-force reports. 1-SER-238-239, 242; 2-SER-373-374. Taum altered Tibayan's use-of-force report without his permission: He eliminated a statement that Taum had authorized the ACOs' use of force on Kaili, replacing it with a statement that the ACOs had used "reactive" force. 2-SER-373-378.

Another ACO, Frank Baker, had witnessed the assault on Kaili in real time over HCCC's video feed and drafted a multipage report truthfully documenting the incident. 1-SER-18-23, 26. Baker also included a detailed description of the assault against Kaili in the facility's logbook. 1-SER-25-26. He not only provided a copy of the report to Taum but also left copies in all ACOs' cubbyholes and provided a copy to the lieutenant in charge of the facility. 1-SER-26-27. Soon after the assault, Taum, who referred to Baker's report as "bullshit" (1-SER-87), confronted Baker in an "aggressive" manner and insisted his report was "wrong" (1-SER-92-93). Baker's report and logbook entry went missing, and Baker never saw them again. 1-SER-29-30, 88.

At least some of the ACOs believed that omitting their uses of excessive force on their reports would put an end to the matter. 1-SER-67-68, 79. They did

not realize that the HCCC security system recorded the surveillance video. 1-SER-81-82. However, Taum did. Within a day or two of the assault, Taum reviewed the video of the incident. 2-SER-322. Taum thought the assault "looked like a Rodney King beating." 2-SER-322.

A week after the assault, HCCC's warden ordered an internal investigation into Tagaloa and his fellow ACOs' conduct. 2-SER-327, 490. Just before midnight that night, Taum returned to the control room and recorded the surveillance video with his phone. 1-SER-161-162, 192-193; 2-SER-359, 501. It took another week or two for the warden's investigators to realize that the surveillance system had recorded the assault and to create their own copy using an official camcorder. 2-ER-565; 1-SER-161-162, 194-195; 2-SER-361-362.

After Taum had recorded the security footage of the assault, he invited Tagaloa, Pinkney, and DeMattos to his house for a series of meetings, joined at least once by fellow ACOs Tibayan, Andy Ahuna-Alofaituli, and Kyle Fernandez-Wise. 2-ER-192-195; 1-SER-268-269, 273-285; 2-SER-330-332. In these meetings, Taum played the footage and coached the ACOs on how they could explain away or attempt to justify each of their actions. 1-SER-90-91, 98-107, 274-276. Taum suggested that the other ACOs give investigators several excuses for their illegal strikes, all of which were false. 1-SER-107, 276. Pinkney

surreptitiously recorded a short portion of the first of these coaching sessions. 1-SER-95-97; Ex. 29-E.

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

The first of Taum's coaching sessions occurred the day before the ACOs had to complete and submit investigative questionnaires as part of the internal investigation. 1-SER-91, 189. DeMattos answered his questionnaire falsely, in keeping with Taum's coaching. 1-SER-108-109, 111-120.

After handing in their questionnaires, Tagaloa, DeMattos, Pinkney, and Taum faced disciplinary hearings before DPS personnel, which lasted through the remainder of 2015 and 2016. 1-SER-110; 2-SER-339. They answered questions in these hearings while under oath. 1-SER-157. However, they continued to tell the same lies that they had included in their prior reports and questionnaires. Tagaloa, for instance, asserted that he had not struck Kaili in the face or head, despite video evidence to the contrary. 1-SER-168-172. And the "majority of the statements" that DeMattos made to DPS were "untrue." 1-SER-122, 132-133.

Other ACOs also lied about what happened. Two weeks before their final termination hearing, Alofaituli texted Tagaloa, Pinkney, and DeMattos that he "will involve myself to try and help you guys" and that he "will testify to any means needed." 1-SER-266. Alofaituli also organized a meeting at his house before the termination hearing, which Tagaloa and Pinkney attended, to form a

strategy to prevent their firing. 1-SER-267-268. To explain Kaili's injuries, Alofaituli, Tibayan, and Fernandez-Wise testified falsely at the termination hearing that they had all seen Kaili jump either from or onto a bunk and hurt his face in the cell in which he was placed after the assault. 1-SER-206-207, 270-272. Ultimately, Tagaloa, DeMattos, Pinkney, and Taum all were fired. 1-SER-157.

B. Procedural Background

1. In 2020, a federal grand jury returned an indictment charging Tagaloa with deprivation of rights under color of law, in violation of 18 U.S.C. 242 and 2; conspiracy to obstruct justice, in violation of 18 U.S.C. 371; and obstruction by false report, in violation of 18 U.S.C. 1519. 1-ER-116-123. The indictment made similar allegations against DeMattos, Pinkney, and Taum. 1-ER-118-126. DeMattos was charged separately by information and pleaded guilty (1-ER-104-112A), while Tagaloa was tried before a jury along with Pinkney and Taum.

2. During discovery, defendants questioned the authenticity of a digital copy of a DVD the government had obtained from HCCC's warden of the security footage showing the assault when the government had not been able to find the physical DVD. 4-ER-694-695; 2-SER-463. Defendants voluntarily withdrew their objection and an associated motion in limine after the government found the DVD. 4-ER-706.

Defendants did not re-assert their withdrawn authenticity objection at trial. Defendants made several new objections to introducing a different video of the assault (2-ER-160-161, 176-177), which the court overruled (2-ER-161-163, 177), but did not challenge that video's authenticity. The government then admitted the video into evidence during DeMattos's testimony. 2-ER-174-177. This video, admitted as Exhibit 1, was not the DVD copy that defendants initially had moved to exclude; it was the video Taum had taken of the security footage, which the FBI had obtained from his laptop. 2-ER-174-177; 2-SER-424. DeMattos testified that the video was accurate and that he had viewed it at Taum's house. 2-ER-174-176.

3. Before trial, defendants filed a motion in limine seeking to prevent the government from entering into evidence a questionnaire that Tagaloa completed as part of DPS's internal investigation into the assault on Kaili. 4-ER-703 (Doc. 186). They argued that admitting the questionnaire would violate Tagaloa's rights under *Garrity v. New Jersey*, 385 U.S. 493 (1967), despite his later waiver of those rights. 4-ER-703, 708 (Docs. 186, 247). The government responded that Tagaloa had waived his *Garrity* rights when he spoke to the FBI nearly five years after completing the questionnaire and more than three years after he left DPS. 4-ER-708 (Doc. 262). The government sought to introduce the questionnaire into evidence because it had charged Tagaloa's false statements in the questionnaire as

one of the overt acts committed in furtherance of the conspiracy. 1-ER-121. The court granted defendants' motion in part. 4-ER-710.

The government moved to reconsider the court's decision. 4-ER-710. After multiple discussions during trial, the court heard arguments on the issue the morning of June 27, 2023. 3-ER-325-326, 4-ER-714. Tagaloa's attorney expressly dropped any objection to admitting the questionnaire except to request an evidentiary hearing outside the jury's presence to establish the voluntariness of Tagaloa's waiver during his FBI interview. 3-ER-325-326; 1-SER-152-153. The court denied the request for a hearing, holding based on an FBI recording of the interview that the government had submitted to the court that Tagaloa's waiver was knowing, voluntary, and intelligent. 1-SER-153-154; *see* 3-ER-326. The court admitted Tagaloa's questionnaire into evidence as Exhibit 23. 1-SER-175-176.

Later that same day, the court issued a written decision reversing its admission of the questionnaire. 2-SER-438-441. Relying entirely on *United States v. Goodpaster*, 65 F. Supp. 3d 1016 (D. Or. 2014), a district court decision that did not involve a post-employment waiver of *Garrity* rights, the court determined that, because Tagaloa's initial questionnaire responses were subject to *Garrity* protection when made, "the subsequent execution of the FBI's Consent Form

cannot change that protection." 2-SER-439-441; *see* 3-ER-324, 327-329 (explaining this reasoning in court the following morning).

The next morning, the court proposed un-admitting Exhibit 23 and issuing a curative instruction to the jury. 3-ER-324-325. The government asked that it be allowed to introduce a redacted version of Exhibit 23, with only Tagaloa's name and date remaining, to help establish the timeline of the overt acts supporting the conspiracy. 3-ER-329-330. Defense counsel did not object to either proposal. 3-ER-330-332. Later that afternoon, the court admitted the government's redacted exhibit without objection. 1-ER-359.

