IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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No. 13-3183

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ANNA MILLER,

Defendant-Appellant

_____

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

_____

UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION FOR RELEASE ON 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 Anna Miller's motion for release on bond pending appeal, filed May 20, 2013. Miller was convicted of two felony offenses: 18 U.S.C. 371 (conspiracy) and 18 U.S.C. 249(a)(2) (willfully causing bodily injury because of a person's religion). On

February 8, 2013, Miller was sentenced to imprisonment of 12 months and one day. R. 382, 408.[1] She reported to prison on April 12, 2013.

As discussed below, because Miller 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 her release pending appeal unless she: (1) "clearly show[s] that there are exceptional reasons" why her 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). As set forth below, because Miller cannot satisfy these requirements, her motion should be denied. Indeed, on May 9, 2013, this Court denied co-defendant Linda Schrock's similar motion for release pending appeal. *United States* v. *Schrock*, No. 13-3194 (6th Cir. May 9, 2013) (Order).[2]

BACKGROUND

1. This case arises out of a series of religiously-motivated assaults over a two-month period by members of a religious community in Bergholz, Ohio against practitioners of the Amish religion. On March 28, 2012, the government filed a

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

[2] Another motion for release pending appeal, filed by co-defendant Samuel Mullet, Sr., is pending before this Court. *United States* v. *Mullet*, No. 13-3205 (6th Cir.) (filed April 23, 2013).

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 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.

Anna Miller was charged with conspiracy (Count 1) and violation of Section 249 (Count 2) in connection with the September 6, 2011, assault of her in-laws, Marty and Barbara Miller. R. 87. To briefly summarize, Anna Miller (and eight other defendants) went to Marty and Barbara Miller's house for the purpose of cutting Marty's beard and head hair and Barbara's hair. They believed cutting the Millers' hair would make them lead a proper Amish life. The group arrived at the Millers' home at approximately 10:30 p.m.; at that time, Marty Miller was sleeping in his room. The men went to the bedroom, where defendant Lester Miller grabbed Marty by the beard, dragged him into the living room, and threw him in a chair. The men held Marty down and cut his beard and head hair. The women – including Anna Miller – then cut approximately two feet of Barbara Miller's hair.

In addition, Anna Miller grabbed Barbara Miller's prayer cap off her head and cut it into ribbons with scissors. As a result of the assault, Barbara Miller had bruises on both wrists, which lasted nearly a month.

2. In September 2012, Miller was convicted on both Counts 1 (conspiracy) and 2 (Section 249(a)(2)). R. 408. 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 Count 2, the jury specifically found that the offense included kidnapping. R. 230 at 88-89. On February 8, 2013, Miller was sentenced to one year and one day in prison. R. 408.

On February 26, 2013, Miller filed in the district court a motion for release pending appeal. R. 449. She asserted that she met the requirements of 18 U.S.C. 3143(b)(1), including that she is not a flight risk or a danger to others or the community, and raises on appeal substantial questions of law or fact. R. 449. On March 1, 2013, the United States filed an opposition, asserting that 18 U.S.C. 3143(b)(2) prohibits release pending appeal in the circumstances of this case and, in any event, Miller does not satisfy the standards set forth in 18 U.S.C. 3143(b)(1). R. 465.

On March 6, 2013, the district court denied the motion for release pending appeal "for the reasons set out in the Government's opposition brief[]" and without further discussion. R. 495.

3. On May 20, 2013, Miller filed the instant motion for release on 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,[3] 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 must also

[3] 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).

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," she is "not likely to flee"; (2) "by clear and convincing evidence," she does not "pose a danger to the safety of any other person 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. 18 U.S.C. 3143(b)(1). The "statute creates a presumption against release pending appeal" in these circumstances. *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, Anna Miller has not established that she is entitled to release pending appeal under *either*: (1) the "exceptional reasons" requirement, or (2) the Section 3143(b)(1) factors. 18 U.S.C. 3145(c).

