Nos. 03-1301, 03-1310 & 03-1314

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

ROBERT VERBICKAS, ROD SCHULTZ, and MIKE LA VALLEE,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(No. 00-CR-481-D)

RESPONSE OF THE UNITED STATES TO DEFENDANTS' MEMORANDA IN SUPPORT OF APPEAL FROM ORDER DENYING RELEASE BEFORE JUDGMENT OF CONVICTION

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STATEMENT OF THE ISSUE

Whether the defendants' felony convictions for violating 18 U.S.C. 242 (deprivation of rights under color of law) are "crimes of violence," thus making the defendants ineligible for release under 18 U.S.C. 3143(a)(2).

STATEMENT OF THE FACTS AND PROCEDURAL BACKGROUND

Verbickas, Schultz, and La Vallee are former federal corrections officers who were employed at the United States Penitentiary in Florence, Colorado (USP–Florence). They and four other corrections officers were indicted on November 2, 2000, for violating 18 U.S.C. 241 (conspiracy to deprive of rights) and 18 U.S.C. 242 (deprivation of rights under color of law). On February 6, 2001, all seven defendants were charged in a ten-count superseding indictment that again alleged violations of Sections 241 and 242. The charges arose from a lengthy federal investigation into allegations that the corrections officers at USP–Florence engaged in widespread unjustified violence against inmates. The superseding indictment charged the defendants with conspiring to deprive and depriving inmates at USP–Florence of their constitutional right to be free from cruel and unusual punishment, by beating and otherwise physically abusing inmates who were handcuffed and compliant. All seven defendants were tried together.

Three other corrections officers, David Armstrong, Charlotte Gutierrez, and Jake Geiger, admitted their wrongdoing and cooperated with the government

investigation. Gutierrez and Geiger pleaded guilty to misdemeanor violations of Section 242. Armstrong pleaded guilty to one felony count of violating Section 241. All three of these officers testified against the defendants at trial.

The trial of the seven defendants began on April 10, 2003. On June 24, 2003, the jury returned guilty verdicts against La Vallee and Schultz on the Section 241 count and one Section 242 count, and returned a guilty verdict against Verbickas on one Section 242 count. The jury returned not-guilty verdicts as to these three defendants on all other counts, and the other four defendants were acquitted on all counts.

After the verdicts were read, the government stated that it would be recommending sentences of imprisonment for each of the three defendants. Tr., 6/24/03 Hr'g, at 7301 (Verbickas Appellate Memorandum Appendix at D). The district court agreed with the government that the defendants had been convicted of a "crime of violence" and were thus ineligible for release under 18 U.S.C. 3143(a)(2). Tr., 6/24/03 Hr'g, at 7323. The district court stated that it did not have full briefing on the issue, and invited the defendants to file a motion for reconsideration of the detention order if they so chose. *Ibid*. All defendants filed such motions, and the government filed a response. Following a hearing on the motions for reconsideration, on July 2, 2003, the district court entered an order denying the motions for reconsideration. The defendants are scheduled to be sentenced on September 11, 2003.

Pursuant to 18 U.S.C. 3145, each of the defendants timely filed a notice of

appeal. Verbickas filed a memorandum in support of his appeal which was joined by Shultz and La Vallee. La Vallee also filed a separate memorandum.

ARGUMENT

THE DISTRICT COURT CORRECTLY ORDERED THE DEFENDANTS DETAINED PENDING SENTENCING

I. The District Court Correctly Held That The Defendants Had Been Convicted of Crimes of Violence And Were Therefore Ineligible for Release Under 18 U.S.C. 3143(a)(2).

All three defendants were convicted of violating 18 U.S.C. 242. As is discussed below, depending on the elements charged and proven, Section 242 encompasses three separate offenses: a misdemeanor, a felony with a maximum penalty of ten years imprisonment, and a felony with a maximum penalty of life imprisonment or death. All three defendants were convicted of felonies punishable by a maximum of ten years imprisonment. Schultz and La Vallee were also convicted of a felony violation of 18 U.S.C. 241, carrying a maximum penalty of ten years imprisonment.

