IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Nos. 09-5095, 08-6506

UNITED STATES OF AMERICA,

Appellee - Cross-Appellant

v.

SHAWN FREEMAN,

Defendant - Appellant

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

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UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION FOR POST-CONVICTION RELEASE

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Pursuant to Federal Rule of Appellate Procedure 9 and Sixth Circuit Rule 9, the United States respectfully submits this Opposition to Defendant's Motion for Post-Conviction Release.

1. Freeman argues that he is eligible for release pursuant to 18 U.S.C. 3143(b)(1). This, however, is not his burden. His burden is showing that his appeal is not raised for the purpose of delay and, importantly, "raises a substantial question of law or fact" that will likely result in reversal, a new trial, a sentence not including imprisonment, or a reduced sentence less than the time served plus the time for appeal. 18 U.S.C. 3143(b)(1)(B). In addition, Freeman must also show "exceptional circumstances." The Bail Reform Act, as amended by the Mandatory

Detention Act of 1990, 18 U.S.C. 3143(b)(2), requires detention pending appeal of a person convicted of "a crime of violence" or "an offense for which the maximum sentence is life imprisonment or death." 18 U.S.C. 3142(f)(1)(A) & (B) (incorporated by reference in 18 U.S.C. 3143(b)(2)). Freeman was found guilty of violating both 18 U.S.C. 241, in which aggravated sexual assaulted occurred, and 18 U.S.C. 242, in which bodily injury resulted. Freeman's conviction under 18 U.S.C. 241 was punishable by life, and his conviction under 18 U.S.C. 242 was a crime of violence. The Bail Reform Act, therefore, requires Freeman's detention pending appeal, pursuant to 18 U.S.C. 3143(b)(2).

2. Freeman has failed his burden of showing exceptional circumstances and a substantial question of law or fact. The district court found that Freeman did not satisfy the "substantial question of law or fact" issue requirement of 18 U.S.C. 3143(b)(1)(B), and did not address the question whether exceptional circumstances were shown. The district court's finding alone is sufficient to deny release pending appeal. This Court can also affirm on the alternative ground that Freeman has failed to establish exceptional circumstances.

BACKGROUND

1. On January 24, 2008, a federal grand jury in the Eastern District of Kentucky returned an indictment[1], charging the defendant, Shawn Freeman, with (1) conspiring under color of law to violate Joshua Sester's constitutional rights,

[1] The indictment is attached hereto as Attachment A.

resulting in aggravated sexual assault, in violation of 18 U.S.C. 241; (2) aiding and abetting, under color of law, the deprivation of Sester's constitutional rights, resulting in bodily injury, in violation of 18 U.S.C. 242 and 2;[2] and (3) falsifying records to obstruct justice in violation of 18 U.S.C. 1519. Indictment 2, 5, 7. On August 14, 2008, a jury found Freeman (and his co-defendant Wesley Lanham) guilty on all counts.

At trial, the government established that in the early morning of February 14, 2003, Joshua Sester, an eighteen year-old male, was arrested for a traffic violation and brought to the Grant County Detention Center in Williamstown, Kentucky.[3] At the Detention Center, corrections officers, Wesley Lanham, Shawn Freeman, Clinton "Shawn" Sydnor, and Jack Powell agreed with each other to place Sester in the general prisoner population at the Detention Center instead of the holding cell dictated by jail policy, in order to teach him a "lesson." Before moving Sester to the general population cell, the corrections officers, including Freeman, taunted Sester about his purported effeminate appearance and told him that he would make a good "girlfriend" to the inmates in the Detention Center. Lanham told the other officers that he knew an inmate in Cell 101 who could help teach Sester a lesson. Lanham and Freeman then went to Cell 101, which housed

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[2] Count 2 also charged Freeman with "acting with deliberate indifference to a substantial risk that inmates in" Cell 101 "would physically assault and otherwise harm" Joshua Sester. Indictment 5.

