

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO**

Criminal Case No. 1:19-cr-257-WJM

UNITED STATES OF AMERICA,

Plaintiff

v.

Eric King,

Defendant

DEFENDANT’S MOTION TO DISMISS FOR PREINDICTMENT DELAY

Defendant Eric King, by and through counsel, moves this Court to dismiss the single count indictment due to prejudicial pre-indictment delay in violation of the Fifth Amendment’s guarantee of Due Process. Counsel has conferred with Assistant US Attorney Teitelbaum who indicates that he opposes this request. As grounds for this motion, Mr. King states the following:

I. FACTUAL BACKGROUND

Mr. King stands before this Court accused of one count of Assaulting or Obstructing a Federal Official in violation of 18 U.S.C §111. The indictment in this case stems from an August 17, 2018 encounter in a prison storage room between Mr. King and an FCI Florence Administrative Lieutenant. Material provided in discovery shows that the matter was immediately investigated by BOP officials, and referred to the FBI and United States Attorney for potential prosecution within hours of the alleged offense. Discovery further shows that the matter was accepted for prosecution the same day.

The FBI Special Agent in charge of the matter communicated with BOP officials throughout the months of September, October, and November 2019, and one time in December of that year.

Mr. King was transferred to USP Leavenworth on August 20, 2018, immediately following his *Miranda* interview with detectives at USP Florence. Florence officers investigating the matter in November 2018 noted that Mr. King was not to be interviewed at USP Leavenworth because he had requested an attorney. Exhibit A: November 2018 FLF Inmate Investigative Report, at 2 (INV0435-0439).

In early December 2019 corrections officials at USP Leavenworth told Mr. King that the government declined to prosecute the charges. This is corroborated by notes in a Disciplinary Hearing Officer (“DHO”) Report related to the incident which shows “the FBI/AUSA did decline to prosecute on December 11, 2018, at which time it was released for administrative processing.” Exhibit B: February 21, 2019 Disciplinary Hearing Officer (“DHO”) Report, at 2 (INV00443-00446). On December 28, 2019, USP Leavenworth officials initiated administrative disciplinary proceedings against Mr. King relative to the alleged assault at FCI Florence on August 17. *Id* at 1.¹ The DHO report reflects that Administrative Notice of the delay initiating administrative proceedings was provided to the Warden of Leavenworth, who found the delay in initiating disciplinary proceedings justified by the fact that the incident took place at another institution and was pending FBI release. *Id* at 2.

During the disciplinary proceedings on January 31, 2019, the DHO reports shows that Mr. King made statements including a direct admission: “I was provoked, that is

¹ Bureau of Prisons disciplinary policy anticipates providing prisoners with written notice of disciplinary proceedings within 24 hours of staff awareness of the incident. 28 C.F.R. §541.5(a)

why I hit him. To defend myself. He hit me.” *Id.*, DHO Report at 3. The report further reflects “Inmate admits the charge(s).” *Id* at 1. A nearly-illegible copy of the questions and statements Mr. King submitted to the DHO was included in the report and appears to read:

“Were witnesses interviewed, if not then why? What stopped it? Is that policy, shot not issued until Dec 28th, given to me until 31st. Was released by FBI Dec. 11th, where in policy does it say being on holdover status delays shot being given on time? Location of incident. Not his office [illegible] cameras and people around, but back mop closet where there is no camera. Staff never have been taken back there. Shot provides no evidence whatsoever, my witness can verify where it took place. Every CO on the compound tried rushing into that closet, blood on the floor. Never had a fight in prison, was getting visits every week, was one week away from transferring to a low. – part of religious group – taught poetry ACE class – took ACE classes – was [illegible] yoga instructor – no shot in the 16 months there – makes no sense that would [illegible] punch Lt. w/out being in danger.”

Exhibit C: Excerpted questions from DHO Report. The DHO officer took Mr. King’s multiple statements and questions into account, in addition to the memoranda and documents produced by FCI Florence staff, before entering a finding that Mr. King had committed a prohibited act. Exhibit B at 2-4.

The assertion of self-defense and staff misconduct in the disciplinary proceedings prompted Disciplinary Hearing Officer Becky Bryant to send a memorandum to the Warden of USP Leavenworth advising that Mr. King admitted to striking the officer and also “made allegation of staff misconduct at FLF Florence.”

Exhibit D: February 21, 2019 DHO Memorandum for Warden (INV0442). The DHO Report and notice to the warden of Leavenworth were completed on February 21, 2019; the notice was provided to FCI Florence staff and forwarded to the FBI on the same date, with a focus on Mr. King’s admission during the DHO hearing. Exhibit E: February 21, 2019 FBI Interview Report (INV0440). The prosecution team met with FCI Florence

Lieutenants Wilcox and Kammrad (the two officers who escorted King into the storage closet) at the prison on April 15, 2019, and re-interviewed the two officers regarding the sequence of events with Mr. King. Lieutenant Wilcox's interview focused in part on the questions of why the Lieutenant attempted to interview Mr. King in the storage room alone without other staff assistance and how the Lieutenant's hand injury occurred. Exhibit F: April 15, 2019 FBI Interview Lieutenant Wilcox (INV0429-430).

