IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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No. 16-6592

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MATTHEW B. CORDER,

Defendant-Appellant

_____

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

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

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Pursuant to Federal Rule of Appellate Procedure 9 and Sixth Circuit Local Rule 9(b), the United States respectfully submits this opposition to defendant Matthew Corder's motion for release pending appeal filed December 20, 2016.[1] Corder was convicted of two violations of 18 U.S.C. 242 for felony deprivation of rights under color of law involving the use of a dangerous weapon and resulting in

[1] Per the request of the Sixth Circuit Clerk's Office, the United States files this response by 12 pm on December 21, 2016, less than 24 hours after Corder filed his motion for release. The United States has endeavored to draft a full and complete response in that limited timeframe. Any arguments not raised in this response are reserved for the United States' briefing on the merits.

bodily injury, and for misdemeanor deprivation of rights under color of law for malicious prosecution. App. 7; R. 1.[2] On October 20, 2016, the district court sentenced Corder to 27 months' imprisonment. App. 8. Corder was initially ordered to self-report to the Federal Bureau of Prisons on November 22, 2016, but the district court granted in part his motion to self-report after the holidays. App. 12. Corder is currently scheduled to self-report on December 28, 2016. App. 12. On December 15, 2016, the district court denied Corder's motion for a bond pending appeal.

As discussed below, because Corder was convicted of a crime of violence, 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). Because Corder cannot satisfy these requirements, his motion should be denied.

BACKGROUND

1. On October 22, 2014, Deric Baize returned home to find Defendant Matthew Corder's police vehicle parked in Baize's parking spot; Corder was

[2] References to "App. __" are to the appendix included with Corder's motion for release pending appeal. References to "R. __" are to numbers on the district court docket sheet in *United States* v. *Corder*, No. 3:15-cr-141 (W.D. Ky.).

responding to a police call at a nearby neighbor's home. When Corder returned to the vehicle, Mr. Baize exited his home, stood on his front porch, and asked Corder why he parked in Baize's spot. The two exchanged words. Baize, unhappy with the conversation, told Corder to "fuck off" and went back inside his home.

Video footage from Corder's body camera, admitted into evidence and shown to the jury, captured what happened next. App. 14, Ex. 3a. Corder walked up Baize's front steps and knocked on Baize's front door. Ex. 3a at 0:00-0:30. When Baize opened his front door, Corder opened the still-closed screen door and told Baize to exit his home. Ex. 3a at 0:30-0:43. When Baize refused, Corder reached into Baize's home, attempted to pull Baize outside of his home and, when that failed, forcibly entered the home and began to arrest Baize. Ex. 3a at 0:43-1:30. The video flatly contradicts Corder's assertion that Baize had been "standing in his doorway." See Mot. for Release 6. When Baize resisted Corder's efforts to arrest him in his home, Corder tased Baize into submission. Ex. 3a at 1:30-1:52. After placing Baize in handcuffs, Corder commented that "fuck you gets you a whole different ballgame, buddy." Ex. 3a at 3:03-3:06. Baize then apologized, to which Corder responded: "fuck that. You get to go to jail tonight." Ex. 3a at 3:08-3:12. When Baize asked Corder why he was being arrested, Corder told Baize "you know why, slick. You sit up there and tell me to fuck off." Ex. 3a at 3:52-3:58.

Corder filed a police report that falsely charged Baize with disorderly conduct for "causing alarm to neighbors," as well as fleeing and evading and resisting arrest. Baize spent two weeks in jail before the prosecutor agreed to drop the charges on the recommendation of the sheriff's office, provided that Baize agreed to stipulate that there had been probable cause to the charges—a practice that shields the sheriff's office from civil liability. Baize ultimately lost both his job and his home because of the jail time.

On December 16, 2015, a grand jury returned a two-count indictment charging Corder with violating 18 U.S.C. 242 for depriving an individual of his constitutional rights under color of law. R. 1. The indictment alleged that Corder seized the victim, Mr. Baize, without probable cause to believe that Baize had committed a crime and unlawfully entered Baize's home to effect the seizure. R. 1. The indictment also alleged that Corder charged Baize with crimes that Baize did not commit and included false and misleading information in the charging document, both of which caused Baize to be detained in jail. R. 1.

2. On July 22, 2016, a jury convicted Corder of both counts of violating 18 U.S.C. 242. App. 23. Count 1 required the jury to find that Corder's unlawful seizure of Baize "resulted in bodily injury or involved the use, attempted use, or threatened use of a dangerous weapon." App. 16. On October 20, 2016, the district court sentenced Corder to 27 months' imprisonment. App. 8.

On October 24, 2016, Corder filed in the district court a motion for bond pending appeal. R. 74. He asserted that he met the requirements of 18 U.S.C. 3143(b)(1), including that he is not a flight risk; is not a danger to others or to the community; and raises on appeal substantial questions of law or fact. R. 74. On November 10, 2016, the United States filed an opposition, asserting that: (1) 18 U.S.C. 3143(b)(2) prohibits release pending appeal in the circumstances of this case; and (2) in any event, Corder does not satisfy the standards set forth in 18 U.S.C. 3143(b)(1). R. 76.

