

**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 SUPPRESS

Defendant Eric King, by and through counsel, moves this Court to suppress statements made 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 to exclude statements from Mr. King's interview at USP Florence, and reserves regarding the DHO hearing because he is unsure if the government will seek to admit the statements. Mr. King respectfully requests this Court schedule an evidentiary hearing regarding this matter. 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 FCI Florence Administrative Lieutenant Wilcox. Wilcox had told a second

Lieutenant to leave the storage closet minutes before he punched Mr. King in the face two times. After Mr. King was forced to defend himself from the repeated blows to his face and head, he stood with his hands behind his head until BOP staff responded.

Directly after the alleged assault on August 17, 2018, Mr. King was subjected to hard, four-point restraints for approximately five hours. Exhibit A: Lt 2-Hour restraint check, p. 1-2 . These restraints were applied after Mr. King was repeatedly beaten and threatened by BOP employees who claimed they were acting to subdue him. When Mr. King was placed in the hard, four-point restraint he was stripped of his clothing, left without a blanket and ultimately involuntarily urinated himself. Exhibit B: Video of transition to soft restraints (INV000295)¹. BOP video records Mr. King while he being placed in restraints. Throughout the entirety he is in the restraints, Mr. King objectively does not demonstrate out of control or violent conduct justifying the use of hard, four-point restraints. Exhibit C: (Video of EK application of four-point restraints) (INV0870)².

The use of hard, four-point restraint is governed by BOP's internal Use of Force and Restraint Program Statement, 3.3. Four-point restraints are permissible for use only by authorization by the warden and as a restraint of last resort to subdue an out-of-control inmate.³ Trained BOP staff are required to permit the inmate to use the restroom, to provide a blanket, and to evaluate the person every two hours to ascertain whether the restraints have had a "calming effect" necessitating the inmate's transition to less restrictive restraints.⁴

¹ A conventional media copy of exhibit B was filed in-person with the clerks' office on September 14, 2021. This exhibit is not being conventionally filed again, but remains as previously filed with the Court and Plaintiff.

² A conventional media copy of exhibit C was filed in-person with the clerks' office on September 14, 2021. This exhibit is not being conventionally filed again, but remains as previously filed with the Court and Plaintiff.

³ Use of Force and Restraints 3.3, 552.24. (https://www.bop.gov/policy/progstat/5566_006.pdf).

⁴ Use of Force and Restraints 3.3, 552.24 (https://www.bop.gov/policy/progstat/5566_006.pdf).

Instead of assessing whether Mr. King was “calm,” at least two officers in charge of determining whether Mr. King could or should be transitioned to less restrictive restraints indicated in writing that Mr. King would remain in hard four-point restraints until his “rights have been read” and that they were instructed by “the captain” not to speak with Mr. King. Exhibit A, p. 1. Mr. King was eventually transitioned to soft four-point restraints at around 7:25 pm; at around 9:00 pm on August 17, 2018 he was placed in escort restraints for transport from FCI Florence to USP Florence sometime after 9:00pm. *Id* at 2.

At USP Florence, Mr. King was held in the Special Housing Unit (SHU) for three days before he was interviewed by Officer Erb and Officer Silva on 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. He did not receive medical care, though he exhibited an obvious black eye. Exhibit D: Video of King Miranda Interview. (INV0290)⁵. 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 E: Schemkes email, August 2018, p. 2-3. Mr. King was not informed of Ms. Schemkes attempted requests for contact. Mr. King was not provided a legal call with Ms. Schemkes prior to his interrogation.

During the August 20, 2018 interrogation, Mr. King repeatedly objected to the disgusting and unsanitary conditions of his confinement, the use of painful restraints,

⁵ A conventional media copy of exhibit D was filed in-person with the clerks’ office on September 14, 2021. This exhibit is not being conventionally filed again, but remains as previously filed with the Court and Plaintiff.

and his inability to contact his lawyer or his family. During the interview Mr. King was shackled and seated in a small room with a closed door. As interrogators went over Mr. King's Miranda warnings, he asked clarifying questions about his right to counsel and access to his counsel at least five times, eventually stating "Alright, well I'd really like to talk to my lawyer." Ex. D (video of interrogation) (INV0290). The BOP interrogators did not terminate the interview. Prior to Mr. King actually engaging with the officers and in response to Mr. King's questions about how he could access counsel, the interrogators told Mr. King that he could have a lawyer "after this process" and "after all of this," but was also told he would have to "wait until a lawyer shows up" before questioning. As a result of those statements by BOP, Mr. King allegedly signed a waiver of rights (original document was lost by BOP) and proceeded to make incriminating statements.

