**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.**

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**UNITED STATES' RESPONSE TO DEFENDANT'S**
**MOTION TO DISMISS FOR PRE-INDICTMENT DELAY [ECF 103]**

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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, Donald Wilcox, during a one-on-one interview at the Federal Correctional Institution in Florence, Colorado. Only the facts most relevant to this motion are set forth below.

The initial FBI report pertaining to the assault states that "[t]he case was accepted for prosecution by the US Attorney's Office the same day" as the assault, i.e., August 17, 2018. ECF 120, Ex. 5, at 2.[1] Defendant was Mirandized and interviewed by BOP Lieutenants Silva and Erb on August 20, 2018, about the assault. ECF 120, Exs.

[1] In the interest of brevity and to avoid excessive docket clutter, many of the citations to exhibits in this motion response are to exhibits already filed with the response to the motion to suppress at ECF 120.

6; 12.[2] During the interview, the defendant stated, in substance, that Lieutenant Wilcox assaulted him, and that he (defendant) punched Wilcox three times in self-defense. *See generally* ECF 120, Ex. 6, at 4:00-9:00.

The defendant was transferred to the United States Penitentiary ("USP") at Leavenworth, Kansas, on August 21, 2018. ECF 120, Ex. 7, at 2. A disciplinary hearing was held at USP Leavenworth on January 31, 2019, in connection with defendant's alleged assault of Wilcox on August 17, 2018. ECF 120, Exs. 8-9.[3] The hearing report reflects that defendant stated at the hearing, in substance, "I was take [*sic*] to the mop closet to be interviewed, not the Lieutenant's office. That is where they take people and try to get them to snitch. I was provoked, that is why I hit him." ECF 120, Ex. 8, at 1; Ex. 9, at 1. The report reflects that defendant was advised of his rights at the hearing, in writing, on January 22, 2019, nine days before the hearing. ECF 120, Ex. 10. The defendant signed the advisement of rights form. *Id.* The advisement of rights informed defendant, among other things, that the defendant had a "right to present a statement or to remain silent," and that defendant's "silence may be used to draw an adverse inference against [defendant]. However, [defendant's] silence alone may not be used to support a finding that [defendant] committed a prohibited act." *Id.*

To date, the U.S. Attorney's Office has received two copies of the disciplinary hearing report. *See* ECF 120, Exs. 8-9. While mostly identical, the first version

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[2] Exhibit 6 is the video itself and was submitted conventionally in connection with the filing of the government's response to the motion to suppress, ECF 120.

[3] Exhibit 8 to ECF 120 was submitted separately under a "Level 2" restriction in accordance with guidance from BOP that this document should not be publicly available. Submitting this document under restriction also ensures compliance with the protective order issued by this Court at ECF 25.

received and produced to prior counsel in 2019 states, "The FBI/AUSA did decline to prosecute on December 11, 2018, at which time it was released for administrative processing." ECF 120, Ex. 8, at 2. By contrast, the version received on Tuesday, September 21, 2021, and produced to defense counsel on September 23, 2021, states, "The FBI/AUSA accepted this case for prosecution on December 11, 2018, however permission was granted to proceed with administrative processing." ECF 120, Ex. 9, at 2.

Correspondence between two BOP personnel on February 6, 2019, 15 days before the disciplinary hearing report was issued, reflects that a BOP employee Mack Word inquired of Lieutenant Cordova, who was employed at Florence on the day of the alleged assault, whether defendant was going to be prosecuted. ECF 120, Ex. 11. Cordova replied, "Absolutely," and referred Word to an attachment to his email, which contained an inmate investigative report regarding the assault on August 17, 2018. *Id.*; *see also* INV_1152-56.[4]

Before seeking an indictment, the government conducted additional interviews of key witnesses to the assault in April 2019, including Donald Wilcox and Jeffrey Kammrad. Ex. 1; ECF 124, Ex. 5. Then, in May 2019, approximately nine months after the assault and one month after these additional interviews, a Grand Jury returned a one-count indictment against defendant based on the alleged assault. ECF 1.

Defendant filed a motion to dismiss for pre-indictment delay, arguing that the government deliberately delayed seeking an indictment so that defendant would make a

[4] Bates numbers beginning with "INV" reference discovery produced to defense counsel in this matter. Leading zeroes are omitted from the numbers for the sake of brevity.

statement at a disciplinary hearing. ECF 103. As explained below, defendant's motion should be denied without an evidentiary hearing.

