

**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 DESTRUCTION OF EVIDENCE

Defendant Eric King, by and through counsel, moves this Court to dismiss the single count of the indictment due to the destruction of exculpatory evidence by FCI Florence officers in violation of Mr. King’s Fifth Amendment Due Process right to obtain and present exculpatory evidence in his defense. 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. Discovery provided by the government shows that Mr. King was summoned to the FCI Florence lieutenant offices.

Administrative Lieutenant Donald Wilcox ordered Mr. King to an interview in the

Lieutenant storage room where the government alleges that Mr. King assaulted, obstructed, or impeded Lieutenant Wilcox in violation of 18 U.S.C. 111.

Multiple officers responded and restrained Mr. King before removing him from the Lieutenant storage room. Once outside, discovery shows that officers reported to the FBI that Mr. King continued to be aggressive and additional use of force was used to restrain him on the ground and put him into a restraint chair before carrying him to the Special Housing Unit (SHU). See Exhibit A: 09/10/2018 Jeremy Kammrad FBI Interview (INV0123-125) (“King moved forward to continue the attack... repeatedly tried to pull away from officers, as a result they called for the restraint chair... King was “talking shit” while Kammrad and others were trying to move him, made multiple statements including “that lieutenant deserved it” and that Lieutenant Wilcox was “messing with the wrong guy.”); Exhibit B: 09/10/2018 L. Reynolds FBI Interview (INV0127-128)(“King started moving toward Kammrad... Reynolds and Kammrad took King to ground.... Reynolds repeatedly ordered King to give her his arms so they could restrain him... King was bouncing around as staff was trying to escort outside”); Exhibit C: 09/10/2018 R. Giconi FBI Interview (INV0288-289)(When Giconi arrived “King was not listening to staff members’ orders so Giconi told them to place King on the ground to gain control of him. Giconi also directed a staff member in the area to get the striker chair. Then ordered the “stryker” chair... Giconi went to SHU where King was placed in four-point restraints due to his assaultive behavior and continued disobedience of orders following the assault. While checking on EK in four points EK spontaneously said DW punched him so he defended himself. Giconi said not going to talk to him).

Upon arrival to the Special Housing Unit (SHU), officers determined that further restraint was needed and “due to his disruptive behavior inmate King was transitioned from the restraint chair to four-points [restraints] at 2:10PM where he will remain until a pattern of self-control can be established.” Exhibit D: Bureau of Prisons Form 583 Report of Incident, page 3 (INV0920). At 2:15PM Lieutenant Kammrad noted that Mr. King was placed in hard four-point restraints due to assaultive behavior, that the restraints had not had a desired calming effect, and that Mr. King would remain in restraints until self-control could be established. Exhibit E: Two-Hour Lieutenant Restraints Check Form (INV0926).

BOP policy and regulations have specific rules regarding staff involvement in and documentation of any kind of use of force. See 28 CFR Subpart C “Use of Force and Application of Restraints on Inmates.” The Bureau has issued guidance to its employees, and procedural requirements for use of force (up to and including four point restraints) can be found at the BOP Program Statement 5566.06. 28 CFR Section 552.26 is dedicated to documentation requirements whenever staff uses force against a prisoner and requires staff to “appropriately document all incidents involving use of force, chemical agents, or non-lethal weapons. Staff shall also document, in writing, the use of restraints on an inmate who becomes violent or displays signs of imminent violence.” The program statement further directs that “Staff must obtain a video camera immediately and record any use of force incident, unless it is determined that a delay in resolving the situation would endanger the inmate, staff or others.” Prog State 5566.06(14)(c). Bureau policy further says that the “Captain must maintain all

documentation, including the videotape and original BP-E583 for a minimum of 2 ½ years.”

At the time, Mr. King was represented by counsel Amanda Schemkes. On September 20, 2018, Ms. Schemkes sent a preservation request letter to the Bureau of Prisons at Florence specifically requesting retention of all video evidence. Exhibit F: 09/20/2018 Email and Evidence Preservation Letter from Amanda Schemkes, Esq.

In response to a discovery request from defense counsel for all video depicting Mr. King’s restraint and forcible movement from outside of the Lieutenant’s office to four-point restraints in the SHU, the United States attorney represented that no such video was available. The government did provide documentation from a May 7, 2020 interview with the FBI wherein FCI Florence Special Investigative Services (“SIS”) Lieutenant Robert Cordova explained that SIS did not save the video from the SHU cameras that would have shown Mr. King being moved to the holding cell, and that such video was not saved because Mr. King was being compliant at the time. Exhibit G: 5/7/2020 Robert Cordova FBI Interview (INV0924-0925).

Mr. King now moves this Court to dismiss the single count of the indictment due to the government’s destruction of exculpatory and impeachment evidence in violation of Bureau of Prison policy and the Fifth Amendment guarantee to Due Process.

