UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,	CR 17-50044
Plaintiff,	UNITED STATES' MEMORANDUM IN OPPOSITION TO DEFENSE MOTION TO DISMISS
vs.	
TOLIN GREGG,	
Defendant.	

The United States of America, by and through Assistant United States Attorney Eric Kelderman, submits this Memorandum in Opposition to the defendant's Motion to Dismiss the Indictment for Governmental Misconduct (Docket 124).

BACKGROUND

The defendant was indicted on March 21, 2017, charged with Aggravated Sexual Abuse by Force. Dockets 1, 2. On June 16, 2017, he filed a Motion to Dismiss Indictment. Docket 34. The defendant has now moved for dismissal of the indictment based on what he claims are "willful acts and omissions" of SA Lucas, which he claims constitute a pattern of governmental misconduct. Docket 124. Defendant claims his rights to due process, to present a defense, and to have a fair trial have been violated and "irreparably prejudiced." The government resists the motion.

In its prior Order (Docket 120) resolving the defendant's first motion to dismiss, the Court found SA Lucas threatened a witness, Brylee Redowl ("Redowl"), and suggested to the parties the threats were "likely . . . improper."

Docket 120 at 28 n.14. The Court did not decide the issue because it was not before the Court, but advised if it found the threats were improper, only a prejudice analysis remained to be decided. The defendant, having accepted the Court's invitation to hear the issue, filed the pending motion.

DISCUSSION

A. Dismissal of an indictment is a drastic and disfavored remedy.

The Eighth Circuit disfavors dismissing indictments. United States v. Manthei, 979 F.2d 124, 126 (8th Cir. 1992). "Because the drastic step of dismissing an indictment is a disfavored remedy, . . . a district court may properly dismiss an indictment *only* if the prosecutorial misconduct (1) was flagrant, . . . and (2) caused substantial prejudice to the defendant." Id. at 126-27 (emphasis added) (quoting United States v. Jacobs, 855 F.2d 652, 655 (9th Cir. 1988) (additional citations omitted)). "[A]bsent flagrant and prejudicial prosecutorial misconduct," the Eighth Circuit "will find that the district court's dismissal of an indictment is an abuse of its discretion." Jacobs, 855 F.2d at 655. It is well-established in the Eighth Circuit Court of Appeals that the dismissal of an indictment is only appropriate when a defendant demonstrates "flagrant misconduct and substantial prejudice." United States v. Darden, 688 F.3d 382, 387 (8th Cir. 2012) (quoting United States v. Wadlington, 233 F.3d 1067, 1073 (8th Cir. 2000).

The Supreme Court has likewise held "[a]bsent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate." United States v. Morrison,

449 U.S. 361, 365, 101 S. Ct. 665, 668 (1981); United States v. Mechanik, 475 U.S. 66, 106 S. Ct. 938, 942–43 (1986); see also United States v. Loud Hawk, 474 U.S. 302, 106 S. Ct. 648, 657 (1986) (discussing "severe remedy of dismissing the indictment").

The Eighth Circuit disfavors dismissal of an indictment without a defendant's affirmative showing of actual prejudice. "There is a strong presumption of regularity in grand jury proceedings, and the defendant has a heavy burden in proving irregularities." United States v. McKie, 831 F.3d 819 821 (8th Cir. 1987) (per curiam) (citing United States v. Kouba, 822 F.2d 768, 774 (8th Cir. 1987)). "Further, the extreme remedy of dismissal of an indictment is appropriate only if there is a showing of actual prejudice." Id. at 821.

The United States Supreme Court has instructed

> [T]he Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment. Judges are not free, in defining "due process," to impose on law enforcement officials our "personal and private notions" of fairness and to "disregard the limits that bind judges in their judicial function." Our task is more circumscribed. We are to determine only whether the action complained of … violates those "fundamental conceptions of justice which lie at the base of our civil and political institutions," and which define "the community's sense of fair play and decency."

