

**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 AMENDED MOTION TO DISMISS FOR OUTRAGEOUS
GOVERNMENT MISCONDUCT**

Defendant Eric King, by and through attorney Lauren Regan, of the Civil Liberties Defense Center, hereby respectfully moves this Court to dismiss the single count of the indictment due to outrageous government misconduct throughout the August 17-20, 2018 interaction with, and investigation of Mr. King. Such misconduct violates the Fifth Amendment’s guarantee of Due Process, and this Court must dismiss the indictment.

I. FACTUAL BACKGROUND

Government officials at FCI Florence engaged in a course of egregious, conscience-shocking misconduct throughout four days of interaction with, and investigation of Mr. King. This misconduct includes (a) the purported interview of Mr. King in an off-camera storage closet, (b) the brutally prolonged and inappropriate use of physical restraints, (c) falsification of evidence or lies to the FBI, and (d) interference with Mr. King’s right to counsel. Each instance of misconduct is in itself “so shocking...

and intolerable that it offends the universal sense of justice” *United States v. Perrine*, 518 F.3d 1196, 1207 (10th Cir. 2008), and the totality of the circumstances reveals a sequence of events where the conduct of law enforcement is so outrageous that due process principles should absolutely bar the government from invoking the judicial process of this Court to obtain a conviction. See *Rochin v. California*, 342 U.S. 165 (1952); *United States v. Russell*, 411 U.S. 423, 431-32 (1973).

A. Mr. King was taken to an interview in an off-camera storage room.

On August 17, 2018, FCI Florence Special Investigative Service (“SIS”) officers monitoring Mr. King’s email decided that Mr. King should be interviewed regarding a message he sent to his wife. At approximately 1:30 PM, Mr. King was called to the Lieutenant’s office. An Administrative Lieutenant (Lt.) then ordered Mr. King to a storage room at the opposite end of the hall from the Lt.’s office. Material provided in discovery seems to indicate that the storage room is 8.5 x 11 feet (Exhibit A: Evidence Recovery Team Sketch (INV0855)), and shows that the room contained unsecured crates, a cleaning supply cart, desk, mops, brooms, rakes, mop bucket, filing cabinets, and cleaning supplies. Exhibit B: Photos of Lt. Storage Room B1 (INV0793), B2 (INV0802), B3 (INV0818), B4 (INV0795), B5 (INV0820). Photos from the date of the alleged offense show a dry-erase board on the floor reading “have camp orderly clean sidewalk” with work assignments and schedules for staff. B5. There are no cameras filming the entrance to, or interior of the storage room. The indictment alleges that in the storage room, Mr. King assaulted, obstructed, or resisted the Lt. in violation of 18 U.S.C. §111.

B. FCI Florence staff held Mr. King in restraints for seven hours

Directly after the alleged assault on August 17, 2018, Mr. King was subjected to multiple forms of unnecessary, punitive physical force and restraint for over seven hours until he was transferred from FCI Florence to USP Florence at 9:00PM. Responding BOP staff report taking Mr. King to the ground inside of the storage room, and his clothing was smeared with blood. Exhibit C: Photos of Eric King clothing (INV0822-INV0825). Outside of the storage room and lieutenant's hallway, Mr. King was held on the ground until he was placed in a restraint chair, called a "Striker chair," which was used to transport Mr. King to the Special Housing Unit ("SHU") of FCI Florence, where his clothing was cut off of him. Exhibit D: Video of application of restraints (INV0870). Prison Nurse Fraboni conducted a cursory medical examination of Mr. King, noting that he complained of pain to his head, that affect was "cooperative, flat" and that his mood was "indifferent. Exhibit E: 08/17/18 L. Fraboni Medical Assessment (INV0717). Video evidence corroborates that he was cooperative. Ex. D. The government has not produced any video depicting Mr. King acting combative, aggressive, or non-compliant.