Immediately following his Miranda interview at USP Florence, Mr. King was transferred to USP Leavenworth on August 20, 2018. Florence BOP officers investigating the incident wrote in November 2018 that Mr. King was not to be interviewed at USP Leavenworth because he had requested an attorney. Exhibit F: November 2018 FLF Inmate Investigative Report, at 2 (INV0435-39).

In early December 2018, corrections officials at USP Leavenworth told Mr. King that the government declined to prosecute the assault charges threatened against him. This is further corroborated by notes in a later 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 G: 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 related to the August 17 alleged assault at FCI Florence. *Id.* at 1.

During the disciplinary proceedings, Mr. King made statements to the DHO including a direct admission: “I was provoked, that is why I hit him. To defend myself. He hit me.” *Id.* at 3. The DHO paperwork merely asserts: “Inmate admits the charge(s).” *Id.* at 1. The DHO Report and Notice to the Warden of Leavenworth were completed on February 21, 2019; it was then provided to FCI Florence staff and forwarded to the FBI on the same date, again with a focus on Mr. King’s admission during the DHO hearing. Exhibit H: February 21, 2019 FBI Interview Report (INV0440-441). A grand jury returned an indictment against Mr. King on May 19, 2019.

II. ARGUMENT

A. Eric King’s Fifth Amendment right to counsel was violated when Mr. King requested a lawyer and BOP officers continued to interrogate him.

Mr. King unequivocally asserted his right to a lawyer after being *Mirandized* in a custodial situation, but officers nonetheless continued to question him in violation of foundational Fifth amendment precedent. Further, the federal officers communicated conflicting information about Mr. King’s right to counsel, rendering Mr. King’s full comprehension of his rights impossible. Further, BOP officials recognized in November 2018, that Mr. King had invoked his right to counsel, but still subjected him to questioning without a lawyer present during the DHO hearing in January 2019. Because of these substantial constitutional violations, the entirety of Mr. King’s videotaped post-*Miranda* statements, as well as statements from the DHO hearing, must be suppressed.

In determining whether an inmate is “in custody” for the purposes of *Miranda* the Court must scrutinize all of the features of the interrogation. *Howes v. Fields*, 565 U.S. 499 (2012). In *Howes*, the Court held the defendant was not in custody because the defendant was repeatedly reminded he was free to leave, he was not shackled or restrained, he was never *Mirandized*, and he was in a room with the door ajar while being interviewed. *Id.* at 515.

In stark contrast, the facts of Mr. King’s interrogation with Officers Erb and Silva establish he was clearly in custody for the purposes of *Miranda*. Mr. King was shackled throughout the interview; he was never informed he was free to leave (because he was not); in fact, his movements were so restrained officers directed him where and how to move. Mr. King was placed in administrative and punitive detention following the assault by Lt. Wilcox, and was not free to move about the prison. Finally, Mr. King was indisputably *Mirandized*, indicating even the officers believed the interrogation to be a custodial one. The facts pertaining to Mr. King’s custodial interrogation are opposite to the facts in *Howes*. Mr. King was clearly in custody.

Once a suspect in custody asserts the right to counsel, not only must the current interrogation cease, but he may not be approached for further interrogation until counsel has been made available to him. *Edwards v. Arizona*, 451 U.S. 477, 484–485, 101 S. Ct. 1880, 1885, 68 L. Ed. 2d 378 (1981); *United States v. Paetsch*, 900 F. Supp. 2d 1202, 1220 (D. Colo. 2012), *aff’d*, 782 F.3d 1162 (10th Cir. 2015).

Further, when an accused has invoked his right to counsel, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. *Id.* 451 U.S., at 484,

101 S.Ct., at 1885; *Michigan v. Harvey*, 494 U.S. 344, 350, 110 S. Ct. 1176, 1180, 108 L. Ed. 2d 293 (1990). This is “designed to prevent police from badgering a defendant into waiving his previously asserted Miranda rights.” *Id.* A waiver is knowing and intelligent if it is made with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

Moran v. Burbine, 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986).