United States v. Talbot, 825 F.2d, 911, 998 (1987) (quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935) (additional citations omitted)).

Furthermore, "[w]hile the courts retain inherent supervisory authority over the law enforcement process which culminates in the criminal proceedings brought before them, courts may not utilize their supervisory powers to fashion remedies calculated to deter perceived future misconduct where the defendant

has not suffered an infringement of a constitutional right." Talbot, 825 F.2d at 998; United States v. Payner, 447 U.S. 727, 735, 100 S. Ct. 2439, 2446 (1980); United States v. Gjieli, 717 F.2d 968, 977–79 (6th Cir. 1983), cert. denied, 465 U.S. 1101, 104 S. Ct. 1595 (1984).

1. The record is devoid of "flagrant misconduct."

This Court and the magistrate judge found SA Lucas's testimony was false, but not perjurious. In other words, SA Lucas misstated the facts, but he did not intentionally testify falsely. Docket 120 at 17-18. This does not rise to the level of "flagrant misconduct" required to dismiss an indictment. The magistrate judge found there was sufficient competent evidence before the grand jury to sustain the charge it issued. Docket 70 at 8; Docket 120 at 12-13. The Supreme Court held

> [w]e believe that the rule ... [is] that only in a flagrant case, *and perhaps only where knowing perjury, relating to a material matter*, has been presented to the grand jury should we dismiss an otherwise valid indictment returned by an apparently unbiased grand jury. To hold otherwise would allow a minitrial as to each presented indictment contrary to the teachings of Mr. Justice Blackmun in *Costello*....

United States v. Kennedy, 564 F.2d 1329, 1338 (9th Cir.1977), cert. denied, 435 U.S. 944, 98 S. Ct. 1526 (1978); United States v. Levine, 700 F.2d 1176, 1179-80 (8th Cir. 1983).

It must be noted United States v. Plumley has no application to the present case. In that case, defendant Kaune perjured himself when he testified to the grand jury that could not have committed a motorcycle theft because he was at work when it was stolen. 207 F.3d 1086, 1095 (8th Cir. 2000). More

than eight months later, an FBI agent proved Kaune's alibi false when he checked Kaune's work records. Id. Kaune was thereafter indicted for perjury. Id. Plumley defines perjury, but has nothing to do with dismissing an indictment for flagrant misconduct, or witness providing false testimony without the "willful intent to provide false testimony." Id. at 1095-96; see Docket 120 at 13. SA Lucas has not been indicted for perjury, nor has the magistrate judge or this Court found his testimony to be perjurious. There is no evidence SA Lucas had the willful intent to falsely testify. Plumley's facts are entirely dissimilar to those in the present case.

Reliance on United States v. Darden is similarly misplaced. The Eighth Circuit found the record devoid of the "flagrant misconduct" and "substantial prejudice" to the defendant required for dismissal of an indictment. United States v. Darden, 688 F.3d 382, 388 (8th Cir. 2012). Darden involved the presentation of conflicting evidence before the grand jury, in that the government presented witness statements and evidence that the witness denied making the statements attributed to them. Id. The defendant alleged the prosecutor acted improperly by suggesting the defendant had threatened witnesses who had recanted. The Eighth Circuit rejected the allegation out of hand. Darden does not stand for the proposition that an FBI agent commits "flagrant misconduct" if he gives false statements that do not rise to the level of perjury. Contra Docket 120 at 13.