Once the medical assessment was completed, Mr. King was put into hard, four-point restraints for approximately five hours. Exhibit F: Lt. 2-Hour Restraint Check (INV0926). He was initially left without a blanket or shirt (Exhibit D) and was not given food or allowed to use the restroom, ultimately forced to urinate on himself. Exhibit G6: SHU video #6 @3:30 (INV0866). BOP video depicts Mr. King while he was being placed in restraints and his time in restraints; at no point does he objectively demonstrate out of control or violent conduct justifying the use of hard, four-point restraints.¹ Exhibit G:

¹ See 28 CFR 552.22: Principles governing use of force and restraints

Videos depicting SHU: G1 (INV0861), G2 (INV0862), G3 (INV0863), G4 (INV0864), G5 (INV0865), G6 (INV0866), G7 (INV0867).

Mr. King was removed from the four-point restraints when he was finally transferred to USP Florence at 9:00PM on August 17, 2018. At USP Florence, Mr. King was held in the SHU for three days before he was interviewed by Officer Erb and Officer Silva on Monday, August 20, 2018. During the three days in the SHU, Mr. King was not permitted a phone call with anyone, including his lawyer. He was not provided a pencil, paper, or other material to write to his family or lawyer. The cell he was placed in had an overflowing toilet with feces all over the floor and walls.

C. FCI Florence officials lied to the FBI and/or destroyed, lost, or falsified evidence

A review of discovery provided by the government shows that there are multiple instances of destroyed, missing, or falsified evidence. The destruction of apparently exculpatory evidence in violation of Due Process and *Trombetta v. California* (467 U.S. 479) is addressed by separate motion. In addition to the destruction of the exculpatory video, FCI Florence officers lost the waiver of *Miranda* rights that Mr. King purportedly signed on August 20, 2018, failed to create or preserve evidence of use of force and restraint, and either falsified evidence or lied to the FBI.

At least two hours of video depicting Mr. King in hard four-point restraints is not accounted for. Documents show that Mr. King was in hard four-point restraints from 2:00PM until 7:25PM (325 minutes). Exhibit F. The government provided approximately 300 minutes of video purporting to depict Mr. King's total time in restraints in the FCI Florence SHU (hard and soft restraints). Exhibits G1-G7. According to the logs provided by the government, there should be at least 325 minutes of video depicting Mr. King in

hard four-point restraints between 2:00PM and 7:25PM. Exhibit F. The government has not accounted for the gaps in evidence to defense counsel. Documents provided in discovery further show that FCI Florence officials lost the *Miranda* rights waiver purportedly signed by Mr. King on August 20, 2021. Exhibit H: 11/15/18 FBI Communication lost advice of rights (INV0413).

Various pieces of evidence provided in discovery show that FCI Florence officials either falsified BOP documents or lied to the FBI agent investigating the matter. Two FCI Florence officials individually represented to the FBI that they did not have contact or interaction with Mr. King on August 17, 2018. Exhibit I: 10/03/18 M. Abraham FBI Interview (INV0303). Exhibit J: 10/03/18 R. Batouche FBI Interview (INV0306). Contrary, material provided in discovery shows that both individuals documented their interactions with Mr. King during the time he was held in restraints in the FCI Florence SHU. Exhibit F; Exhibit K: 08/17/18 R. Batouche Medical Assessment (MR069-071).

D. DOJ and FCI Florence Officials Interfered with Mr. King's access to counsel

On August 19 and August 20, 2018, Mr. King's attorney at the time, Amanda Schemkes, reached out to Special Assistant United States Attorney, James Wiencek, attempting to have contact with her client. Exhibit L: A. Schemkes and J. Wiencek emails 08/19/18-08/20/18 (INV0931). Ms. Schemkes had an established attorney-client relationship with Mr. King. Exhibit M: Central File Inmate Visitor List (INV0498). Mr. Wiencek refused to provide Ms. Schemkes with information regarding, or access to, Mr. King, instead, as an apparent delay tactic, instructed her to have Mr. King complete an authorization allowing Mr. Wiencek to talk to Ms. Schemkes. Exhibit L. Mr. King was not

informed of Ms. Schemkes' attempted requests for contact, nor was Mr. King provided a legal call with Ms. Schemkes prior to his interrogation.