In this case, Mr. King asserted his right to counsel by saying “... I’d really like to talk to my lawyer” after his *Miranda* warnings were provided by federal BOP interrogators. Mr. King also repeatedly asked BOP officers when and how he could access a lawyer while in the SHU. Exhibit D. After the interrogation, Mr. King again asked about contact with his attorney. Mr. King’s intention and desire to speak to a lawyer were clear before, during, and after his interrogation—the officers simply ignored his rights. Interrogators never ceased questioning Mr. King despite his unambiguous requests for counsel. Officers never informed Mr. King of his lawyer’s attempts to contact him to provide counsel. Continued questioning of Mr. King after he unambiguously said, “I’d really like to speak to my lawyer,” violated the prophylactic rule in *Edwards* and clearly violated Mr. King’s 5th amendment due process rights.

In addition, a similarly situated officer would have understood Mr. King’s invocation as demonstrated by other BOP officers who refrained from questioning Mr. King, even after a signed waiver had been executed. Mr. King also received conflicting information about his right to counsel. As a result of this conflicting and untrue advice, Mr. King’s subsequent waiver of his right to counsel cannot be established, and as such, the statements must be suppressed and excluded from Mr. King’s criminal trial.

Finally, during the January 2019, DHO hearing, Mr. King made incriminating statements after invoking his right to counsel and after BOP officials clearly recognized this invocation as demonstrated in written records. Mr. King's counsel was not present during this hearing. The DHO's questioning and resulting admissions clearly occurred after Mr. King invoked his rights. Therefore, any of Mr. King's statements made during the DHO hearing are in violation of *Edwards* and his Fifth amendment right to counsel and must be excluded from trial.

B. Mr. King was subject to extreme punitive measures leading up to his interrogation and thus his statements were involuntary.

American jurisprudence does not permit involuntary confessions coerced by force. Mr. King was subjected to a series of brutal acts leading up to his interrogation that establish his statements to law enforcement were involuntary. These punitive acts included closed fist punches to the head and face, as well as additional physical abuse by BOP staff, and restraint in hard four-point restraints without penological purpose for over five hours. Mr. King was also forced to involuntarily urinate on himself, was left without a blanket wearing only a thin pair of underwear, was deprived of any communication with his lawyer and/or family for at least three days, vindictively shackled, and forced to remain in a revolting, feces-strewn- unsanitary cell for three days with no recourse. Because of the circumstances surrounding Mr. King's interrogation, his statements were involuntary and should not be admitted at trial.

“[T]he criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice.” *United States v. Lopez* (10th Cir. 2006) 437 F.3d 1059, 1063, quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 224-225, 93 S. Ct. 2041, 2046, 36 L. Ed. 2d 854 (1973) (quotation, alterations

omitted). In cases involving involuntary confessions, th[e Supreme] Court enforces the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will. *Id.*

When the government obtains incriminating statements through acts, threats, or promises which cause the defendant's will to be overborne, it violates the defendant's Fifth Amendment rights and the statements are inadmissible at trial as evidence of guilt. *United States v. Lopez*, 437 F.3d 1059, 1063 (10th Cir. 2006). A constitutional right is traduced the moment torture or its close equivalents are brought to bear. *Chavez v. Martinez* 538 U.S. 760, 789, 123 S.Ct. 1994, 2013, 155 L.Ed.2d 984 (2003) (Justice Kennedy joining in part, dissenting in part).

The government bears the burden of showing, by a preponderance of the evidence, that a confession is voluntary. *Lopez*, 437 F. 3d at 1063. The determination of voluntariness is based on the totality of the circumstances. Relevant circumstances embrace both the characteristics of the accused and the details of the interrogation. Such factors include: (1) the age, intelligence, and education of the defendant; (2) the length of detention; (3) the length and nature of the questioning; (4) whether the defendant was advised of his constitutional rights; and (5) whether the defendant was subject to physical punishment. *Id.* at 1063–1064.

The *Lopez* Court held the government's promises to "...Lopez that he would spend 6 rather than 60 years in prison if he admitted to killing Box by mistake and the Agents' misrepresenting the strength of the evidence they had against Lopez, resulted in Lopez's first confession being coerced and, thus, involuntary" despite the fact that Lopez's personal characteristics did not indicate he was susceptible to coercion, that Lopez was mirandized, and the interrogation was short. *Id.* at 1066.

