

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 FINAL ARGUMENT IN SUPPORT OF AMENDED MOTION TO
SUPPRESS**

Defendant Eric King, by and through counsel, hereby submits this closing argument in support of his amended motion to suppress involuntary statements obtained in violation of the Fifth Amendment's guarantee of Due Process (Docket No. 114), the reply (Docket No 143), exhibits submitted in support thereof, and the testimony from the witnesses at the October 14, 2021, hearing. This Court must suppress (1) the statements made by Mr. King to SIS Officers on August 20, 2018, following three days of continuous unlawful retaliatory physical and emotional punishment while held incommunicado in reprehensible conditions as involuntary and the product of coercion; and (2) the involuntary statements made to DHO Bryant on December 28, 2018, under the false belief that he would not be prosecuted for assault.

I. ARGUMENT

The Due Process guarantees contained in the Fifth Amendment protects suspects from undue coercion during interrogation. U.S. Const. amend. V, XIV;

Colorado v. Connelly, 479 U.S. 157, 163 (1986); *Bram v. United States*, 168 U.S. 532 (1897). A confession is inadmissible as evidence if it is not free and voluntary, but is the product of coercion that overbore the confessor's will. *Connelly*, 479 U.S. 163-164; *Schneckloth v. Bustamante*, 412 U.S. 225-226 (1973); *Lynum v. Illinois*, 372 U.S. 528, 534 (1963); *United States v. Lopez*, 437 F.3d 1059, 1063 (10th Cir. 2006). The voluntariness of a confession is determined by considering the totality of the circumstances in which it was made. *United States v. Perdue*, 8 F.3d 1455 (10th Cir. 1993); *Lopez*, 437 F.3d at 1063. The government has the burden of proving the admissibility and voluntariness of the statements the government seeks to admit at trial. *Lopez*, 437 F.3d at 1063 (10th Cir. 2006) citing *Missouri v. Seibert*, 542 U.S. 600, 608 n. 1, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004).

The evidence provided by the government at the motion to suppress hearing asks the Court to ignore video and photographic evidence, and lack of evidence, as well as troubling and contradictory testimony by prior and current BOP employees that clearly established that Mr. King was subjected to a combination of a prolonged stream of unauthorized and unconstitutional excessive use of force and restraints, deplorable conditions of confinement, and incommunicado detention prior to interrogation without access to counsel. Additionally, the government did not meet its burden regarding whether Mr. King was told and/or believed that he was not being criminally prosecuted prior to participating in a DHO hearing in December, 2018. That promise of no criminal punishment was the primary reason Mr. King gave statements at this hearing—a hearing that would normally never occur if criminal charges were pending.

The totality of the circumstances in this case - as illustrated by the testimony presented at the hearing and evidence submitted in support of Mr. King's Amended Motion to Suppress and Reply – demonstrate that the statements Mr. King made to prison officials on August 20, 2018 and December 28, 2018 were involuntary and the products of coercion and thus must be suppressed.

A. The statements made to SIS Officers following three days of ongoing physical punishment, incommunicado detention in terrible conditions must be excluded as involuntary and the product of coercion

The uncontroverted evidence proves that Mr. King displayed a calm, non-violent demeanor in the immediate aftermath of the alleged assault on August 18, 2018, and throughout the entirety of the three days of prolonged excessive use of force, restraints, and incommunicado detention. In fact, there is no credible evidence that Mr. King was ever resistant, aggressive, or noncompliant in any manner that would legally justify the punitive torture he endured at the hands of BOP in the aftermath of the alleged incident. This unbroken stream of physical and emotional coercion and punishment directly underlies Mr. King's state of mind as he entered the interrogation room at USP Florence on August 20, 2019 and thus resulted in an involuntary confession.

Mr. King was in the storage room alone with Lt. Wilcox when responding officers used physical force to put Mr. King on the ground. Mo. Hr'g. Tr. 92:6-24; 116:19-25; 204:24-25; 205:1-13. Mr. King did not resist officers' immediate response, "Inmate King was to the left of the room, and he was going to lay down, like to submit, like it was all done. It was over." Mo. Hr'g. Tr. 92:6-14. Officer White testified that Mr. King complied with commands even in the absence of restraints: "When I was there, I didn't have restraints. I told him to just keep his hands behind his back, and he complied. And then

when the restraints came, I was going-- I believe I put the restraints on him myself, but we had him secured up until that point restraints came.” Mo. Hr’g. Tr. 80:22-25.

