IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 1:19-cr-00257-WJM

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. ERIC KING,

Defendant.

UNITED STATES' RESPONSE TO DEFENDANT'S AMENDED MOTION TO DISMISS FOR OUTRAGEOUS GOVERNMENT MISCONDUCT [ECF 113]

INTRODUCTION AND BACKGROUND[1]

In the morning of August 17, 2018, a correctional officer lieutenant was assaulted by an inmate (not the defendant) at the Federal Correctional Institution ("FCI") in Florence, Colorado. Exs. 1-2. In response to that assault, defendant sent an email to his significant other, expressing happiness that the assault occurred and a desire to experience it via virtual reality. In pertinent part, the email stated:

> So you want to hear great news?! A newer Paisa ROCKED A LT!! That's why we were locked down for a little bit lolol! One for the home team! I hope that the weight of every prisoner who has been disrespected, felt belittled, felt less than human by any guard or Lt ever was behind that punch. Wish I would have gotten to see it or experience it via VR. This is a win for every prisoner ever. Hard to stop smiling thinking about it.

[1] The factual statements in this "Introduction and Background" section are based on the discovery obtained by government counsel and produced to the defense in this matter. These statements constitute a non-exhaustive summary of some of the government's anticipated evidence at trial.

Ex. 3. Concerned that defendant might pose a threat to the safety of Bureau of Prisons ("BOP") staff, Lieutenant Donald Wilcox arranged to interview defendant in the lieutenants' office at FCI Florence. Ex. 1. The defendant arrived outside the lieutenants' office, and Wilcox escorted defendant to a vacant office adjacent to the offices occupied by other lieutenants. Exs. 1, 4.

As Wilcox began asking defendant about the email he sent earlier in the day, defendant struck Wilcox in the face with a closed fist. Ex. 1. Several correctional officers intervened in the assault after hearing a commotion from the room where Wilcox was interviewing defendant. For example, Lieutenant Jeffrey Kammrad heard a noise coming from the office where Wilcox was interviewing defendant. When Kammrad arrived at the door to the office, he saw defendant striking Wilcox in the face while Wilcox was attempting to block the blows. Ex. 2. Kammrad and other personnel intervened to protect Wilcox. Defendant was ultimately restrained and transported to the Special Housing Unit ("SHU") at FCI Florence. Kammrad heard defendant exclaim, in substance, "that lieutenant deserved it" and "he was messing with the wrong guy" while officers were attempting to move defendant to the SHU. Ex. 2.

As a result of the assault, Wilcox suffered a broken nose, damage to blood vessels in his eye, and a finger injury. Ex. 1. Defendant had no visible injuries on August 17, 2018, immediately following the assault, *see* ECF 113, Ex. E, although defendant appears to have a black eye during a video-recorded interview on August 20, 2018.

A Grand Jury returned a one-count indictment against defendant based on the assault just over nine months later. ECF 1. The indictment charges defendant with

assault on a federal officer causing bodily injury, in violation of 18 U.S.C. § 111(a)(1), (b). *Id.* Trial is set to begin on October 12, 2021. ECF 92. On September 16, 2021, defendant filed an amended motion to dismiss the indictment for "outrageous government misconduct." ECF 113. As explained below, defendant's motion should be denied.

ARGUMENT

Defendant argues that a series of alleged government errors and discrepancies in government records amount to "egregious, conscience-shocking misconduct" that requires dismissal of the indictment. ECF 113, at 1. The Court should reject defendant's argument and deny this motion for two reasons. First, even if defendant's allegations were completely accurate (they are not), there is no legal basis for dismissing an indictment based on alleged "outrageous conduct" that occurs during the investigation of a crime that has already been committed. *See, e.g.*, *United States v. Leon*, 2018 WL 4339374, at *6 (N.D. Ill. Sept. 11, 2018) (unpublished). Second, defendant vastly overstates the seriousness of the alleged government misconduct he identifies in his motion—indeed, the exhibits attached to defendant's motion tell a much less disturbing story than his allegations suggest.