The following day, the court addressed the timing of a curative instruction with the parties; it agreed with the government's request to wait to see if Tagaloa testified and whether his testimony opened the door to discussion of otherwise-protected statements. 1-SER-225-226. Again, no defense attorney objected. 1-SER-225-226, 290-291. After Tagaloa informed the court on July 5 that he would not testify (2-SER-298-300), the court issued a curative instruction to the jury, admonishing the jurors that they "must not consider Exhibit 23" and that "[i]t must be treated as if [they] ha[ve] no knowledge about it" (3-ER-494). No defendant objected to the adequacy or timing of this instruction. 3-ER-494; 2-SER-304-305.

4. The jury found Tagaloa, Taum, and Pinkney guilty of one count each of deprivation of rights under color of law, conspiracy to obstruct justice, and

obstruction by false report. 4-ER-723. The jury found Tagaloa not guilty of a separate deprivation-of-rights charge for allegedly punching Kaili in his cell after the assault. 1-ER-118-119; 4-ER-723. Although Tagaloa had moved for judgment of acquittal before the evidence was submitted to the jury (3-ER-444-446), he did not renew his motion after the verdict.

5. The court sentenced Tagaloa to 96 months' imprisonment on the deprivation-of-rights and obstruction-by-false report charges and 60 months on the conspiracy charge, to be served concurrently. 1-ER-3.

SUMMARY OF ARGUMENT

This Court should affirm Tagaloa's convictions.

1. Tagaloa fails under plain-error review to show that the government elicited false testimony from DeMattos under *Napue v. Illinois*, 360 U.S. 264 (1959). Tagaloa's sole evidence that DeMattos's testimony was false was that it contradicted other witnesses' testimony. But credibility battles are left to the jury. Regardless, inconsistencies do not prove DeMattos's testimony was knowingly false. Nor can Tagaloa show that the government knew of any false testimony. Indeed, his only purported evidence of the government's knowledge is that DeMattos testified *consistently* for years. Tagaloa's attacks on DeMattos's credibility during trial, and the wealth of other evidence supporting Tagaloa's convictions, also eliminate any potential prejudice.

2. The district court did not plainly err in admitting a video of the security footage of the assault. Tagaloa challenges the authenticity of a video that never was introduced into evidence, and he raised no authenticity objection below to the principal video that *was* entered into evidence. Even had he preserved a challenge, the court properly relied on DeMattos for authentication, as he had participated in the assault and knew Taum had made the video. Nor could any error in relying on DeMattos prejudice Tagaloa: Tagaloa does not challenge several other recordings of the assault that were received into evidence, and three other witnesses provided sufficient foundation to enter Taum's recording into evidence.

3. Sufficient evidence supported each of Tagaloa's convictions, and the district court did not plainly err in accepting the jury's verdict.

The government satisfied the two elements of Tagaloa's Section 242 conviction that he challenges. First, Tagaloa used excessive force on Kaili in violation of the Eighth Amendment. Tagaloa used extreme force: repeated punches, kicks, and hammer fists to Kaili's head and spine. This force led to extreme injuries, including a broken jaw, nose, and eye socket. The testimony of his fellow assaulters and other witnesses established that Tagaloa's force was unconstitutional, as it could not be justified by the need to gain access to Kaili's hands to handcuff him, all of which supports the jury's conclusion that Tagaloa acted to cause harm rather than to serve good-faith penological interests. Second,

Tagaloa caused bodily injury sufficient to warrant Section 242's felony enhancement. The statute requires only minimal injury, but Kaili's injuries were far from minimal, and the evidence supported the jury's determination that they were a reasonable and foreseeable result of Tagaloa's use of excessive force. The felony enhancement also can be satisfied by use of a dangerous weapon, here a shod foot. By kicking Kaili in the head with his heavy boots, Tagaloa used that weapon in a manner that was likely to lead to serious injury.

The government also proved the existence of, and Tagaloa's participation in, a conspiracy in violation of 18 U.S.C. 371. The assaulters' actions on the night of the assault itself sufficed to prove both: Tagaloa, DeMattos, and Pinkney worked together to craft their reports, while Taum knowingly signed off on their reports despite knowing they included false statements. The video evidence and testimony of the meetings Tagaloa attended, at which Taum coached him on how to explain away his uses of excessive force, also provided sufficient evidence from which a jury reasonably could conclude that the assaulters had agreed to obstruct justice and that Tagaloa knowingly participated in that plan.

Finally, the government introduced sufficient evidence to establish that Tagaloa possessed the knowledge and intent required to engage in obstruction by false report in violation of 18 U.S.C. 1519. The sheer number of omissions and false statements in Tagaloa's incident and use-of-force reports, the testimony of

several other witnesses, and a comparison of Tagaloa's and DeMattos's use-of-force reports all support the jury's finding that Tagaloa knowingly falsified or omitted information from his report with the intent to obstruct an investigation.

4. The district court properly admitted Tagaloa's completed internal investigative questionnaire before later un-admitting it. And Tagaloa abandoned below his objection, waiving any challenge to its admission. Regardless, *Garrity* rights, like other Fifth Amendment rights, can be knowingly and voluntarily waived. Tagaloa validly waived his rights in an interview with the FBI years after his government employment—and the employment-related coercive pressure that underlies *Garrity*'s prophylactic rule—had ended. Certainly, the court did not *plainly* err by initially admitting the questionnaire, when neither the Supreme Court nor this Court has addressed waiver in this context and the only circuit to do so has held that *Garrity* rights can be waived. *See United States v. Smith*, 821 F.3d 1293, 1304 (11th Cir. 2016). Nor did the questionnaire's admission affect Tagaloa's substantial rights, as the court issued a sufficient curative instruction and the questionnaire played a minimal role at trial.

ARGUMENT

I. DeMattos made no false statements.

Tagaloa asserts (Br. 14-33) that DeMattos testified falsely and that the government knowingly elicited this false testimony in violation of *Napue v.*

Illinois, 360 U.S. 264 (1959). Because Tagaloa never presented any *Napue* claim to the district court, his claim must be reviewed for plain error. *See United States v. Houston*, 648 F.3d 806, 813 (9th Cir. 2011).

"Under the familiar plain error review test, [a defendant] must establish the following three prongs to be eligible for relief: '(1) error, (2) that is plain, and (3) that affects substantial rights.'" *United States v. Hougen*, 76 F.4th 805, 810 (9th Cir. 2023) (citation omitted). Then, "[u]nder the fourth prong of plain error review," this Court has "the 'discretion to grant relief,' but only if [Tagaloa] can demonstrate that the error 'seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* at 810-811 (citation omitted). "[T]he Supreme Court has made clear that relief under plain error review is to be used *sparingly*, solely in those circumstances in which a miscarriage of justice would otherwise result." *Id.* at 810 (citation and internal quotation marks omitted).

There was no error, let alone plain error, in allowing DeMattos's testimony. "To establish a *Napue* violation, a defendant must show: (1) that the testimony was actually false, (2) that the government knew or should have known that it was false, and (3) that the testimony was material, meaning there is a 'reasonable likelihood that the false testimony could have affected the judgment of the jury.'" *United States v. Renzi*, 769 F.3d 731, 751 (9th Cir. 2014) (citation omitted). Tagaloa cannot and does not make any of these showings.

1. DeMattos's testimony was not false. Aside from the defense's attempts to attack DeMattos's credibility during trial, "no record was developed about the government's [supposed] use of perjured testimony." *Houston*, 648 F.3d at 814. Rather, Tagaloa's sole basis for claiming falsity is that DeMattos's testimony "contradicted other witness testimony." Br. 32. But Tagaloa mistakes a credibility battle for deliberate lies. Any "inconsistencies" between DeMattos's testimony and that of other witnesses "were fully explored and argued to the jury." *Houston*, 648 F.3d at 814. Defense counsel repeatedly attacked DeMattos's statements and his incentives for lying, both on cross-examination and in closing arguments. 2-ER-222-228, 231-232; 1-SER-121-129; 2-SER-386-387, 397-402, 408-411, 413-417. Once the parties have probed the witnesses in this way, "it is emphatically the 'province and duty [of the jury] to determine . . . the weight and the credibility of the testimony of the witnesses.'" *United States v. Preston*, 873 F.3d 829, 836 (9th Cir. 2017) (citation omitted; alteration in original). That the jury credited DeMattos's version of events—backed up by video evidence, other witnesses' testimony, and documentary evidence (*see* Part III, *infra*)—over any inconsistent statements from defense witnesses "does not establish that [DeMattos] lied." *Houston*, 648 F.3d at 814.

