IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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No. 13-3205

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

SAMUEL MULLET, SR.,

Defendant-Appellant

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

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UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION FOR BOND PENDING APPEAL

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Pursuant to Federal Rule of Appellate Procedure 9 and Sixth Circuit Rule 9(b), the United States respectfully submits this opposition to defendant Samuel Mullet, Sr.'s motion for bond pending appeal, filed April 23, 2013. Mullet was convicted of seven felony offenses: 18 U.S.C. 371 (conspiracy), 18 U.S.C. 249(a)(2) (willfully causing bodily injury because of a person's religion) (four counts), 18 U.S.C. 1519 (obstruction of justice), and 18 U.S.C. 1001 (false statements). On February 8, 2013, Mullet was sentenced to 15 years'

imprisonment. R. 394.[1] Mullet has been in custody since he was arrested in November 2011. See generally R. 127 at 1. On five previous occasions he has asked either this Court or the district court that he be released; all of his requests have been denied.

The instant motion should also be denied. As discussed below, because Mullet was convicted of a crime of violence, and it is an offense for which the maximum sentence is life imprisonment, 18 U.S.C. 3143(b)(2) prohibits his release pending appeal unless he: (1) "clearly show[s] that there are exceptional reasons" why his detention would not be appropriate; and (2) satisfies the requirements for release pending appeal set forth in 18 U.S.C. 3143(b)(1). See 18 U.S.C. 3145(c). He cannot satisfy these requirements.

BACKGROUND

1. This case arises out of a series of religiously-motivated assaults over a two-month period in the fall of 2011 by members of a religious community in Bergholz, Ohio against practitioners of the Amish religion. On March 28, 2012, the government filed a ten-count Superseding Indictment charging 16 defendants in connection with five religiously motivated assaults. R. 87 at 14-19. The indictment alleged that, in the fall of 2011, defendants willfully caused bodily

[1] References to "R. __" are to numbers on the district court docket sheet in *United States* v. *Mullet*, No. 5:11cr594 (N.D. Ohio).

injury to the victims by restraining and assaulting them, including forcibly cutting off their beard hair (and in some cases also their head hair), because of their religion, in violation of 18 U.S.C. 249(a)(2), a provision of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009. R. 87 at 3-19. The indictment also charged related counts of conspiracy, obstruction of justice, and making false statements to federal law enforcement officers. R. 87 at 3-13, 19-21.

Samuel Mullet, Sr., the Bishop and leader of the Bergholz community, was charged with conspiracy (Count 1); violation of Section 249 (Counts 2-6) in connection with the five separate assaults; obstruction of justice (Counts 7-8); and false statements (Count 10). R. 87. As alleged in the indictment, Mullet conspired with the other defendants to forcibly remove the beard and head hair of the victims because of religious disagreements. R. 87 at 2-5. He also concealed evidence of assaults and made false statements to FBI agents during the FBI's investigation. R. 87 at 19-21.

2. In September 2012, Mullet was convicted on seven of the nine counts charged: Counts 1 (conspiracy); Counts 2, 4-6 (Section 249(a)(2)); Count 8 (obstruction); and Count 10 (false statements). R. 230 at 1-4, 21-33. To prove a violation of Section 249(a)(2), the government must show that the defendant willfully caused bodily injury to another person because of the person's actual or perceived religion. If the offense involves kidnapping, it is punishable by

imprisonment "for any term of years or for life." 18 U.S.C. 249(a)(2)(A)(ii). With regard to Counts 2 and 4-6, the jury specifically found that the offense included kidnapping. R. 230 at 21-30. On February 8, 2013, Mullet was sentenced to 15 years' imprisonment, the longest sentence of the 16 defendants. R. 389.

3. Mullet was arrested in November 2011 in connection with the assaults. After a detention hearing, a federal magistrate determined that he was a flight risk and a danger to the community; as a result, the district court ordered Mullet detained. See R. 127 at 1; see generally R. 14.

On January 5, 2012, Mullet filed a motion to revoke the detention order, asserting that he satisfied the standards for release pending trial set forth in 18 U.S.C. 3142. R. 14. The district court denied the motion. R. 26 at 2. On January 18, 2012, Mullet filed a motion for reconsideration. R. 43. On January 23, 2012, the district court denied that motion. R. 52. Mullet appealed to this Court the denial of his motions to revoke the detention order and motion for reconsideration. R. 53.