Multiple officers used unnecessary, excessive physical force upon Mr. King when they responded to the lieutenant’s storage room. According to Mr. King, several of the responding officers kicked Mr. King while he was restrained on the ground. Mo. Hr’g. Tr. 205:1-13. Mr. King did not react or resist to the kicks because “If I fight back, who knows what will happen.” *Id.* It seems clear that many BOP officers have an “us or them” mentality whereby an inmate accused of threats or harm to a fellow officer may be subjected to retaliatory extrajudicial punishment in contradiction of BOP policies and law. The entirety of this stream of events illustrates this abuse of power. Officers then lifted Mr. King up by the cuffs and pressed him against the door, *Id.* at 205:13-21, before walking him through the hallway and outside onto the compound. *Id.* at 21-25; Mo. Hr’g. Tr. 94:1-3. Mr. King was then placed face-down on the ground and surrounded by multiple officers who continued to use force to restrain him despite the fact that he was not resisting. Mo. Hr’g. Def. Ex. P @3:20-6:48; Mo. Hr’g. Tr. 99:1-21; 206:1-13.

Captain Giconi arrived and threatened Mr. King, who lay prone on the ground. He hissed at Mr. King, “I wish you had done it to me, you punk. You’re fucking dead.” Mo. Hr’g Tr. 206:14-17. Despite the fact that he was not resisting and appeared calm, Captain Giconi unlawfully ordered that Mr. King be strapped into and transported via the Stryker chair, a metal restraint device described by Officer White as “pretty much a wheelchair, but it’s for anybody who is hostile. So, if somebody is noncompliant, a threat, high, or drunk or something, the Stryker chair creates safety for the inmate and the staff around them.” Mo. Hr’g. Tr. 81:2-8. Mr. King was not assaulting, resisting, or

yelling; and cooperated as multiple officers restrained him in the chair. Mo. Hr'g. Tr. 99, 1-21; 207, 1-25. Mo. Hr'g. Def. Ex. P @6:48-7:30; Mo. Hr'g. Ex. Q @ 0:00-0:59.

Contrary to BOP policy which directs that restraints shall not be used to transport prisoners who cooperate in moving on their own, Mr. King was restrained in the Stryker chair and then wheeled off of the compound yard, through the prison, and down a flight of stairs into cell B100 in the Special Housing Unit (SHU). See 28 C.F.R. §552.22(e); BOP Prog. Stat. 5566.006 – Use of Force and Application of Restraints, 6(e). Mr. King described the experience of being transported in the Stryker chair:

“The Stryker chair is terrifying, because you're vulnerable. You can't move. If they want to pepper spray you, you can't protect yourself. At one time they put on masks, and I think that's what they're going to do. And I'm like, I'm going to die. They're going to suffocate me and say I resisted or spit on them, so I'm sitting there staring like a zombie. I don't want to move. I don't want to resist. Then they wheel this chair over to the steps, and my heart rate is going so fast, because what's the first thought? They're going to toss me down these stairs and say it slipped. They think I hit one of theirs. They're going to end me right now in this chair. And they carry me down, thank God they don't throw the chair down. But I'm terrified, zombie. And they wheel me to that room, and then they start the four-point process.”

Mo. Hr'g. Tr. 207:8-22. Video evidence showing the final moments of Mr. King's transport to the SHU (Mo. Hr'g. Def. Ex. Q @0:00-0:59) and subsequent medical assessment/ application of four-point restraints in SHU cell B100 demonstrates that Mr. King is calm, obedient, and does not speak to staff unless he is directly spoken to. *Id.* at 0:00-13:42. Officer White confirmed that throughout the transport to the SHU and application of four-point restraints, Mr. King was compliant and able to maintain his composure. Mo. Hr'g. Tr. 99:16-21. There is no evidence, other than the impeached testimony of Lt. Kammrad, that Mr. King was at any time resisting commands, acting

aggressive, or attempting to flee or resist. Contrary, the unbiased videos and testimony of all other witnesses demonstrate that Mr. King was compliant and passive.