On December 15, 2016, the district court denied the motion for bond pending appeal, finding that "Corder was convicted of a 'crime of violence' and has not shown an 'exceptional reason' why detention would be inappropriate." App. 1. Indeed, the court stated that Corder never filed a reply brief to advance "*any* 'exceptional reasons' for why detention is inappropriate." App. 4-5 (emphasis added).

In addition, the court found that Corder failed to satisfy the requisite standards for a bond pending appeal because he "ha[d] not demonstrated that his appeal raises a substantial question of law or fact likely to result in a reversal, new trial, or change in sentence." App. 1. Corder had raised four possible issues for appeal: defective jury instructions, redaction of the state court order of dismissal of the charges against Mr. Baize, denial of Corder's Fifth Amendment rights, and

Corder's within-guidelines sentence. App. 2. But Corder "d[id] not provide any argument or cite any authority to support his contention that these issues are close questions." App. 2.

3. On December 20, 2016, Corder filed the instant motion for release pending appeal with this Court. Mot. for Release.

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 shall be detained.[3] 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 § 3143(b)(1), but also must demonstrate exceptional reasons why his detention is not appropriate.") (citing 18 U.S.C. 3145(c)).

[3] 18 U.S.C. 3143(b)(2) incorporates the circumstances set forth in 18 U.S.C. 3142(f)(1)(A)-(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 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, Matthew Corder 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).

A. "Exceptional Reasons"

This Court may not grant release pending appeal unless it finds that Corder has "clearly shown" that "exceptional reasons" exist making detention inappropriate. 18 U.S.C. 3145(c). 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 citation and quotation marks 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."); 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.").

Corder argues for the first time on appeal, with no citation to case law, that exceptional reasons exist that warrant his release. Mot. for Release 14-15. He argues that (1) he is not a flight risk, (2) he is not a danger to the community, (3) he has no other criminal history and has behaved well throughout this case, (4) he has complied with his conditions of release, (5) his family will suffer financial hardship if he is incarcerated, (6) he distinguished himself in his service as a police officer, and (7) his job as a former police officer places him at risk in prison. Motion for Release at 14-15. Corder is mistaken that these circumstances constitute exceptional reasons for release pending appeal.

Corder's first two reasons—lack of flight risk or danger to the community—are factors that Corder already must prove under Section 3143(b)(1) to be eligible for release *in addition to* the exceptional circumstances mandated by Section 3145(c). To consider the Section 3143(b)(1) factors as exceptional would nullify the added requirement of Section 3145(c) for violent crimes and eviscerate the desire by Congress that violent criminals meet a higher threshold for obtaining release pending appeal.

Corders's next three reasons—good behavior and family hardship—have been rejected by courts as not out-of-the-ordinary, uncommon, or rare. See *United States* v. *Kirby*, No. 1:15-CR-00024-GNS, 2016 WL 538483 (W.D. Ky. Feb. 9, 2016) (perfect record of supervision, never missing court appearance, therapy appointments, assisting authorities); *United States* v. *Roos*, No. 12-09-ART-(2), 2013 WL 3005631 (E.D. Ky. June 13, 2013) (family hardship); *United States* v. *Walden*, No. 3:10-CR-110-7, 2011 WL 4476641 (E.D. Tenn. Sept. 26, 2011) (good behavior, hardship for family, cooperation); *United States* v. *Bunke*, No. 3:08-CR-65, 2009 WL 1117311 (N.D. Ohio Apr. 24, 2009) (compliance with pre-trial release conditions); *United States* v. *Mellies*, 496 F. Supp. 2d 930 (M.D. Tenn. 2007) (no serious injury or illness, need to support family members); *United States* v. *Burnett*, 76 F. Supp. 2d 846 (E.D. Tenn. 1999) (family hardship); *United States*

v. *Rodriguez*, 50 F. Supp. 2d 717 (N.D. Ohio 1999) (severe financial hardship to family, illness).

Corder's last two reasons—his service and job as a police officer—merely underscore the severity of his underlying offenses, namely, his abuse of his authority as a police officer to violate an individual's constitutional rights. Such a violation constitutes a "flagrant abuse of the public trust." *United States* v. *Guerra*, 463 F. App'x 451, 453 (5th Cir. 2012); see also *United States* v. *Boone*, 110 F. Supp. 3d 909, 917 (S.D. Iowa 2015), aff'd 828 F.3d 705 (8th Cir. 2016), petition for cert. pending, No. 16-6799 (filed Nov. 4, 2016); *United States* v. *Rodella*, No. 14-CR-2783.JB, 2015 WL 711941, at *50 (D.N.M. Feb. 5, 2015), aff'd 804 F.3d 1317 (10th Cir. 2015), cert. denied, 137 S. Ct. 37 (2016). In addition, as explained below, Corder's actions in this case were not a one-time lapse in judgment, but rather another chapter in a long history of official misconduct. Over the course of his career as a law enforcement officer, Corder has been fired from three law enforcement agencies for abusing his power, has lied to internal investigators to cover up those abuses, and has been sued successfully for excessive force. Moreover, a police officer being convicted of a crime under 18 U.S.C. 242 is neither uncommon nor rare: acting under color of law is an element of the statute.