II. LEGAL ARGUMENT

When the government's conduct during an investigation is sufficiently outrageous, the courts will not allow the government to prosecute offenses developed through that conduct because [doing so] would offend the Due Process Clause of the Fifth Amendment. *United States v. Pedraza*, 27 F.3d 1515, 1521 (10th Cir. 1994). Outrageous governmental conduct is most often asserted as a defense in cases involving alleged entrapment and/or excessive governmental involvement in the creation of a criminal offense. The Tenth Circuit has developed a two-part test governing adjudication of outrageous governmental conduct claims in this context. See, e.g., *Id.* This test, however, is plainly inapplicable to cases alleging outrageous governmental conduct outside the context of an entrapment/excessive governmental involvement defense. Thus, Mr. King directs this Court's attention to the Supreme Court's seminal decision in *Rochin v. California*, 342 U.S. 165 (1952) as a starting point for analysis here.

In *Rochin*, 342 U.S. at 172-74, the Supreme Court held that "conduct that shocks the conscience" may not be used to further a criminal prosecution and, as a corollary, convictions may not be "obtained by methods that offend the Due Process Clause." In *Rochin*, the petitioner had been convicted of possessing morphine obtained by police forcibly pumping his stomach. *Id.* at 166. As the Court wrote, "to sanction the brutal conduct" before it "would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society." *Id.* at 173-

74. The Court rejected the notion that there was no constitutional basis for its opinion because there was not a specific rule prohibiting the exact official conduct at issue.

Rather, the Court recognized:

[There is a] general requirement that States in their prosecutions respect certain decencies of civilized conduct. Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend “a sense of justice.”

Id. at 173. See also *County of Sacramento v. Lewis*, 523 U.S. 833, 846-47 (1998) (reaffirming *Rochin*’s prohibition on conduct “that shocks the conscience” and violates the “decencies of civilized conduct”); *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957) (noting the importance of analyzing the extent to which governmental conduct is “brutal” and “offensive” in assessing due process claims under *Rochin*); *United States v. Spivey*, 508 F.2d 146, 149-50 (10th Cir. 1975) (noting, albeit in an entrapment-related context, that “the more immediate the impact of the government’s conduct upon the particular defendant, the more vigorously would be applied” a test for impropriety under a theory of outrageous governmental conduct).

A. The government’s misconduct in the entire incident and investigation of Mr. King is so shocking, outrageous, and intolerable that it offends a universal sense of justice

Here, the prosecution of Mr. King is inextricably tied to the conscience-shocking brutality and offensive disregard for Mr. King’s constitutional rights to due process, assistance of counsel, and freedom from cruel and unusual punishment displayed by BOP officials throughout both the events giving rise to the charges and the subsequent investigation. The alleged assault cannot be viewed in isolation, but is properly considered as a product of a series of arbitrary and offensive acts of brutality and other

deprivation of rights directed at Mr. King. The incident initially arose when bizarrely and inexplicably took Mr. King alone to the storage room at the end of the lieutenant's hallway in order to be obscured from view raising a clear specter of intended misconduct and official impropriety. Exhibit N: 04/15/19 D. Wilcox FBI Interview (INV0429) The storage room was clearly intended as a place accessible only to staff, as it contained multiple unsecured items, chemicals, and notes regarding prison count and cleaning logistics. Exhibits B1-B5. There are no cameras filming the entrance to or interior of the storage room. Lt. Wilcox did not attempt to obtain audio or video recording of this "interview," nor did he have any documents to review, nor pen or paper to take any notes. Government misconduct preceded the events underlying the allegation, and continued throughout the rest of Mr. King's time at the Florence prison complex.