II. ARGUMENT

In *Brady v. Maryland*, 373 U.S. 83 (1963), the United States Supreme Court ruled that “suppression of evidence favorable to the accused was itself sufficient to amount to a denial of due process.” *Id.* at 87. The *Brady* Court further noted that “[t]he suppression of evidence favorable to an accused upon request violates due process

when the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.” *Id.* The government’s obligation of disclosure under *Brady* applies equally to potential impeachment information as it does to exculpatory and mitigating evidence. In *United States v. Bagley*, 473 U.S. 667 (1985), the Supreme Court disavowed any difference between exculpatory and impeachment evidence for Fifth Amendment *Brady* purposes. When witness reliability “may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within [the] general rule [of *Brady*].” *United States v. Giglio*, 405 U.S. 150, 154 (1972) as cited in *Bagley*, *supra* at 677.

“A failure to preserve exculpatory evidence violates due process if the evidence was exculpatory and the exculpatory value was apparent before its loss.” *California v. Trombetta*, 467 U.S. 479, 489 (1984). When the evidence was not “apparently exculpatory” but merely “potentially useful,” the failure to preserve evidence does not violate due process unless the criminal defendant can show bad faith on the part of the government. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988). See *United States v. Beckstead*, 500 F.3d 1154 (10th Cir. 2007). The video from the Special Housing Unit (SHU) demonstrating Mr. King’s compliance was valuable and necessary exculpatory evidence for his complete defense. The evidence was also invaluable impeachment evidence and cannot be duplicated as a method of impeaching multiple law enforcement officers. The Bureau of Prisons knew of the exculpatory character of the evidence and destroyed the recording(s) in bad faith, against policy, as well as after counsel for Mr. King made a timely and specific request for preservation of the evidence

in September 2018; such destruction amounts to a denial of due process which can only be remedied by dismissal of the indictment in this case.

A. The exculpatory and impeaching nature of the video was apparent.

Under the two-prong *Trombetta* test governing claims regarding destruction of exculpatory evidence, the government violates a defendant's right to due process when: (1) it destroys evidence whose exculpatory significance is "apparent before" destruction; and (2) the defendant remains unable to "obtain comparable evidence by other reasonably available means." *Trombetta*, 467 U.S. at 489. *United States v. Bohl*, 25 F.3d 904 (10th Cir. 1994). Mr. King bears the burden of showing that the missing evidence met this standard when it was lost. *United States v. Gomez*, 191 F.3d 1214, 1218 (10th Cir. 1999). The constitutional duties imposed on the government do not require the government to preserve every possible piece of evidence, and the mere fact that the government controlled the evidence and failed to preserve it is by itself insufficient to establish bad faith and does not necessarily give rise to a Due Process violation. *United States v. Richard*, 969 F.2d at 853-54 (no due process violation where potentially exculpatory boxes of marijuana were destroyed before trial).

The duty the Constitution imposes on the state to preserve evidence is "limited to evidence that might be expected to play a significant role in the suspect's defense." *Trombetta*, at 489. In *Trombetta*, the Supreme Court opined that the State of California did not violate Due Process by failing to preserve the breath samples of DWI suspects because "the chances [we]re extremely low that preserved samples would have been exculpatory," and because the criminal defendants complaining about the destroyed evidence had "alternative means to demonstrate their innocence" including arguments

regarding faulty calibration, extraneous interference with machine measurements, and operator error. *Trombetta*, 467 U.S. at 479. See also *United States v. Beckstead*, 500 F.3d 1154, 1160 (no due process violation where defendant's claim that methamphetamine lab testing would have revealed exculpatory information was conclusory).

Unlike the destroyed breath samples in *Trombetta* or the un-tested methamphetamine lab equipment in *Beckstead*, the exculpatory and impeachment value of the destroyed audio/video recording(s) in this case is not based purely on speculation, conjecture, or chance. Based on the facts, there are no alternative means of obtaining different or alternative exculpatory evidence to adequately impeach the false narratives provided by numerous government witnesses in this case. The critical importance of this evidence was made clear to the government by the timely Notice of Preservation of Evidence that was sent by Mr. King's attorney at the time.

The destruction of the video recording meets the requirements of *Trombetta*. Florence SIS Lieutenant Cordova clearly acknowledged to the FBI that the video was deleted **because** it depicted Mr. King's compliance, and the only issue for the jury to decide in this case will be whether or not to believe FCI Florence officials regarding Mr. King's alleged acts of assault, obstruction, or interference. The case in essence boils down to who threw the first punch and whether Mr. King was responding from a defensive posture. If Mr. King is fighting, resisting or otherwise out of control on the video, a jury may infer he was aggressive and may have instigated violence against Wilcox in the closet; but on the other hand, if King is compliant and not resisting in the immediate aftermath, a jury may infer that he merely defended himself in response to an

assault by staff. The video is key to establishing this question before the jury. The content of the video was therefore clearly evidence whose exculpatory significance was apparent before the evidence was destroyed.