Finally, United States v. Moore does not support dismissal of the indictment in this case. The Eighth Circuit was clear that, even where an

alleged misstatement or perjurious statement has been made before the grand jury, dismissal is still inappropriate so long as there is "some other competent evidence to sustain the charge." Moore, 184 F.3d 790, 794 (8th Cir. 1999). "[M]isstatements or mistakes alone do not justify the dismissal of an otherwise valid charge. Id. (citing United States v. Johnson, 767 F.2d 1259, 1275 (8th Cir. 1985). Even if SA Lucas's statements regarding his interview with Redowl are material but false, sufficient competent evidence was presented to the grand jury to sustain the charge. See United States v. Gregg, Grand Jury Proceedings, dated March 21, 2017. Specifically, the grand jury heard testimony about the alleged victim's account of suffering forcible rape, her sexual assault examination, her injuries, the defendant's admission that sexual activity occurred on the night the alleged victim said she was raped, her sexual orientation, and the defendant's knowledge of her lack of sexual attraction to men. SA Lucas's mistaken testimony with relation to Redowl does not justify dismissal of the otherwise valid charge. See Moore, 184 F.3d at 794; Johnson, 767 F.2d at 1275; Levine, 700 F.2d at 1180.

2. The defendant has not shown demonstrable prejudice.

The defendant has made broad and conclusory allegations of constitutional violations, without any showing of demonstrable prejudice. He has not been presented with the "inability to mount a fair and complete defense." See Docket 124 at 8 (quoting United States v. Juan, 704 F.3d 1137 (9th Cir. 2013)). The fact that either party can impeach Redowl at trial using his own statements is not "demonstrable prejudice" such that dismissal of the

indictment is appropriate. Redowl has obtained counsel and, as this Court pointed out in Docket 120, has indicated to the defendant his intention to testify as a defense witness at the time of trial. Arguably, the Court's rulings with respect to SA Lucas's interview of Redowl and grand jury testimony regarding the same have improved the defendant's defense. Not only can the defendant present Redowl's exculpatory testimony, but also evidence of SA Lucas's alleged threats having caused Redowl's statements inculpating the defendant. The defendant will suffer no prejudice in both presenting the evidence that assists his defense and impugning the credibility of the government's case agent.

The proposition that the government is not permitted to substantially interfere with defense witness testimony was set forth by the Supreme Court in Webb v. Texas, 409 U.S. 95, 98 (1972) (per curiam). The defense cites United States v. Juan, 704 F.3d 113 (9th Cir. 2013), for the proposition that the government may not interfere with testimony by its witnesses. Juan involved a discussion of the government's alleged interference with its own witnesses. The Ninth Circuit agreed that the principles of Webb should apply to all witnesses, but found that the defendant failed to prove that "under the totality of the circumstances, the substance of what the prosecutor communicate[d] to the witness [was] a threat over and above what the record indicates is necessary." Juan, 704 F.3d at 1142 (internal citation omitted).

Even if it is assumed, *arguendo*, the defendant's rights were violated by SA Lucas's grand jury testimony about the Redowl interview, the defendant points to no adverse impact upon the proceedings and ignores the various remedies

available to alleviate the supposed prejudice. The defendant's right to present exculpatory evidence has not been "substantially interfered" with. See Docket 124 at 9. Redowl provided information both implicating and exculpating the defendant. However, Redowl remains an exculpatory witness, according to the defendant. Redowl is not precluded from testifying that SA Lucas threatened him and as a result, he changed his statement, if that is in fact Redowl's belief. Accordingly, the defendant cannot show demonstrable prejudice with respect to SA Lucas's interview with Redowl.

Even if the Court finds there is "demonstrable prejudice," the appropriate remedy is not dismissal, but "tailoring relief appropriate in the circumstances." Morrison, 449 U.S. at 366. Even where government agents engage in "egregious behavior," including but not limited to blatant violation of the Sixth Amendment by interviewing a represented defendant without his counsel present, dismissal of the indictment is not condoned by the Supreme Court. Id. at 367. Under the circumstances of this case, appropriately tailored relief includes admission of all of Redowl's statements to SA Lucas, as well as all of SA Lucas's statements to Redowl and to the grand jury. This protects the defendant's ability to impugn SA Lucas's credibility on the stand by cross-examination about Lucas's alleged threats. Allowing the defendant to vigorously cross-examine SA Lucas about his conduct in this case is a sufficient remedy to both remove any alleged prejudice to the defendant and impugn the credibility of the case agent.