A grand jury returned an indictment against Mr. King on May 19, 2019. Mr. King was held continuously in solitary confinement since August 18, 2018, was arbitrarily transported through six different notorious bureau of prison facilities (FCI Florence, USP Florence, USP Leavenworth, USP McCreary, USP Lee, USP Atlanta), and assaulted by other prisoners between the date of the alleged offense and his arrival at FCI Englewood on a writ shortly before his first appearance in this Court on August 27, 2019. These repeated arbitrary transfers and conditions of confinement severely impacted Mr. King's physical and mental health.

II. ARGUMENT

The nine-month delay in indictment in this matter prejudiced Mr. King and provided the government tactical advantage while also punitively harassing Mr. King. Although the indictment was returned within the statute of limitations, the Fifth Amendment's Due Process Clause also plays a role in protecting criminal defendants against prejudicial preindictment delay. *United States v. Lovasco*, 431 U.S. 783, 789 (1977).

The Tenth Circuit uses a two-part test to determine whether a Defendant's rights have been violated by preindictment delay: "Preindictment delay is a violation of due

process where (1) the defendant suffered ‘actual prejudice resulting from the delay,’ and (2) the delay was purposefully designed to gain tactical advantage or to harass the defendant.’ *United States v. Colonna*, 360 F.3d 1169, 1176-1177 (10th Cir. 2004) (quoting *United States v. Comosona*, 848 F.2d 1110, 1113 (10th Cir. 1998)). Mr. King bears the burden of proof to demonstrate to this Court that both parts of this test are satisfied. *United States v. Marion*, 404 U.S. 307, 322 (1977); *United States v. Engstrom*, 965 F.2d 836, 839 (10th Cir. 1992).

A. The delayed indictment allowed the government to unconstitutionally obtain admissions prejudicial to Mr. King’s defense.

In November 2018 BOP officials at both FCI Florence and USP Leavenworth were on notice that Mr. King had invoked his right to counsel and should not be questioned regarding the events of August 17, 2018. See Exhibit A. After the government declined criminal prosecution, the Bureau initiated disciplinary proceedings alleging that Mr. King assaulted Lieutenant Wilcox; during those proceedings Mr. King asserted self-defense in his admission to the charge(s) in response to the Disciplinary Hearing Officer’s questioning without *Miranda* warnings, which are not necessarily required in prison disciplinary proceedings. See *Wolff v. McDonnell*, 418 U.S. 539, 560 (1974); *Baxter v. Palmagiano*, 425 U.S. 308 (1976). See Exhibit B. These admissions were forwarded to the FBI and United States Attorneys, who then re-interviewed two BOP witnesses in the weeks leading up to indictment. The admissions were included in discovery provided by the government and are subject to a separate motion to suppress the statements as obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966).

In the Tenth Circuit, “preindictment delay rises to a constitutional violation when the defense is substantially prejudiced by the delay and the reasons for the prosecutor’s delay are improper.” *Gutierrez v. Moriarty*, 922 F.2d 1464, 1472 (10th Cir. 1991). Most of the cases regarding prejudicial preindictment delay concern claims of prejudice alleged through lost evidence, fading memories, or dead witnesses. See *United States v. Wood*, 207 F.3d 1222 (10th Cir. 2000) (no prejudice demonstrated by doctor speculations regarding autopsy challenges); *United States v. Trammell*, 133 F.3d 1343, 1351 (10th Cir 1998) (without specific allegation how testimony of two dead witnesses would have benefitted defense case, 45 month delay in indictment did not violate due process); *United States v. Johnson*, 120 F.3d 1107, 1110 (10th Cir. 1997) (no prejudice where claim rests on lapse of time and faded memories of potential alibi witnesses). When a Defendant claims prejudice due to unavailability of witnesses or evidence he “must be able to show definite and not speculative prejudice, and in what specific manner missing witnesses would have aided his defense.” *United States v. Jenkins*, 701 F.2d 850, 855 (10th Cir. 1983). These cases are inapplicable to Mr. King because his claim of prejudice does not rest on lost trial evidence, but on the prejudice of a statement providing the government a preview of his defense that allowed them to attempt to alter and/or bolster the statements of Lt. Wilcox and Kammrad when they re-interviewed them subsequent to Mr. King’s statement.