Once inside of SHU cell B100, Mr. King was stripped of his clothing as officers held him against the wall. He complied with directives to lift and lower his feet to remove his socks and shoes, and he did not object as his clothing was cut off of him with a sharp hook and he was left wearing only a new pair of underwear. Mo. Hr'g. Tr. 208:1-8; Mo. Hr'g. Def. Ex. Q @0:59-7:49. Mr. King was compliant and followed orders as he was stripped of clothes, 'examined,' and each limb was strapped to a metal bed. Mo. Hr'g. Tr. 103:11-18; 127:9-15; 161:24-25; 162:1-3; 208:1-8. Mr. King then underwent a cursory medical exam that lasted less than four minutes as he was handcuffed and surrounded by multiple officers preparing to place him in four-point hard restraints. Mo. Hr'g. Def. Ex. Q @8:05-11:20; See 28 C.F.R. 552.24(f). He told prison Nurse Fraboni "I [feel] very bad. I am in pain. My head hurts. My hand hurts. My wrist hurts. My face hurts," he estimated that the pain was a seven out of ten "in the left temple," and that he was having difficulty breathing. Mo. Hr'g Tr. 209:2-11. See *also* Mo. Hr'g. Def. Ex. Q @8:05-9:00. When Officers left Mr. King in hard four-point restraints in the FCI Florence SHU, he was laying only in his underwear without a shirt or a blanket. *Id* @13:20-13:42.

Mr. King remained in hard four-point restraints chained to a bed in the SHU for five hours¹. Mo. Hr'g. Ex. 3. He described the experience as excruciating:

You're handcuffed behind your back, pushed forward, and so they stretch your legs out to make sure they can come up your ankles, and then they pull you back and stretch you like a garrote.² Within a minute or two of this happening my limbs are on fire. My back is hurting. My neck is hurting. You can't breathe. If you start hyperventilating you will probably black out. I don't know, I felt close. And every

¹ Lt. Kammrad was not authorized to place King in restraints pursuant to policy. Further, his paltry justification for the restraints, if believed, is still unlawful under BOP policy. Mo. Hr'g. Ex. G.

² This sequence of events is depicted in Mo. Hr'g. Def. Ex. Q @11:15-13:42.

limb immediately starts cramping, and then you have the itches. Every little thing itches, and you cannot scratch yourself. You can't do anything. You can't bite your arm to make it stop itching, so you're stretched where it feels like your shoulders are being ripped out of your body. It's not a casual thing, man. It's not casual. This is torturous. And that goes on and on and on.

Mo. Hr'g Tr. 209:13-25; 210:1-2. Mr. King was in hard four-point restraints for at least 300 minutes, from shortly after 2:00PM until 7:20PM. Mo. Hr'g. Pltf. Ex. 3. The government has provided approximately 200 minutes of video depicting Mr. King in four-point restraints. Mr. King alleges that during this 100 minute gap in video, he was threatened and smothered by Captain Giconi while other officers were present:

I am caged to a bed. And as [the Captain] walks up next to me, the complex person put their hand over my mouth. And then while he's doing that, Giconi comes over with this shield, replaces his hand with a shield, and pushes it on my face and on my body and says, that's for spitting at my staff. I've never been accused of spitting at staff. There's no record of me doing anything like that in any way, and it would have been on camera. But he pushes on the shield so that now I can't breathe, because you have this plastic here so you're just breathing in your fumes. And then he just leaves. He leaves it. Fifteen minutes later, Giconi comes back, takes it, takes off the shield, and then puts a sign on the door saying do not talk to him. No one can talk to inmate. And then he leaves.”

Mo. Hr'g Tr. 211:12-25.

There is no video evidence depicting officers interacting with Mr. King to place a torn white undershirt around his neck or blanket around his waist – the only evidence is Mr. King's testimony that Captain Giconi returned to the cell while he was in hard four-point restraints to place the t-shirt around his neck and give him half a blanket in order to 'comply' with policy. Mo. Hr'g Tr. 214:13-24. The evidence shows that officers were “ordered by Captain not to speak to I/M [inmate],” and that “I/M did not request to use bathroom.” Mo. Hr'g. Ex. 3. In obedience to the orders, not a single staff person asked Mr. King if he needed to drink water or use the bathroom during the 5 hours in hard

four-point restraints. As a result, Mr. King urinated on himself twice. After Mr. King was transitioned to soft restraints at 7:20PM he told staff he urinated on himself and needed new sheets³. Mo. Hrg. Def. Ex. S @3:25 “(would a change of sheets and a bucket become available?”); *Id* @10:42-10:52 (underwear).