On April 23, 2012, while that appeal was pending, Mullet filed a second motion in the district court for reconsideration of the denial of his motion to revoke the detention order. R. 117. Mullet asserted that, because of a change in his financial circumstances, he could provide a "significant cash bond to secure his pretrial release," as well as his "now-unencumbered 800-acre property in

Bergholz." R. 117 at 2. On April 30, 2012, the district court denied the motion. R. 127. Noting that the government "continues to oppose Mullet's release," the court stated that the government had met its burden of showing that Mullet was a danger to the community by "demonstrating that Mullet exerts incredible control over members of his community, leading these individuals to commit violent acts against those who challenge his authority." R. 127 at 2. The court added that it was "concerned that Mullet might again exert this control were he to be released. If anything, Mullet's new wealth will enhance the scope of his power over members of his community, most of whom are people of modest means." R. 127 at 2 (footnote omitted).

Also on April 30, 2012, this Court affirmed the district court's orders denying Mullet's motion to revoke the detention order and motion for reconsideration. *United States* v. *Mullet*, No. 12-3096 (6th Cir.); see R. 128. This Court, applying the standards set forth in 18 U.S.C. 3142(g), noted that Mullet faced a lengthy sentence and the charged offenses are crimes of violence. Slip op. 2. The Court also noted that he "has previously defied court orders; he has confronted the local sheriff when the sheriff attempted to enforce these orders; and he has threatened the local sheriff's life." Slip op. 3. Further, the Court found that "the possibility of danger to others weighs against Mullet's release." Slip op. 4. The Court explained that while "Mullet's own community has nothing to fear from

him, * * * those that have previously crossed paths with Mullet * * * do. By his own admission to the media, he could have stopped the attacks but he did not. He further admitted that the attacks were in retaliation for other community members' failure to adhere to his decision, and he claimed he should be permitted to punish these people." Slip op. 3-4. The Court concluded that the district court "did not clearly err in finding that there were no conditions that would assure Mullet's appearance or the safety of others or the community." Slip op. 4.

4. As noted above, in September 2012, Mullet was convicted on seven counts, and on February 8, 2013, he was sentenced to 15 years' imprisonment. On February 20, 2013, he filed a notice of appeal. R. 425.

On March 29, 2013, Mullet filed in the district court a motion for release pending appeal. R. 518. This was the sixth time Mullet sought release. He principally argued that his appeal raises substantial questions of law and fact that constitute "exceptional circumstances" warranting release pursuant to 18 U.S.C. 3145(c), and he discussed these legal issues at length. R. 518 at 4-26. On April 5, 2013, the United States filed an opposition, stating: "Detaining Mullet has always been appropriate and necessary to ensure his appearance and protect the community. Indeed, the attacks only stopped *after* Mullet was arrested on November 23, 2011. The arrests of his followers had no deterrent effect on him, and Mullet was even heard on October 9, 2011 jail calls pronouncing that the

Bergholz community would commit more attacks and that law enforcement would not be able to stop them." R. 530 at 4 (footnote omitted).

On April 9, 2013, the district court denied the motion for release pending appeal. R. 535. The court noted that because Mullet was convicted of a crime for which the maximum sentence is life imprisonment, "detention is mandatory" unless "it is clearly shown that there are exceptional reasons why his detention would not be appropriate." R. 535 at 1. The court further noted that Mullet asserts that his appeal raises substantial questions of law and fact likely to result in reversal. R. 535 at 2. But the court explained that it had previously rejected similar arguments. Quoting from its order addressing the United States' post-trial motion for detention, the court explained: "In denying each defendant's motion for judgment of acquittal at the close of the government's case and again at the conclusion of all the evidence * * *, the Court ruled that there was sufficient evidence from which a reasonable juror could convict each defendant. Prior to trial, the Court rejected all of the legal challenges to the indictment and to the prosecution * * *. The Court does not believe the law has changed in the last few months, nor that anything in the evidentiary presentation at trial suggested its rulings were incorrect." R. 535 at 2 (quoting R. 243 at 2). The court concluded that Mullet "has not supplied the Court with a good reason to alter its position." R. 535 at 2.