As noted in its previous filings, the government opposes suppression of Redowl's inculpatory statements to SA Lucas. Suppression of his statements

would permit the defendant to create the false impression that his witness is unimpeachable where the witness has given arguably conflicting accounts of what he witnessed. Suppression of Redowl's statements would present to the petit jury the same situation the defendant now complains of with respect to the grand jury—that a witness created a false impression or gave misleading testimony, and the jurors were therefore illegitimately persuaded. In this case, suppression is not the "tailored remedy" envisioned by the Eighth Circuit.

B. SA Lucas's statements to Redowl were not improper, and Webb v. Texas does not require dismissal.

Before the government applies Webb v. Texas to the facts of this case, the government reasserts its argument and incorporates its previously-submitted authority that Special Agent Lucas did not engage in improper intimidation of Redowl. Dockets 47, 48, 65. SA Lucas, upon recognizing that Redowl's version of events contrasted with that of the alleged victim, simply and directly warned Redowl of the consequences for providing false information during an investigation. "[W]arnings by government agents to prospective witnesses regarding the consequences for testifying falsely are not improper per se." United States v. Anwar, 428 F.3d 1102, 1113 (8th Cir. 2005).

At no time did SA Lucas threaten Redowl with perjury. Instead, SA Lucas challenged untrue information by informing Redowl he could get himself into trouble if he provided false information. Providing materially false statements to an FBI agent is a felony. See 18 U.S.C. § 1001. Any person who assists an offender to hinder his apprehension, trial, or punishment, is an accessory to a crime. See 18 U.S.C. § 3. When SA Lucas challenged Redowl's provision of

information which SA Lucas knew to be false, SA Lucas advised Redowl of the potential consequences for providing false information. This is not improper under the applicable law. This is not a situation where a witness has taken the stand at trial and threatened during a recess. See, e.g., *United States v. Hammond*, 598 F.2d 1008, 1012 (5th Cir.), on reh'g, 605 F.2d 862 (5th Cir. 1979) (reversing a conviction where an FBI agent warned a testifying defense witness that he would have "nothing but trouble" if he persisted in his testimony). This is not a situation where a witness previously testified at grand jury and has now changed his testimony during a jury trial. Juan, 704 F.3d at 1142. Unlike the witness in Juan, Redowl has provided no prior testimony. If and when he testifies at trial, regardless of what he testifies to, he will not have "materially change[d] his prior trial testimony." 704 F.3d at 1142.

Nor is SA Lucas's interview akin to United States v. Smith, 156 478 F.2d 976, 979 (D.C. Cir. 1973), "in which the prosecutor threatened to prosecute the prospective witness for past crimes if he took the stand and testified in a pending trial." United States v. Risken, 788 F.2d 1361, 1371 (8th Cir. 1986). In United States v. Habhab, the Eighth Circuit recognized "government conduct designed to intimidate potential defense witnesses is improper[,]" and "intimidation may occur when a potential witness is informed, say, on the eve of trial, that he or she is under criminal investigation." 132 F.3d 410, 415 (8th Cir. 1997) (citing United States v. Thirion, 813 F.2d 146, 156–57 (8th Cir. 1987)). However, the Eighth Circuit concluded the district court did not err in

concluding no witness intimidation occurred where "there [was] no evidence that the government's actions were designed to intimidate" a witness[.]" Id.