[3] On appeal, where an appellant raises an insufficiency of the evidence claim, the facts must necessarily be viewed in a light to support the jury verdict. *United States* v. *Goosby*, 523 F.3d 632, 636 (6th Cir. 2008).

about 14 male inmates from the general prison population. At Cell 101, Lanham told an inmate in the cell to "fuck with" the victim. Victor Zipp was one of the inmates in the cell. He was known as a rowdy inmate who walked around in the nude. Later, Sydnor and Powell placed Sester in the cell with the inmates as the inmates yelled sexually-charged taunts. After being left in the cell, some of the inmates beat Sester, Zipp anally raped Sester, and an inmate later forced Sester to perform oral sex on Zipp. Freeman never checked on Sester during the five hours Sester remained in the cell and Freeman remained on duty, even though Freeman testified he was responsible for the safety of inmates. Tr. Vol. III-B, at 67.[4]

2. After trial and before sentencing, the district court released Freeman (and Lanham) over the objection of the United States. At the time of sentencing, the district court continued Freeman on supervised release and allowed him to self-report to prison. On December 29, 2008, Freeman filed a motion seeking post-conviction release, which the district court denied on January 5, 2009. The district court held that "Freeman has not raised a substantial question of law that is likely to result in reversal, an order for a new trial, or a sentence that does not include a term of imprisonment or a reduced sentence which is less than the time the Defendant will serve during the appeal process." Memorandum Opinion and Order, Doc. 130 at 2. The district court rejected Freeman's argument that he and

[4] "Tr. Vol. __, at __" indicates the volume and page number of the transcript volume of the United States v. Lanham & Freeman trial. Those pages of the transcript cited are attached hereto as "Attachment B."

Lanham "merely failed to protect Joshua Sester." Memorandum Opinion and Order, Doc. 130 at 4. The district court held:

> [T]he proof at trial established that Defendants Lanham and Freeman jointly took *affirmative* action in seeking to have inmates harm Sester. Under the circumstances presented, it is clear that the Defendants used third parties to punish Sester in an inhuman and unacceptable way. These action[s] were not only wrong, but *any* reasonable official would understand that they were illegal and in violation of Sester's rights. And while it is "possible" that Sester might have eventually been placed in a general population cell (and could have been harmed), the facts presented during trial established that both Lanham and Freeman took action to have inmates harm Sester.

Ibid. The district court also stated that none of the other potential appellate issues that Freeman mentioned in passing was likely to result in reversal or a new trial. *Ibid*.

On March 18, 2009, the defendant filed this Motion for Post-Conviction Release.

ARGUMENT

This Court has stated that "The Bail Reform Act [of 1984], 18 U.S.C. § 3143(b), creates a presumption against [a defendant's] release pending appeal." *United States* v. *Chilingirian*, 280 F.3d 704, 709 (6th Cir. 2002) (citing *United States v. Vance*, 851 F.2d 166, 168-69 (6th Cir. 1988)); see also *United States* v. *DiSomma*, 951 F.2d 494, 496 (2d Cir. 1991). The Act further

> distinguishes between two categories of crimes to determine eligibility for release. The first category

> applies to defendants convicted of crimes not listed in section 3142(f)(1)(A), (B), and (C) and allows for release when the trial judge finds certain conditions satisfied. See 18 U.S.C. § 3143(b)(1). The second category mandates detention for persons found guilty of crimes encompassed in section 3142(f)(1)(A), (B), and (C) which are, respectively, crimes of violence, offenses with maximum sentences of life in prison or death, and drug offenses carrying maximum sentences of ten or more years. See 18 U.S.C. § 3143(b)(2).

