**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 SUPPRESS [ECF 114]**

---

## 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. *See generally* 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 (punctuation in original). 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, at 1. The defendant arrived outside the lieutenants' office, and Wilcox escorted defendant to a vacant office adjacent to the offices occupied by other lieutenants. *Id.*; Ex. 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, at 2. As a result of the assault, Wilcox suffered a broken nose, damage to blood vessels in his eye, and a finger injury. *Id.* at 3. 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," i.e., August 17, 2018. Ex. 5, at 2.

Defendant was Mirandized and interviewed by BOP Lieutenants Silva and Erb on August 20, 2018, about the assault. Exs. 6; 12.[2] The interview was video-recorded, and defendant signed a written *Miranda* waiver form. *Id.* Defendant asked questions about when he would be permitted to speak with a lawyer, and he was told, "after all this." Ex. 6 at 00:50-53. The defendant read the waiver form to himself, on camera. *Id.* at 1:29-1:53. The defendant then asked about when he would be able to speak to a lawyer. *Id.* at 1:53-57. The defendant specifically noted, "I assume you guys are prosecuting me so I would need a lawyer," and one of the investigators responded in the affirmative, saying "mm-hmm." *Id.* at 2:03-07. The defendant then asked again about the logistics of how he would get in touch with a lawyer. *Id.* at 2:20-35. The lieutenants responded as follows:

[2] Exhibit 6 is the video itself and has been submitted conventionally.

**Silva:** You'll be given the right to contact your own attorney.

**Erb:** Before we do anything, we will have to make sure that you are able to make contact with a lawyer.

**Defendant:** When would I be able to make that contact? Today?

**Erb:** Probably, yeah.

**Defendant:** I'd really like to talk to my lawyer.

**Erb:** Ok.

**Defendant:** I still don't mind answering some questions.

**Erb:** Ok.

**Defendant:** But I also want to talk to a lawyer.

*Id.* at 2:46-2:52. Defendant then read the waiver of rights form aloud, including the statement, "I do not want a lawyer at this time." *Id.* at 2:53-3:03. He then signed the waiver form. *Id.* at 3:16-3:21; *see also* Ex. 12. The lieutenants then asked if defendant was willing to answer questions, and defendant responded, in substance, that he wanted to hear what the questions would be before deciding whether to answer them, and that he would go on a "question by question basis." Ex. 6 at 3:45-53. The defendant also asked if the lieutenants would be willing to answer some of his questions. *Id.* at 3:53-57.

The interview continued until about the nine-minute mark. Between approximately the four-minute and nine-minute marks, the defendant stated, in substance, that Lieutenant Wilcox assaulted him, and that he (defendant) punched Wilcox three times in self-defense. At the end of the interview, defendant raised a series of concerns about his conditions of confinement, including that his toilet was not

working properly and that he did not have a pencil for writing. *Id.* 8:46-11:48. He also asked how long he would be held in the SHU, and whether he would be transferred to another facility. *Id.* The interview concluded after 11 minutes and 48 seconds. *Id.* at 11:48.

The defendant was transferred to the United States Penitentiary ("USP") at Leavenworth, Kansas, on August 21, 2018. 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. 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." 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. 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* Exs. 8-9. While mostly identical, the first version received and

[3] Exhibit 8 has been 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.

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." 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." 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. 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]

A Grand Jury returned a one-count indictment against defendant based on the assault in May 2019. 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 suppress statements. ECF 114. He is seeking to suppress his statements made on August 20, 2018, during his Mirandized interview, as well as his statements at the disciplinary hearing in January 2019. *Id.* As explained below, defendant's motion should be denied in part and granted in part, as the government is

[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.

not seeking to use either of these statements in its case-in-chief, and only wishes to use them for impeachment and cross-examination if defendant testifies.

**ARGUMENT**

Statements made under custodial interrogation, without proper warnings under *Miranda v. Arizona*, 384 U.S. 436 (1966) are generally inadmissible in the prosecution's case in chief. *United States v. Carrizales-Toledo*, 454 F.3d 1142, 1148 (10th Cir. 2006) (citing *United States v. Patane*, 542 U.S. 630, 639 (2004)). However, statements given without proper *Miranda* warnings can nonetheless be used for cross-examination and impeachment purposes as long as they were voluntary. *E.g.*, *Harris v. New York*, 401 U.S. 222, 225-26 (1971); *United States v. Stoner*, 466 F. App'x 720, 725-27 (10th Cir. March 12, 2012) (unpublished). Voluntariness is based on the "totality of the circumstances." *United States v. Perdue*, 8 F.3d 1455, 1466 (10th Cir. 1993). Relevant factors include "age, education, and intelligence of the suspect, the length of his detention and the questioning, and the use of physical punishment." *United States v. Chalan*, 812 F.2d 1302, 1307 (10th Cir. 1987). Any promises made to the defendant by law enforcement should also be considered. *United States v. Lewis*, 24 F.3d 79, 82 (10th Cir. 1994).