A. Defendant's motion should be denied because dismissal for "outrageous government conduct" is only available in cases of excessive government involvement in the creation of the crime or significant governmental coercion to induce the crime.

"The outrageous conduct defense . . . is an extraordinary defense that will only be applied in the most egregious circumstances." *United States v. Pedraza*, 27 F.3d 1515, 1521 (10th Cir. 1994). A defendant asserting this defense must show that

governmental conduct violated "fundamental fairness" and was "shocking to the universal sense of justice" mandated by the Due Process Clause of the Fifth Amendment. *United States v. Harris*, 997 F.2d 812, 815 (10th Cir. 1993). "To succeed on an outrageous conduct defense, the defendant must show either: (1) excessive government involvement in the creation of the crime, or (2) significant governmental coercion to induce the crime." *Pedraza*, 27 F.3d at 1521. "Defendants have the burden of proving outrageous government conduct." *Id.*

Defendant's allegations of various errors and discrepancies after the assault and before his indictment are not a valid basis for an "outrageous government conduct" defense because "[a] defendant may not invoke the Due Process Clause . . . unless the government's acts, no matter how outrageous, had a role in inducing the defendant to become involved in the crime." *See United States v. Gamble*, 737 F.2d 853, 858 (10th Cir. 1984). Successful assertions of this defense, though rare, involve, for example, "[g]eneration of new crimes merely for the sake of pressing criminal charges," *United States v. Emmert*, 829 F.2d 805, 812 (9th Cir. 1987), or governmental "engineer[ing] and direct[ion] [of] a criminal enterprise from start to finish," *United States v. Williams*, 547 F.3d 1187, 1199 (9th Cir. 2008). *United States v. Black*, 733 F.3d 294, 302 (9th Cir. 2013) (collecting cases and noting that there were "only two reported decisions in which federal appellate courts have reversed convictions under this doctrine" as of 2013).

Here, defendant's allegations of governmental misconduct—even if taken at face value—have nothing to do with government engineering of criminal activity or coercion of criminal activity. *Cf. United States v. Twigg*, 588 F.2d 373, 381 (3d Cir. 1978)

(reversing conviction due to outrageous government conduct where DEA provided key ingredients and expertise for establishing a methamphetamine production lab where the defendants ultimately played only minor role in the enterprise compared to government agents). Instead, defendant makes the following allegations:

- BOP officials elected to interview defendant in a room in the lieutenants' office that did not have cameras. ECF 114, at 7-8.
- Defendant was held in restraints for a lengthy period of time following the assault, in a manner that, according to defendant, was excessive and violative of BOP policy. ECF 114, at 8-11.
- Video of defendant being held in restraints following the assault is missing. ECF 114, at 11-13.
- Two BOP employees stated that they did not interact with defendant on the day of the assault, although BOP documents indicate that one employee medically evaluated defendant and the other was involved in monitoring defendant while he was in restraints. ECF 114, at 13.
- BOP officials lost the original *Miranda* waiver form from defendant's interview on August 20, 2018. ECF 114, at 4-5.
- BOP officials did not provide defendant with the opportunity to speak to his counsel before defendant was interviewed on August 20, 2021.

All of these allegations relate to evidentiary issues, matters that might be raised on cross-examination of government witnesses, or concerns with how defendant was treated after the assault. None of them, either separately or together, have anything to do with government engineering of the charged crime or coercion of the charged crime.

Accordingly, they do not form a proper basis for a motion to dismiss based on outrageous government conduct. *See, e.g.*, *Gamble*, 737 F.2d at 858.