DiSomma, 951 F.2d 494, 496 (2d Cir. 1991). This means that where a defendant is "subject to the mandatory detention" under 18 U.S.C. 3143(b)(2), "he must meet not only the criteria for release established in § 3143(b)(1), but must also demonstrate exceptional reasons why his detention is not appropriate." *United States* v. *Sandles*, 67 Fed. Appx 353, 354 (6th Cir. 2003), cert. denied, 128 S. Ct. 969 (2007) (citing *United States* v. *Lanier*, 120 F.3d 640, 642 (6th Cir.1997) (en banc) (Nelson, J. concurring), cert. denied, 523 U.S. 1011 (1997)).[5]

To meet the criteria for release under 18 U.S.C. 3143(b)(1), a "defendant must show 1) by clear and convincing evidence, that he is not likely to flee or pose a danger to the safety of another person or the community, and 2) that the appeal is not for delay and raises a substantial question of law or fact likely to result in a reversal, an order for a new trial, or a sentence that does not include a term of imprisonment." *Chilingirian*, 280 F.3d at 709; *United States* v. *Pollard*, 778 F.2d 1177, 1181 (6th Cir. 1985). This Court has held that "an appeal raises a substantial question when the appeal presents a 'close question or one that could go either

[5] This unpublished decision is attached hereto as Attachment C.

way' and that 'the question '[must be] 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.'" *Pollard*, 778 F.2d at 1182 (quoting *United States* v. *Powell*, 761 F.2d 1227, 1233-1234 (8th Cir. 1985) (en banc)). The Court must find that the substantial question "will more probably than not, if decided in defendant's favor, lead to reversal or order for new trial on all counts on which imprisonment has been imposed." *Powell*, 761 F.2d at 1233.

A. The District Court Properly Found That Freeman Failed To Raise A Substantial Question Of Law Or Fact

As an initial matter, the government agrees that Freeman is not a flight risk or a danger to the community, the first prong of the 3143(b)(1) criteria. The only part of the 3143(b)(1) criteria before this Court is whether Freeman's appeal "raises a substantial question of law or fact" that is likely to result in reversal, new trial, a sentence of no imprisonment, or a sentence less than served to date plus the time for appeal. Freeman's arguments fail on this prong. He has not shown a close question, let alone one that will more probably than not lead to reversal.

Freeman argues that the evidence was insufficient to support his conviction for conspiracy under 18 U.S.C. 241, and that, as a matter of law, his actions do not constitute a civil rights violation under 18 U.S.C. 242. [6]

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[6] Freeman also states in passing that he intends to raise a number of other issues on appeal. Freeman Mot. 5. As he makes no legal arguments addressing them, he has failed to meet his burden of showing that they raise a substantial issue of law or fact that will more probably than not lead to reversal. Thus, this response

(continued...)

Freeman first contends that the evidence supporting his conspiracy conviction is insufficient. He argues that the only evidence of his entering the conspiracy consists of: his joining in the taunting of Sester, Freeman Mot. 3, his presence during the discussion of how to punish Sester, Freeman Mot. 3-4, and his presence and nodding of his head at Cell 101, Freeman Mot. 4. Specifically, he contends that the nod of his head is "not adequate to support [his] conviction." Freeman Mot. 4. The district court rightly rejected this argument as factually and legally groundless.

Freeman's argument fails for several reasons. Freeman's argument not only isolates these facts and attempts to examine them individually rather as a whole, he also fails to describe all the evidence of the conspiracy. A sufficiency claim looks to the *whole* record, in the light most favorable to the government, and as long as any rational trier of the fact could have found the defendant guilty, the verdict must stand. See, *e.g.*, *United States* v. *Goosby*, 523 F.3d 632, 636 (6th Cir. 2008).

Contrary to Freeman's claim, the evidence was more than simply that he nodded his head. It was also more than these three isolated incidents. Thus, while it is true that as a matter of law mere knowledge, acquiescence, or approval of a crime is not enough to establish a conspiracy, see, *e.g.*, *United States* v. *Heater*, 63

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[6](...continued)
will limit itself to his arguments concerning the sufficiency of the evidence and law on the civil rights violations.