Moreover, despite Tagaloa's in-depth recounting of the trial testimony (Br. 16-31), Tagaloa identifies only three potential inconsistencies between DeMattos's

and other witnesses' testimony. None suggests DeMattos's testimony was knowingly false. He first points (Br. 26, 28) to other witnesses' statements indicating that Kaili was agitated or "acting strange" in the period before he was rehoused. But these statements were not inconsistent with DeMattos's statements (*see* Br. 20-21) that Kaili was not physically aggressive toward the ACOs and did not attempt actively to resist them during the assault. Tagaloa also suggests (Br. 30) that Tibayan contradicted DeMattos's testimony (*see* Br. 24) that DeMattos helped escort Kaili to his holding cell. However, Tibayan testified only that he did not know where DeMattos was during the escort. 1-SER-252. Regardless, the government played for the jury security footage that showed DeMattos escorting Kaili after the assault along with Taum, Pinkney, and Tibayan. 1-SER-47-50; Ex. 1 at 5:16-5:33; Ex. 4.

Tagaloa is left, then, with conflicting witness statements about whether DeMattos was present when Tagaloa placed Kaili in a cell after the initial assault and whether Tagaloa punched Kaili. *See* Br. 30-31. But inconsistencies between witnesses' testimony does not mean that DeMattos was inaccurate, much less that he knowingly lied. *See Renzi*, 769 F.3d at 752. Nor does the jury's decision to acquit Tagaloa on his charge for punching Kaili in his cell after the assault mean that DeMattos lied about seeing Tagaloa punch Kaili (or anything else). *Contra* Br. 20. It merely means that the jury did not find his testimony enough to prove

the charge beyond a reasonable doubt, while it did find his testimony, in combination with the video footage and other witnesses' testimony, sufficient to convict Tagaloa on his other three counts. Tagaloa's failure to prove any knowing lies defeats his *Napue* claim at the first step.

2. As there is no evidence that DeMattos ever lied, it is unsurprising that there likewise "is no evidence that the prosecutors actually knew [DeMattos] would" make any false statements. *Renzi*, 769 F.3d at 752. Tagaloa's only purported evidence (Br. 32) that the government knew of false statements is that "DeMattos' testimony confirmed what was detailed in DeMattos' Plea Agreement and his testimony at the Grand Jury." This fact, however, merely confirms that DeMattos was consistent in his testimony and his statements to prosecutors. If anything, this consistency shows that DeMattos was telling the truth—particularly considering that, in making these statements, DeMattos was exposing himself to criminal liability by admitting that he had lied to state investigators for years. That DeMattos made consistent statements to federal prosecutors, the grand jury, and the trial jury does not prove "that the government knowingly presented false testimony." *Houston*, 648 F.3d at 814. Certainly, it does not offer the "clear" evidence of government knowledge needed to prove a plain error. *United States v. Olano*, 507 U.S. 725, 734 (1993).

3. Even assuming (against all evidence) that DeMattos's testimony were false, "there is not a 'reasonable likelihood' that [DeMattos's] statement[s] 'affected the judgment of the jury.'" *Houston*, 648 F.3d at 814 (citation omitted). "Defense counsel effectively attacked [DeMattos's] credibility," pointing out inconsistencies with other witnesses' testimony as well as his incentives as a cooperating witness to lie. *Ibid.*; *accord Renzi*, 769 F.3d at 752. The court further limited the possibility that the jury would weigh DeMattos's testimony too heavily by warning them to "consider this witness's testimony with greater caution than that of other witnesses" due to his cooperation agreement. 3-ER-508.

Moreover, the government did not rely "almost entirely on the testimony by DeMattos," as Tagaloa suggests. Br. 33. To the contrary, the video footage, documentary evidence, and witness testimony at trial provided "overwhelming evidence" of Tagaloa's guilt on all three counts on which the jury found him guilty, further indicating that any purportedly erroneous statements from DeMattos would not have affected the jury's verdict. *Houston*, 648 F.3d at 815; *see* pp. 4-12, *supra*; Part III, *infra*.

4. Tagaloa also cannot show that any error would have affected his substantial rights or that he would warrant an exercise of discretion to correct any error. For the same reasons Tagaloa cannot prove any erroneous statements affected the jury for purposes of proving the *Napue* claim, he cannot bear his

burden of showing that any supposed error affected his substantial rights. *See Olano*, 507 U.S. at 734 (stating that to affect substantial rights "the error must have been prejudicial: [i]t must have affected the outcome of the district court proceedings"). As to the court's discretion: Because he challenges a trial error, reversal of which would lead to a retrial, Tagaloa must "offer a plausible basis for concluding that an error-free retrial might end more favorably." *United States v. Johnson*, 979 F.3d 632, 637 (9th Cir. 2020). He has not done so. Again, the evidence against Tagaloa on all three convicted counts was overwhelming even without DeMattos's testimony. As "the hypothetical retrial is certain to end in the same way as the first one, . . . refusing to correct an unpreserved error will, by definition, not result in a miscarriage of justice." *Ibid.*

II. The district court did not plainly err by allowing the security footage of defendants' assault into evidence.

Tagaloa next challenges (Br. 33-45) the authenticity of a recording of the security footage of the ACOs' assault on Kaili. The video he challenges was taken by HCCC officials on a camcorder—and never was entered into evidence. Meanwhile, Tagaloa forfeited below any challenge to the admissibility of the principal video that *was* admitted: the video Taum recorded on his cell phone. The district court did not commit plain error in admitting that recording.

A. Tagaloa principally objects on appeal to the authenticity of a video the government did not offer into evidence, and he did not object to the authenticity of the one video he challenges that *was* entered into evidence.

Tagaloa challenges the wrong video. He joined a motion below challenging under Federal Rules of Evidence 403, 901, and 1002 the admissibility of a DVD onto which FBI agents had burned a digital copy of the security footage HCCC officials had recorded on an HCCC camcorder. 2-SER-467-468. But though the government eventually recovered the original DVD of that recording, it never offered the digital version of the camcorder recording, labeled Exhibit 5, into evidence. 2-SER-418, 423. Instead, the court admitted into evidence three versions of the footage of the assault that Taum had taken on his cell phone: two regular-speed versions, labeled Exhibits 1 and 3, and a slowed-down copy, labeled Exhibit 2—all of which Taum had stored on his laptop. 2-SER-418, 423; Exs. 1, 2, 3.

Tagaloa says nothing about Exhibits 2 and 3 in his opening brief and has therefore forfeited any challenge to them. *United States v. Saelee*, 51 F.4th 327, 339 n.3 (9th Cir. 2022). He also stipulated to Exhibit 3's authenticity in the district court. 1-SER-163. And when the government moved to introduce Exhibit 1 into evidence, Tagaloa's counsel objected only on other bases: (1) hearsay; (2) his right to confront Kaili, who ultimately testified; (3) whether its introduction through DeMattos would be more prejudicial than probative because DeMattos did

not record the footage himself; and (4) a discrepancy between the timestamp on the video and the approximate time witnesses testified the assault took place. 2-ER-160-161, 176-177. Because Tagaloa never challenged below the authenticity of the one video that both was entered into evidence and was challenged on appeal, his claim must be reviewed for plain error. *United States v. Gadson*, 763 F.3d 1189, 1203 (9th Cir. 2014).[2]

B. The court did not err in admitting Exhibit 1 through DeMattos, and any error did not affect Tagaloa's substantial rights.

1. The court did not plainly err by allowing the rec yard video into evidence through DeMattos. Tagaloa first asserts (Br. 36) that Rule 901 requires testimony "describing a process or system, showing that it produces an accurate result," unless a statute or court rule allows some other form of proof. Tagaloa, however, references only two of Rule 901(b)'s ten listed—and expressly non-exhaustive—

[2] Even if the Court considered Exhibit 5 and Exhibit 1 similar enough—despite the videos' different provenances—to consider Tagaloa's mismatched arguments, Tagaloa waived below any challenge to Exhibit 5's authenticity. Defendants did initially challenge the authenticity of that video below, but they moved to withdraw their motion once the FBI found the original copy of the camcorder recording that HCCC had given them. 2-SER-458. Defendants dropped their authenticity objections to the footage and "notified the government that they need not call any of the witnesses that filmed, recorded, and handled the DVD recording which eventually made its way to" the FBI (2-SER-458, 460-461; *contra* Br. 37). As Tagaloa willingly relinquished his known right to challenge the DVD's authenticity, he cannot raise such a challenge now. *United States v. Depue*, 912 F.3d 1227, 1233 (9th Cir. 2019) (en banc).

forms of proof. *See* Fed. R. Evid. 901(b)(9)-(10). While the methods Tagaloa mentions are sufficient means of proving authenticity, a piece of evidence also "may be authenticated by extrinsic evidence, such as through testimony of a knowledgeable witness" who can say "that the recording is what it purports to be, or is a true and accurate copy of the original." *Gadson*, 763 F.3d at 1203-1204 (citation omitted); *see* Fed. R. Evid. 901(b)(1).[3] "[S]uch knowledge may be inferred from the witness's position and the nature of his participation in the matters to which he attests." *Lehman Bros. Holdings, Inc. v. PMC Bancorp*, 612 F. App'x 885, 887 (9th Cir. 2015) (citing *Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1018 (9th Cir. 1990)).