5. On April 23, 2013, Mullet filed the instant motion for bond pending appeal with this Court.

DISCUSSION

The Bail Reform Act (Act) mandates detention pending appeal in the circumstances presented in this case. Pursuant to 18 U.S.C. 3143(b)(2), a person found guilty of a crime of violence or an offense for which the maximum sentence is life imprisonment[2] shall be detained. The Act includes a narrow exception, however, which allows for release pending appeal if the defendant: (1) "clearly show[s] that there are *exceptional reasons*" why detention would not be appropriate; and (2) meets the conditions for release set forth in 18 U.S.C. 3143(b)(1). 18 U.S.C. 3145(c) (emphasis added); see *United States* v. *Sandles*, 67 F. App'x 353, 354 (6th Cir. 2003) ("[D]efendant is subject to the mandatory detention provision in 18 U.S.C. []3143(b)(2)" and "[t]herefore, he must meet not only the criteria for release established in [Section] 3143(b)(1), but also must demonstrate exceptional reasons why his detention is not appropriate") (citing 18 U.S.C. 3145(c)).

Section 3143(b)(1) requires the defendant to make four showings: (1) "by clear and convincing evidence," he is "not likely to flee"; (2) "by clear and convincing evidence," he does not "pose a danger to the safety of any other person

[2] 18 U.S.C. 3143(b)(2) incorporates these factors by cross-referencing to the circumstances set forth in 18 U.S.C. 3142(f)(1)(A)-(C).

or the community"; (3) the appeal "is not for the purpose of delay"; and (4) the appeal "raises a substantial question of law or fact" likely to result in reversal, a new trial, or a reduced term of imprisonment. The "statute creates a presumption against release pending appeal." *Sandles*, 67 F. App'x at 353-354. If the Court finds that the defendant meets these "conditions for release required of any convicted person," the Court turns to whether the defendant established that "exceptional reasons exist making detention inappropriate." *United States* v. *Herrera-Soto*, 961 F.2d 645, 646 (7th Cir. 1992) (per curiam) (internal quotation marks omitted).

As set forth below, Samuel Mullet, Sr., has not established that he is entitled to release pending appeal under *either*: (1) the required showing that there are "exceptional reasons" why his "detention would not be appropriate"; or (2) the Section 3143(b)(1) factors. 18 U.S.C. 3145(c).

1. "Exceptional Reasons." This Court may not grant release pending appeal unless it finds that Mullet has "clearly shown" that "exceptional reasons" exist making detention inappropriate. Mullet has made no such showing. Indeed, he has not even attempted to make such a showing, apart from asserting that the appeal raises substantial legal issues likely to result in reversal. Motion 6-7. But that is a Section 3143(b)(1) factor, and those factors do not satisfy the requirements of Section 3145(c); rather, they are "foundational." *United States* v. *Koon*, 6 F.3d

561, 564 (9th Cir. 1993) (denying petitions for rehearing and rehearing en banc) (Rymer, J., concurring) (showing that the appeal raises a substantial question cannot be "exceptional," otherwise "every violent offender would have as good a chance of getting bail on appeal as every nonviolent offender," which would be inconsistent with Section 3143(b)(2)). In other words, to establish "exceptional" reasons, the defendant has to show more than the fact that he is neither a danger to the community nor likely to flee and that the appeal raises a substantial legal issue. *Id.* at 563-564.

Courts have described such "exceptional reasons" as those that are "clearly out of the ordinary, uncommon, or rare." *United States* v. *Little*, 485 F.3d 1210, 1211 (8th Cir. 2007) (per curiam) (citation omitted). Generally, circumstances that are "purely personal do not typically rise to the level of exceptional[,] warranting release." *United States* v. *Lea*, 360 F.3d 401, 403 (2d Cir. 2004) (internal quotation marks and citation omitted); see also *id.* at 403-404 ("There is nothing exceptional about going to school, being employed, or being a first-time offender, either separately or in combination.") (internal quotation marks omitted); see generally *United States* v. *Garcia*, 340 F.3d 1013, 1022 (9th Cir. 2003) ("Hardships that commonly result from imprisonment do not meet the standard. * * * Only in truly unusual circumstances will a defendant whose offense is subject

to the statutory provision be allowed to remain on bail pending appeal.") (citing cases).