B. The brutal application and duration of arbitrary restraint violated Mr. King's rights to be free from excessive force and cruel and unusual punishment

Though it may be uncomfortable and time-consuming, counsel encourages the Court and government to personally review all of the video evidence provided to the defense and submitted in support of this motion. None of the video depicts Mr. King being combative, aggressive, assaultive, or obstructive, but instead depicts Mr. King displaying signs of calm and cooperation throughout the seven hours he is held in various forms of restraint.

When the government's conduct during an investigation is sufficiently outrageous, the courts will not allow the government to prosecute offenses developed through that conduct because [doing so] would offend the Due Process Clause of the Fifth Amendment. *United States v. Wagner*, 951 F.3d 1232, 1253 (10th Cir. 2020). The

methods of physical restraint punitively used in violation of BOP policy in the SHU at FCI Florence on August 17, 2018, are exactly the type of methods too close to the rack and the screw that the Supreme Court found offensive to Due Process in *Rochin v. California*. 342 U.S. 165. See also *Whitley v. Albers*, 475 U.S. 312, 320-21, 327 (1986) (comparing *Rochin*'s "shocks the conscience" standard to the Eighth Amendment prohibition on cruel and unusual punishment and finding that in the context of prison riot response, force punitively applied for the purpose of causing harm is cruel and unusual punishment).

The federal law governing use of force and application of restraints in the Bureau of Prisons can be found at 28 C.F.R. Subpart C. Staff must use only the amount of force necessary to gain control of a prisoner. 28 C.F.R. 555.20. The law distinguishes between categories of "immediate use of force" and "calculated use of force/application of restraints" where a prisoner is in an area that can be isolated and where there is no immediate, direct threat. 28 C.F.R. 552.21. No matter the circumstances, the principles governing use of force and application of restraints contemplates that staff will attempt to gain a prisoner's voluntary cooperation and use only the amount of force necessary until the prisoner is able to regain self-control. 28 C.F.R. 552.22.

When FCI Florence staff secured Mr. King following the emergency call to the storage room, their response was governed by the immediate use of force principles. After Mr. King was removed from the storage room and hallway area, the use of force and restraints fell under the category of "calculated use of force," and policy required that Mr. King be restrained only long enough for Mr. King to regain self-control. 28 C.F.R. 552.22(f). Video evidence demonstrates that Mr. King was cooperative, quiet,

and compliant with officers cutting off his clothes, performing medical examinations, and placing him in four-point restraints inside of the SHU. Any further restraint was unnecessary, retaliatory and punitive.

BOP policy concerning four-point restraint procedure is very specific: soft restraints must be used unless proven ineffective, staff should check a prisoner every 15 minutes, and a Lt. is required to review the restraints every two hours to determine if they have had the required calming effect. 28 CFR 552.24. At every two-hour review, the Lt. should give the prisoner an opportunity to use the toilet unless the prisoner continues to resist or be violent. *Id.* Even though he was displaying signs of self-control, Mr. King was placed into hard four-point restraints at 2:00PM, and was not placed into soft restraints at 7:25PM. Exhibit F. The 4:00PM Lt. restraint check noted that staff were “ordered by capt[ain] not to speak with inmate” that Mr. King “did not request use of toilet,” and that he would “remain in hard four-point restraint until rights have been read.” *Id.* The 6:00PM entry repeats the information written on the 4:00 entry, stating that Mr. King should remain in restraints until his rights were read. *Id.*

The 15 minute staff restraint check log provided by the government shows that Mr. King requested food at 5:45PM (Exhibit O: Fifteen Minute Restraints Check Form (INV0928)), but Mr. King was not given food until he was released from restraints at 7:25PM. Exhibit F. Video shows that Mr. King was calm throughout his time in four points and was not offered an opportunity to use the toilet at all during the time he was in four-point restraints. The evidence further shows that when Mr. King was allowed to sit, he informed staff that he had urinated on himself and exclaimed in pain as his arms

were lowered from the forced position. Exhibit G6 @3:30-4:10. Mr. King remained in soft four-point restraints until he was transferred to USP Florence at 9:00PM. Exhibit F.