Despite Mr. King’s continued calm demeanor and ongoing pattern of self-restraint and control, he was held in soft restraints, binding his wrists and ankles for over two additional hours, until he was transferred to the Special Housing Unit at USP Florence. News that Mr. King would be moved to USP Florence, a more serious custody level facility than FCI Florence, was “the scariest thing I’ve ever heard in my life. I’m a known antiracist activist, and I know that there’s a vast difference in custody level between medium and penitentiary. What happens at the penitentiary is stabbing, and I’m thinking they’re sending me there to kill me.” Mo. Hr’g. Tr. 215:2-8. To make matters worse, Captain Giconi met Mr. King at the doors of the USP and accompanied them into the SHU. Mo. Hr’g. Tr. 215:23—216:5. There is no evidence of required BOP prior authorization to transfer Mr. King to the USP, nor are there records of the transfer in the BOP rosters. ECF 167 at 6-7.

Once at the penitentiary, Mr. King was housed in deplorable conditions. He found that the property bag in the SHU that was supposed to contain essentials required for all SHU detainees contained only half a towel, one t-shirt, and one pair of boxers. Mo. Hr’g. Tr. 216:15-25; 217:1-13; 28 C.F.R. §541.31; BOP Prog. Stat. 5270.11 (12). The toilet in

³ The Code of Federal Regulations and BOP policy regarding use of four-point restraints both explicitly require that “at every two-hour review, the inmate will be afforded the opportunity to use the toilet, unless the inmate is continuing to actively resist or becomes violent while being released from the restraints for this purpose.” 28 C.F.R. §552.24(e); BOP Prog. Stat. 5566.006 – Use of Force and Application of Restraints, 10(e).

Mr. King's small SHU cell was clogged and began to overflow with someone else's feces. Mo. Hr'g. Tr. 217:4-15. This concern was dismissed by officers throughout the weekend, *Id.* 218:11-23, who also ignored Mr. King's request for paper and pencil and refused him contact with his sick wife and his attorney, to apprise them. *Id.* 219:1-16.

On the evening of August 19, 2018, Lt. Wilcox' son, who worked on different tier at the USP, came and silently stood directly outside of Mr. King's SHU cell door, which he interpreted as a threat. Mo. Hr'g. Tr. 219:17-25; 220:1-18⁴. At the 10/14 hearing, the government offered the testimony of Captain Root in an attempt to dispute the allegations regarding the conditions of confinement between August 17 through 20, 2018. Mo. Hr'g. Tr. 182-197. Root's testimony that the policy of the USP Florence SHU aligns with the law and policy should be ignored because he had no personal knowledge as to the conditions of Mr. King's actual confinement. *Id.* 187:2-25.

By the time Mr. King was taken to an interview with SIS officers on the morning of Monday, August 20, 2018, he was terrified, sleepless, and physically and emotionally traumatized by the ongoing stream of events. "And so I'm able to sit, but I am so frayed. ... My mind is three straight days of preparing to get killed, and then now I'm sitting in front of these two officers." *Id.* 221:1-18. After enduring the beatings, prolonged restraints, threats, and suffering horrible conditions of confinement while *incommunicado*, Mr. King felt that the interview with the SIS officers was his only chance to save his own life.

It was my absolute total understanding that if I don't do this interview in some way, shape, or form, that I'm not getting out of their penitentiary, and I'm not talking to my lawyer. So, I can do it their way, or I can do it my way and suffer,

⁴ Captain Root specifically acknowledged that Lt. Wilcox's son was a compound officer at USP Florence August 17-20, 2018, and that the younger Officer Wilcox could have been outside of Mr. King's cell in the SHU. Mo. Hr'g. Tr. 193:5-16.

but I have got to find -- I've gotta pick one, and I chose to do it their way to try to save my life and talk to this lawyer and get ahold of my family.

Mo. Hrg. Tr. 222:1-23.