In sum, because Corder 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 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, as discussed below, he does not meet those criteria.

B. The Section 3143(b)(1) Factors

Section 3143(b)(1) requires Corder to prove by clear and convincing evidence that: (1) he is not a flight risk; (2) he is not a danger to others or to the community; (3) the appeal is not for delay; and (4) the appeal raises a substantial question of law likely to affect the outcome of the judgment. For purposes of this motion, in light of the time exigencies, the United States addresses only the fourth factor without conceding anything on the other three factors. Corder argues that three errors of law are likely to result in reversal or a new trial. None has merit.

1. Corder argues that the jury was incorrectly instructed on warrantless arrests in one's home. He suggests that the jury should have been instructed "that the doorway to a home is a public place," Mot. for Release 10, presumably to justify Corder's act of forcibly entering Baize's doorway. But "[i]n terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent

circumstances, that threshold may not reasonably be crossed without a warrant." *United States* v. *Saari*, 272 F.3d 804, 805 (6th Cir. 2001) (quoting *Payton* v. *New York*, 445 U.S. 573, 590 (1980)). That threshold is precisely what Corder crossed when he barged into Baize's home without a warrant and tased and arrested Baize—all because Baize told Corder to "fuck off."

Corder's citation to *United States* v. *Santana*, 427 U.S. 38 (1976), is inapposite. See Mot. for Release 10. In that case, the Court upheld as occurring in a public place the warrantless arrest of a woman standing "directly in the doorway" of her home while holding a bag full of drugs. *Id.* at 40 & n.1, 42. The woman retreated when police officers arrived, and the officers apprehended her in the vestibule of her home through an open door. *Id.* at 40. Here, however, Corder knocked on Baize's closed door, opened Baize's screen door, and forcibly entered Baize's home when Baize refused to step outside. See Ex. 3a at 0:00-1:30. The district court's jury instruction was correct and consistent with case law.

2. Corder next argues that the district court erred in admitting into evidence an order of dismissal of the charges against Baize while redacting the stipulation in the order that there had been probable cause for the charges. Mot. for Release 11. Corder argues that the jury should have been given the stipulation to help it decide whether probable cause existed for Corder's in-home arrest of Baize. Mot. for Release 11-12. The district court redacted the stipulation under Federal Rule of

Evidence 403, which allows a court to exclude evidence if its probative value is outweighed by a danger of, inter alia, unfair prejudice. This Court reviews a district court's evidentiary rulings for an abuse of discretion. *United States* v. *Schreane*, 331 F.3d 548, 564 (6th Cir.), cert. denied, 540 U.S. 973 (2003).

The district court did not abuse its discretion in determining that the stipulation's danger of unfair prejudice outweighed its probative value because the jury might infer mistakenly that a practice used to limit the sheriff's office's civil liability required it to find that Corder had probable cause to arrest Baize—a central issue in the case. In addition, any error was harmless as the jury was shown Corder's body camera footage, which showed Corder barging into Baize's home, tasing and arresting Baize, and admitting that he was arresting Baize because Baize told him to "fuck off." See Ex. 3a at 0:30-1:52, 3:03-3:06, 3:08-3:12, 3:52-3:58.

3. Corder also argues that his Fifth Amendment rights were violated when the district court allowed the United States to question him on cross-examination about two written admissions he made on a job application about having lied to internal affairs in a prior police department. Mot. for Release 12-13. The district court allowed the questioning under Federal Rule of Evidence 608 and pursuant to *Brown* v. *United States*, 356 U.S. 148, 154-155 (1956), which holds that the credibility of a criminal defendant who takes the stand in his own defense may be impeached based on the matters he himself has put into dispute. See also *United*

States v. *Hughes*, 308 F. App'x 882, 887 (6th Cir. 2009) (quoting *Brown*). This Court reviews evidentiary rulings, including constitutional challenges to evidentiary rulings, for an abuse of discretion. *Schreane*, 331 F.3d at 564.

The district court did not abuse its discretion in allowing the cross-examination. Corder placed his credibility and truthfulness as a law enforcement officer into dispute by taking the stand in his own defense and asserting that his version of the facts surrounding Baize's arrest should be believed. In addition, any error was harmless as the jury was shown Corder's body camera footage, which showed Corder barging into Baize's home, tasing and arresting Baize, and admitting that he was arresting Baize because Baize told him to "fuck off." See Ex. 3a at 0:30-1:52, 3:03-3:06, 3:08-3:12, 3:52-3:58.

CONCLUSION

For the foregoing reasons, this Court should deny Matthew Corder's Motion For Release Pending Appeal.

Respectfully submitted,

VANITA GUPTA
Principal Deputy Assistant
Attorney General

s/ Robert A. Koch
TOVAH CALDERON
ROBERT A. KOCH
Attorneys
Department of Justice
Civil Rights Division

Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-2302

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2016, I electronically filed the foregoing UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION FOR RELEASE 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 service will be accomplished by the appellate CM/ECF system.

s/ Robert A. Koch
ROBERT A. KOCH
Attorney