F.3d 311, 324 (4th Cir. 1995), cert. denied, 516 U.S. 1083 (1996), the government proved much more than Freeman's simple knowledge or acquiescence. As the district court found, "the proof at trial established that * * * Lanham and Freeman jointly took *affirmative* action in seeking to have inmates harm Sester." Memorandum Opinion and Order, Doc. 130 at 4.

The record as a whole clearly would support any rational fact finder finding the elements of conspiracy. Freeman joined in the taunting of Sester. Clinton Shawn Sydnor testified that he told *both* Lanham and Freeman of his plan to scare Sester, and that Freeman did not object to the plan. After Lanham suggested soliciting inmate Bobby Wright in Cell 101 to harm Sester, Freeman went with Lanham to the cell. Corrections Officer Wendy Guthrie also testified that Freeman was present during the discussion of the plan to scare Sester. Tr. Vol. II-A, at 131. Inmate Bobby Wright testified that Lanham and Freeman came to the door of cell 101 and spoke with him. While Lanham told Wright that they wanted Wright to "fuck with" the individual they would bring down, Freeman was standing at the door, and, as Wright testified "agreeing with Lanham, shaking his head yes." In other words, the evidence showed that Freeman was communicating his agreement with the plan to Wright and the inmates in Cell 101. In addition, Freeman also failed to protect or assist Sester after learning of the plan; he left Sester in the cell for five hours while knowing of the plan. As Freeman himself admitted, Tr. Vol. III-B, at 67-68, he had a duty to protect Sester, as a pretrial

detainee, and his failure to do so could surely help convince a reasonable jury that he was acting in furtherance of the conspiracy. Finally, Freeman's false reporting after the incident further supports the conclusion that he agreed to enter the conspiracy. Taken together, all of this evidence is more than sufficient to establish Freeman's participation in the conspiracy.

Freeman next argues that "[t]here is no Sixth Circuit authority allowing a conviction for civil rights violations or a conspiracy to violate civil rights under facts remotely comparable to those presented here * * *[.] To sustain a conviction, there must be evidence of violation of *clearly established* Constitutional rights." Freeman Mot. 7. Freeman's argument, that this case presents a novel factual and legal situation that has no analogue in caselaw, is wholly without merit.

The Supreme Court and this Court have recognized that "prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners." *Farmer* v. *Brennan*, 511 U.S. 825, 833 (1994) (citation omitted); *Leary* v. *Livingston County*, 528 F.3d 438, 442 (6th Cir. 2008). Prison officials are "not free to let the state of nature take its course," and "gratuitously allowing the beating or rape of one prisoner by another serves no 'legitimate penological objectiv[e].'" *Farmer*, 511 U.S. at 833. This deliberate indifference standard has both an objective and subjective component. A prison official can be found liable where "the official knows of and disregards an excessive risk to inmate health or

safety" and he or she "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Ford* v. *County of Grand Traverse*, 535 F.3d 483, 494-495 (6th Cir. 2008) (quoting *Farmer*, 511 U.S. at 825, 837). Punishment of a pretrial detainee is also not a legitimate penological purpose under the Fourteenth Amendment. *Bell* v. *Wolfish*, 441 U.S. 520, 535 (1979)

Here, Freeman was charged under two separate legally theories. The conspiracy count charged Freeman with conspiring to punish Sester. Indictment 2. Count 2 charged that Freeman was deliberately indifferent to the substantial risk that inmates in Cell 101 would harm Sester in violation of 18 U.S.C. 242. Indictment 5. While Freeman's argument focuses on the deliberate indifference theory, as explained, *supra* pp. 8-10, the evidence showed clearly that not only did Freeman let nature take its course, he actively took steps to punish and harm Sester. The evidence also clearly supports the conclusion that Freeman was aware of the excessive risk of harm to Sester and his responsibilities given that risk. Freeman covered up the crime after the fact, suggesting that he knew exactly what his actions did. Freeman admitted that his duty as a corrections officer was to keep inmates free from harm. Tr. Vol. III-B, at 67. He testified that he had a duty to take a child molester out of a cell if he was going to be hurt, Tr. Vol. III-B, at 68, and admitted that a law enforcement officer had greater duties than a layman, Tr. Vol III-B, at 78-79. Corrections officers testified that they were supposed to