In sum, because Mullet has failed to clearly show that "exceptional" circumstances warrant his release pending appeal, he does not fall within the Section 3145(c) exception that would now permit his release. The failure to clearly show any exceptional circumstances defeats his motion for release, regardless of whether he meets the Section 3143(b)(1) requirements. In any event, he does not meet those criteria.

2. The Section 3143(b)(1) Factors. Mullet argues that he does not pose a risk of flight or a danger to others. Motion 19-20. He notes that several of his co-defendants were not detained prior to trial and sentencing, but all showed up for their court appearances. Motion 19. But in the context of Mullet's motion for bond pending appeal, the actions of his co-defendants are irrelevant. In any event, as noted above, both this Court and the district court have previously rejected his argument that he does not present a danger to the community, citing the role he played in the offenses and his control over the other defendants. See pp. 4-6, *supra*. He points to nothing in the record that now warrants a different conclusion.

Mullet's principal argument is that his appeal raises substantial legal issues. Motion 7-19. He cites three, all relating to his convictions for violating Section 249(a)(2): (1) whether Congress's power under the Commerce Clause supports the

application of Section 249(a)(2) in this case; (2) whether the jury instructions addressing Section 249(a)(2)'s requirement that the defendant act "because of * * * religion" were correct; and (3) whether the jury instructions on the definition of "kidnapping" for the sentencing enhancement provision in Section 249(a)(2) were correct. Motion 7-19.

As this Court has explained, an appellant raises a "substantial question" when "the appeal presents a close question or one that could go either way and * * * the question is so integral to the merits of the conviction that it is more probable than not that reversal or a new trial will occur if the question is decided in the defendant's favor." *United States* v. *Sutherlin*, 84 F. App'x 630, 631 (6th Cir. 2003) (quoting *United States* v. *Pollard*, 778 F.2d 1177, 1182 (6th Cir. 1985)). Here, the district court presided over the lengthy trial and, as noted above, denied defendants' various motions to dismiss the indictment, for judgment of acquittal, and for a new trial. Moreover, the district court denied Mullet's repeated motions for release pending appeal. "Since the district court is familiar with the case, the district court is in an excellent position to determine in the first instance whether the defendant raises a substantial question on appeal." *Pollard*, 778 F.2d at 1182. In any event, the issues Mullet cites do not constitute "substantial issues." Moreover, Mullet ignores the fact that he was also convicted of violating 18 U.S.C.

1519 (obstruction) and 18 U.S.C. 1001 (false statements); he does not raise any issues with respect to those convictions.

First, Mullet asserts that Section 249(a)(2) exceeds Congress's Commerce Clause power. Motion 7-11. But "congressional enactments are entitled to a presumption of validity." See, *e.g.*, *United States* v. *Fisher*, 149 F. App'x 379, 383 (6th Cir. 2005). The Court may strike down an act of Congress "only if the lack of constitutional authority to pass the act in question is clearly demonstrated." *National Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2579 (2012) (internal brackets, citation, and quotation marks omitted). Moreover, with respect to the Commerce Clause issue, "for criminal defendants, [i]t appears that *United States* v. *Lopez*[3] has raised many false hopes. Defendants have used it as a basis for challenges to various statutes. Almost invariably those challenges fail." *United States* v. *Beuckelaere*, 91 F.3d 781, 783 (6th Cir. 1996) (internal quotation marks and citation omitted). In this case, Section 249(a)(2) contains "jurisdictional hooks" requiring that the Government prove beyond a reasonable doubt, as an element of the offense, a nexus to interstate commerce in every prosecution. 18

[3] In *Lopez*, the Court struck down a federal statute prohibiting the possession of a gun in a school zone, concluding that Congress lacked power under the Commerce Clause to enact the statute. In so doing, the Court recognized three categories of Commerce Clause regulation: (1) the "channels" of interstate commerce; (2) "instrumentalities * * * or persons or things" in interstate commerce; and (3) activities that "substantially affect" interstate commerce. *United States* v. *Lopez*, 514 U.S. 549, 558-559 (1995).