1. <u>"Exceptional Reasons."</u> This Court may not grant release pending appeal unless it finds that Anna Miller has "clearly shown" that "exceptional reasons" exist making detention inappropriate. 18 U.S.C. 3145(c). "Exceptional reasons"

are 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).

Miller first argues that the possibility that she may serve her sentence before her appeal is resolved may be an exceptional reason. Motion 17-19. But Miller's appeal was originally on an expedited briefing schedule pursuant to this Court's practice of expediting appeals where a criminal defendant has been sentenced to 15 months or less. See Sixth Circuit Rule 31(c)(2)(A). Under that schedule, her opening brief was due May 13, 2013 – approximately one month after she was due to report (and did report) to prison. See Sixth Circuit Docket Entry dated Feb. 20, 2013 (Briefing Letter).[4] On May 3, 2013, however, Miller filed a motion to have her appeal removed from the expedited briefing schedule. Motion to Remove Case from Expedited Briefing Schedule, filed May 3, 2013. On May 13, 2013, the Court granted the motion (stating that a new briefing schedule would issue consolidating the 16 related appeals for briefing and submission). Order, May 13, 2013. Miller filed a motion for release pending appeal *three weeks* after she filed a motion to remove her case from the expedited briefing schedule, and *one week* after the motion was granted. In these circumstances, Miller should not be able to rely on *her voluntary decision* to have her appeal removed from the expedited

[4] On March 20, 2013, the Court issued a revised expedited briefing schedule, with Miller' opening brief due June 7, 2013. See Sixth Circuit Docket Entry dated March 20, 2013 (Briefing Letter); Order, March 20, 2013.

briefing schedule in arguing that the appeal may not be resolved prior to the completion of her sentence. Moreover, her circumstances – serving a one year sentence while an appeal is being pursued – are no different from those of any defendant serving a one year (or relatively short) sentence, and therefore cannot constitute an "exceptional" reason for release. But cf. *United States* v. *Garcia*, 340 F.3d 1013, 1019 (9th Cir. 2003) (in discussing generally the "exceptional circumstances" analysis, court notes that length of prison sentence may be a relevant factor because it may be "a proxy for the seriousness of the crime," the need to incapacitate violent people "is only weakly implicated where the sentence imposed is very short," and because the defendant may serve most or all of his sentence before his appeal has been decided, incarceration "could substantially diminish the benefit he would ordinarily receive from an appeal").

Miller also asserts that her ties to the community, family responsibilities, status as a first-time offender, and compliance with all pretrial conditions of release constitute exceptional reasons. Motion 18-19. Generally, however, 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). In other words, "[t]here is nothing exceptional about going to school, being employed, or being a first-time offender, either separately or in combination." *Id.* at 403-404 (internal quotation marks

omitted); see also *Garcia*, 340 F.3d at 1022 ("Hardships that commonly result from imprisonment do not meet [this] 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."); see also *United States* v. *Mahoney*, 627 F.3d 705, 706 (8th Cir. 2010) (fact that defendant did "remarkably well on release" is not an exceptional reason); *United States* v. *Wages*, 271 F. App'x 726 (10th Cir. 2008) (defendant's age, lack of criminal record, use of wheelchair, and limited ability to hear are not exceptional circumstances); *United States* v. *Brown*, 368 F.3d 992, 993 (8th Cir. 2004) (fact that defendant may be subject to mistreatment in prison given conviction for child pornography is not an exceptional reason and does not make case "clearly out of the ordinary * * * when compared to every other defendant convicted of offenses involving the sexual exploitation of children, all of whom are subject to mandatory detention") (internal quotation marks omitted). Indeed, these considerations raised by Miller are relevant to the Section 3143(b)(1) factors (addressed below), not to the requirements of Section 3145(c). See *United States* v. *Koon*, 6 F.3d 561, 564 (9th Cir. 1993) (denying petitions for rehearing and rehearing en banc) (Rymer, J., concurring); see also *ibid.* (to establish "exceptional" reasons, the defendant "has to show more than the fact that he or she is neither a danger to the community nor likely to flee").