Mr. King's Eighth Amendment guarantee to be free from cruel and unusual punishment, and Fifth Amendment right to due process and freedom from coerced confession were violated. A defendant's statements must be the product of "an essentially free and unconstrained choice. *Lopez*, 437 F.3d at 1063. Courts analyze the voluntariness of a statement by considering several factors including, but not limited to, any physical punishment. *Sharp v. Rohling*, 793 F.3d 1216, 1233. (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)). Also relevant is whether an officer's statements amount to a "promise of leniency" in exchange for the defendant's confession. *Sharp* at 1250-1251. It is not dispositive that Mr. King was not unusually susceptible to coercion because of age, lack of education, or intelligence, that the interrogation was short in duration, or the environment was not coercive. See *U.S. v. Young*, 964 F.3d 944, 945-946 (10th Cir. 2020) (defendant's statements involuntary even though nothing suggested defendant was of limited intelligence, questioning was friendly and short, and defendant confessed within minutes); *Lopez*, 437 F.3d at 1066 ("despite our conclusion about Lopez's personal characteristics, we conclude that the "totality of the circumstances" surrounding the interrogation, and in particular the federal agents' promising Lopez that he would spend 6 rather than 60 years in prison if he admitted to killing Box by mistake and the Agents' misrepresenting the strength of the evidence they had against Lopez, resulted in Lopez's first confession being coerced.")

Some kind of police coercion is necessary for a finding of involuntariness because "[t]he Due Process Clause is not implicated without the "crucial element of

police overreaching.” *United States v. Cash*, 733 F.3d 1264 (10th Cir. 2013) (citing *Colorado v. Connelly*, 479 U.S. at 164-167. In *Darwin v. Connecticut*, the Supreme Court held both of the Defendant’s confessions were involuntary after the defendant was held incommunicado for 30 to 48 hours (despite lawyer’s numerous attempts to access him). 391 U.S. 346, 349. The Court reasoned there was no break in the stream of events from the initial coercion “sufficient to insulate the final events from the effect of all that went before.” *Id.* (internal quotations omitted); see also *Lopez*, 437 F.3d at 1066.

Courts consider with scrutiny the use and continuity of physical punishment, the length and purpose of detention prior to interrogation, and whether a defendant was held incommunicado. Courts have found twenty-four hours, two days, and four days not enough time to insulate the effect of an illegally obtained confession. See *Griffin v. Strong*, 983 F.2d 1540 (10th Cir.1993) (effects of compelled confession felt two days later); *United States v. Lee*, 699 F.2d 466 (9th Cir.1982) (twenty-four hours not enough); *United States v. Matthews*, 488 F.Supp. 374 (D.Neb.1980) (four days not enough time to dissipate effects of first confession). “Physical punishment” can mean more than just being beaten. *Reck v. Pate*, 367 U.S. 433 (1961) (deprivation of food or sleep is physical punishment). An officer may lawfully use force, but such lawful use of force can still produce an involuntary statement. See *United States v. Perdue*, 8 F.3d 1455, 1467 (10th Cir. 1993) (“However, if police officers choose to use forceful methods to detain a suspect for investigation, they must back off before interrogating him.) The physical beatings and punishment Mr. King endured were not lawful or accepted parts of BOPs job. Even if the Court finds the conduct was lawful, despite the brutality and officers’

inability to follow their own procedures, a defendant's will may still be overcome by lawful, but coercive conduct.

Involuntariness may be shown not only by physical coercion, but also by the use of different types of psychological coercion. *Cf. Stein v. New York*, 346 U.S. 156, 182 (1953), *Brown v. Mississippi*, 297 U.S. 278, 286 (1936); *Mincey v. Arizona*, 437 U.S. 385 (1978) (finding inculpatory statements obtained during hospital interview of seriously wounded, barely conscious homicide suspect after police ignored requests to see attorney to be involuntary). Psychological coercion may be exacerbated by other factors – questioning at night; deprivation of food, sleep, or medication; isolation from friends or relatives, especially after a request to see or speak with them; the number of officers present; and the physical setting. Statements were found involuntary on the basis of one or more of these factors in *Greenwald v. Wisconsin*, 390 U.S. 519 (1968) (defendant was aware of constitutional rights, but was questioned for four hours during a thirteen-hour detention, requested counsel, and was given neither food nor medication for high blood pressure) and *Gallegos v. Colorado*, 370 U.S. 49 (1962) (notwithstanding oral statements given immediately after arrest, written statement obtained after five days of being held incommunicado was involuntary).

While Mr. King's age, intelligence, and education, do not suggest he was unusually susceptible to coercion, the 10th circuit has repeatedly held this factor is not dispositive. See *Lopez*, 437 F.3d at 1065 (holding Lopez' personal characteristics did not indicate he was "unusually susceptible to coercion" when he was "thirty-three years old and had completed the eleventh grade," nor was there anything "to suggest he h[as] 'a limited intelligence'"). However, the physical beating and use of restraint beyond

immediate use of force and prolonged detention incommunicado in deplorable conditions of confinement amount to coercive law enforcement misconduct sufficient to overbear Mr. King's will.

