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 IN LIMINE

Defendant Eric King, by and through counsel, hereby responds to notice provided by the government of intent to admit evidence of prior bad acts, and moves this Court *in limine* to review and enter orders regarding the following evidentiary issues prior to trial. Given the lack of factual foundation for some of these allegations, Mr. King requests a hearing on these issues so that the court can make a clear factual record prior to trial:

I. MOTION IN RESPONSE TO GOVERNMENT 404(b) NOTICE

On September 21, 2021 the government notified counsel for Mr. King of its intent to introduce evidence of prior and subsequent bad acts pursuant to FRE 404(b). The evidence the government seeks to introduce includes (1) evidence of Mr. King's statements at sentencing in 2016 for his underlying offense, (2) an email sent by Mr. King on August 17, 2018, (3) an alleged threat toward FCI Englewood Officer Gustafson in May 2020, and (4) correspondence written by Mr. King in May 2020 that allegedly contains Officer Gustafson's address.

A. Sentencing transcript from June 2016 sentencing

The government indicates it will seek to introduce statements from Mr. King's sentencing in the underlying case, and that this evidence is admissible because it "shows that the defendant has a deep-seated hatred for persons involved in the criminal justice system." The statement at issue speaks to Mr. King's lack of remorse for his underlying offense and states that he "would have loved to attack more government buildings…" *See* INV_1050-1062.

The statement from Mr. King's 2016 sentencing is extraordinary prejudicial, fails to address the difference between property damage and harm to people, and is wholly irrelevant to the question here: whether or not Mr. King assaulted Lieutenant (Lt.) Wilcox. Fed.Rules Evid.Rule 404(b); *United States v. Commanche*, 577 F3d 1261 (10th Cir 2009); *Old Chief v. United States,* 519 U.S. 172 (1997). The government cannot cite any authority supporting use of this evidence.

B. August 17, 2018 e-mail

The defense has no objection to this evidence. The defense *does* object to conclusory characterizations of this email or other statements of Mr. King as "threats" without legal foundation for doing so. *See* IV, *infra*.

C. Interactions with Officer Gustafson

The defense seeks exclusion of all records relating to Mr. King's 2020 DHO proceedings regarding Mr. King's alleged violations against Officer Gustafson at FCI Englewood—including events which took place on July 21, 2020, May 8, 2020, and April 3, 2020. These violations include an allegation that in 2020 Mr. King attempted to send Mr. Gustafson's address to a third-party via prison mail, at another time stated a verbal

threat towards Gustafson (which Mr. King denies), and flicked an "unknown substance" (water) at Gustafson. Even a prior assault or battery conviction is immaterial to a self-defense claim in a separate incident except as character evidence to suggest conformity or propensity. *United States v. Commanche*, 577 F3d 1261, 1268 (10th Cir 2009). (Holding the Court abused its discretion by admitting testimony regarding the defendants two other aggravated battery convictions while defendant asserted self-defense in a third assault case.)

> E]vidence of [the defendant's] prior convictions for assault and possession of contraband is a prime example of evidence "which proves only criminal disposition." Since [the defendant] admitted the stabbing and claimed only that in doing so he acted in self-defense, the only factual issue in the case was whether that was the reason for the admitted act. The fact that [the defendant] had committed an assault on another prisoner and possessed contraband one year earlier had nothing to do with his reason for-his intent in-stabbing [the victim]. All that the evidence of the prior conviction of assault could possibly show was [the defendant's] propensity to commit assaults on other prisoners or his general propensity to commit violent crimes. ... This is exactly the kind of propensity inference that Rule 404(b)'s built-in limitation was designed to prevent.

Id. quoting *United States v. Sanders*, 964 F.2d 295, 298–99 (4th Cir.1992).

Preliminarily, verbal or written threats are clearly not "similar" to the charged crime" of assault. *United States v. Mares*, 441 F.3d 1152, 1157 (10th Cir. 2006). "Where the uncharged acts show motive, intent, or knowledge, they are admissible whether the acts involved previous conduct or conduct subsequent to the charged offense, as long as the uncharged acts are similar to the charged crime and sufficiently close in time." *Id*.

In addition, the allegation Mr. King flicked an "unknown substance" (water) towards Gustafson as he left the shower is distinguishable from the alleged punches Mr. King allegedly exacted against Wilcox. First, Mr. King admitted that he "…did what I did. Im [sic] guilty" while in the instant case Mr. King has maintained he acted in self-defense

throughout. In *Commanche*, the court considered that the defendant had not claimed self-defense in his other two convictions—here too, Mr. King has not made other claims of self-defense outside of the allegations herein. 577 F.3d at 1269 (10th Cir. 2009). Second, Mr. King flicking water and punching are clearly different acts. Third, Mr. King's relationship with Wilcox and Gustafson as COs was completely different—Mr. King alleges that Gustafson targeted and abused Mr. King repeatedly, while it is undisputed Mr. King and Wilcox had no previous relationship. *See United States v. Becker,* 230 F.3d 1224, 1232–33 (10th Cir.2000) (drug defendant's prior convictions for methamphetamine *possession* and *distribution* not admissible under Rule 404(b) in part because the prior acts lacked a common scheme with the charged offense of methamphetamine *production*).