In sum, because Miller has failed to clearly show that "exceptional" circumstances warrant her release pending appeal, she does not fall within the Section 3145(c) exception. The failure to clearly show any exceptional circumstances defeats her motion for release, regardless of whether she meets the Section 3143(b)(1) requirements. See generally *United States* v. *Rothenbach*, 170 F.3d 183 (5th Cir. 1999) (per curiam) ("It is not necessary to determine whether the appellant has satisfied the criteria of [Section] 3143(b)(1) because, even if he has, he has not shown that 'exceptional reasons' exist; thus he is not eligible for release under [Section] 3145(c)."). In any event, she does not meet the Section 3143(b)(1) criteria.

2. The Section 3143(b)(1) Factors. Miller first asserts that she does not pose a risk of flight or a danger to others. She notes her strong ties to her home and family and that she does not have a history of violent conduct. Motion 4-5. Miller, however, fully participated in a violent "surprise" attack of her in-laws and participated in cutting Barbara Miller's hair and prayer cap, and was convicted of a crime of violence that included kidnapping. Moreover, the assault was under the leadership of her husband's uncle (and co-defendant) Samuel Mullet, Sr. Her allegiance to him provides reason for concern of the risk she may pose to others, including members of Amish communities whose religious practices may be contrary to those followed by Mullet and the other defendants. In these

circumstances, merely reciting her family situation and her ties to her religious community does satisfy her burden of showing "by clear and convincing evidence" she does not pose a danger to the safety of others. This is particularly true where the very reason for the violent assault stems from her (and the other defendants') connection to their religious community.

Miller's principal argument is that her appeal raises substantial legal issues. She cites two: (1) whether Congress's Commerce Clause power supports the enactment of Section 249(a)(2) and its application to this case, and (2) whether the jury instructions on the definition of "kidnapping" for the sentencing enhancement provision of Section 249(a)(2) were correct. Motion 5-17.

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 denied defendants' various motions to dismiss the indictment, for judgment of acquittal, and for a new

trial.[5] Moreover, the district court denied Miller's motion for release pending appeal. R. 495. "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 Miller raises do not constitute "substantial issues."

First, Miller asserts that the statute exceeds Congress's power under the Commerce Clause both on its face and as applied. Motion 5-14. 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

[5] Shortly after defendants were convicted, the district court issued an order addressing the United States' post-trial motion for detention. See R. 243. The court permitted some of the defendants (including Anna Miller) to remain on bond *until sentencing*, but also noted that it was putting these defendants "on notice" that they should expect to be remanded into custody after sentencing "should the Court impose a prison sentence." R. 243 at 2-3. 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 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 suggest[ed] its rulings were incorrect." R. 243 at 2.

marks omitted). Moreover, with respect to the Commerce Clause issue, "for criminal defendants, [i]t appears that *United States* v. *Lopez*[6] 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 drafting Section 249(a)(2), Congress intended to invoke the "full scope of [its] Commerce Clause power." H.R. Rep. No. 86, Pt. 1, 111th Cong., 1st Sess. 15 (2009). To this end, and "[t]o avoid constitutional concerns * * *, the [statute] requires that the Government prove beyond a reasonable doubt, as an element of the offense, a nexus to interstate commerce in every prosecution." *Ibid.* Specifically, the defendant's conduct must satisfy one of the four "circumstances" – or jurisdictional "elements" or "hooks" – listed in Section 249(a)(2)(B).[7] These "hooks" reflect the three *Lopez* categories of activity that Congress may regulate under its commerce power. Section 249(a)(2), therefore, is fully consistent with

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[6] 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).

[7] The "jurisdictional" hooks in the statute tie application of the statute to Congress's power to enact the statute under the Commerce Clause; they do not refer to a court's subject matter jurisdiction.