The Bureau of Prisons, an agency of the Department of Justice, destroyed evidence that was exculpatory for Mr. King and could be used to impeach the government's witnesses, and there is no way to recover or recreate the video.

B. The video was destroyed in bad faith, against policy, and in spite of an attorney's preservation request.

Brady and its progeny are clear: the Due Process guarantees of the Fifth Amendment to the United States Constitution require the government to disclose to the defense information that is exculpatory, mitigating, or may hold impeachment value, even in the absence of a request by the defense. *United States v. Agurs*, 427 U.S. 97 (1977). When the government violates this duty to a criminal defendant's constitutionally protected right to due process by destroying potentially exculpatory evidence, reviewing courts will not find a violation of a defendant's due process rights unless the evidence was lost or destroyed in bad faith. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988); *United States v. Bohl*, 25 F.3d 904, 910 (10th Cir. 1994). As the defendant, Mr. King has the burden of establishing that the government acted in bad faith. See *United States v. Smith*, 534 F.3d 1211 (10th Cir. 2008).

The mere fact that the government controlled evidence and then failed to preserve it is by itself insufficient to establish bad faith. *United States v. Richard*, 969 F.2d at 853-854. In the Tenth Circuit, a trial court reviewing claims of destruction of evidence should consider several factors when determining whether the government acted in bad faith. See *Bohl*, 25 F.3d at 911-913. These factors include:

(1) Did the Government have explicit notice that the defendant believed the evidence was exculpatory?

(2) Is the claim that evidence is potentially exculpatory conclusory, or is it "instead . . . backed up with objective, independent evidence giving the government reason to believe that further tests on the [destroyed evidence] might lead to exculpatory evidence"?

(3) Did the Government still have the ability to control the disposition of the evidence at the time it was indicated that it might be exculpatory?

(4) Was the evidence disposed of central to the case?

(5) Does the Government offer any innocent explanation for its failure to preserve the evidence?

Id., See also *United States v. Simpson*, 845 F.3d 1039 (10th Cir. 2017) (weighing *Bohl* factors when examining claim regarding hard drive to conclude that claims of potential exculpation were conclusory and government provided innocent explanation that hard drive crashed); *United States v. Smith*, 534 F.3d 1224-1225 (rejecting due process claim where *Bohl* factors showed evidence was destroyed in compliance with department policy).

The timing of when evidence was destroyed or lost matters to this inquiry, and generally destruction of evidence according to established government procedure "precludes a finding of bad faith absent other compelling evidence." *Beckstead*, 500 F.3d at 1159. *Cf Bohl*, 25 F.3d at 911-12 (bad faith suggested because government destroyed physical evidence *after* Defendant requested the evidence and explained potential exculpatory value).

Here, it is clear that FCI Florence officers believed that the video demonstrated Mr. King's compliance in the middle of what various officers characterize as ongoing aggression and resisting by Mr. King. Exhibit G. It is unclear when this video was destroyed, but it is clear that in the month following the alleged incident counsel for Mr. King explicitly requested that the prison retain all video from that location on that date. Exhibit F. It is also clear that Bureau policy anticipates that this evidence will be retained for at least 2 years. See 28 CFR 552.27, Prog Stat P5566.06 14(b). The video evidence was critical to Mr. King's defense, as he is charged with assaulting or obstructing bureau of prison staff, and according to those same staff, the video portrayed Mr. King's compliance in the minutes immediately following the encounter in the storage room. The absence of an innocent explanation for the loss of evidence can also point to bad faith; here, the government cannot offer an innocent explanation for the loss because the video was very clearly intentionally destroyed when prison guards realized it's exculpatory value.

III. CONCLUSION

FCI Florence officials admitted to the FBI that they destroyed the video of Mr. King because the video showed that Mr. King was compliant. This amounted to destruction of apparently exculpatory evidence and a violation of due process. See *California v Trombetta*, 467 U.S. 479, 489 (1984). Should the Court find that the video was only "potentially exculpatory," and analyze the matter according to *Arizona v. Youngblood*, (488 U.S. 51) and the Tenth Circuit's *Bohl* factors, Mr. King has demonstrated that the government was on notice by Mr. King's counsel to preserve the evidence, the destruction of the video was contrary to BOP policy, the video was central

to the issues because it would both exculpate Mr. King and impeach the government's witnesses, and the government cannot offer any innocent explanation for the destruction. For these reasons and any other that may appear to this Court, Mr. King thus requests that the Court find that the destruction of exculpatory evidence violated his rights to due process and order the single count of the indictment to be dismissed.

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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