In analyzing the facts regarding the voluntariness of Mr. King's statements within the stream of events leading up to his interrogation it is relevant to consider his extreme physical punishment and duration of detention prior to interrogation: the conditions of confinement were inhumane and were intended as coercion and punishment. The tenth circuit found that being detained for hours does not necessarily render a later confession involuntary. See *United States v. Ravenell*, 810 F. App'x 625 (10th Cir. 2020) (statement was voluntary following five-hour detention incommunicado where defendant was also given food, water, a blanket, and a bench, and the questioning was not very long or intense). See also *Sharp v. Rohling*, 793 F.3d 1216, 1233 (10th Cir. 2015) (describing Rohling's five-hour detention as "not unusually long" and noting the fact that Rohling was given water and stating that it "weigh[ed] in favor of voluntariness").

The case before the Court involves a drastically different set of circumstances than those approved by the Court in *Cash*, *Sharp* and *Ravenell*. Here, multiple officers failed to follow basic protocols such as providing a blanket or bathroom breaks, subjecting Mr. King to the most severe forms of unlawful use of force beyond what was required to immediately control the situation, placed him in excruciating hard restraint confinement for prolonged time periods (5 hours) without legitimate cause, keeping Mr. King in an unsanitary cell with an overflowing toilet full of feces, keeping Mr. King incommunicado despite his lawyer's efforts, and explicitly stating the government's

intent to keep Mr. King in restraints until his “rights have been read.” Numb, overwrought and “frayed,” he was then brought into a room where Mr. King repeatedly asked for a lawyer and was told that he ‘will get one after this’—which he reasonably interpreted as meaning after he answers their questions he will finally have access to his lawyer and the outside world so that someone knows where he is and that he is still alive. Mo. Hr’g. Tr. 221:7-24.

Government may incorrectly argue that because Mr. King read and signed a Miranda form, that statement cannot be involuntary. *See United States v. Bustillos-Munoz*, 235 F.3d 505, 517 n.8 (10th Cir. 2000) (“A suspect cannot be subjected to invalid coercion to obtain a confession just because he earlier was given a valid Miranda warning.”) The law requires the totality of circumstances be used to determine voluntariness. In this case, the ongoing, arbitrary, punitive use of force and restraints, threats, and depraved conditions of confinement without penological purpose continuously for three days during which Mr. King was confined incommunicado prior to interrogation, resulted in an involuntary statement that must be suppressed.

B. The Court should exclude the involuntary statements made to the DHO because the statements were made under the false belief that he would not be prosecuted for assault on Lt. Wilcox

The record establishes that the government used both explicit misrepresentations about the penalties Mr. King faced, and implicit promises of leniency to secure statements from him during the DHO hearing, that he would not have otherwise made. Relevant to the inquiry is “...the coercive nature of assertions from the standpoint of the defendant.” *Young* 964 F.3d. at 944. (quoting *United States v. Walton*, 10 F.3d 1024, 1029 (3d Cir. 1993); *United States v. Shears*, 762 F.2d 397, 402 (4th Cir.

1985) (evaluating “the defendant's perception of what government agents have promised”). Mr. King’s standpoint, through his testimony was reasonable, clear, and totally unchallenged by the government who failed to cross examine him, and was corroborated by former BOP Disciplinary Hearings Officer Rebecca Bryant.

Courts view promises of leniency or threats of harsher punishment made in order to gain a confession as an unconstitutional form of police misrepresentation. *Lynum v. Illinois*, 372 U.S. 528; *Bram v. United States*, 168 U.S. 532 (1897). Promises or threats have long been recognized as an impermissible type of coercion that could overbear a suspect’s will with hope of leniency. *Id.* at 550-553. Promises do not have to be false or misleading. In fact, the defendant’s belief that the promises will be fulfilled may render a statement involuntary. *United States v. Harris*, 301 F. Supp. 996, 999 (E.D. Wis. 1969) (statement found involuntary where defendant reasonably believed police made promise of leniency, even when no promise was actually made). Promises of leniency are “relevant to determining whether a confession was involuntary and, depending on the totality of the circumstances, may render a confession coerced.” *Clanton v. Cooper*, 129 F.3d 1147, 1159 (10th Cir. 1997), *overruled on other grounds by Becker v. Kroll*, 494 F.3d 904 (10th Cir. 2007); *United States v. Young*, 964 F.3d 938, 943 (10th Cir. 2020) (*citing to Lopez*, 437 F.3d at 1065) (officer's deceptions or misrepresentations may render a confession coerced). If a government agent misrepresents the penalties associated with a charge, then that deception impacts the voluntariness of any resulting statements. *Young*. 964 F.3d at 944.