Lopez, as well as the Supreme Court's Commerce Clause decision in *United States* v. *Morrison*, 529 U.S. 598 (2000). In these circumstances, where a statute's reach is limited by express jurisdictional elements, thereby ensuring on a case-by-case basis that the particular offense has a sufficient nexus to interstate commerce, the statute is immunized from a *facial* constitutional attack. See *United States* v. *Coleman*, 675 F.3d 615, 620 (6th Cir.), cert. denied, 133 S. Ct. 264 (2012); see generally *United States* v. *Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.").

Miller argues that the jurisdictional hooks are not sufficient to support the constitutionality of Section 249(a)(2) in this case. Motion 8-14. The jurisdictional elements, however, enable Congress to reach conduct that implicates commerce. Congress may use its commerce power to reach bias-motivated assaults that involve activities that Congress is empowered to regulate under the Commerce Clause. As the Court in *Lopez* stated, a jurisdictional element limits the reach of a statute to "a discrete set" of regulated activities "that additionally have an explicit connection with or effect on interstate commerce." 514 U.S. at 562. In this case, the statutory nexus with interstate commerce is established because, *in connection with the bias-motivated assaults*, (1) the defendants (including Anna Miller)

traveled "using a channel, facility, or instrumentality of interstate * * * commerce"; and (2) the defendants used a "weapon that has traveled in interstate * * * commerce." 18 U.S.C. 249(a)(2). Anna Miller (and other defendants) hired a driver with a van to drive them on the two hour trip to the Millers' home[8] and, in effectuating the assaults on the Millers, used scissors and electric clippers that crossed state lines.[9]

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[8] This Court has recognized that cars, like airplanes and trains, are instrumentalities of interstate commerce, as they "retain the inherent potential to affect commerce." *United States* v. *McHenry*, 97 F.3d 125, 127 (6th Cir. 1996), cert. denied, 519 U.S. 1131 (1997). Indeed, they are the "quintessential instrumentalities of modern interstate commerce." *Id.* at 126 (quoting *United States* v. *Bishop*, 66 F.3d 569, 588 (3d Cir. 1995), cert. denied, 516 U.S. 1032, and 516 U.S. 1066 (1996)).

[9] As the legislative history notes, the jurisdictional hook in Section 249(a)(2)(B)(iii) "is similar to [those in] several other Federal statutes in which Congress has prohibited persons from using or possessing weapons or other articles that at one time or another traveled in interstate * * * commerce." S. Rep. No. 147, 107th Cong., 2d Sess. 21 (2002). Courts have uniformly upheld such statutes as valid exercises of Congress's commerce power. In *Scarborough* v. *United States*, 431 U.S. 563 (1977), the Court upheld defendant's conviction for violating a federal statute prohibiting a convicted felon from possessing "in commerce or affecting commerce" any firearm. See *id.* at 564 (addressing 18 U.S.C. 1202(a), now 18 U.S.C. 922(g)(1)). The Court concluded that the phrase "in commerce or affecting commerce" was not "intended to require any more than the minimal nexus that the firearm have been, at some time, in interstate commerce." *Id.* at 575. Therefore, the fact that the firearm *previously traveled in interstate commerce* created a sufficient nexus between possession of the firearm and interstate commerce to support defendant's conviction under the statute.

Second, Miller 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 14-17. She suggests 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. She maintains that the jury should have been instructed on elements of kidnapping that require more than "trivial restraint." Motion 15. 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 expressly rejected the argument that it must apply either the definition of kidnapping in the federal kidnapping statute (18 U.S.C. 1201) or the common law definition of kidnapping. Rather, the court, applying the "generic, contemporary meaning" of kidnapping, found that it was sufficient that the defendant "abducted and confined" the victim without her consent. *Id.* at 510-511.[10]

[10] 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, Miller's Section 249 conviction would be unaffected; she would simply have to be resentenced.

CONCLUSION

For the foregoing reasons, this Court should deny Anna Miller's Motion For Release on Bond Pending Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2013, I electronically filed the foregoing UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION FOR RELEASE ON 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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