Pursuant to 18 U.S.C. 3143(a)(2), the district court ordered the defendants detained pending sentencing. Section 3143(a)(1) applies to convicted persons generally and permits the district court to order that a convicted person be released pending sentencing if he can show by clear and convincing evidence that he is not a danger nor likely to flee. Section 3143(a)(2), however, applies to persons convicted of certain categories of offenses described in 18 U.S.C. 3142(f)(1) and requires detention unless a specific exception is shown. The category relevant

here is "a crime of violence."

For purposes of release under Section 3143, a "crime of violence" is defined by 18 U.S.C. 3156(a)(4) to be:

> (A) an offense that has [as] an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another;
>
> (B) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense; or
>
> (C) [certain specified sex offenses not relevant here]

The district court held that the Section 242 offense with which the defendants were charged was a crime of violence under Subsection (B). 7/02/03 Order at 7 (Verbickas Appellate Memorandum Appendix at F).[1] (In his initial memorandum addressing release in the district court, Verbickas conceded that Section 242 was an offense that "falls within 18 U.S.C. 3142(f)(1)." See Verbickas Appellate Memorandum Appendix at A, ¶ 4.)

Whether Section 242 is a crime of violence for purposes of 18 U.S.C.

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[1] In the district court, the government argued that the felony offenses of violating of Section 241 or Section 242 are crimes of violence under both Subsection (A) and (B). Gov't Memorandum at 2 (Verbickas Appellate Memorandum Appendix at C). In *dictum* the district court rejected those additional arguments. 7/02/03 Order at 10 n.7. While the government does not concede that the district court was correct, this response will address the only ground on which the district court denied release. The Fifth Circuit has held that a conviction under Section 241 is a "crime of violence" under 18 U.S.C. 924(c). See *United States* v. *Greer*, 939 F.2d 1076, 1098-1100 (5th Cir. 1991), *aff'd en banc on other grounds*, 968 F.3d 433 (1992) (reinstating panel opinion except for *Batson* issue), *cert. denied*, 507 U.S. 962 (1993).

3143(a)(2) is a question of first impression in this Circuit. The Fifth Circuit, however, recently held that a felony conviction under Section 242 is a "crime of violence" under the virtually identical statutory definition in 18 U.S.C. 924(c). See *United States* v. *Williams*, No. 02-60519, 2003 WL 21940787, *5 (5th Cir. Aug. 14, 2003) (ten-year felony conviction under Section 242 is "unquestionably a 'crime of violence'"). That decision and the decisions of this Court and the other courts of appeals addressing the meaning of a "crime of violence" under other statutes compel the conclusion that a felony violation of Section 242 is a crime of violence.[2]

This Court determines whether an offense is a crime of violence by analyzing the statutory elements of the offense, not the underlying facts of the conviction. See *United States* v. *Reyes-Castro*, 13 F.3d 377, 379 (10th Cir. 1993) (addressing definition in 18 U.S.C. 16); accord *United States* v. *Singleton*, 182 F.3d 7, 12 (D.C. Cir. 1999) (applying categorical approach to Section 3156(a)(4) analysis); *United States* v. *Dillard*, 214 F.3d 88, 92 (2nd Cir. 2000) (assuming categorical approach applies to Section 3156(a)(4) analysis), *cert. denied*, 532 U.S. 907 (2001); see also *Taylor* v. *United States*, 495 U.S. 575, 600-601 (1990) (applying categorical analysis under 18 U.S.C. 924(e)); *United States* v. *Williams*,

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[2] Two concurring opinions by judges in other circuits have stated, without significant analysis, that felony violations under Section 242 are crimes of violence for purposes of release. See *United States* v. *Lanier*, 120 F.3d 640, 642 (6th Cir. 1997) (en banc) (Nelson, J., concurring in order to detain defendant); *United States* v. *Koon*, 6 F.3d 561, 563 (9th Cir. 1993) (Rymer, J., concurring in denial of rehearing).

No. 02-60519, 2003 WL 21940787 at *3 (applying "categorical approach" under 18 U.S.C. 924(c)).