A defendant’s inability to present a defense at trial is only one type of prejudice caused by preindictment delay, and a court examining a claim that preindictment delay violates Due Process should determine “whether the action complained of... violates those fundamental conceptions of justice which lie at the base of our civil and political

institutions, and which define the community's sense of fair play and decency." *United States v. Lovasco*, 431 U.S. 783, 790 (1977). Claims of prejudice other than lost witnesses or evidence must rely on more than the simple passage of time and unusual timing of an indictment. See *United States v. Colonna*, 360 F.3d 1169 (10th Cir. 2004) ("unusual" timing of superseding indictment five days before trial insufficient to establish actual prejudice). Here, Mr. King alleges that he has been prejudiced not by lost speculative evidence or witnesses, but an overt declination of prosecution that resulted in documented admissions in response to questioning by an agent of the Department of Justice. The circumstances show that the government's investigation did not develop any new evidence after November 2018, and that Mr. King's statements in the January 2019 Leavenworth DHO hearing prompted the re-interview of the government's primary witnesses prior to indictment using this preview of Mr. King's claims and defenses.

The claims of prejudice in *United States v. Revada* (574 F.2d 1047 (10th Cir. 1978) and *United States v. Dewing* (2 F.3d 1161 (Table), 1993 WL 307946, *1 (10th Cir. 1993) (unpublished)) did not involve lost evidence at all. In *Revada*, the Tenth Circuit reversed and remanded a trial court's order dismissing the indictment for further fact-finding regarding preindictment delay. The dismissal was reversed and remanded for further factual findings because the "very meager" record in the matter showed that the trial court dismissed the matter after receiving statements from the parties and reviewing an affidavit submitted by the defendant claiming that "he gave federal agents a statement, apparently incriminating... which would not have given had he thought he might be prosecuted" by indictment 21 months after the offenses (and 10 months after the statement). *Revada*, 574 F.2d at 1049.

United States v. Dewing appears to be the only case where the Tenth Circuit has found preindictment delay to be a violation of Due Process and ordered dismissal of the indictment. 2 F.3d 1161 (Table), 1993 WL 307946, *1. The defendant in *Dewing* was found with a gun while awaiting trial on state charges. Federal authorities represented to the New Mexico state court that the defendant would not be prosecuted for the possession of a firearm while on bond. *Id* at *1. The state court took this into account at sentencing and sentenced the defendant to nine years of punishment. *Id*. At *1-2. The defendant was then federally indicted post-release from the state sentence, and “was prejudiced by the government’s failure to prosecute when it had all the evidence it needed and represented to the state court that it would not prosecute.” *Id*. Regarding the government’s motive for the delay, the Court found there appeared to be no reason for the delay in prosecuting the defendant other than to reserve that option as a weapon if the state’s punishment was insufficient to satisfy federal prosecutors. *Id*. at *2. In ordering the matter reversed and indictment dismissed, the Tenth Circuit explained that the government cannot explicitly and deliberately represent that they will not proceed with a prosecution, and then later break that promise. *Id*.

The prejudice alleged by the delay in Mr. King’s matter is analogous to that alleged in *Revada* and *Dewing*: the evidence tends to show that Mr. King made an incriminating statement to prison authorities (here, without *Miranda* warnings) under the belief that he would not be prosecuted for the matter because the government had explicitly represented that they declined prosecution. The government had all the evidence it needed when it made the decision not to prosecute him, and that evidence did not change in the nine months that ensued. Mr. King’s statements made in the

administrative disciplinary hearing were then used to strengthen the government's case by asking Lieutenants Wilcox and Kammrad questions specifically designed to undercut any claim of self-defense or staff misconduct. Even if the government concedes that the admissions will not be used against Mr. King at trial, the statements were obtained in violation of Mr. King's Due Process rights and provided the government with a tactical advantage after Mr. King had explicitly invoked his right to counsel during the investigation.

B. The delay provided the government with tactical advantage and harassed Mr. King.

Having made this showing of prejudice, Mr. King acknowledges that he must also demonstrate that the preindictment delay in this matter was purposefully designed to gain tactical advantage or to harass Mr. King. *United States v. Colonna*, 360 F.3d at 1176.

The Tenth Circuit has rejected many claims of prejudicial preindictment delay for a failure to allege any motive by the government to delay or harass the defendant. See *United States v. Wood*, 207 F.3d 1222, 1225 (rejecting claim as vague and conclusory where no evidence of improper government motive); *United States v. Johnson*, 120 F.3d 1107, 1110 (10th Cir. 1997) (no allegation of improper motive); *United States v. Jenkins*, 701 F.2d 850, 855 (10th Cir. 1983) (no allegation or evidence of improper government motive). When examining government motive in preindictment delay, the Court in *Lovasco* noted that the government conceded that “[a] due process violation might also be made out upon a showing of prosecutorial delay incurred in reckless disregard of circumstances, known to the prosecution, suggesting that there existed an

appreciable risk that delay would impair the ability to mount an effective defense.” 431 U.S. at 795; n. 17.