Defendant has moved to suppress two statements: (1) his statement during a disciplinary hearing in January 2019 in which he asserted that he struck Lieutenant Wilcox in self-defense; and (2) his Mirandized interview three days after the assault, on August 20, 2018. As an initial matter, the government does not intend to use either of these statements in its case-in-chief. Rather, the government only intends to use the statements for impeachment and cross examination. The Court therefore need not

address whether either of these statements were properly Mirandized. *See, e.g.*, *Harris*, 401 U.S. at 225-26. The Court need only determine whether the statements were voluntary. They both were.

**A. The video of the interview on August 20, 2018, shows that defendant was clear-headed and retained the capacity for rational decision-making.**

Starting with the defendant's interview on August 20, the defendant's demeanor and the circumstances of the interview demonstrate that the statement was the product of "free will," and therefore voluntary. *See Chalan*, 812 F.2d at 1308. The defendant was advised of his *Miranda* rights on video, at the beginning of the interview. He stated that he was willing to answer questions after being advised of those rights, and he signed a written waiver form. The defendant's posture and manner of speaking showed that he was calm and composed throughout the interview. *See generally* Ex. 6. He had the presence of mind to ask questions about the *Miranda* waiver form and took the time to read the form to himself before reading it aloud. *Id.* at 00:00-3:21. The only reasonable conclusion that can be drawn from the video of this interview is that the defendant's statements were voluntary.

Indeed, while the Court need not reach the issue, a close review of the interview audio reveals that the defendant also received proper *Miranda* warnings, and waived his *Miranda* rights during the interview. In this regard, the defendant asked questions about when he might be permitted to speak to a lawyer, and the interviewing officers ultimately told him that he would likely be able to speak to a lawyer that same day if he wished. Defendant suggests that the officers' statements that the defendant could speak to a lawyer "after this process" or "after all of this" conveyed to defendant that he had to

answer questions before speaking to a lawyer. ECF 114, at 4. But a review of the entire beginning portion of the interview, up to the time that the defendant signs the *Miranda* waiver form, shows that these statements, taken in context of the entire conversation, are conveying to the defendant that the reading of his *Miranda* rights needed to be completed before he could speak to a lawyer. After being fully advised of his rights and having the opportunity to ask the officers questions, the defendant then stated "I'd really like to talk to my lawyer. . . . I still don't mind answering some questions. . . . But I also want to talk to a lawyer." Ex. 6 at 2:46-2:52. These "plainly and directly contradictory" statements were not the unequivocal invocation of the right to counsel necessary to halt police questioning, particularly given that defendant signed the *Miranda* waiver form after making these statements, Ex. 12. *See United States v. Brown*, 287 F.3d 965, 972-73 (10th Cir. 2002) (holding that ambiguous responses to *Miranda* warnings about wanting to speak with an attorney before questioning did not suffice to invoke right to counsel).

Defendant argues that his conditions of confinement between the assault and the interview made his statement on August 20, 2018, involuntary. ECF 114, at 11-12. This argument fails because the interview video shows that defendant was fully in control of his faculties. "The mere existence of threats, violence, implied promises, improper influence, or other coercive police activity does not render a confession involuntary." *United States v. Braxton*, 112 F.3d 777, 780 (4th Cir. 1997). The question is whether the particular defendant's "will has been 'overborne' or his 'capacity for self-determination critically impaired.'" *Id.* (quoting *United States v. Pelton*, 835 F.2d 1067, 1071 (4th Cir. 1987). In the video here, defendant is unmistakably calm, self-possessed,

and articulate. He is clearly not intimidated by the officers, as he takes the opportunity during the interview to ask questions of his own, and to address the conditions in his cell. Regardless of the conditions defendant endured in the preceding days, the video of the interview shows that defendant's will and capacity for self-determination remained fully intact. Thus, the statement was voluntary and is admissible for impeachment and cross-examination purposes.