FCI Florence officers violated their own policy and the Fourth Amendment's guarantee to be free from excessive force when they punitively held Mr. King in a restraint chair and later both hard and soft four-point restraints without regard to his behavior necessitating such restraint (literally the closest analogy to the rack). The force and restraints officials used in response to the alleged assault of another officer was cruel and unusual punishment in violation of the Eighth Amendment and Bureau policy and were clearly applied "maliciously and sadistically for the very purpose of causing harm." *Whitley v. Albers*, 475 U.S. at 327.

C. Destruction and falsification of evidence

Misconduct in collecting incriminating evidence may rise to the level of a due process violation when the misconduct is outrageous enough to shock the conscience of the court. *United States v. Kennedy*, 225 F.3d 1187 (10th Cir 2000). Following the incident from which the charges in the instant case arise, BOP officials chose not to capture and/or later destroyed video of Mr. King behaving calmly and non-combatively. The destruction of this apparently exculpatory evidence in violation of Due Process and *Trombetta v. California* (467 U.S. 479) is addressed by separate motion. A review of discovery provided by the government shows other instances of destroyed, missing, or falsified evidence.

Federal law and BOP policy requires staff to "appropriately document all incidents involving the use of force... Staff shall also document, in writing, the use of restraints on an inmate who becomes violent or displays signs of imminent violence." 28

CFR 552.27. These requirements are further detailed by the BOP policy statement which says that “calculated use of force shall be videotaped following the sequential guidelines presented in the correctional services manual. Original videotape must be maintained and secured as evidence in the SIS office.” BOP Use of Force Program Statement P5566.06 14(c) accessed at

https://www.bop.gov/policy/progstat/5566_006.pdf

At least two hours of video depicting Mr. King in hard four-point restraints is not accounted for. Documents show that Mr. King was in hard four-point restraints from 2:00PM until 7:25PM (325 minutes). Exhibit F. The government provided approximately 300 minutes of video. Of the video, 200 minutes of video show Mr. King in hard four-point restraints: G1 (52:20 minutes), G2 (32:53 minutes), G3 (52:31 minutes), G4 (42:06 minutes), G5 (16:59 minutes); and 100 minutes of video depict him in soft restraints and beginning the transfer process to USP Florence: G6 (52:25 minutes) and G7 (52:19 minutes). The video depicting Mr. King accords with the restraint check logs documenting approximately 95 minutes of soft restraints. *Compare* Exhibits G6 and G7 with Exhibit F. According to the logs provided by the government, there should be at least 325 minutes of video depicting Mr. King in hard four-point restraints between 2:00PM and 7:25PM. Exhibit F.

All of the video provided shows that Mr. King was calm and cooperative. Given the length and character of the physical force and restraints at issue, creation and maintenance of this video was reasonably required by law and policy. There is no clock or counter visible in any of the videos depicting Mr. King in the SHU, and it is therefore impossible to know what period(s) of time remain unaccounted for. Gaps in the

evidence of such a brutal and prolonged use of force are inexplicable and part of a larger course of official misconduct and cover-up.

The evidence provided by the government further demonstrates that FCI Florence officers either lied to the FBI or falsified documents relating to the investigation of this case and treatment of Mr. King. Discovery shows that FCI Florence Lt. M. Abraham and Nurse R. Batouche both told the FBI that they did not interact with Mr. King on August 17, 2018. Exhibit I (Abraham), Exhibit J (Batouche). However, both officers completed paperwork showing that they were in fact involved with monitoring Mr. King during his time in four-point restraints in the FCI Florence Special Housing Unit. Exhibit F (Abraham). Exhibit K (Batouche).

Legally significant documents signed by Mr. King are also unaccounted for. Mr. King was interviewed in the SHU of USP Florence shortly after noon on August 20, 2018. On November 15, 2018, SIS Officers emailed the FBI to report that they were unable to locate the original waiver of rights purportedly executed by Mr. King. Exhibit H.