Section 242, the full text of which is appended hereto, prohibits "under color of any law * * * willfully subject[ing] any person * * * to the deprivation of any rights * * * secured or protected by the Constitution or laws of the United States." 18 U.S.C. 242. Thus, the first three essential elements of the offense are that the defendants (1) willfully (2) under color of law (3) deprived the victims of federal rights. See *United States* v. *Lanier*, 520 U.S. 259, 264 (1997). All offenses under Section 242 require proof of these elements. Section 242 also encompasses two felony offenses, which require proof of additional elements.

The Section 242 offense relevant to this case is deprivation of rights where "bodily injury results from the acts committed in violation of [Section 242] or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire." That offense is punishable by up to ten years imprisonment. 18 U.S.C. 242.[3] Because the element that would make the Section 242 offense a felony increases the maximum penalty under the statute, that conduct is an essential element of the offense that must be submitted to the jury and proven beyond a reasonable doubt. See *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000). In applying *Apprendi*'s analysis to Section 242, the Fifth Circuit concluded that the statute set out three separate offenses depending on the

[3] If death results or the offense involves certain specified violent conduct, the maximum penalty is life imprisonment or death.

elements charged and proven. See *United States* v. *Williams*, No. 02-60519, 2003 WL 21940787 at *5 (Section 242 "defines three separate offenses, not one offense with two sentence enhancements"); see also *ibid.* (causing bodily injury or using a dangerous weapon "are 'elements' that define an 'offense'"). The indictment charged and the jury found that the defendants' depriving the inmates of their rights against cruel and unusual punishment resulted in bodily injury.

So long as these statutory elements "involve[] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," it is a crime of violence under 18 U.S.C. 3156(a)(4)(B). Because this definition only requires a "substantial risk" that force "may" be used, it is not necessary that force always be used. See *Reyes-Castro*, 13 F.3d at 379 ("Our scrutiny ends upon a finding that the risk of violence is present."). Thus, the defendants' argument that Section 242 is not a crime of violence because it "does not, in all cases, involve the use of force against the person of another," Verbickas Appellate Memorandum at 9, is meritless. If Section 242 required the use of force "in all cases," it would clearly satisfy the statutory definition of a crime of violence under Paragraph (A) of Section 3156(a)(4). But Paragraph (B) of Section 3156(a)(4) applies more broadly. See *United States* v. *Dillard*, 214 F.3d 88, 92 (2nd Cir. 2000) (Subsection "(B) is clearly intended to cast a wider net [than Subsection (A)]. * * * Force need not be an inevitable concomitant of the offense."), *cert. denied*, 532 U.S. 907 (2001). The defendants' arguments therefore provide no basis for this Court to disagree

with the analysis and conclusion of the Fifth Circuit in *Williams*.[4]

Moreover, this Court's analysis in *Reyes-Castro* demonstrates that a felony violation of Section 242 is clearly a crime of violence. In that case, the Court addressed an identical statutory definition of "crime of violence" under 18 U.S.C. 16. This Court concluded that attempted sexual abuse of a child under age 14 was a crime of violence because the crime "involves a non-consensual act upon another person, [so] there is a substantial risk that physical force may be used in the course of committing the offense." 13 F.3d at 379. Although a defendant could be convicted of attempted sexual abuse under the statute addressed in *Reyes-Castro* even though no bodily injury resulted, a felony violation of Section 242 requires proof of bodily injury. *A fortiori*, there is an even greater risk that force may be used in the commission of a felony under Section 242. Cf. *United States* v. *Williams*, No. 02-60519, 2003 WL 21940787, at *11 n.5 ("[C]ausing bodily injury necessarily includes the element of use of physical force.") (quoting *United States* v. *Shelton*, 325 F.3d 553, 555 (5th Cir. 2003) (concluding that misdemeanor assault was "crime of violence" under 18 U.S.C. 16)); see also *Tapia-Garcia* v. *INS*, 237 F.3d 1216, 1222 (10th Cir. 2001) (under 18 U.S.C. 16 offense of driving

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[4] The defendants rely on only one case for their assertion that Section 242 is not a crime of violence. See Verbickas Appellate Memorandum at 7 (citing *United States* v. *Ramey*, 336 F.2d 512 (4th Cir. 1964), *cert. denied*, 379 U.S. 972 (1965)). But that case did not address whether Section 242 was a "crime of violence" under Section 3156(a)(4) or any other statute. Because that case involved a misdemeanor offense, it did not address whether felony offenses under Section 242 are crimes of violence.

under the influence of drugs and alcohol was a crime of violence because of the danger inherent in drunk driving, which frequently resulted in injury).[5]

In short, the district court was entirely correct to hold that a felony violation of Section 242 is a crime of violence under 18 U.S.C. 3156(a)(4)(B).