protect inmates from being harmed, Tr. Vol. I-C, at 30; Tr. Vol. II-A, at 108; Tr. Vol. III-A, at 28-29.

There was also specific testimony concerning Sester and the risk of harm if he were to be placed in the general prison population. Sydnor testified that he did not believe a general population cell was a safe place for Sester and that it did not appear that Sester could protect himself from loud and rowdy inmates. Tr. Vol. I-C, at 64; Tr. Vol. II-A, at 6. Former corrections officer Jack Powell testified that he did not believe Sester would be safe in the general population. Tr. Vol. II-B, at 120. Sydnor testified that he believed when he, Lanham *and Freeman* agreed to teach Sester a lesson, that Sester might be beaten up. Tr. Vol. II-A, at 7. Several corrections officers testified that 26 Hallway, in which Cell 101 was located, was commonly known as the "hallway from hell." Tr. Vol. I-C, at 43; Tr. Vol. III-A, at 29, 47-48; see also Tr. Vol. II-A, at 110 (describing Hallway 26 as unpleasant). The evidence also showed that Freeman was aware of 26 Hallway's reputation. Tr. Vol. II-A, at 115. All of this evidence supports the conclusion that Freeman was well aware of the risk Sester faced on February 14, 2003. See *Dominguez* v. *Correctional Medical Services*, 555 F.3d 543, 550 (6th Cir. 2009) (stating that subjective component may be shown through "inference from circumstantial evidence," and that a "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious") (quoting *Terrence* v. *Northville Reg'l Hosp.*, 286 F.3d 834, 843 (6th Cir. 2002)).

Freeman is also mistaken that no analogous caselaw exists. Freeman Mot. 8. In *Leary* v. *Livingston County*, this Court examined a claim in the context of a 42 U.S.C. 1983 claim. Leary, an inmate who had been charged with raping a nine-year old girl, was beaten up by other inmates shortly after arriving. The plaintiff alleged that the correctional officer told two inmates that he had raped a nine-year old girl. 528 F.3d at 442. The plaintiff also claimed that the officer told him that once the other inmates found out, there would be no protection by anyone at the jail. *Ibid*. Another correctional officer told the inmate to keep his mouth shut concerning the charges against him. *Ibid*. This Court held that the correctional officer's alleged actions had violated a clearly established constitutional right. This Court held that "the harm facing Leary was 'sufficiently serious.'" *Ibid*. (quoting *Farmer*, 511 U.S. at 834). The first correctional officer's words – about how no one would be able protect the inmate if the others learned of his charges – also confirmed that he was subjectively aware of the risk of harm to Leary.

This Court also stated the right at issue was "clearly established: 'Prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners.' It thus would have been 'clear to a reasonable officer that [this] conduct was unlawful in the situation [Stone] confronted.'" *Leary*, 528 F.3d at 442 (internal citations omitted). Freeman's actions were, if anything, more egregious than those in *Leary*. He took affirmative steps to put Sester in harm's way. He

conspired to punish him. Freeman's contention that there is no caselaw on point in this or other circuits is meritless.[7]

Finally, Freeman makes no argument concerning his conviction for knowingly falsifying a document with the intent to obstruct justice. Even assuming his appeal raises a substantial question of law or fact regarding his convictions on Counts 1 and 2, which the foregoing discussion demonstrates he has not done, his motion is silent concerning his conviction on Count 6. This alone gives this Court sufficient grounds to deny his appeal. A conviction on Count 6 alone would have resulted in a Sentencing Guideline range of at least 10-16 months. See U.S.S.G. § 2J1.2 (2002) (establishing base offense level of 12 for obstruction of justice). At this point, the defendant has served under three months of his sentence. Any reduced sentence is not likely to result in a term of imprisonment less than the total amount of time served plus the expected duration of the appeal process.

