

**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
MOTION TO DISMISS FOR DESTRUCTION OF EVIDENCE [ECF 104]**

INTRODUCTION AND BACKGROUND

A Grand Jury returned a one-count indictment against defendant based on an alleged assault of a federal officer that occurred on August 17, 2018. 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. The facts of this case are set forth in detail in other government filings, including the government's responses to defendant's amended motion to suppress and motion to dismiss for outrageous government conduct. See ECF 120, 124. In brief, the government anticipates that the trial evidence will show that defendant assaulted a correctional officer lieutenant during a one-on-one interview at the Federal Correctional Institution in Florence, Colorado. Following the assault, defendant was transported to the Special Housing Unit ("SHU").

According to an interview with BOP Lieutenant Robert Cordova, after an incident at a BOP facility involving inmates and staff, BOP staff “will save video from as many cameras as they have that capture the incident.” ECF 104, Ex. G, at 1. The goal of BOP staff is to “identify any activity that is vital to the investigation and would be relevant to the after action report.” *Id.* The “after action review” is conducted by a broad range of staff, and is designed to “ensure staff are following policy and no staff misconduct occurred.” *Id.* Investigative staff will therefore “start saving video from far enough before the incident to see what precipitated the event and follow through until the incident is controlled.” *Id.* Cordova explained that he took steps to preserve video from immediately before the alleged assault, and “continued saving video from the camera until [defendant] was taken to the [SHU].” *Id.* at 2. Cordova “did not save the video from the SHU cameras that would have shown [defendant] being moved from the door of the SHU to the holding cell.” *Id.* Cordova did not think to save that video because defendant “was being compl[ia]nt at that time.” *Id.*

BOP’s video retention policy states that “video recordings of uneventful content require a limited retention time interval,” while “video content already established as relevant or applicable to an event category or case is preserved under a separate record keeping authority.” Ex. 1. Video recordings “not deemed to contain a case-related or category-related event” may be deleted “10 days after the date of the recording.” *Id.*

Defendant states that, on September 20, 2018, his attorney Amanda Schemkes sent a preservation request to BOP, requesting preservation, among other things, of video footage of defendant “beginning on August 17, 2018, and for the subsequent 4

days, including but not limited to interactions with corrections officers, medical staff, and SIS staff.” ECF 104, Ex. F, at 2, 5.

Defendant now contends that BOP’s decision not to retain this particular video of defendant being moved from the door of the SHU to the holding cell was a destruction of crucial exculpatory evidence justifying dismissal of the indictment. As explained below, defendant’s motion should be denied without an evidentiary hearing.

ARGUMENT

The government violates a defendant’s due process rights 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.’” *United States v. Bohl*, 25 F.3d 904, 910 (10th Cir. 1994) (citing *California v. Trombetta*, 467 U.S. 479, 489 (1984)). Alternatively, if the defendant can only show that evidence was “potentially useful” for the defense, then “a defendant must show that the government acted in bad faith in destroying the evidence.” *Id.* (citing *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988)). Defendant contends that the government’s failure to preserve the video of his movement from the door of the SHU to his holding cell violated his due process rights, and that dismissal is the appropriate remedy.

Defendant is wrong for four reasons.

First, the unpreserved video evidence is not even relevant, let alone exculpatory. Defendant’s behavior during a brief period when he was in transit between the door of the SHU and a holding cell sheds no light on whether he did or did not assault a correctional officer earlier that day. Moreover, even if the evidence were relevant, it would not be admissible at trial to show that defendant did not assault the officer

because “[e]vidence of any other . . . act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.” Fed. R. Evid. 404(b)(1). In other words, defendant would not be permitted to argue that his compliant behavior during his entry into the SHU somehow suggests that he is a peaceful person who therefore did not assault the correctional officer earlier in the day.

Second, for the same reason identified above, the exculpatory value of this evidence could not have been reasonably “apparent” to BOP, nor could it have appeared to be “potentially useful.” *Cf. Bohl*, 25 F.3d at 910. BOP officers could have quite reasonably thought that there was no reason to preserve this particular video of this defendant’s “compliance,” particularly when BOP *did* preserve *hours* of other video from August 17, 2018, in which defendant is lying stationary on a bed, or being transported in a restraint chair from the scene of the assault to the SHU. Defendant acknowledges in his other filings that such video exists and was preserved, although he claims that approximately 100 minutes out of a total of 300 minutes of him being held in hard-point restraints is missing. *See* ECF 113, at 3-4.

Third, even if the Court finds that the evidence of defendant’s compliance during his transit from the door of the SHU to the holding cell was “potentially useful,” defendant cannot show that “the government acted in bad faith in destroying the evidence.” *Bohl*, 25 F.3d at 910. Cordova provided a reasonable explanation for not preserving the video: he did not see a need to preserve it because it merely showed defendant being compliant with BOP officials. Even if the Court disagrees with Cordova’s thought process, it is nonetheless within the realm of reason, and not

indicative of any bad faith. Defendant's reliance on the September preservation request does not help him because the default retention policy for non-pertinent video is to retain it for 10 days. Given that Cordova did not deem the video appropriate for preservation, he would have had no reason to preserve it for 33 days until BOP received Schemkes' preservation request on September 20, 2018.

Finally, even if the Court were to determine that the government destroyed "evidence whose exculpatory significance [was] 'apparent before' destruction," see *Bohl*, 25 F.3d at 910, he still could not meet the second prong of this test: that he could not obtain "comparable evidence by other reasonably available means," *id.* Here, defendant has access to hours of video of him appearing "compliant" with BOP officials while he is in restraints and also has access to video of his compliance while he is in the restraint chair shortly after the assault. And, to the extent that the Court deemed defendant's behavior between the entrance to the SHU and the holding cell to be particularly relevant on some issue in this case, the government would stipulate that defendant was compliant with BOP officers during that time.

CONCLUSION

The unpreserved video of defendant behaving in a compliant manner between the entrance to the SHU and his holding cell was not relevant to this case, let alone exculpatory. Moreover, the failure to preserve that video was not the result of bad faith. And finally, even if the evidence were somehow useful to defendant, he has access to comparable evidence from other sources. For all of those reasons, defendant's motion should be denied without an evidentiary hearing.

Respectfully submitted this 24th day of September, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of September, 2021, I electronically filed the foregoing **UNITED STATES' RESPONSE TO DEFENDANT'S MOTION TO DISMISS FOR DESTRUCTION OF EVIDENCE [ECF 104]** 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
Assistant U.S. Attorney