For a defendant convicted of a "crime of violence," Section 3143(a)(2) requires that he be detained unless

> (A)(i) the judicial officer finds there is a substantial likelihood that a motion for acquittal or new trial will be granted; or
>
> (ii) an attorney for the Government has recommended that no sentence of imprisonment be imposed on the person; and
>
> (B) the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to any other person or the community.

Neither of the exceptions in Paragraph (A) applies to these defendants. The government has recommended a term of imprisonment for all three defendants. Additionally, neither Verbickas nor Schultz asserted in the district court or in this Court that he was likely to obtain a new trial or an acquittal. La Vallee moved in the district court for a new trial or acquittal, and that motion remains pending. The district court previously stated that it was not likely to grant such a motion. Tr., 6/24/03 Hr'g, at 7321 (Verbickas Appellate Memorandum Appendix at D). Thus,

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[5] The defendants argue that Section 242 covers offenses "that do not involve a substantial risk of harm to another." Verbickas Appellate Memorandum at 9. While that assertion may be correct for a misdemeanor offense, it is irrelevant. The felony offense of which the defendants were convicted *requires* bodily injury.

none of the defendants has shown that there is a "substantial likelihood" that such a motion will be granted, and the exception in Subsection (A)(i) therefore does not apply.[6]

Thus, because the defendants were convicted of a crime of violence and the exceptions to Section 3143(a)(2) do not apply, they cannot be released pending sentencing.

II. The Defendants Failed To Present Their Claims Regarding "Exceptional Reasons" For Release To The District Court.

The defendants further argue that even if their detention was required under 18 U.S.C. 3143(a)(2), there were "exceptional reasons" warranting their release under 18 U.S.C. 3145(c). That Section provides in relevant part:

> A person subject to detention pursuant to section 3143(a)(2) * * * and who meets the conditions for release set forth in section 3134(a)(1) * * * may be ordered released, under appropriate conditions, by the judicial officer, if it is clearly shown that there are exceptional reasons why such person's detention would not be appropriate.

In *United States* v. *Kinslow*, 105 F.3d 555, 557 (10th Cir. 1997), this Court noted that to obtain release under Section 3145(c), a defendant must make "a clear showing of exceptional reasons why his detention would not be appropriate."

On appeal the defendants assert several grounds that they claim satisfy the

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[6] In this Court, La Vallee has attached to his memorandum in support of his bail appeal his motion for a new trial or for an acquittal. But this Court does not address issues regarding release in the first instance. See *United States* v. *Hart*, 779 F.2d 575, 576-577 (10th Cir. 1985); see also *United States* v. *Affleck*, 765 F.2d 944, 954 (10th Cir. 1985) (requirement that district court produce written order "aids our appellate function").

"exceptional reasons" requirement:

> (1) the sixteen not-guilty use-of-force verdicts, including three regarding [Verbickas];
>
> (2) The failure of the Act to define the critical terms of "crime of violence," and "exceptional reasons";
>
> (3) The disparate treatment of other law enforcement officers under the Act;
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> (4) The trial court's unconstitutional application of the Act;
>
> (5) The jury statement returned with the verdicts; and
>
> (6) [Verbickas's] lack of a prior record and his exemplary conduct over the six years from the date of the offense.

Verbickas Memorandum at 13-14. These reasons do not appear exceptional.

The defendants assert that the district court "ignored" the "exceptional reasons" justifying their release. Verbickas Appellate Memorandum at 10. But the defendants raised below only the unconstitutional application of the release provisions based on the different treatment of others, which we address below. The defendants failed to present to the district court the other "exceptional reasons" they now raise and thus failed to create a factual record to support their claims.[7]

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[7] In the district court, the defendants asserted that it was likely that they would be assaulted by other inmates, which justified their release. See Tr., 6/24/03 Hr'g, at 7313-7314 (Verbickas Appellate Memorandum Appendix at D); Verbickas motion for release at ¶¶ 4-7 (Verbickas Appellate Memorandum Appendix at A); Verbickas motion for reconsideration at ¶ 13 (Verbickas Appellate Memorandum Appendix at B). But on appeal, the defendants have abandoned that argument.