Finally, Mr. King seeks to exclude the testimony of Mr. Gustafson in its entirety because it is irrelevant to the matter charged herein. Should the Court allow the government to introduce this evidence against Mr. King, he will in turn seek to establish that Gustafson targeted and abused Mr. King repeatedly, including evidence of a June 20, 2020, assault by Gustafson which sent Mr. King to the hospital with a serious head injury.

II. MOTION TO EXCLUDE PRIOR BAD ACTS

A. Prior DHO hearings/proceedings

Defense seeks exclusion of all records and evidence relating to Mr. King's previous DHO proceedings because the information is highly prejudicial with little to no probative value and its admission would violate FRE 404(b). The government has indicated to defense counsel that they may seek to introduce prior prison disciplinary

proceedings during trial in its case against Mr. King. At this time the government has turned over information/documents regarding various disciplinary proceedings in discovery: a January 2017 Englewood Diary Incident, and 2018 Leavenworth Proceedings. Such evidence is irrelevant and highly prejudicial, and would result in the jury viewing a misleading series of mini-trials to determine the truth or veracity of the allegations of underlying conduct, which is wholly irrelevant to the issue of whether or not Mr. King committed the acts alleged in the indictment.

B. Prior interactions not subject to disciplinary proceedings

Some witnesses for the government alleged prior negative interactions with Mr. King during his imprisonment at Florence. These interactions do not rise to the level of disciplinary investigation or action, but include observations regarding Mr. King's wife being argumentative, their children being playful at visitation (INV0127-130), Mr. King's "submitting false complaints" (INV0288-290), and Mr. King's rule compliance during family visitation (INV0292-0294). The government has not provided notice of intent to introduce these prior interactions, and in an abundance of caution, Mr. King requests that the Court issue an order specifying which, if any, other bad act evidence may be adduced at trial, and forbidding the government or government witnesses from introducing wholly irrelevant and inadmissible character and propensity evidence.

III. MOTION TO EXCLUDE TESTIMONY FROM/REGARDING LIEUTENANT WILCOX

A. Exclude government witnesses from referring to Wilcox as a "victim"

The defense requests that the Court issue an order precluding use of the word "victim." Lt. Wilcox's status as a "victim" is one that lies at the heart of the case and that the government must prove beyond a reasonable doubt. Who is a "victim" is for the jury

to decide; the term is prejudicial when the core issue at trial is whether a crime has been committed—and, therefore, whether there is a victim. *See State v. Cortes*, 851 A.2d 1230, 1239-40 (Conn. App. Ct. 2004), aff'd, 885 A.2d 153 (Conn. 2005) (holding that jury charges using the term "victim" instead of "alleged victim" violated a defendant's due process right to a fair trial); *Talkington v. State*, 682 S.W.2d 674, 674 (Tex. App. 1984) (use of the term "victim" in court's rape charge was reversible error when the issue at trial was whether complainant consented to sexual intercourse);. A crime here did not occur if Mr. King acted in self-defense. The word is conclusory, argumentative, and unfairly invades the fact-finding province of the jury.

B. Exclude improper opinion testimony

During Wilcox's interviews with the FBI, he identified that 1) he was aware his finger injury was the result of grappling rather than punching because of the location of the injury on his body; and 2) his experience working with mentally ill inmates caused him to make certain decisions regarding his handling of Mr. King. The government has not provided notice that Lt. Wilcox will be testifying as an expert, thus any opinion evidence offered by the Lt. would need to meet the requirements of FRE 701, which the government cannot do because both opinions would be based "on scientific, technical, or other specialized knowledge within the scope of Rule 702." Both pieces of testimony are inadmissible lay opinion testimony under FRE 701 and should thus be excluded from trial.

(1) Testimony regarding Injuries

Lt. Wilcox informed the FBI his knuckle injury was the result of "grappling" rather than "…to his knuckles, which would be the result of a punch." This is purely self-

serving speculation regarding the origin of injury and is not corroborated by or reflected in any medical opinion or documents regarding Lt. Wilcox in the discovery provided by the government. The opinion is not based on medical diagnosis and is inadmissible as such from Lt. Wilcox without additional foundation qualifying the Lt. as an expert, or testimony from an expert, or stipulated medical records demonstrating a medical provider's diagnosis. The Court should exclude this testimony from trial.