That is precisely what occurred here. DeMattos testified that he was aware Taum had a copy of the security footage on his computer because DeMattos had visited Taum's house for his coaching sessions. 2-ER-174-175. He confirmed that he had watched the entire video before. 2-ER-175-176. And he confirmed that the video was a "fair and accurate depiction" of the assault in which he was personally involved. 2-ER-176.

[3] Neither of Tagaloa's cited cases (Br. 36-37) are to the contrary. Each notes that evidence may be authenticated in any way that satisfies Rule 901(a), but found that the government met its burden by providing evidence of a recording's chain of custody or other circumstantial evidence. *See United States v. Fluker*, 698 F.3d 988, 999 (7th Cir. 2012); *United States v. Salcido*, 506 F.3d 729, 733 (9th Cir. 2007).

The court was well within its discretion to accept the video into evidence after DeMattos had so testified. "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.'" *United States v. Panaro*, 266 F.3d 939, 951 (9th Cir. 2001) (citation omitted). "The government need only make a prima facie showing of authenticity 'so that a reasonable juror could find in favor of authenticity or identification.'" *United States v. Workinger*, 90 F.3d 1409, 1415 (9th Cir. 1996) (citation omitted). The government made its prima facie case. It therefore did not need to call someone from the control room where the security footage initially ran, or the HCCC warden who ordered creation of the camcorder copy of the video, or the ACO who recorded the camcorder copy. *Contra* Br. 40-45. "Once the offering party meets this burden, 'the probative value of the evidence is a matter for the jury.'" *Gadson*, 763 F.3d at 1204 (citation omitted). This includes issues like "the discrepancy in the time stamp" (Br. 39), which the court made clear defense counsel could explore on cross-examination (2-ER-177). The court committed no error, and certainly no plain error, in admitting Exhibit 1.

2. Tagaloa likewise cannot show that any error in allowing Exhibit 1 into evidence affected Tagaloa's substantial rights. *United States v. Hougen*, 76 F.4th 805, 810 (9th Cir. 2023). Tagaloa does not challenge several other versions of the

video that also were entered into evidence and which depict precisely the same events as Exhibit 1. For instance, Taum testified in his own defense, and the government admitted the slowed-down version of his video, Exhibit 2, into evidence during his cross-examination. 2-SER-342-343; Ex. 2. Tagaloa has not challenged Exhibit 2's authenticity on appeal. *See* Br. 39-40. The government also admitted Exhibit 3, which contained the same footage as Exhibit 1 along with audio of Taum as he recorded the footage. 1-SER-160-163; Ex. 3. FBI Special Agent Robert Nelson explained that the FBI found the video along with Exhibit 1 on Taum's laptop, and he testified to its contents and to the date it was recorded. 1-SER-160-163. The parties stipulated to Exhibit 3's authenticity and foundation, and Tagaloa did not object to its admission. 1-SER-163-164.

As for Exhibit 1, at least three other witnesses' testimony provided sufficient foundation to establish the video's authenticity. First, Taum testified that he had viewed the security footage several times on HCCC's security system, and that he had then taken the video footage later entered as Exhibit 1 on his cell phone and downloaded it to his laptop. 2-SER-321-326. Tagaloa's counsel never cross-examined Taum about the authenticity of the video—indeed, he *used* the video in his examination. 2-SER-333-338.

Second, the government also could have introduced Exhibit 1 into evidence through its first witness, Frank Baker. Baker watched the security footage of the

assault live from the control room at HCCC (*cf.* Br. 44), and he confirmed that Exhibit 1 was a fair and accurate depiction of the events he saw that night. 2-ER-150.

Finally, Special Agent Nelson testified that the FBI obtained the video, along with many others, from Taum's laptop pursuant to a search warrant. 1-SER-161-162. He also testified that the video was a different version of the same footage from HCCC's camcorder recording, which the FBI had separately obtained from HCCC. 1-SER-161-162. And he explained how the FBI had determined that Exhibit 3—the video from which Exhibit 1 was derived—was created the evening of June 22, 2015, a week after the assault. 1-SER-162, 192-193.

Given these many different proofs of Exhibit 1's authenticity, as well as the unchallenged alternate versions of the video entered into evidence, Tagaloa cannot establish that "there is 'a reasonable probability' that the outcome would have been different" had Exhibit 1 not been admitted. *United States v. Brooks*, No. 21-30122, 2023 WL 2009929, at *1 (9th Cir. Feb. 15, 2023) (citation omitted).

3. Tagaloa's various other arguments fail. To the extent Tagaloa seeks to re-raise the hearsay objection made to Exhibit 1 below (Br. 38; 1-ER-160), it lacks any basis. As the video had no sound (*see* Ex. 1), and as the ACOs' "nonverbal conduct in consummating the [assault] clearly did not intend an assertion," *United States v. Astorga-Torres*, 682 F.2d 1331, 1335 (9th Cir. 1982), the video does not

contain any "[s]tatement[s]" within the meaning of the hearsay rule, Fed. R. Evid. 801(a). Regardless, the video was admissible against each defendant as evidence of that defendant's own "statement[s]." Fed. R. Evid. 801(d)(2); *see United States v. Dominguez*, 641 F. App'x 738, 741 (9th Cir. 2016). Nor does the fact that DeMattos appeared in the rec yard mere seconds after the video began, rather than immediately at its start, deprive him of sufficient firsthand knowledge of the events to testify to the events in the video or render introduction through DeMattos more prejudicial than probative. *Contra* Br. 38-39. And DeMattos did not "fail[] to testify truthfully" (Br. 45), as explained above.[4]

III. The evidence was more than sufficient for a reasonable jury to convict Tagaloa on all three charges.

Tagaloa also challenges (Br. 45-71) the sufficiency of the evidence on each count of conviction. While Tagaloa raised some of these arguments in a Rule 29(a) motion at the close of the government's evidence (3-ER-444-446), he did not "renew[]" them "in a post-trial motion for judgment of acquittal," *United States v. Mongol Nation*, 56 F.4th 1244, 1250-1251 (9th Cir. 2023); *see* 2-SER-379-382

[4] For the same reasons, even had Tagaloa preserved the issue, the court neither abused its discretion nor prejudiced Tagaloa by admitting the camcorder footage. *See Arizona v. ASARCO LLC*, 773 F.3d 1050, 1060 (9th Cir. 2014); *United States v. Estrada-Eliverio*, 583 F.3d 669, 672 (9th Cir. 2009).

(close of evidence); 4-ER-721-724 (posttrial proceedings). Hence, his claims "are reviewed for plain error." *Mongol Nation*, 56 F.4th at 1251.

In evaluating claims of insufficient evidence, the Court must "view[] the evidence in the light most favorable to the prosecution" and affirm if "*any* rational trier of fact *could* have found the essential elements of the crime beyond a reasonable doubt." *United States v. Eller*, 57 F.4th 1117, 1119 (9th Cir. 2023) (emphasis added; citation omitted).

A. The jury rationally convicted Tagaloa for deprivation of rights.

Section 242 prohibits "acting 'willfully' 'under color of any law' to 'subject' another 'to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.'" *United States v. Reese*, 2 F.3d 870, 880 (9th Cir. 1993) (quoting 18 U.S.C. 242); *see* 3-ER-509-510. Here, the charged deprivation was the right to be free from excessive force under the Eighth Amendment. 1-ER-118-119. Section 242 allows for up to ten years' imprisonment "if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire." 18 U.S.C. 242.