Mr. King’s reasonable belief he was not going to be prosecuted, based on the government’s [mis]representations, overcame his will to remain silent. Here, at least two

BOP officials told Mr. King he was not going to be prosecuted prior to his DHO hearing. Mo. Hr'g. Tr. 226: 4-8; Mo. Hr'g. Tr. 225:12—228:25. Mr. King contemporaneously documented this in a letter to his wife on December 13, 2018. Mo. Hr'g. Tr. 226:2-8; Mo. Hr'g. Ex. A6. Informing a suspect he is not being prosecuted, when this information is false, is akin to the false representations about punishment and penalties in *Lopez* and *Young*. In *Lopez*, the defendant was told by government agents he could spend fifty-four fewer years in prison if he would confess to killing the victim by mistake. 437 F.3d at 1065. In *Young*, the government agent made misrepresentations about the potential sentence the defendant faced. *Young*. 964 F.3d at 943-944. There, the Court ruled Young's statements were involuntary, holding "[a]lthough we do not require a law enforcement officer to inform a suspect of the penalties for all the charges he may face, if he misrepresents these penalties, then that deception affects our evaluation of the voluntariness of any resulting statements." *Id.* at 944. Informing Mr. King he faces no prosecution, shortly before a hearing where he is incentivized to make statements, is a clear misrepresentation of fact, and is far more serious than minimizing the amount of time a defendant may receive, where at least, the defendants in *Lopez* and *Young* still knew they faced *some* criminal liability.

Further, not only was Mr. King offered misrepresentations, he was also subjected to a coercive BOP policy that presumes guilt from silence, falsely compelling Mr. King to speak just like a false promise of leniency. Prior to the DHO hearing, Mr. King received and signed an "Inmate Rights at Discipline Hearing" which advised him of his "[r]ight to present a statement or to remain silent. Your silence may be used to draw an adverse inference against you. However, your silence alone may not be used to support a

finding that you committed a prohibited act.” Mo. Hr’g. Ex. 10. This document did not warn Mr. King his statements could be used against him in a criminal proceeding, which is logical, given that when the FBI or AUSA declines a case for prosecution that automatically releases the case for administrative processing and therefore concerns for an inmate’s rights as a criminal defendant are no longer a concern during the administrative hearing. Mo. Hr’g. Tr. 53:7-13. Mr. King reasonably believed he was not being prosecuted because he was subjected to an administrative DHO hearing, and the explicit representations by BOP staff. Mo. Hr’g. Tr. 229:20—230:7.

At USP Leavenworth, DHO Bryant confirmed to Mr. King what had already been relayed by other BOP staff at Leavenworth: Mr. King would not be criminally prosecuted for the events of August 17, 2018. Mo. Hr’g Tr. 230:8-17. DHO Bryant testified, “They (FBI) released the incident report for administrative processing.” Mo. Hr’g. Tr. 225:12. However, the evidence provided by the government showed that there were two different documents admitted into evidence as Ex. 8 and 9. Exhibit 8 merely corroborates Mr. King’ testimony, that the FBI/AUSA had informed Mr. King of their decision not to prosecute him prior to the hearing. And while it is immaterial for the Court’s analysis which document was actually delivered to Mr. King right *after* the hearing and statements were made, the fact that Exhibit 8 was delivered to Mr. King establishes that it was contemporaneously in use during this time period—rather than being pulled from thin air, a few weeks prior to the Motion to Suppress evidentiary hearing like Exhibit 9. Exhibit 8 is a reflection of what everyone understood going into the DHO hearing and is relevant in that regard.

Ms. Bryant was unable to provide any explanation for why two nearly identical DHO documents, Ex. 8 and Ex. 9, were created in Mr. King's case, and indicated there could only be one document drafted by her. Mo. Hr'g. Tr. 33: 5-6; 46:16-20. Ms. Bryant could not offer any explanation for why Ex. 9 lacked her signature. *Id.* 47: 13-23. Nor did the government offer proof of which document was "uploaded into the system" or any other paperwork about what Mr. King was or was not informed of regarding prosecution. *Id.* 46:7-8. Bluntly, the only piece of evidence the government offered to rebut Mr. King's perspective was the problematic, and potentially fraudulent, Exhibit 9:

Question by Government: At the end of both Exhibit 8 and Exhibit 9, do you see a handwritten signature?