Defendant has not cited a single case that resists this conclusion. He suggests that *Rochin v. California*, 342 U.S. 165 (1952) supports his argument, but it does not. There, the Supreme Court affirmed dismissal of an indictment for drug possession where government agents arranged for the defendant's stomach to be pumped against his will in order to secure drugs that he swallowed. *Rochin v. California*, 342 U.S. 165, 168-74 (1952). The Court reasoned that the government's conduct in that case violated the Due Process Clause of the Fourteenth Amendment. *Id.*

Rochin does not help defendant because "the law has evolved significantly in the 60 years since *Rochin* was decided." *United States v. Leon*, 2018 WL 4339374, at *6 (N.D. Ill. Sept. 11, 2018) (unpublished) (rejecting the defendant's reliance on *Rochin* in seeking dismissal of indictment based on outrageous government conduct). Specifically, "*Rochin* was decided before the Fourth Amendment's exclusionary rule was applied to the states." *United States v. Paredes-Machado*, 2019 WL 5800286, at *3 (E.D. Mich. March 28, 2019) (unpublished), *adopted*, 2019 WL 4023787 (E.D. Mich. Aug. 27, 2019) (unpublished). The suppression of evidence contemplated in *Rochin* "would be routine today under the Fourth Amendment," but *Rochin* "did not authorize dismissal of an indictment for post-offense conduct." *Id.* Rather, evaluated under modern standards, the conduct and principles at issue in *Rochin* would be addressed through the litigation of motions to suppress based on the Fourth and Fifth Amendments. *Leon*, 2018 WL 4339374, at *6-7. Accordingly, the defense of

"outrageous government conduct" is unavailable to defendant in this case, and *Rochin* is of no help to defendant.

B. Beyond the fatal legal problems with defendant's motion, his factual allegations overstate what the evidence shows.

As explained above, defendant's motion should be denied because his allegations do not give rise to a defense of "outrageous government conduct," even if taken completely at face value. Moreover, as explained below, the record here shows that each of defendant's six allegations overstate what the evidence shows.

First, defendant claims that Wilcox "bizarrely and inexplicably" took defendant to a "storage room at the end of the lieutenant's hallway" to be interviewed, without arranging for audio or video recording. The evidence actually shows that Wilcox took defendant to a vacant office within the bank of individual lieutenants' offices and chose to interview him there to create a non-confrontational atmosphere. Exs. 4, 5 at 1. While defendant is correct that the interview (and resulting assault) were not video- or audio-recorded, the lack of such recording is not "shocking to the universal sense of justice." *Cf. Harris*, 997 F.2d at 815.

Second, defendant objects to the approximately five-hour period that he was held in restraints following the assault in a manner violative of BOP policy. The government understands that defendant is contending that he did nothing wrong, and that he acted in self-defense after allegedly being assaulted by Wilcox. However, a Grand Jury has found probable cause to believe that defendant assaulted Wilcox on August 17, 2018, causing bodily injury. ECF 1. It is not hard to understand why defendant was held in restraints for several hours after the assault. The government declines to analyze

whether the use of restraints comported with BOP policy, as it is irrelevant to the Court's determination of this motion. Moreover, violations of BOP regulations do not, on their own, give rise to a constitutional violation. *See, e.g.*, *Flanagan v. Shively*, 783 F. Supp. 922, 931 (M.D. Pa. 1992) ("The Constitution does not require strict adherence to administrative regulations and guidelines.").

Third, defendants contend that approximately 100 minutes of video of defendant in hard-point restraints is missing, when compared against the observation logs completed by BOP officials responsible for monitoring defendant while he was in restraints. According to defendant, this discrepancy constitutes "destruction of . . . exculpatory evidence" because the video may show defendant "behaving calmly and non-combatively." ECF 114, at 11. Even assuming that such video is indeed missing, defendant fails to explain how additional video of him lying on a cot in restraints without causing a disturbance (beyond the hours of video already provided) is relevant at all, let alone exculpatory. This case is not about the defendant's behavior hours after the charged assault occurred. Indeed, Federal Rule of Evidence 404(b) bars the introduction of evidence of the defendant's calm behavior at a time separate from the assault to show that the defendant behaved calmly with Wilcox. Such evidence would be inadmissible "propensity" evidence. *See* Fed. R. Evid. 404(b)(1).