Tagaloa does not contest that he acted under color of law, and he does not articulate any challenge to the jury's conviction based on the willfulness element, instead merely reciting the court's jury instruction on willfulness. Br. 60-61. He

thus has forfeited any challenge to the sufficiency of the evidence regarding these elements. *United States v. Saelee*, 51 F.4th 327, 339 n.3 (9th Cir. 2022). Ample evidence supports the jury's decision on the remaining elements: (1) deprivation of Kaili's Eighth Amendment rights, and (2) resulting bodily injury or use of a dangerous weapon.

1. A rational jury easily could have found that Tagaloa violated Kaili's Eighth Amendment rights. To find an Eighth Amendment violation, the jury was instructed to consider whether Tagaloa (1) "used excessive and unnecessary force under all of the circumstances"; (2) "acted maliciously and sadistically for the purpose of causing harm and not in a good faith effort to maintain or restore discipline"; and (3) "caused harm to the prisoner." 3-ER-510-511. Tagaloa does not challenge these instructions (Br. 47-48), which are consistent with the Supreme Court's and this Court's precedents, *see Hudson v. McMillian*, 503 U.S. 1, 7 (1992); *Hoard v. Hartman*, 904 F.3d 780, 788 & n.9 (9th Cir. 2018). The court also instructed the jury to consider five factors this Court's cases have found relevant to whether an Eighth Amendment violation has occurred: (1) "[t]he extent of the injury suffered"; (2) "[t]he need to use force"; (3) "[t]he relationship between the need to use force and the amount of force used"; (4) "[a]ny threat reasonably perceived by a defendant"; and (5) "[a]ny efforts made to temper the severity of a forceful response." 3-ER-511; *see Bearchild v. Cobban*, 947 F.3d

1130, 1141 (9th Cir. 2020); *Furnace v. Sullivan*, 705 F.3d 1021, 1028 (9th Cir. 2013); Br. 48-49 (relying on same factors). Here, "[t]he videotape and the testimony of the government witnesses who interpreted it provided ample evidence that [Tagaloa's] conduct was unreasonable." *United States v. Koon*, 34 F.3d 1416, 1451 (9th Cir. 1994), *aff'd in part, rev'd in part on other grounds*, 518 U.S. 81 (1996).

First, Kaili suffered extensive injuries. His jaw was broken and had to be wired shut for four to six weeks. 2-ER-262; 1-SER-21-22. His eye socket was broken and his nose fractured. 2-ER-253-255, 259-260. His face was swollen and bloody, and he left a pool of blood on the ground of the rec yard. 1-SER-47-49.

Second, there was no need for the force Tagaloa used. Assuming the initial takedown of Kaili was reasonable given his sudden movement (*see* Br. 56), several witnesses testified that Kaili did not actively or aggressively resist the ACOs once on the ground (*contra* Br. 50), merely struggling to protecting himself against their strikes without lashing back (1-SER-20-21, 44-45, 50; 2-SER-357-358). Avery Gomes, who testified as an expert witness on basic training, stated that the strikes Tagaloa used were not justified by Kaili's level of resistance. 3-ER-370; 1-SER-218, 221-222. Other lay witnesses, including DeMattos and Taum, agreed that Tagaloa's strikes were unwarranted under the circumstances. 1-SER-40-45; 2-SER-341-342, 344-345, 349-353.

Third, the amount of force used was entirely disproportionate to the need to free Kaili's hands to place him in handcuffs. Gomes testified that punches, hammer fists, and kicks of the sort Tagaloa used against Kaili's head were unauthorized and considered deadly force. 1-SER-218-222. Tagaloa questions (Br. 57) whether he could have seen where he was striking Kaili under the rec yard's lighting, but the jury was entitled to draw a different conclusion from the video footage and testimony (*see, e.g.*, Exs. 1-C, 1-D, 1-E). Others who viewed the video recognized the assault's severity: Both Gomes and ACO Frank Baker testified that this was the worst beating they had seen in their respective 20-year careers in corrections (2-ER-132; 1-SER-222), and Taum referred to it as a "Rodney King beating" (2-SER-322).

Fourth, while Tagaloa may reasonably have viewed Kaili as a threat when he backed up into Tagaloa, once Kaili was on the ground, witnesses testified that he posed no realistic threat to the ACOs and could not have escaped over an 18-foot, barbed-wire-topped fence. 1-SER-20-21, 44-45, 50; 2-SER-357-358. That Kaili was high on methamphetamine at the time (Br. 52-53) does not fundamentally alter the security risk to a set of ACOs who collectively weighed over six times more than Kaili (*see* p. 5, *supra*), nor did it justify Tagaloa's kicking and punching Kaili in the face or using hammer fists that smashed Kaili's head into the asphalt. This disproportionate, unwarranted violence supports a jury determination that Tagaloa

used force "to cause harm," rather than in a good-faith effort to restore discipline. *See Hoard*, 904 F.3d at 789.

Finally, DeMattos testified that nobody made any effort to reduce the assault's severity, either by telling Kaili to comply or by trying to stop one another's actions. 2-ER-222; 1-SER-24-25, 52-54. "Officers cannot justify force as necessary for gaining inmate compliance when inmates have been given no order with which to comply." *Furnace*, 705 F.3d at 1029. While Taum claimed that the ACOs yelled at Kaili to comply (2-SER-319-320), no other witness corroborated this statement, and the jury was free to believe DeMattos on this point. A jury rationally could conclude that Tagaloa violated Kaili's Eighth Amendment rights.[5]

[5] Tagaloa also violated the Eighth Amendment under two alternate theories. As the court instructed the jury, aiding and abetting also qualifies if "someone else committed" a violation of Section 242 and if "a defendant aided, counseled, commanded, induced[,] or procured that person with respect to at least one element of" the crime, "acted with the intent to facilitate the commission of" the crime, and "acted before the crime was completed." 3-ER-511-512; *see* 18 U.S.C. 2; Instruction No. 4.1, *Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit* (2022), https://www.ce9.uscourts.gov/jury-instructions/node/851. And a corrections officer violates the Eighth Amendment if they "observe[] another correctional officer using cruel and unusual punishment, ha[ve] a reasonable opportunity to intervene, and cho[o]se not to do so." 3-ER-513; *see Koon*, 34 F.3d at 1447 n.25. Pinkney and DeMattos used unreasonable force against Kaili (1-SER-45, 218-219), and Taum directed the others to punch and kick Kaili (2-ER-172; 1-SER-45), yet Tagaloa helped hold down Kaili and did nothing to stop the others (2-ER-170; 1-SER-52-53).

2. Additionally, a jury rationally could have found that Tagaloa's use of excessive force resulted in "bodily injury" or included the use, attempted use, or threatened use of a dangerous weapon. 18 U.S.C. 242.

a. The court instructed the jury that "[b]odily injury' means: [A] a cut, abrasion, bruise, burn, or disfigurement; [B] physical pain; or [C] any other injury to the body, no matter how temporary." 3-ER-515. This definition, which Tagaloa does not contest (Br. 61), follows the holdings of at least eight other circuits, *see United States v. Boen*, 59 F.4th 983, 993-994 (8th Cir. 2023) (citing cases). The court also instructed, and Tagaloa does not challenge (Br. 61), that bodily injury need only have been "a natural and foreseeable result of the offense conduct." 3-ER-515; *see United States v. Martinez*, 588 F.3d 301, 317 (6th Cir. 2009) (discussing cases interpreting Section 242 and other similar statutes).

Here, ample evidence confirms that Tagaloa's actions caused Kaili bodily injury. The video footage, confirmed by witness testimony, showed Tagaloa punch, hammer fist, and kick Kaili in the head and punch him in the spine. *See* pp. 5-6, *supra*. Kaili repeatedly screamed for help during the assault and sought to shield his face from the strikes. 1-SER-145-146, 260-261. After the assault, Kaili had a swollen face and left a "pizza"-sized pool of blood on the ground. 1-SER-31, 47-49. The medical evidence showed that Kaili suffered a broken jaw, eye socket, and nose, and that fat had been pushed from his eye socket into his sinus.

2-ER-253-260. The jury rationally could have concluded that any of these injuries, or any of the pain Kaili experienced, resulted from Tagaloa's many blows.

