

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 REPLY TO GOVERNMENT'S RESPONSE TO DEFENSE'S
AMENDED MOTION TO SUPPRESS**

The voluntariness of Mr. King's statements are disputed by the parties, therefore Mr. King respectfully requests the court schedule a required evidentiary hearing under 18 U.S.C 3501(a). *See also Jackson v. Denno*, 378 U.S. 368, 380, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964) (a defendant objecting to the admission of a confession is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined).

In both Mr. King's August 20, 2018 interview and his January 31, 2019 disciplinary hearing (DHO), the government bears the burden of showing, by a preponderance of the evidence, that a confession is voluntary. *United States v. Lopez*, 437 F.3d 1059, 1063 (10th Cir. 2006). Here, the government has attempted to meet its burden with, at best, factually inconsistent assertions demonstrating the necessity for a fact-finding hearing, and at worst, a paltry summation of the AUSA's opinions of Mr. King's appearance.

I. January 31, 2019 DHO Hearing

It is clearly undisputed the government ultimately decided to prosecute Mr. King. What is material in the voluntariness inquiry is what Mr. King believed at the time of the hearing when he made incriminating statements. On September 23, 2021, the government produced a new DHO hearing document with a single changed sentence: “[t]he FBI/AUSA accepted this case for prosecution on December 11, 2018, however permission was granted to proceed with administrative processing;” and documentation that some BOP personnel believed in February 2019 that Mr. King would “absolutely” be prosecuted. Docket 120. Neither of these documents actually demonstrate what Mr. King believed regarding *his* statements when *he* made them. In fact, it renders Mr. King’s argument that the government intentionally used misconduct to produce the statements more tenable because some BOP officials were aware of Mr. King’s prosecution while he was simultaneously told by other BOP officials he would not be prosecuted.

Mr. King’s mistaken belief, because of BOPs misconduct, is evidenced in a few ways. First, the DHO document purporting to claim Mr. King was informed he was being prosecuted bears an unsigned line which records who actually provided the document-- “DHO report delivered to inmate by,” while the DHO document informing Mr. King he was *not* to be prosecuted bears the DHO officer’s signature; thus indicating Mr. King was never informed of the “amended” document.¹ Second, on December 13, 2018, Mr. King memorialized a statement made by BOP official Lt. Rotz, telling him he would not be

¹ While the exact procedure the government used to create and produce a new document (with new information contrary to defense arguments) a few weeks before trial and three years after the alleged crime and/or duty to provide criminal discovery is not directly at issue here, the mere existence of an apparently doctored or selectively amended document demonstrates the critical need for a hearing *and* the overall outrageous behavior of government agents in this case thus far.

prosecuted, in a handwritten letter to his wife. Exhibit A; Redacted letter to Rochelle Brinker, December 13, 2018.

The government cites to the case, *United States v. Cash*, to support the position that a government agent's mistake is dissimilar from "coercive police activity." Docket 120, p. 10. However, *Cash* did not involve government "statements through manipulation or false promises of leniency" which is what is at issue here. 733 F.3d 1264, 1282 (10th Cir. 2013). Instead, Mr. King's case is most similar to the defendant's involuntary statements in *Lopez*, where the defendant was falsely told he would spend 6 rather than 60 years in prison if he admitted to killing the victim by mistake, and was told misrepresentations of the strength of the evidence the government had against Lopez. 437 F.3d 1059, 1066 (10th Cir. 2006).

The difference in punishment between the risk of a criminal conviction, where years of additional incarceration are at stake, versus an adverse DHO finding, where days are at stake, is obvious. Mr. King was told at least twice that he was not being criminally prosecuted, though apparently, the government always intended to "absolutely" prosecute him. In Mr. King's mind, with the danger of the prosecution lifted and a presumption against his silence during the DHO hearing, he made statements he may not have otherwise made—because of the false promises by the government. As such, Mr. King's statements during the DHO hearing should be excluded from the government's case in their entirety.

II. August 20, 2018 Interview

The government's sole focus on its opinion of Mr. King's appearance during his August 20, 2018 interview is misplaced and fails to properly consider the totality of the circumstances in assessing the voluntariness of a statement, including "(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 defendant’s appearance during an interview is not one of the above factors for the Court to consider.

However, there are factors in this case the Court should weigh. Mr. King was subjected to physical punishment and held incommunicado for nearly three days directly before the interview—the government does not appear to dispute or defend this. Mr. King was also presented misinformation about when and how he could have access to a lawyer. The government invites the Court to consider the entire interview “in context” to establish that officers were attempting to tell Mr. King “the reading of his *Miranda* rights needed to be completed before he could speak to a lawyer,” but fails to consider the interview in light of the context of the extreme punitive conditions Mr. King was subjected to, nor does it establish why Mr. King himself would have such a context given his circumstances in the aftermath of being assaulted by Wilcox and others.

The government’s sole reliance on Mr. King’s apparent composure, without also addressing the horrific ordeal he suffered the proceeding three days, opens the door to the most reprehensible logic imaginable: the government may use any means necessary to acquire a confession, so long as a defendant *appears* resilient in the face of such abuses. This is not the law. Instead, the confusing information regarding Mr. King’s right to counsel, the amount of time Mr. King was held incommunicado, and the physical punishment Mr. King suffered leading up to the interview all support a finding that his statements on August 20, 2018 were involuntary.

The motion to suppress must be granted.

Dated September 27, 2021.

Respectfully submitted,

/s/ Lauren C. Regan

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CERTIFICATE OF SERVICE

I hereby certify that on September 27, 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
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