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[7] Freeman cites cases totally inapposite to that here. Freeman Mot. 7-9. See, *e.g.*, *Deshaney* v. *Winnebago County Dep't of Soc Services*, 489 U.S. 189 (1989) (claim that social services failed to remove child from father's custody after receiving abuse reports); *Bukowsky* v. *City of Akron*, 326 F.3d 702 (6th Cir. 2003) (claim that officers violated Section 1983 by returning mentally disabled woman, at her request, to person who raped her); *Bell* v. *Wolfish*, 441 U.S. 520 (1979) (claim that prison conditions and practices violated constitutional rights). His claim that "at least an equal, if not a greater, standard of what is a 'clearly established' right should apply in the criminal context," Freeman Mot. 9, is also erroneous. *United States* v. *Lanier,* 520 U.S. 259, 260 (1997) (holding that the "view that due process under § 242 demands more than the 'clearly established' qualified immunity test under § 1983 or Bivens is error"), cert. denied, 523 U.S. 1011 (1998).

B. Freeman Has Failed To Carry His Burden Of Showing Exceptional Circumstances Under 18 U.S.C. 3145(c).

Freeman's motion must be denied also because he has failed to demonstrate that exceptional circumstances make his continued detention inappropriate. While the district court determined that Freeman had not raised a substantial question of law or fact likely to result in reversal or an order for a new trial, as a matter of law Freeman's detention is mandatory unless he demonstrates exceptional circumstances in addition to a substantial issue. This he has not done.

Freeman was convicted of two separate counts that require mandatory detention. First, Freeman's conviction on Count 1 of violating 18 U.S.C. 241 requires mandatory detention pending appeal because it is a crime subject to a maximum term of life imprisonment. Freeman was indicted and convicted of a conspiracy, with acts including aggravated sexual abuse. See Indictment 2-5. Under 18 U.S.C. 241, such a conspiracy is subject to sentence of "any term of years or for life." A defendant convicted of such a conspiracy must be detained. See 18 U.S.C. 3143(b)(2); 18 U.S.C. 3142(f)(1)(B).

Second, Freeman was indicted and convicted of violating 18 U.S.C. 242, which in this case resulted in bodily injury. As the Second Circuit has held, in the context of a 18 U.S.C. 924(c) prosecution, a conviction under the "bodily injury" clause of 242 is a crime of violence. *United States.* v. *Acosta*, 470 F.3d 132, 135-136 (2d Cir. 2006), cert. denied, 128 S. Ct. 646 (2007); see also *United States* v. *Patino*, 962 F.2d 263, 267 (2d Cir 1992) (stating that the definition of "crime of

violence" in the Bail Reform Act, 18 U.S.C. 3156(a)(4), is "virtually identical" to that in Section 924(c)(3)), cert. denied, 506 U.S. 927 (1992). A defendant convicted of a crime of violence must also be detained under the Bail Reform Act. See 18 U.S.C. 3143(b)(2); 18 U.S.C. 3142(f)(1)(A). Thus, Freeman *must* be detained for either of these convictions, unless he establishes a substantial issue of fact or law *and* exceptional circumstances. Freeman fails to make *any* argument concerning exceptional circumstances. Thus, even if he were to have raised a substantial question of law that is likely to result in reversal or an order for a new trial, he still would not be entitled to release pending appeal.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's denial of the defendant's motion for release pending appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify on March 30, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and that, via the CM/ECF system, a copy of the foregoing will be caused to be sent to the following attorneys of record for the appellant:

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