The quantity and type of missing evidence at issue here: exculpatory video of Mr. King in various levels of physical restraint as mandated by policy and concededly destroyed by law enforcement; additional video depicting the entire duration of the unlawful use of force is missing or was never created; and the rights waiver signed by Mr. King after three days *incommunicado* is missing or destroyed. This goes beyond negligence and is the type of misconduct that is so shocking, outrageous, and intolerable that it offends universal sense of justice. *United States v. Garcia*, 411 F.3d 1173, 1181 (10th Cir. 2005).

D. The government interfered with the attorney-client relationship, resulting in prejudice to Mr. King

In addition to the conscience-shocking storage room encounter and restraint torture sequence, the government obstructed Mr. King's relationship with his attorney in a manner that interfered with his ability to exercise his right to counsel prior to, and during interrogation. This is itself outrageous government misconduct meriting dismissal of the indictment. In cases examining claims of outrageousness pertaining to alleged government intrusion into the attorney client relationship via use of the attorney as an informant, the Tenth Circuit requires a defendant's submissions to demonstrate awareness of an issue of fact as to each of following three elements (*Voigt* factors): (1) government's objective awareness of an ongoing attorney-client relationship, (2) deliberate intrusion into that relationship, and (3) actual and substantial prejudice. *United States v. Thompson*, 518 F.3d 832 (10th Cir 2008) (citing *United States v Voigt*, 89 F.3d 1050, 1067 (3rd Cir. 1996)).

Though Mr. King does not allege government intrusion upon the content of his communications with counsel, he does allege intentional government misconduct obstructed Mr. King in his exercise of his right to counsel before and during the August 20, 2018 interrogation, in part by obstructing counsel's ability to communicate with Mr. King while concealing this fact from Mr. King. In this case, the government was objectively aware of the ongoing attorney-client relationship between Mr. King and Ms. Schemkes. Exhibit M. On Sunday, August 19, 2018, Ms. Schemkes emailed BOP officials requesting information regarding Mr. King. On the morning of August 20, 2018, BOP attorney/Special Assistant United States Attorney Wiencek responded that Mr. King would need to complete authorization paperwork before Mr. Wiencek would talk to

Ms. Schemkes. *Id.* Ms. Schemkes responded at 10:43AM that she would like to have a legal call with Mr. King as soon as possible; at 12:55PM Mr. Wiencek responded that the request for a legal call had been passed along to Mr. King's unit team. Exhibit L. Mr. Wiencek's acts deliberately intruded with and obstructed Mr. King's ability to access counsel. Mr. King was further prejudiced by these acts because the government was able to obtain admissions from him in spite of asking SIS Detectives Erb and Silva about the possibility of speaking to an attorney.² This interference with Mr. King's ability to communicate with counsel is offensive to the notions of due process, and the Court should dismiss the indictment due to this misconduct alone.

III. CONCLUSION

The collective actions of Lt. Wilcox and BOP officials who assaulted Mr. King and participated in the investigation of this matter "shock[] the conscience[,]" violate the "decencies of civilized conduct[,]" are "too close to the rack and the screw to permit of constitutional differentiation[,]" and ultimately offend any "sense of justice." *Rochin*, 342 U.S. at 172-73. The ongoing course of misconduct in this matter precipitated serious prejudices to Mr. King's legal right to due process, legal rights to be free from excessive force, and cruel and unusual punishment. "[T]o sanction the brutal conduct" such as that displayed by officers at FCI Florence in this matter "would be to afford brutality the cloak of law." *Id.* at 173. To vindicate "the community's sense of fair play and decency" and avoid "discredit[ing] law and thereby [] brutaliz[ing] the temper of a society[,]" Mr. King requests that this Court dismiss the indictment. *Id.* at 173-74.

Dated September 16, 2021.

² The deficiency of the *Miranda* warnings and circumstances of the interrogation are subject of a separate motion to suppress.

Respectfully submitted,

/s/ Lauren C. Regan

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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 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

Lauren C. Regan, Attorney at Law
The Civil Liberties Defense Center