To explain away this severe damage, Tagaloa principally relies (Br. 61-65) on testimony from some ACOs who asserted that Kaili's broken bones may instead have come from Kaili jumping off the bunk in his cell after the assault. 1-SER-206-207, 233-234, 265, 270-272. But as Alofaituli and Fernandez-Wise admitted at trial, the ACOs who had claimed to see Kaili injure himself were saying whatever was needed to help their friends. 1-SER-206-208, 266-267. Their stories thus contradicted one another regarding whether Kaili injured himself leaping *off* or *onto* his bunk (1-SER-233-234, 254-255, 270-272), and contradicted the evidence showing that the cell contained only a few drops of blood (1-SER-198-201, 211-212). Regardless, Tagaloa at most outlines inconsistencies between witnesses' testimony, and this Court is "powerless to question a jury's assessment of witnesses' credibility." *United States v. Johnson*, 229 F.3d 891, 894 (9th Cir. 2000) (citation omitted).

This debate over Kaili's broken bones also is irrelevant for the injury element, because the statute requires only "bodily injury." 18 U.S.C. 242. The statute thus reaches injuries like "a cut, abrasion," or "bruise," any "physical pain," or "any other injury to the [body], no matter how temporary" or minor. *Boen*, 59 F.4th at 993 (alteration and citation omitted); 3-ER-515. The testimony about

Kaili's attempts to protect his body from the ACOs' blows, his screams for help during the assault, his swollen face as the ACOs picked him up, and the pool of blood visible on the ground after his assault provide more than enough evidence on their own from which a jury could conclude that Tagaloa's violation resulted in bodily injury. 1-SER-31, 47-49, 145-146, 260-261.

b. Moreover, as the court instructed the jury (3-ER-515), and as Tagaloa acknowledges (Br. 61), Section 242's felony enhancement alternatively can be proven by evidence that the offense involved "the use, attempted use, or threatened use of a dangerous weapon," 18 U.S.C. 242. And Tagaloa also acknowledges (Br. 61) that a shod foot is considered a dangerous weapon "when used in a manner likely to endanger life or inflict great bodily harm," *United States v. Riggins*, 40 F.3d 1055, 1057 (9th Cir. 1994) (citation omitted); *see United States v. Swallow*, 891 F.3d 1203, 1204 (9th Cir. 2018) (similar); *United States v. Smith*, 561 F.3d 934, 939 (9th Cir. 2009) (en banc) (defining "great bodily harm"); 3-ER-515 (instructing the jury).

Tagaloa protests that "Kaili was not seriously injured in the rec yard" (Br. 61), but that is not the standard. As the jury was instructed (3-ER-515-516), Tagaloa need only have used his shod foot "*in a manner likely to*" inflict such harm, *Riggins*, 40 F.3d at 1057 (emphasis added). And he did so. Both the video footage and witness testimony showed that Tagaloa kicked Kaili in the head with

his heavy work boots, which Tagaloa was taught constitutes impermissible deadly force. 1-SER-42, 135, 221-222; 2-SER-342; Exs. 1-C, 2-D. Regardless, the jury easily could have concluded that Kaili likely *did* suffer great bodily harm from Tagaloa's actions, given the evidence of his reaction, the blood on his face and on the ground after the assault, and the medical evidence of the injuries to Kaili's face—including prolonged loss of use of his jaw. *See* pp. 6-7, *supra*. "[W]hat constitutes a dangerous weapon in a particular case is a question of fact for the jury," *Riggins*, 40 F.3d at 1057, and the jury rationally could have found Tagaloa's shod foot to be a dangerous weapon.

B. The jury rationally convicted Tagaloa for conspiracy to obstruct justice.

Tagaloa next challenges his conviction under 18 U.S.C. 371, under which he was charged with conspiring to violate two obstruction statutes, 18 U.S.C. 1512(b)(3) and 18 U.S.C. 1519. 2-ER-119-120. A conspiracy claim under Section 371 requires "[a]n agreement to achieve an unlawful objective, an overt act in furtherance of the illegal purpose, and the requisite intent to defraud the United States." *United States v. Tuohey*, 867 F.2d 534, 537 (9th Cir. 1989). Tagaloa challenges only the evidence for the existence of a conspiracy and for Tagaloa's participation in it. Br. 66-69.

Overwhelming evidence supported Tagaloa's participation in a conspiracy. The court properly instructed the jury that the conspirators must have agreed "to

commit at least one of the crimes alleged to be the object of the conspiracy," regardless whether "the conspirators made a formal agreement," and that "[o]ne becomes a member of a conspiracy by willfully participating in the unlawful plan with intent to advance or further some object or purpose of the conspiracy." 3-ER-522; *accord* Instruction 11.1, *Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit* (2022), https://www.ce9.uscourts.gov/jury-instructions/node/951. The evidence at trial showed that Tagaloa and his co-conspirators agreed to work together for a single purpose: to cover up the ACOs' use of excessive force on Kaili.

This much can be seen just from the ACOs' actions 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, a story each of the officers repeated in the falsified reports they submitted." *United States v. Gonzalez*, 906 F.3d 784, 792 (9th Cir. 2018); *see* 3-ER-337; 1-SER-65-68, 217; *contra* Br. 68-69. Tagaloa's use-of-force report employed almost identical language to DeMattos's (2-SER-494, 496)—a fact from which the jury reasonably can infer that the two worked together or copied one another (*contra* Br. 68). Tagaloa's agreement with DeMattos and the other defendants to omit information from and include incorrect information in their reports involved him in a conspiracy.

Tagaloa also attended the ACOs' meetings at Taum's house. Several witnesses, including defense witness Alofaituli, testified that the purpose of these meetings was to come up with justifications for the ACOs' uses of force so that they would not be fired. 1-SER-90-91, 98-107, 274-276; *contra* Br. 67. And the jury saw footage that Pinkney recorded, which showed Taum coaching Tagaloa on how to explain away some of his strikes. 1-SER-95-97; Ex. 29-E. Defendants and DeMattos then lied throughout the state investigations into their conduct. *See* pp. 11-12, *supra*. Tagaloa's "participation in a coordinated cover-up" shows "that he was in on the agreement to" obstruct justice. *Gonzalez*, 906 F.3d at 793.

C. The jury rationally convicted Tagaloa for obstruction by false report.

Finally, the evidence supported Tagaloa's conviction for obstruction by falsification of records under 18 U.S.C. 1519. As the jury was instructed, this statute requires proof that the defendant (1) "knowingly falsified, concealed, covered up, or made a false entry in a record or document"; and (2) "acted with intent to impede, obstruct, or influence an actual or contemplated investigation of a matter within the jurisdiction of any department or agency of the United States." 2-SER-383; *accord United States v. Singh*, 979 F.3d 697, 715 (9th Cir. 2020). Tagaloa was charged with omitting or falsifying information on his incident and use-of-force reports. 2-ER-122-123.

Tagaloa questions the evidence of his knowledge and intent, asserting (Br. 70) that he merely wrote in his reports what he recalled at the time. But Tagaloa's "falsifications went beyond the kind of innocent mistakes attributable to a faulty memory." *United States v. Valenzuela*, No. 22-50212, 2023 WL 6276280, at *1 (9th Cir. Sept. 26, 2023). Tagaloa's reports omitted his many uses of force, even in response to questions that expressly asked about use of force. 1-SER-90-91, 98-107, 274-276. He stated that all force used across a four-to-five-minute assault was "reactive," even though Taum had ordered some of the uses of force. 1-SER-78, 134, 186; 2-SER-494. And he falsely stated that Kaili was "aggressive" to justify his actions. 1-SER-71-72, 179; 2-SER-492, 494, 496. "The sheer number of discrepancies" between Tagaloa's reports and the facts as shown at trial "suggests that they were not mistakes." *Valenzuela*, 2023 WL 6276280, at *1.

Several witnesses' testimony, as well as a comparison of Tagaloa's and DeMattos's use-of-force reports, also supports the jury's determination that Tagaloa intended to obstruct justice. *Contra* Br. 71 (asserting the government relied on DeMattos's testimony alone). Tibayan and DeMattos both testified that the assaulters gathered to draft their reports together, even though HCCC regulations required them to draft their reports alone precisely to avoid the sort of false alignment of statements that occurred here. 3-ER-336-337; 1-SER-65-67, 134, 217. DeMattos testified that the ACOs, including Tagaloa, worked together

to align their statements to avoid investigation. 1-SER-67, 134. As a result, the ACOs worked for more than two hours to complete two one-page forms. 1-SER-69. And one of the end products of this hours'-long work—Tagaloa's use-of-force report—used essentially the same language as DeMattos's report to answer several key questions. 2-SER-494, 496. This evidence was more than enough for a jury to find that "[t]he whole point of the officers' efforts to concoct a false cover story was to make it appear as though the force they used was justified, thereby shielding them from the punishment that would likely follow if the truth were revealed." *Gonzalez*, 906 F.3d at 794.