(2) Prisoner Mental Health

During an April 2019 interview with the FBI, Lt. Wilcox discussed his prior experience working with mentally ill offenders and that he can "quickly rule out mental illness as contributing to the inmate's behavior." The Court should issue an order precluding the Lt. rom speculating or offering an opinion regarding prisoner mental health, or specifically Mr. King's behavior as being consistent or inconsistent with any type of mental health problems or diagnosis. *See United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents testifying that the defendant's conduct was consistent with that of a drug trafficker could not testify as lay witnesses; to permit such testimony under Rule 701 "subverts the requirements of Federal Rule of Criminal Procedure 16 (a)(1)(E)"). The government has failed to provide any evidence to indicate that Lt. Wilcox has specialized training or experience interacting with persons with mental illness. Mr. King thus asks that the government be precluded from eliciting opinion testimony from the Lt. regarding Mr. King's mental health and/or behavior in conformity thereof.

IV. PRECLUDE THE GOVERNMENT FROM OFFERING LEGAL THE LEGAL CONCLUSION THAT MR. KING ENGAGED IN "THREAT" OR "ASSAULT"

Although the defense does not object to the August 17, 2018 email, the defense does move this Court to preclude the government or its witnesses from characterizing the email or other statements as "threats" or "threatening." "Threat" is a legal term of art which the Tenth Circuit has defined as a "declaration of intention, purpose, design, goal, or determination to inflict punishment, loss, or pain on another, or to injure another or his property by the commission of some unlawful act." *See United States v. Viefhaus*, 168 F.3d 392 (10th Cir. 1999).

The email at issue here did indisputably prompt the interview underlying the allegations in the indictment, but Mr. King is not charged with threats nor is there any indication that the email actually contained a threat. To allow government witnesses to mischaracterize the evidence with a legal conclusion would invade the province of the jury and unfairly prejudice the jury against Mr. King. As such, the Court should issue an order precluding the government's witnesses from referring to the August 17, 2018 email, or other verbal statements of Mr. King as a "threat" or "threatening." Similarly, witnesses and disciplinary records repeatedly refer to Mr. King committing assault. This is a legal conclusion. Given that the determination of whether or not an assault occurred is the very heart of this case, the government's witnesses should not be permitted to testify that "Mr. King had a history of assaulting staff," "assaulted Wilcox," or draw legal conclusions that specific acts were 'assault' when the word "assault" is itself the very issue the jury will need to determine in this matter.

V. MOTIONT TO PRECLUDE THE GOVERNMENT FROM OFFERING TESTIMONY THAT MR. KING IS A "TERRORIST"

Mr. King asks this Court pursuant to FRE 403 to preclude the government or witnesses from using the word "terrorist" to describe Mr. King. Multiple officers from FCI

Florence refer to Mr. King as a "terrorist" in their interviews following the events underlying the allegations in the indictment. Mr. King was not subject to a terrorism enhancement at his June 2016 sentencing event, nor was he prosecuted for any offense under 18 U.S.C. 2331 et seq. Testimony or evidence referring to Mr. King as a "terrorist" is irrelevant to the question of whether or not Mr. King committed the acts alleged in the indictment and are clearly meant to enflame the jurors against him. Even if the Court finds the term to be relevant, F.R.E 403 requires the court to exclude relevant evidence whose probative value is outweighed by the risk of unfair prejudice and confusion of the issues, or misleading the jury. "Terrorist" is a loaded word, particularly post-September 11, 2001. There is a distinct category of "terrorism" offenses classified under federal law, and the prejudice and confusion associated with the term "domestic terrorist" is obviously prejudicial and likely to confuse the issues.

VI. EXCLUDE TESTIMONY OR EVIDENCE REGARDING THE FACTS OR CIRCUMSTANCES OF MR. KING'S UNDERLYING OFFENSE UNDER 18 USC 844(H)

Preliminarily, Mr. King does not dispute that should he testify, the government may introduce evidence to establish his status as a felon pursuant to FRE 609. Mr. King is willing to stipulate that he is a felon and was imprisoned on the date of the offense for a felony. However, further evidence regarding any of the actual facts of Mr. King's underlying crime of conviction should be excluded because it significantly prejudices him, is irrelevant to the criminal charge at issue, and completely lacks probative value. *See, e.g., Old Chief v. United States*, 519 U.S. 172 (1997).

VII. CONCLUSION

For all of the above-stated reasons and any others that appear to this Court, Mr. King now requests that this Court issue an order *in limine* precluding the government from adducing the categories of testimony and evidence outlined above.

Dated September 21, 2021.

Respectfully submitted,

/s/ Lauren C. Regan
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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 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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