Similarly here, there was no design by SA Lucas to intimidate the witness. Instead, he spoke to Redowl to determine what he observed on the night of the crime alleged in the Indictment. When Redowl provided information the agent believed was inconsistent with the investigation, SA Lucas straightforwardly advised Redowl he needed to be truthful or Redowl could face consequences. Contrary to defendant's assertion, SA Lucas did not give Redowl a choice to either become a government witness or be prosecuted and face fifteen years' imprisonment. See Docket 124 at 5. Redowl "was never threatened with an actual prosecution, a recommendation for prosecution, or any other specific adverse consequence of his testimony." Smith v. Rackley, No. EDCV1500864ODWAFM, 2016 WL 3704775, at *17 (C.D. Cal. June 6, 2016), report and recommendation adopted, No. CV 15-0864-ODW (AFM), 2016 WL 3704867 (C.D. Cal. July 11, 2016) (citing United States v. Jaeger, 538 F.3d 1227, 1232 (9th Cir. 2008) (concluding statements to witness about perjury that were "brief, factual, and explanatory" did not constitute intimidation, especially where the witness "was not lectured on any *specific* consequences that might flow from her testimony") (emphasis in original); Williams v. Woodford, 384 F.3d 567, 603 (9th Cir. 2002) (concluding that merely warning a witness of legal consequences of testimony "does not unduly pressure the witness's choice to testify or violate the defendant's right to due process")).

Webb v. Texas does not support a finding of prejudice to defendant, whether or not Redowl eventually testifies or refuses to do so. Webb involved a witness who presented himself to testify on a defendant's behalf, but then refused to testify following the trial judge's lengthy admonition about perjury. 409 U.S. 95, 96, 93 S. Ct. 351, 352 (1972). The Supreme Court found that the witness's refusal to testify immediately following the judge's perjury admonition "strongly suggest[ed] that the judge's comments were the cause of [the witness's] refusal to testify. Id.

The defendant has expressed his knowledge that Redowl will testify truthfully and favorably to the defense at trial. Should Redowl now refuse to testify at trial, SA Lucas's brief admonition in December 2016 cannot reasonably be said to be the basis for any such refusal. Moreover, regardless of Redowl's testimony, whether favorable to the government's case or the defendant's, he will have a prior inconsistent statement. The agent's conduct here cannot be responsible for any such concerns because he did nothing more than interview the potential witness and advise him of the importance of providing truthful information. The witness's decision to retain counsel and invoke his Fifth and Sixth Amendment rights was not made anywhere near the time he was interviewed or allegedly threatened or intimidated. The witness was not charged in connection with the crime alleged in the Indictment in this case nor the circumstances surrounding it. His decision to retain an attorney was his own, and now the witness's decision whether to testify will be his own, after being advised by counsel, rather than a decision made as a result of any intimidation.

Moreover, the timing of the witness's assertion of the privilege against self-incrimination shows he was not intimidated by government conduct by the agent. The witness was interviewed on December 24, 2016. The notification that he was asserting his Fifth and Sixth Amendment privilege through counsel was sent on July 12, 2017. Four days later, on June 16, 2017, the instant motion was filed with the Court. *See* Docket 35. As noted in Habhab, intimidation can occur when a witness is informed, for example, "on the eve of trial, that he or she is under criminal investigation." Habhab, 132 F.3d at 415. Most, if not all, cases analyzing issues of government misconduct discuss situations in which the allegations of misconduct arise near or during trial. Nothing even close to that situation occurred here. The witness was interviewed roughly 5½ months before any invocation of rights by the witness, or allegation of misconduct, ever arose. There is no prejudice to the defendant now, nor will there be prejudice to the defendant later *attributable to the government* if Redowl refuses to testify, because having indicated his willingness to testify truthfully and favorably to the defense despite being "threatened" by SA Lucas, Redowl has not been "driven off the stand" by any governmental action.

C. The defendant has failed to show bad faith on the part of law enforcement.

The defendant mischaracterizes SA Lucas's investigation and conduct with respect to the alleged cell phone video. SA Lucas's failure to view the cell phone video or seize Redowl's phone and search its contents without a warrant does not amount to bad faith. The testimony at the evidentiary hearing demonstrates that Lucas repeatedly attempted to preserve the video but Redowl refused to

produce it to law enforcement. On December 24, 2016, the date of Redowl's interview, SA Lucas had no reason to believe Redowl would refuse to produce the video and later delete it.