**B. Apparent confusion about whether the Department of Justice had accepted the assault case for prosecution did not make defendant's statements at the disciplinary hearing involuntary.**

Defendant argues that his statements at the disciplinary hearing in January 2019 were involuntary because he was falsely assured that he was not going to be criminally prosecuted for the assault on Wilcox. Defendant is wrong for two reasons. First, the record shows that the FBI and the U.S. Attorney's Office accepted this case for prosecution on the day the assault occurred. Ex. 5, at 2. Internal BOP emails from February 6, 2019, confirm that at least two BOP officials had that understanding before the disciplinary hearing report was issued. Ex. 11. Beyond that, one version of the disciplinary hearing report says it was declined, and one says it was accepted. *Compare* Ex. 8 *with* Ex. 9. The most plausible interpretation of the disciplinary hearing report that references the case being declined is that certain BOP officials were confused about the status of the criminal case.[5] Confusion resulting in incorrect

[5] While the government bears the burden of showing voluntariness, it is still noteworthy that defendant merely alleges that "corrections officials at USP Leavenworth" told him in early December 2018 that the "government declined to prosecute the assault charges threatened against him." ECF 114, at 4. He does not identify the name of an official or any evidentiary support for this assertion, other than that the declination is referenced in one version of the disciplinary report.

information being conveyed to a defendant does not render the confession involuntary because making a mistake is not the same as "coercive police activity" that "undermine[s] the suspect's ability to exercise free will." *See United States v. Cash*, 733 F.3d 1264, 1281 (10th Cir. 2013).

Moreover, in *United States v. Byram*, the court held that "even a false assurance to a suspect that he was not in danger of prosecution" in an interview atmosphere that was otherwise benign and free of threats or retaliation was not police coercion that could render a statement involuntary. *See* 145 F.3d 405, 408 (1st Cir. 1998). Thus, even if the Court finds that defendant was affirmatively told that he was not in danger of prosecution for the assault, such an assurance would not render his statements at the disciplinary hearing involuntary. *See id.* Indeed, this is not a situation where the defendant was badgered into confessing to a crime or into making a statement through a promise of leniency. *Cf. Sharp v. Rohling*, 793 F.3d 1216, 1234 (10th Cir. 2015) (holding that defendant's statement was involuntary where interviewing detective (falsely) told defendant repeatedly that she would not go to jail as long as she cooperated and continued speaking to police).

Second, defendant's statement was voluntary because it was not the "product" of police coercion; rather, it was the result of a particular feature of BOP disciplinary hearings. *See United States v. Erving L.*, 147 F.3d 1240, 1251 (10th Cir. 1998) (holding that statement should not have been excluded as involuntary because it was not "the product of police coercion"); *accord United States v. Mahan*, 190 F.3d 416, 422 (6th Cir. 1999) (stating that "alleged police misconduct" must be "the crucial motivating factor in the defendant's decision to offer the statement" for it to be deemed involuntary).

Specifically, as defendant acknowledges in his motion, "an inmate's silence during a disciplinary proceeding can be used to draw an adverse inference against the inmate." ECF 114, at 10. Defendant likely chose to make a statement to avoid that adverse inference. And "permitting an adverse inference to be drawn from an inmate's silence at his disciplinary proceedings is not, on its face, an invalid practice." *Baxter v. Palmigiano*, 425 U.S. 308, 320 (1976). Defendant may regret making that statement now, but it was not the product of police coercion, and should therefore be admissible for impeachment and cross-examination purposes at trial.

## CONCLUSION

Defendant's motion should be denied in part and granted in part. The government does not intend to use the challenged statements in its case-in-chief, and therefore does not oppose the suppression of the statements for that limited purpose. Defendant's motion should otherwise be denied, as his statements were voluntary under the Due Process Clause of the Fifth Amendment, and therefore may be used for impeachment and cross-examination.

Respectfully submitted this 23rd day of September, 2021.

MATTHEW T. KIRSCH
Acting United States Attorney

By: *s/ Aaron Teitelbaum*
Aaron M. Teitelbaum
Assistant U.S. Attorney
United States Attorney's Office
1801 California St., Suite 1600
Denver, Colorado 80202
Phone: (303) 454-0100
Fax: (303) 454-04
E-mail: Aaron.Teitelbaum@usdoj.gov
Attorney for the Government

**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 SUPRRESS [ECF 114]** 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