U.S.C. 249(a)(2)(B). These "hooks" reflect the three *Lopez* categories of activity that Congress may regulate under its commerce power. Section 249(a)(2), therefore, both on its face and as applied in this case, is fully consistent with *Lopez*, as well as the Supreme Court's Commerce Clause decision in *United States* v. *Morrison*, 529 U.S. 598 (2000).

Second, Mullet asserts that the jury was incorrectly instructed that it could find that the defendants acted "because of" religion even if the defendants had other motives for doing what they did. Motion 11-13. He asserts that the court should have instructed that the intent requirement means that "defendant would not have acted absent the defendant's prejudice against such religion." Motion 11. Moreover, according to Mullet, Section 249(a)(2) requires a showing that the defendant acted with "religious animus toward the victim" or because of "hatred toward the victim's belonging to the Amish faith." Motion 12. This argument is baseless; it apparently takes the descriptive title of Section 249 as a "hate crime" statute literally. But the animus requirement of Section 249 does not require that the government prove that the defendant "hated" or was "prejudiced" against the victim's religion. It simply requires, as the district court correctly instructed, that the victim's actual or perceived religion be a substantial or significant motivating factor for the defendant's conduct. The same element in other federal hate crime statutes has been interpreted similarly. See *United States* v. *McGee*, 173 F.3d 952,

957 (6th Cir. 1999) (under 18 U.S.C. 245, "as long as racial animus is a substantial reason for a defendant's conduct, other motivations are not factors to be considered"); *United States* v. *Bledsoe*, 728 F.2d 1094, 1098 (8th Cir. 1984) (under Section 245, requirement that defendant acted because of race is satisfied if race was a "substantial motivating factor"); *United States* v. *Nix*, 417 F. Supp. 2d 1009, 1011-1013 (N.D. Ill. 2006) (under criminal provision of Fair Housing Act, 42 U.S.C. 3631(a), to prove that defendant acted because of race, government must prove that race was a "substantial motivating factor[] in defendant's actions"). It does not matter if there were also *other* motivating factors. *United States* v. *Piekarsky*, 687 F.3d 134, 142-145 (3d Cir. 2012) (to find that defendant acted because of race under Section 3631(a), the government need not prove that race was the only motivation); *Bledsoe*, 728 F.2d at 1098; *Nix*, 417 F. Supp. 2d at 1013.

Finally, Mullet argues that the jury was incorrectly instructed on the elements of kidnapping for purposes of the sentencing enhancement element of Section 249(a)(2). Motion 13-19. He asserts that the instruction given – requiring proof that, *inter alia*, defendants restrained and confined a person by force in circumstances that created a substantial risk of bodily injury – reflected a "watered down" version of kidnapping. Motion 14-15. He maintains that the jury should have been instructed that kidnapping must involve either moving the person a substantial distance or confining the person "for a substantial period of time."

Motion 16-18. The district court's jury instruction, however, was correct and consistent with caselaw applying the same provision in 18 U.S.C. 242. In *United States* v. *Guidry*, 456 F.3d 493, 509-511 (5th Cir. 2006), the court held that the defendant need not have transported the victim across state lines in order to satisfy the kidnapping element of the offense. Rather, applying the "generic, contemporary meaning" of kidnapping, it was sufficient that the defendant "abducted and confined" the victim without her consent. *Id.* at 511. In so concluding, the court expressly rejected the argument that the kidnapping enhancement applied the common law definition of kidnapping (requiring "asportation," *i.e.*, carrying away or moving) or that in the federal kidnapping statute, 18 U.S.C. 1201. *Id.* at 509-510.[4]

[4] Pursuant to 18 U.S.C. 249(a)(2)(A), a person convicted of willfully causing bodily injury because of religion is subject to up to 10 years' imprisonment. If, however, the offense includes, *inter alia*, kidnapping, as the jury found in this case, the defendant is subject to life imprisonment. Therefore, even if the definition of kidnapping was incorrect, Mullet's Section 249 convictions would be unaffected; he would simply have to be resentenced.

CONCLUSION

For the foregoing reasons, this Court should deny Samuel Mullet, Sr.'s Motion For Bond Pending Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2013, I electronically filed the foregoing UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION FOR BOND PENDING APPEAL with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the Appellate CM/ECF system.

I further certify that all parties are CM/ECF registered, and will be served electronically.

s/ Thomas E. Chandler
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