* * *

The evidence was more than sufficient to support Tagaloa's convictions, and the district court did not err, let alone plainly error, by not overturning the jury's verdict.

IV. The district court properly allowed Tagaloa's statement into evidence because Tagaloa waived his *Garrity* rights in his FBI interview.

Finally, Tagaloa asserts (Br. 72-78) that his convictions must be reversed because the district court temporarily admitted his completed investigative questionnaire into evidence before reversing itself.[6] Because Tagaloa withdrew his

[6] As the district court was correct to admit the completed questionnaire in the first instance, it erred in reversing itself and de-admitting it. However, this

Garrity objection during trial, he has waived this argument. At the very least, because he failed to preserve the argument throughout trial, his argument is subject to plain error review. The district court did not err, much less plainly, by temporarily admitting the questionnaire, and any error did not prejudice Tagaloa.

A. Tagaloa waived his *Garrity* objection.

As Tagaloa waived his *Garrity* objection during trial, he cannot revive it now. When a defendant waives an argument in the district court, that "waiver precludes appellate review altogether." *United States v. Depue*, 912 F.3d 1227, 1232 (9th Cir. 2019) (en banc). Constitutional arguments, like any other argument, can be waived. *See United States v. Knight*, 56 F.4th 1231, 1236 (9th Cir.) (holding that Fifth and Sixth Amendment rights are waivable), *cert. denied*, 143 S. Ct. 2478 (2023). Waiver requires "the 'intentional relinquishment or abandonment of a known right.'" *Ibid.* (citation omitted). This Court "review[s] the adequacy of a criminal defendant's waiver of constitutional rights de novo." *Ibid.*

Tagaloa plainly was aware of his *Garrity* rights: His counsel had moved to keep Tagaloa's investigative questionnaire, among other documents, out of evidence because their introduction allegedly would violate *Garrity*. 4-ER-703; 2-SER-453-456. The court initially granted his motion. 4-ER-710. When the

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Court need not decide whether the later reversal was error to affirm the initial admission on plain error review.

government moved for reconsideration and the parties first discussed that motion on June 24, 2022, Tagaloa knew that he could continue making his *Garrity* arguments. *See* 1-SER-149. And counsel confirmed that Tagaloa himself participated in deciding whether to persist in opposing admission of the questionnaire. 1-SER-149.

Yet instead of maintaining his *Garrity* objection during the parties' mid-trial argument on the issue on June 27, 2022, Tagaloa's counsel intentionally narrowed his focus to the voluntariness of Tagaloa's waiver to the FBI. He stated that a voluntariness hearing "should be sufficient" to allay any concerns. 1-SER-152. And he expressly dropped any other objection under *Garrity* to the questionnaire's admission:

> [O]ur understanding is that this -- that the only information that they are asking to allow us not to challenge the *Garrity* issue is the internal affairs question and answer form and that was handed out by Lieutenant Cravalho and answered by my client. We have no problem with that.

1-SER-152-153. When the government offered the questionnaire into evidence as Exhibit 23 later that day, Tagaloa's counsel again consented, stating: "I think we kind of agreed that these are relevant [and that] they should be brought into evidence, so we have no objection to these pieces of evidence to be introduced for the jury." 1-SER-175; *see* 1-SER-175 (lodging a *Garrity* objection to Exhibits "21

and 22," Tagaloa's incident and use-of-force reports, but making no similar objection regarding Exhibit 23).

Tagaloa thus "'considered the controlling law, . . . and, in spite of being aware of the applicable law,' relinquished his right." *Depue*, 912 F.3d at 1233 (citation omitted). Because he validly waived his *Garrity* argument—and because he does not challenge on appeal the voluntariness of his waiver to the FBI, the sole issue he chose to preserve below (Br. 72-78)—Tagaloa cannot challenge the introduction of his questionnaire responses. *See, e.g.*, *United States v. Wells*, 719 F. App'x 587, 588 n.1 (9th Cir. 2017) (refusing to address *Garrity* claim not raised below); *United States v. Thomas*, 103 F. App'x 239, 240-241 (9th Cir. 2004) (declining to address issue of *Miranda* waiver's voluntariness not raised below).

B. There is no reversible plain error.

Even if Tagaloa did not knowingly waive his *Garrity* claim, his counsel's statements and actions during trial at least evidence a "failure to make the timely assertion of a right" and thus constitute forfeiture. *United States v. Hougen*, 76 F.4th 805, 810 (9th Cir. 2023); *see United States v. Castellanos*, 524 F. App'x 360, 361 (9th Cir. 2013). Because Tagaloa did not object "when the court ruling or order [was] made or sought," *Puckett v. United States*, 556 U.S. 129, 135 (2009) (citation omitted), either during the mid-trial arguments over admission of the investigative questionnaire or when the government moved it into evidence, his

Garrity claim is at best subject to plain error review. *See, e.g.*, *Castellanos*, 524 F. App'x at 361 (subjecting to plain error review forfeited claim that *Miranda* waiver was involuntary); *United States v. Mejia*, 559 F.3d 1113, 1117 (9th Cir. 2009) (analyzing adequacy of *Miranda* warning under plain error standard). Tagaloa fails this review at each step.

1. The court did not err, much less plainly err, when it allowed Tagaloa's investigative questionnaire into evidence because Tagaloa validly waived his *Garrity* rights in 2020.

The district court properly allowed Tagaloa's completed investigative questionnaire into evidence, even though it later reversed itself. The government consistently has treated Tagaloa's statements as *Garrity*-compelled because they were made to internal DPS investigators on pain of termination. 3-ER-328-329. However, Tagaloa later waived those protections, voluntarily, under circumstances that lacked the administrative compulsion against which *Garrity* protects.

a. The Supreme Court's decision in *Garrity v. New Jersey*, 385 U.S. 493 (1967), prohibits government employers from requiring information that may incriminate an employee upon threat of disciplinary consequences unless that information is immunized from future use in criminal proceedings, *see United States v. Wells*, 55 F.4th 784, 792 (9th Cir. 2022). This rule is a prophylactic, intended to protect the Fifth Amendment's right against self-incrimination. *See, e.g.*, *Chavez v. Martinez*, 538 U.S. 760, 768 n.2 (2003) (plurality opinion). "The

principle" underlying *Garrity* "is that a witness need not expressly invoke the privilege where some form of official compulsion denies him a free choice to admit, to deny, or to refuse to answer." *Salinas v. Texas*, 570 U.S. 178, 185 (2013) (plurality opinion) (citation and internal quotation marks omitted).

However, the right against self-incrimination is an individual right that can be knowingly and voluntarily waived. *See Colorado v. Spring*, 479 U.S. 564, 573 (1987); *Knight*, 56 F.4th at 1236-1237; *United States v. Swacker*, 628 F.2d 1250, 1252-1253 (9th Cir. 1980). "*Garrity* protections—which derive from the Fifth Amendment—are no exception to this general rule." *United States v. Smith*, 821 F.3d 1293, 1304 (11th Cir. 2016). Hence, when the compulsive conditions that give rise to *Garrity* protections dissipate—when the person who gave the incriminating statements no longer can be threatened with disciplinary consequences for refusing to provide testimony—that person can choose to waive his existing *Garrity* rights and make *Garrity*-protected statements available to investigators. *See ibid.*; *cf. Oregon v. Elstad*, 470 U.S. 298, 310-311 (1985) (holding same for *Miranda* rights).

While neither the Supreme Court nor this Court has addressed this question in the *Garrity* context, the one circuit that has done so has held that *Garrity* rights can be waived. The Eleventh Circuit in *United States v. Smith* confronted facts similar to those here: A state prison guard was investigated for fighting with

another guard and seeking to cover up his conduct, and he made statements to internal investigators after being told he was "duty-bound" to tell everything. 821 F.3d at 1297-1298. The FBI later investigated the same incident after the guard had been fired, and the FBI presented and explained to him a consent form nearly identical to that used in this case. *Compare id.* at 1300, *with* 2-SER-451-452. The former guard signed the form, waiving his *Garrity* rights, and agreed to hand over his prior *Garrity*-protected statements from the internal state investigation. *Smith*, 821 F.3d at 1299-1300.