## ARGUMENT

"Preindictment delay is not a violation of the Due Process Clause unless the defendant shows both that the delay caused actual prejudice and that the government delayed purposefully in order to gain a tactical advantage." *United States v. Johnson*, 120 F.3d 1107, 1110 (10th Cir. 1997). Defendant has not shown either of these things.

### A. Defendant has not shown prejudice because he alleged self-defense and law enforcement misconduct in a video-recorded interview on August 20, 2018; the defendant's statement in January 2019 conveyed nothing new to the government.

Starting with prejudice, defendant contends that the delay resulted in him making an "incriminating statement" at a BOP disciplinary hearing that he would not have made if he thought he was still facing the possibility of prosecution. ECF 103, at 8. He alleges that his statements made at the hearing "were then used to strengthen the government's case by asking Lieutenants Wilcox and Kammrad questions specifically designed to undercut any claim of self-defense or staff misconduct." *Id.* at 9.

This argument lacks merit for three reasons. First, defendant has failed to produce any evidence that he was ever assured that he would not be prosecuted for the assault before he made statements at the disciplinary hearing. Instead, he provides only unsubstantiated allegations and conjecture. He alleges (without evidentiary support) that "corrections officials at USP Leavenworth told [him] that the government declined to prosecute the charges." *Id.* at 2. He then argues that this unsubstantiated allegation is "corroborated" by a statement in the disciplinary hearing report indicating

that the "FBI/AUSA did decline to prosecute on December 11, 2018." *E.g.*, ECF 121, at 1. But the disciplinary hearing was held in January 2019, and the report was issued in February 2019, after defendant made the statements. Defendant is asking the Court to speculate that someone *must* have told him that he was not going to face prosecution, but has not provided evidence to support that assertion.

Second, defendant's claims of self-defense and staff misconduct in January 2019 were not a surprise to law enforcement; defendant made similar allegations on August 20, 2018, during a video-recorded, Mirandized interview. During that interview, he alleged that Lieutenant Wilcox assaulted him, and that he acted against Wilcox to defend himself. *See* ECF 120, Ex. 6, at 4:00-9:00. Defendant's statements at the disciplinary hearing in January 2019 did not tell the government anything new about defendant's perspective on the August 2018 assault—defendant already apprised the government of his thoughts on August 20, 2018.

Third, the reports of interviews of Kammrad and Wilcox from April 2019 do not support defendant's contention that his statements at the disciplinary hearing were somehow used to "strengthen the government's case." ECF 103, at 9. Indeed, neither interview makes any mention of the disciplinary hearing at all. *See* Ex. 1; ECF 124, Ex. 5. It is also worth noting that the issues of self-defense or possible allegations of law enforcement misconduct are potentially present in *every* assault case where a civilian assaults a law enforcement officer. The government did not need defendant to apprise it of the possibility that these issues could be present in this case; these types of allegations are routine in such cases.

**B. Defendant has not shown purposeful delay on the part of the government to gain a tactical advantage; rather, the evidence shows that the government took time to conduct a thorough investigation before seeking an indictment.**

Defendant has also not shown a purposeful delay by the government in order to gain a tactical advantage. Rather, the timing of the filing of the indictment in May 2019 versus the additional interviews of Kammrad and Wilcox in April 2019 shows that the government took time to conduct follow-up interviews of important witnesses before seeking an indictment. Unsurprisingly, this type of investigative delay is not a basis for dismissal. *See, e.g.*, *United States v. Lovasco*, 431 U.S. 783, 795 (1977) ("[T]o prosecute a defendant following investigative delay does not deprive him of due process.").

A review of the FBI's opening report, BOP email correspondence, and alternate versions of the disciplinary hearing reports discussed above are of no help to defendant in showing that the government delayed his indictment for tactical advantage. Rather, at most, these documents demonstrate some level of confusion at BOP regarding the status of this prosecution at the time of the disciplinary hearing. But being confused is not the same as acting deliberately for tactical advantage.

## CONCLUSION

Defendant has not shown prejudice from the alleged preindictment delay, and he has also not shown that the government deliberately delayed seeking an indictment to obtain a tactical advantage. Defendant's motion should therefore 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 PRE-INDICTMENT DELAY [ECF 103]**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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