The record supports a finding that SA Lucas had no animus toward the defendant or Redowl, nor did he make any effort to suppress exculpatory evidence. Instead, SA Lucas provided Redowl with his business card and asked Redowl to email the video to Lucas. Redowl failed to do so, despite SA Lucas's repeated requests for its production.

1. California v. Trombetta

The defendant's reliance on California v. Trombetta is misplaced. The due process challenge underlying Trombetta resulted from evidence actually obtained by law enforcement, but not preserved for trial. 467 U.S. 479, 481-83, 104 S. Ct. 2528 (1984). Specifically, in that case the defendants provided samples of their breath when subjected to a breath test pursuant to DUI investigations. Id. at 481-82. The breath itself was not preserved. Id. at 482-83. The prosecution relied on raw data from the breath machines in each respective case in chief. Each defendant filed a motion to suppress his breath test results based on law enforcement's failure to preserve his breath sample. Id. at 483-84.

The Supreme Court considered the extent to which the Due Process Clause imposes on the government the duty to take affirmative steps to preserve evidence on behalf of criminal defendants. Id. at 486. The Court determined that any duty the Constitution imposes on the State to preserve evidence is

limited to evidence that might be expected to play a significant role in the suspect's defense. Id. at 488. Moreover, the Court found no evidence of official animus toward the defendants, nor was there a conscious effort to suppress exculpatory evidence. Id. Trombetta, however, involved the failure to preserve evidence actually collected by the arresting officer, an issue not present in the instant case.

2. Arizona v. Youngblood

The seminal holding of Arizona v. Youngblood is that the failure of police to preserve only *potentially* useful evidence is not a denial of due process unless the defendant demonstrates bad faith on the part of police. 488 U.S. 51, 56-58, 109 S. Ct. 333, 336-37 (1988). The Court explained rejection of a defendant's spoliation argument is proper where law enforcement officers act in good faith and in accordance with their normal practice. Id. at 56 (citing Trombetta, 467 U.S. at 488).

The case law on the issue of failure to preserve evidence emphasizes that for purposes of constitutional violations, the good or bad faith of the government is paramount. The Youngblood panel aptly wrote:

> The Due Process Clause of the Fourteenth Amendment, as interpreted in Brady, makes the good or bad faith of the [government] irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the [government] to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant. Part of the reason for the difference in treatment is found in the observation made by the Court in Trombetta, (citation omitted), that "[w]henever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed." Part of it stems from our

> unwillingness to read the "fundamental fairness" requirement of the Due Process Clause, (citation omitted), as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution. We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. **We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.**

Youngblood, 488 U.S. at 57–58 (emphasis added). The Youngblood decision requires the defendant to *affirmatively* show animus on the part of law enforcement in order to demonstrate a denial of due process. No such showing has been made in the present case. The defendant's conclusory allegation of bad faith is not supported by the record.

Furthermore, there is no evidence that the video recording was exculpatory. No one with knowledge of the video's contents testified at the evidentiary hearing on July 5, 2017. There is no evidence in the record about what the video showed, other than SA Lucas's testimony about what Redowl told him the video showed. Testimony taken at the evidentiary hearing in this matter confirms this.

> Q. (Attorney Hanna) When Brylee Red Owl told you that he had video recorded of a girl who you thought had been raped and that he recorded this minutes after she said she had been raped, you knew that was potentially very important evidence, didn't you?
>
> A. (SA Lucas) Yes, I did. Brylee was being cooperative at that point. And that's why I made a note of that in my notes that he had a video. So that's why I asked him later that day to get me the video. He was being cooperative, so I didn't see a reason to take his phone. It was in his interest to provide that video. So I thought he would give me the video.

After I asked for it twice that day and then I called him later to ask for that video again, he didn't send it to me.