The law is clear that a good faith investigation justifies even prejudicial preindictment delay, which should be contrasted with “delay undertaken by the government solely to gain tactical advantage over the accused.” *Lovasco*, 431 U.S. at 795. The Tenth Circuit recognizes that the government may lawfully delay indictment for all manner of administrative reasons, including case backlogs, attorney shortages, or the nature of the case. See e.g., *United States v. Colonna*, 360 F.3d 1169 (defendant failed to rebut government explanation for superseding indictment five days before trial); *United States v. Trammell*, 133 F.3d 1343, 1351 (10th Cir. 1998) (prosecution explained office was short-staffed and there was no indication that the delay was undertaken with the purpose of working injury to the ability of the defendant to defend the action); *United States v. McClain*, 501 F.2d 1006 (10th Cir. 1974) (39-month delayed indictment explained by complex nature of white-collar case).

Here, Mr. King does not need to speculate about the government’s motives because he has demonstrated that the government did in fact obtain a tactical advantage via the government’s own declination to pursue charges and Mr. King’s reasonable reliance on said declination: an un-*Mirandized* admission to the allegation and explanation of the circumstances provided to the prosecution team; the team later correctively re-interviewed the two witnesses implicated by Mr. King’s allegations of staff misconduct.

During the January 2019 disciplinary hearing Mr. King disputed that he was interviewed in an “office.” Exhibit C at 1, 3. Mr. King’s statements were provided to the

prosecution team (Exhibit E) and then used to strengthen the government's case by prompting questions to Lieutenants Wilcox and Kammrad specifically designed to undercut any claim of self-defense or officer wrong-doing. In April 2019, Lieutenant Wilcox had an interview with the prosecution team focused in part on why Mr. King was taken to the storage room. Exhibit G. The statements obtained from the DHO hearing essentially allowed for the government to obtain information about Mr. King's defense that was otherwise unavailable and unknown. The government then used that information to bolster the testimony of their primary witnesses in the month before indictment.

Mr. King was further prejudiced by the destruction of apparently exculpatory evidence by FCI Florence officers who destroyed exculpatory video in violation of policy and Mr. King's Fifth Amendment right to exculpatory evidence. The destruction of evidence and resultant prejudice is the subject of a separate motion to Dismiss for Destruction of Exculpatory Evidence.

Nor does Mr. King speculate whether government intended to harass him: he was in fact harassed in the period between the date of the allegation and his appearance before this Court. The delay in indictment in this matter harassed Mr. King through multiple arbitrary prison transfers shuttling him across the country via "diesel therapy" and perpetually housing him in administrative segregation without visits from loved ones or attorneys, restricted from access to phone, mail, and email. It is significant that Mr. King was repeatedly transferred outside of Colorado: shortly after sentencing in the District of Kansas during the summer of 2016, Mr. King was transferred to Englewood, Colorado to serve his sentence. Mr. King is husband and co-

parent to a partner and children who live in Colorado, and valued his ability to have visits and participate in prison programs. See Exhibit C: DHO Report questions written by Eric King. The repeated, arbitrary, unnecessary transfers of Mr. King in segregated status to special housing units throughout the country severely impacted his physical and mental health. The conditions of these transfers and of Mr. King's confinement are currently subject to pending civil rights/FTCA litigation in this district. See *Eric King v. United States et al*, 1:21-cv-01421 (D.Ct CO 2021).

III. CONCLUSION

Preindictment delay rises to a constitutional violation when the defense is substantially prejudiced by the delay and the reasons for the prosecutor's delay are improper. The nine-month delay in indictment in this matter substantially prejudiced and harassed Mr. King while allowing the government to obtain a tactical advantage. The delay in indictment resulting from the government's explicit declination of criminal charges prejudiced Mr. King by allowing government agents to trick and unconstitutionally obtain admissions prejudicial to Mr. King's defense, and then use this information to revise and bolster the government's witnesses accused of misconduct. The government cannot excuse the delay by claiming that the interviews of FCI Florence Lieutenants Wilcox and Kammrad within a month of indictment demonstrate an "ongoing good faith investigation" when the re-interview of the witnesses was itself prompted and informed by the unlawfully obtained prejudicial statement and evidence from Mr. King. Mr. King has carried his burden of demonstrating that this delay was a violation of his right to Due Process guaranteed by the Fifth Amendment because he has established that he suffered actual prejudice as a result of the delay. Mr. King has

further demonstrated that the delay in indictment provided the government with tactical advantage while also harassing Mr. King.

For these reasons and any others that may appear to this Court, Mr. Eric King respectfully requests that this Court dismiss the single count of the indictment.

Respectfully submitted September 13, 2021,

/s/ Lauren C. Regan

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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2021, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to all other counsel of record.

/s/ Lauren C. Regan

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