In the instant case, prior to Mr. King's DHO hearing, the government explicitly stated the government would not criminally prosecute him for the alleged assault. While now obviously untrue, it is evident that Mr. King and BOP administrators believed this to be true and acted in furtherance of that false promise. The government's false assertion that it would not prosecute Mr. King is akin to the government's promise of a fictional plea deal for Mr. Lopez. Importantly, an inmate's silence during a disciplinary proceeding can be used to draw an adverse inference against the inmate.⁶ In both *Lopez* and the present case, the government's actions falsely conveyed to the defendant that he was in a safe harbor if he spoke about the incident; in both of these cases the statements were coerced and must be suppressed.

The *Lopez* court also discussed the case law surrounding an unbroken chain or stream of events leading up to Mr. Lopez's second interrogation. In *Darwin v. Connecticut*, the Supreme Court held both of the Defendant's confessions were involuntary after the defendant was held incommunicado for 30 to 48 hours (despite his lawyer's numerous attempts to access him) and the Defendant's subjection to a "hypnotic device" before his first confession. 391 U.S. 346, 349. The Court reasoned there was no break in the stream of events from the initial coercion "sufficient to insulate the final events from the effect of all that went before." *Id.* (internal quotations omitted). Likewise in *Lopez*, the Court reasoned that the 12 hours between the Officer's promises of leniency and Lopez's second confession was not enough time to dissipate the effect of the government's initial coercion. *Lopez*, 437 F.3d at 1066.

⁶ Inmate Discipline Program, Program Statement, 541.5(b)(2), p. 18. (https://www.bop.gov/policy/progstat/5270_009.pdf)

In the case at bar, there was no break in the stream of events from Mr. King's inhumane confinement beginning on August 17, 2018, to his interview with officers on August 20, 2018. The events began with Mr. King's beating and prolonged restraint, and continued for 72 hours where he was completely incommunicado to the outside world in a disgusting cell, and ended with the interview by Officers Erb and Silva. The events of Mr. King's confinement leading up to the interview renders his post-*Miranda* statements involuntary.

In analyzing the facts regarding the voluntariness of Mr. King's statements within the stream of events leading up to his interrogation it is relevant to consider his extreme physical punishment: the conditions of confinement were inhumane and were intended as coercion and punishment. This is illustrated by multiple officers failing to follow basic protocols such as providing a blanket or bathroom breaks, subjecting Mr. King to the most severe forms of confinement for prolonged time periods without legitimate cause, keeping Mr. King in an unsanitary cell with an overflowing toilet full of feces, keeping Mr. King incommunicado despite his lawyer's efforts, and explicitly stating the government's intent to keep Mr. King in restraints until his "rights have been read." The effect of physical punishment clearly had an effect on Mr. King—at one point during his interview with officers he baldly stated in reference to his filthy cell, "...because that in and of itself feels like coercion. Do whatever it takes so that you can get out of this cell." Exhibit D.

For Mr. King, while it is true that the length and nature of the actual questioning was relatively short, it was clear the officer's apathy towards Mr. King's demands for counsel and a sanitary cell were continuations of the intentional neglect Mr. King had

experienced over the past 3 days—and demonstrated the likelihood that Mr. King would potentially be subjected to identical conditions after his interview.

Finally, while Mr. King does not suffer from any specific characteristics that would leave him more vulnerable to coercion, this single factor should not control when Mr. King was forced to endure physical coercion by the government shortly before being asked to provide testimony against himself. Mr. King's will was overborne by a stream of government actions leading up to his interview with Officer Erb and Silva. Such coercion violates the defendant's Fifth Amendment rights and renders all the statements made by Mr. King during his post-*Miranda* interview inadmissible.

For these reasons, and any others that may appear to this Court, Mr. Eric King respectfully requests that this Court exclude statements from Mr. King's August 20, 2018 interview and his January 2019 DHO hearing from trial.

Further, Mr. King respectfully request the Court schedule an evidentiary hearing and/or oral argument regarding this matter.

Respectfully submitted September 16, 2021,

/s/ Lauren C. Regan

Lauren C. Regan, Attorney at Law
The Civil Liberties Defense Center
Oregon State Bar #970878
1430 Willamette St. #359
Eugene, Oregon 97401
541.687.9180
lregan@cldc.org

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