But the defendants may not raise these issues for the first time on appeal. See *United States* v. *Hart*, 779 F.2d 575, 576-577 (10th Cir. 1985); see also *United States* v. *Affleck*, 765 F.2d 944, 954 (10th Cir. 1985) (requirement that district court produce written order "aids our appellate function"). The defendants were obligated to present their supposed "exceptional reasons" to the district court and to create a factual record when necessary to support their assertions, which they did not do.

III. The Defendants Have Not Shown That Their Detention Violated Any Constitutional Rights.

The defendants argue that their detention is unconstitutional because some other convicted persons, whom the defendants assert were similarly situated, were not detained after their convictions. But, with one exception, those individuals pled guilty and cooperated with the government. There is no question that those who cooperated are not similarly situated to those who went to trial.

The facts do not support the defendants' argument. They assert that Charlotte Gutierrez and Jake Geiger "plead guilty to the same offense for which Mr. Verbickas was convicted, 18 U.S.C. § 242." Verbickas Appellate Memorandum at 17. In fact, Gutierrez and Geiger pleaded guilty to *misdemeanor* violations of Section 242. See *United States* v. *Gutierrez*, 00-CR-299-MW (D. Col.); *United States* v. *Geiger*, 00-CR-198-D (D. Col.). A misdemeanor conviction cannot be a "crime of violence" under Section 3156(a)(4)(B), which only applies to felonies. Both Gutierrez and Geiger were sentenced to terms of

probation.

Likewise, these defendants are not similarly situated to David Armstrong, who pleaded guilty to violating Section 241, see *United States* v. *Armstrong*, 99-CR-190-D (D. Col.). Mr. Armstrong cooperated with the government over a period of approximately five years. He has not yet been sentenced. Mr. Armstrong left his cancer treatment in Philadelphia and traveled to Colorado to testify at the defendants' trial, and he remains hospitalized in Philadelphia. It is unclear that he will recover sufficiently to be sentenced.

Thus, at best, the defendants have identified one person, Steven Mills, who was convicted of a felony violation of Section 242 and later received a term of imprisonment, but was not detained prior to sentencing. See *United States* v. *Mills*, 97-CR-346-D (D. Col.). Because a complete factual record was not created in the district court regarding Mills' situation, this Court cannot determine whether it was error not to detain Mills.[8] But in any event, even if it was error, the defendants have offered no authority — and the government is aware of none — that would make it unconstitutional to properly apply the law to defendants merely

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[8] The defendants also assert without any citation to the record or other authority that Koon and Powell, who were convicted under Section 242 for beating Rodney King, "were not detained during the four-month time period between the return of the guilty verdict in April of 1993 and their sentencing in August of 1993." Verbickas Appellate Memorandum at 20. Cf. *United States* v. *Koon*, 6 F.3d 561, 563 (9th Cir. 1993) (Rymer, J., concurring in denial of rehearing) (noting that district court found Section 242 violation to be "crime of violence"). The defendants have offered nothing to show that even if these officers were not detained, it was error.

because they have identified one instance when it was possibly erroneously applied to someone else.[9]

CONCLUSION

The district court's order detaining the defendants should be affirmed.

Respectfully submitted,

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[9] The defendants also appear to assert on appeal for the first time that Section 3145(c) is impermissibly vague and resulted in an unconstitutional application to them. See Verbickas Appellate Memorandum at 19. Because they failed to present their "exceptional reasons" to the district court, they cannot plausibly assert that the statute was applied to them, let alone that it was applied unconstitutionally.

18 U.S.C. 242 provides:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisonment not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned nor more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

CERTIFICATE OF SERVICE

I certify that on August 21, 2003, the foregoing RESPONSE OF THE UNITED STATES TO DEFENDANTS' MEMORANDA IN SUPPORT OF APPEAL FROM ORDER DENYING RELEASE BEFORE JUDGMENT OF CONVICTION was served by first class mail on:

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