Answer by Bryant: Yes.

Q: And whose signature is that?

A: Mine.

...

Q: Could you please explain to the court what that difference was?

A: There's some wording in section five on page two that I am not sure in Exhibit 8 -- is that right? Yes. Exhibit 8. Regarding the FBI/USAA. It shows in Exhibit 8 in section five that the USA did decline to prosecute. However, in section -- or, I'm sorry. Exhibit 9, section five, on page two, it specifies that they did accept -- the FBI slash AUSA did accept the case for prosecution on December 11th, 2018.

...

Q: As you sit here today, are you able to account for this difference between the two documents?

A: No.

Mo. Hr'g. Tr. 32: 4--33:7.

THE COURT: All right. Because how is it that we have -- how do we have -- how is it that we have a document that's labeled Exhibit 8 with your signature that you appear to be saying you did not draft?

A: ...It's a mystery to me as well.

THE COURT: So, you don't know how it is that a document bearing your signature was created that we have in front of us, Exhibit 8?

THE WITNESS: I would have to say no. I don't know.

Mo. Hr'g. Tr. 45:12—47:16.

Q: ... As part of your standard practice, would the subject of possible criminal prosecution of an inmate ever be discussed at that hearing?

A: Outside of the reason for delay, no.

...

Q: As part of your standard practice, would you ever tell an inmate whether the FBI or U.S. Attorney's Office has accepted or declined a case for prosecution?

A: I would.

Mo. Hr'g. Tr. 36:1—23

Q: ...could you explain to the Court what if anything would you tell the inmate about possible criminal prosecution for what they've been charged with at the hearing?

A: A standard practice for me whenever I ran into a situation where the FBI or the AUSA has taken a case or not taken a case, I would tell the inmate the reason for delay was pending FBI referral. **If it was released for administrative processing, which is where the DHO comes into play, we don't do criminal, it's administrative, that's wherever I would tell the inmate it was referred to us for administrative processing.** (emphasis added).

Q: Would you say specifically whether the FBI or the U.S. Attorney's Office had accepted or declined –

A: No. I would have said it's released. Released for administrative processing.

Mo. Hr'g. Tr. 37:10—23.

THE COURT: One second, because I want to make sure I understand this. I'm the one going to be making the decision. Released for administrative processing, is that a nice bureaucratic way of saying the FBI and the AUSA are telling you you have the green light to go ahead with your hearing?

THE WITNESS: Yes.

Mo. Hr'g. Tr. 52:17-22.

In *Young*, the government agent misrepresented his connection to the federal judiciary while interrogating the defendant, but later testified “that his “number of mentions” of having spoken with the judge were all “error[s] in specificity of speech” and that his intent was to say “prosecutor.”” 964 F.3d at 942 (10th Cir. 2020) (internal quotations original). The Court reasoned that it need not consider what the agent *intended* to say, “[r]ather, we view the coercive nature of assertions from the standpoint of the defendant. *Id.* at 944. (quoting *United States v. Walton*, 10 F.3d 1024, 1029 (3d Cir. 1993); *United States v. Shears*, 762 F.2d 397, 402 (4th Cir. 1985) (evaluating “the defendant's perception of what government agents have promised”)).

Here, the government may argue that any misrepresentation made to Mr. King was due to confusion or accident and therefore Mr. King’s statements were not produced through explicit police coercion. However, from Mr. King’s standpoint, it is coercive to inform a person, repeatedly, he will not be prosecuted, while subjecting him to a hearing where his silence carries a presumption against him. From Mr. King’s standpoint, the government’s behavior was coercive, and the combination of the government’s misrepresentations and his incentive to speak, overbore his will to remain silent, and therefore his statements made during the DHO hearing were involuntary.

II. CONCLUSION

This Court must suppress (1) the statements made by Mr. King to SIS Officers on August 20, 2018, as involuntary and the product of coercion; and (2) the statements made to DHO Bryant on December 28, 2018, under the false belief that he would not be prosecuted for assault, overbore his will to remain silent and were also involuntary and obtained by coercion.

Dated November 15, 2021.

Respectfully submitted,

/s/ Lauren C. Regan

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 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
The Civil Liberties Defense Center