Fourth, defendant alleges that certain BOP documents arising from the events of August 17, 2018, show that two BOP officials—Lieutenant Abraham and Nurse Batouche— "either lied to the FBI or falsified documents relating to the investigation of this case." ECF 114, at 13. A close review of the documents cited by defendant reveal nothing so salacious. Starting with Lieutenant Abraham, the "Restraints Check Form"

from August 17, 2018 shows that she checked on defendant once at 6:00 pm and once at 7:25 pm. ECF 114, Ex. F at 1-2. During an interview on October 9, 2018, Lieutenant Abraham stated that she had not interacted with defendant "since the incident." ECF 114, Ex. I at 2. Defendant alleges that a comparison of these two documents shows a lie or falsification of evidence. However, significantly more plausible explanations are: (1) Abraham was describing the entire sequence of events on August 17, 2018, as the "incident" or (2) Abraham forgot that she was involved in checking on defendant while he was in restraints.

Turning to Nurse Batouche, in an interview on October 3, 2018, he stated that he "did not have interactions" with defendant on the day of the assault. ECF 114, Ex. J at 2. Defendant's medical records produced in discovery indicate that Batouche conducted a medical assessment of defendant in the evening of the day of the assault, involving a basic physical exam and checking of vital signs. ECF 114, Ex. K at 1-3. The most logical explanation for this apparent discrepancy is that Nurse Batouche forgot about this exam or some type of miscommunication occurred during the interview in October. It would make no sense for someone to deliberately lie about something that would be clearly reflected in medical records.

Fifth, defendant alleges that "FCI Florence officers lost the waiver of *Miranda* rights that [defendant] purportedly signed on August 20, 2018. " ECF 114, at 4-5. Defendant notably fails to mention that BOP officers lost the *original* form, but a scanned copy was located—as explained in the exhibit to his motion—and produced in discovery. Ex. 6.

Finally, defendant alleges that the government "obstructed [defendant's] relationship with his attorney." ECF 114, at 14. The documents defendant submitted in support of this allegation, consisting of email correspondence between a BOP attorney and an attorney representing defendant, tell a much different story. *See* ECF 114, Ex. L-M. Specifically, the email correspondence between a BOP attorney (also designated as a Special Assistant United States Attorney) James Wiencek and attorney Amanda Schemkes reflects that Schemkes contacted Wiencek for the first time at 12:01 pm on August 19, 2018 (a Sunday), asking for an update on defendant's status and to request a legal call with defendant. ECF 114, Ex. L at 3. Wiencek responded less than 24 hours later, at 9:02 am on Monday, August 20, 2018, providing forms that defendant would need to fill out to authorize a release of information from BOP to Schemkes. *Id.* at 2. Schemkes responded approximately one hour and forty minutes later, stating that she would mail the documents that morning. *Id.* She once again requested a legal call with defendant. *Id.* Less than two hours later, Wiencek responded that BOP would "try to get [the legal call] done tomorrow ideally." *Id.* at 1.

The correspondence ends with two emails from Schemkes, one from August 20, 2018, and one where no date is provided, and no associated responses from Wiencek. *Id.* Defendant fails to explain how a delay in being able to speak to an attorney, in the context of the events of August 17, 2018, to August 20, 2018, amount to something "outrageous," particularly when defendant was already a sentenced prisoner on another matter and was therefore already imprisoned and separated from society.

CONCLUSION

Defendant's motion should be denied as a matter of law because defendant's allegations, even if taken at face value, do not give rise to an "outrageous government conduct" claim. Moreover, when defendant's allegations are scrutinized along with the supporting evidence, he has not shown "outrageous" conduct even in the colloquial sense. Defendant's motion should therefore be denied in its entirety without holding an evidentiary hearing.

Respectfully submitted this 23rd day of September, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of September, 2021, I electronically filed the foregoing **UNITED STATES' RESPONSE TO DEFENDANTS' AMENDED MOTION TO DISMISS FOR OUTRAGEOUS GOVERNMENT MISCONDUCT [ECF 113]** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties of record.

s/ Aaron Teitelbaum
Aaron M. Teitelbaum
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