Q. And you have not called him in the last six months to say, Where is that video of the rape victim, Brylee, correct?

A. That's correct.

Q. Doesn't it seem to be an important piece of evidence to you anymore?

A. I thought maybe it didn't exist. If he would have an interest in sending that to me, he was being very cooperative, I thought he was going to send it to me, and I didn't see a reason to take his phone and keep it as a piece of evidence for that video.

Q. Now, he just told you, I just looked at it, right?

A. That's correct.

Q. So you presumed that he's talking about his phone, right?

A. Correct.

Q. And he had his phone on him, right?

A. That's correct.

Q. And you didn't -- at that point you had interviewed the girl and you had started to interview Brylee, right?

A. That's correct.

Q. And you didn't -- you didn't know that -- well, I'm going to ask you, did you realize at that point that when he's telling you, I videotaped her to show her what she's like when she's really drunk, that if that video showed what he said it showed, it would contradict her statements to you, right?

A. That's correct.

Q. And you knew that if that video showed what Brylee said it showed, that would prove that she lied to you on at least that point, right?

A. Correct. On that point.

Q. Okay. Agent -- Special Agent, why didn't you say, Let's take a look at that right now, Brylee?

> A. It happened early on in the interview. And as I got through the interview, essentially, I didn't think to ask him about that. I forgot to ask him to view the video. So we're in my vehicle shortly thereafter, essentially right after, and we drive up to the spot to take a look at that. As I'm driving back from that spot, I said, Hey, you've got that video, right? He said, Yes. I said, Here's my business card. I want you to email that video to me. He said, Okay. I'll do that.
>
> Q. He told you that the video lasted six minutes, right?
>
> A. That's correct.
>
> Q. And in this investigation where you're talking to witnesses, you didn't think it was important enough to take six minutes out and see right then and there what she looked like after she claimed she was raped?
>
> A. No. He said he was going to give me the video, so I took him at his word that he was going to give me the video.

EH Transcript, July 5, 2017, at 56:8-59:1.

> During the same evidentiary hearing, SA Lucas testified:
>
> Q. (Attorney Hanna) But then later on in the car, in your car he, again, brought it up or you brought it up?
>
> A. (SA Lucas) No. I brought it up.
>
> Q. Okay.
>
> A. I said, Hey -- it popped back in my mind that, hey, I need to get that video. I said, Hey, would you email that video to me? He agreed. He was being very cooperative. I had no reason to believe he wouldn't give me that video.
>
> Q. You weren't curious to look at it right then and there?
>
> A. No, not at that time. I was still driving down a country road.

EH Transcript, at 60:4-15. The record is insufficient to definitively conclude that the video is exculpatory. In addition to the victim being "drunk," the video would presumably show the victim's facial injuries, the presence or absence of any alcohol containers, and the conduct of Redowl and the defendant. At most,

the video is only "potentially exculpatory." This is insufficient to meet the standard under Youngblood.

It should be noted the defendant's argument the video would have established R.O.H. was not "acting like a rape victim," Docket 124 at 12, is unsupported by evidence in the record and should be disregarded. The premise that a sexual assault victim would, or should, have behaved in a certain way after being raped, particularly while still in the presence of her alleged rapist, is patently offensive and lacks foundation of any kind. The defendant asks the Court to conclude that the video was definitely exculpatory simply because it is now unavailable. The defendant he has failed to put forth evidence that the video's contents were exculpatory. The defendant argues the video might have been helpful to impeach the victim, but a showing of potential usefulness does not meet the requisite standard. Youngblood, 488 U.S. at 57–58.

CONCLUSION

Based on the foregoing, the United States requests the Court deny the defendant's motion to dismiss the indictment, in its entirety.

Dated this 21st day of January, 2019.

RONALD A. PARSONS, JR.
United States Attorney

/s/ Eric Kelderman

Eric Kelderman
Assistant U.S. Attorney
201 Federal Bldg., 515 Ninth Street
Rapid City, SD 57701
(605)342-7822