The Eleventh Circuit upheld the waiver. It held that "a state employee can, after he has been fired, waive his *Garrity* rights and allow his prior compelled and protected statements to be used by the federal government in a criminal investigation," at least "as long as the employee's waiver is voluntary, knowing, and intelligent." *Smith*, 821 F.3d at 1296. And it found that, "[b]y signing the consent form, Mr. Smith voluntarily, knowingly, and intelligently agreed to make all of his prior statements available to FBI agents and federal prosecutors, even with the understanding that those statements could be used against him if he chose not to take the stand at a subsequent trial." *Id.* at 1305; *see also U.S. ex rel. Wojtycha v. Hopkins*, 517 F.2d 420, 425 (3d Cir. 1975) (finding "no constitutional defect" where defendant initially refused to testify before grand jury for fear of

losing his job but later "stated on the record that he would testify voluntarily and executed a waiver of rights").

Likewise, here, Tagaloa validly waived his *Garrity* rights. He had not been employed at HCCC for more than three years by the time the FBI met with him, and the FBI had no coercive power over him in any event. 1-SER-157; 2-SER-451-452. He was therefore free to waive his *Garrity* rights and offer his prior statements to federal investigators. *See Smith*, 821 F.3d at 1296. The district court properly found, based on the audio recording the FBI took of the non-custodial interview in which Tagaloa signed the consent form, that his waiver was knowing, voluntary, and intelligent. 1-SER-154; 3-ER-326. And Tagaloa does not challenge the voluntariness of his waiver on appeal. Br. 72-78; *see United States v. Saelee*, 51 F.4th 327, 339 n.3 (9th Cir. 2022). The court therefore did not err in admitting the questionnaire responses into evidence.[7] Its only error was in later reversing its judgment.

b. Even if the district court had committed an error, the error was not *plain*. Under plain error review, this Court "'*cannot*' correct an error unless it is clear under current law." *United States v. Thompson*, 82 F.3d 849, 856 (9th Cir. 1996)

[7] When defendants preserve *Garrity* arguments, this Court reviews the district court's underlying legal conclusions de novo and its factual findings for clear error. *Wells*, 55 F.4th at 791. For the reasons outlined herein, Tagaloa's claim fails under this standard, as well.

(quoting *United States v. Olano*, 507 U.S. 725, 734 (1993)). It is anything but clear that Tagaloa's 2020 waiver was ineffective. There cannot be "plain error when the Supreme Court and this court have not spoken on the subject, and the authority in other circuits is split." *Id.* at 855 (citation omitted). Here, there is not even a circuit split—the only court of appeals to reach the issue has held that former employees *can* waive their *Garrity* rights. *See Smith*, 821 F.3d at 1296. Because of "the lack of controlling authority, and the fact that there is at least some room for doubt about the outcome of this issue" given the Eleventh Circuit's decision in *Smith*, this Court "cannot brand the court's failure to exclude the evidence plain error." *Thompson*, 82 F.3d at 856; *see United States v. Ghanem*, 993 F.3d 1113, 1131 (9th Cir. 2021).

2. Any error from the initial admission of Tagaloa's investigative questionnaire did not affect his substantial rights.

Tagaloa's *Garrity* claim also fails because any error was harmless. "To establish prejudice under the plain-error test, [Tagaloa] must show 'that the probability of a different result is sufficient to undermine confidence in the outcome of the proceeding.'" *United States v. Ramirez-Ramirez*, 45 F.4th 1103, 1110 (9th Cir. 2022) (citation omitted). Tagaloa cannot show this.

a. The district judge gave a sufficient curative instruction.

First, the district court ameliorated any potential harm from the investigative questionnaire by issuing a curative instruction to the jury before trial ended. It informed the jury that it "has made a legal ruling" and instructed the jury that it "must not consider Exhibit 23, which is Mr. Tagaloa's responses to the internal affairs questionnaire," nor "consider any testimony about his responses." 2-SER-308. "It must be treated," the court said, "as if you had no knowledge about it." 2-SER-308. Tagaloa asserts (Br. 77) without evidence that this instruction "was not sufficient to remedy the damage." But "[t]he jury is *presumed* to have followed that instruction, and there is" no "basis for concluding that the jury may have failed to do so here." *Saelee*, 51 F.4th at 345 (emphasis added; citation omitted). Nor were Tagaloa's questionnaire responses "so inherently and overwhelmingly incriminating that a jury could not be expected to follow an explicit instruction directing them to disregard" them. *Ibid.* Particularly since the government made little use of the questionnaire before the court reversed its admission of the document into evidence. *See* p. 56, *infra*.

Tagaloa also takes issue (Br. 76-77) with the court's delay in instructing the jury, but it had a perfectly legitimate reason for doing so: Tagaloa still reserved his right to testify, and any testimony about the questionnaire responses on direct examination could open the door to cross-examination. 1-SER-225-226; *Gonzales*

v. Estelle, 46 F.3d 1141, at *1 (9th Cir. 1995) (unpublished). It is therefore unsurprising that no defense attorney objected to the court's decision to wait until Tagaloa testified, or decided not to, before issuing the instruction. *See* 1-SER-226, 290-291. As soon as it became clear that Taum would be the only defendant to testify, the court determined that it would provide the curative instruction before the close of Tagaloa's case. 2-SER-305. It provided the instruction moments later. 3-ER-494.

b. Tagaloa's investigative questionnaire was not material to the jury's verdict.

Introduction of the questionnaire did not affect Tagaloa's substantial rights for another reason: It was not material to the jury's verdict on the conspiracy count. Tagaloa "does not argue that . . . there would have been any difference in the court's finding of guilt" had the questionnaire never been entered into evidence, "nor is there any evidence in the record to support such a conclusion." *Ramirez-Ramirez*, 45 F.4th at 1110.

For one thing, Tagaloa's questionnaire responses were consistent with the other statements that he does not challenge on appeal, including those in his incident and use-of-force reports and those made during his DPS hearings. *See* 3-ER-307-311; 1-SER-176-180. The government also introduced ample testimony and video evidence to demonstrate that Tagaloa participated in a conspiracy to obstruct justice. *See* Part III.B, *supra*. This other evidence "was powerfully

incriminating." *United States v. Lopez*, 500 F.3d 840, 846 (9th Cir. 2007). The questionnaire's brief introduction into evidence does not meaningfully change the facts from which the jury reached its verdict, as evidenced by the fact that it convicted Pinkney and Taum of the same offense despite never having seen their questionnaire responses. 4-ER-723.

Nor could the questionnaire's admission have prejudiced Tagaloa. The government asked Special Agent Nelson about Tagaloa's answers to only two of the questions on his questionnaire (1-SER-181-182), and the court ordered the jury to disregard Nelson's answers about one of them (1-SER-182). Before the jury could view the questionnaire responses for itself during deliberations, the court withdrew the document from evidence and replaced it with a redacted version showing only Tagaloa's signature and the date. 1-SER-213. The jury thus never saw the remainder of the questionnaire.

Additionally, the jury required less than three hours to reach its verdicts on six different counts involving three defendants. 4-ER-723. The jury's alacrity likewise "suggest[s] that any error in allowing" the questionnaire responses into evidence "was harmless." *Lopez*, 500 F.3d at 846.[8]

[8] For similar reasons, should this Court determine that Tagaloa sufficiently preserved his *Garrity* challenge, any error was "harmless 'beyond a reasonable doubt.'" *Neder v. United States*, 527 U.S. 1, 7 (1999) (citation omitted); *see Ramirez-Ramirez*, 45 F.4th at 1109.

3. Tagaloa does not warrant discretionary relief.

The Court also should not exercise its discretion to grant relief under plain error's fourth prong. Tagaloa does not indicate any way in which the questionnaire's brief admittance into evidence prejudiced his case. *See* Br. 72-78. By contrast, reversal would require duplicating a ten-day, ten-witness trial—a "substantial" cost to the parties, witnesses, and the court. *Hougen*, 76 F.4th at 812. It also would require retrial of an incident that took place more than eight years ago, "with memories of the underlying incident fading." *Ibid.* And because Tagaloa's counsel dropped his *Garrity* objection at trial, reversing Tagaloa's convictions now would provide "precisely the kind of 'windfall for the defendant' that the Supreme Court has cautioned is 'not in the public interest.'" *Ibid.* (citation omitted).

CONCLUSION

For the foregoing reasons, this Court should affirm Tagaloa's convictions.

Respectfully submitted,

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FOR THE NINTH CIRCUIT

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