Nos. 19-1684 & 19-1949

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

CHRISTOPHER M. ROEDER,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

THE UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR RELEASE PENDING APPEAL

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The United States files this response to Appellant Christopher Roeder's motion for release pending appeal under Federal Rule of Appellate Procedure 9(b) and Local Rule 9(b).[1] On February 5, 2019, a jury convicted Roeder, a former police officer, of using excessive force against an arrestee in violation of 18 U.S.C. 242, and of falsifying a police report in violation of 18 U.S.C. 1519. He was sentenced to 14 months' imprisonment, and is currently due to report on November 5, 2019.

On October 8, 2019, the district court denied Roeder's motion for release pending appeal. On October 16, 2019, Roeder filed a motion for release pending appeal in this Court. As discussed below, because none of the issues raised by Roeder presents a substantial question of law or fact that he is likely to prevail upon in his appeal, the Court should deny the motion.

BACKGROUND

1. Roeder is a former police officer with the Hadley Police Department in Hadley, Massachusetts. Doc. 194, at 2.[2] On March 30, 2017, while then-Officer Roeder directed traffic in Hadley, a truck driven by Nikolas Peters clipped

[1] The United States files this expedited response at the Court's request. The United States has endeavored to draft a full and complete response in the limited time available. Any arguments not in this response are reserved for the United States' merits brief.

[2] "Doc. __, at __" refers to the docket number on the district court docket sheet and the page numbers of the document.

Roeder's right elbow with its sideview mirror. See Doc. 194, at 2. After being hit, Roeder yelled at Peters to stop. See Doc. 194, at 2. As Peters drove away, Edward Koehler, a witness at the scene, heard Roeder say, "I'll get that fucker. He's a contractor, he'll be coming through town." Doc. 194, at 2.

Days later, Roeder noticed Peters driving the same truck, pulled him over, and called for backup to place him under arrest. Doc. 194, at 2-3. Roeder then drove Peters to the police station for booking. Doc. 194, at 3. When Roeder arrived with Peters, the dispatcher, Richard Downie, noticed that Roeder "seemed a little anxious, irritated," and "had an angry look on his face." Doc. 194, at 3.

Roeder and Officer Courtney Call conducted Peters' booking. Doc. 194, at 3. After Officer Call took his photograph, Peters sat on a bench in the booking area. Doc. 194, at 3. Officer Call then asked Peters a question. Doc. 194, at 3. Peters stood up to answer Officer Call. Doc. 194, at 3. Roeder instructed Peters to sit back down, and Peters complied. See Doc. 194, at 3-4. After sitting down Peters said, "Sir, I was asked a question, okay[.]" Doc. 194, at 3-4. Peters then told Roeder to "[s]ettle down." Doc. 194, at 4. In response, Roeder walked around the booking desk and approached Peters, telling him, "You're not in charge here, bud." Doc. 194, at 4. Peters replied, "I know I'm not." Doc. 194, at 4. At that point, Roeder, attempted to handcuff Peters, but Peters, who remained seated, put both hands behind his back and said, "I'm not being cuffed[.]" Doc. 194, at 4-5.

Roeder stood over Peters and responded, "You are being cuffed. You are being cuffed. Release your grasp right now." Doc. 194, at 5. Roeder then used his right elbow to strike Peters directly in the nose. Doc. 194, at 5.

Peters remained seated in a daze as blood ran down his face and onto the floor. Doc. 194, at 5-6. Peters was taken to a hospital where doctors informed him that he had a broken nose and would need surgery. Doc. 194, at 6.

Two video cameras in the booking area captured the incident. Doc. 194, at 3. Roeder reviewed one of the recordings with his supervisor, who then ordered Roeder to write a police report documenting his use of force. Doc. 194, at 6. In that report, Roeder wrote that Peters made an obscene comment toward him after he instructed Peters to turn around to be photographed, and that he used his right hand to control Peters' left arm in an attempt to handcuff Peters while ordering him to stop resisting. Doc. 194, at 6. The jury ultimately found that Roeder knowingly falsified each of those claims and that he made them to influence a potential investigation into his conduct. Doc. 250, at 2-3.

2. The government charged Roeder with two counts: deprivation of civil rights under color of law under 18 U.S.C. 242, and falsification of a record in connection with a federal investigation under 18 U.S.C. 1519. Doc. 4. The Section 242 count required the government to prove that Roeder willfully used objectively unreasonable force when he elbowed Peters. The theory of the

government's case was that Roeder elbowed Peters out of anger even though Peters remained seated and did not physically threaten Roeder during the incident. The Section 1519 count required the government to show that Roeder knowingly falsified his police report describing his use of force against Peters with the intent of impeding, obstructing, or interfering with the FBI's investigation of his conduct.

At trial, each party presented expert testimony related to Roeder's training on various use of force principles. Doc. 92, at 1. The district court allowed a significant amount of expert testimony related to the Hadley Police Department's use of force policies, Massachusetts' use of force training curriculum for police officers and recruits, and training Roeder received, but limited that testimony to the issue of willfulness. Doc. 92, at 4-9. The district court, concerned that any testimony about the reasonableness of Roeder's specific use of force in this case would invade the province of the jury on an ultimate issue, prohibited both parties from presenting expert testimony on whether Roeder's actions were objectively reasonable. Doc. 92, at 6-9.

On February 5, 2019, the jury convicted Roeder on both the Section 242 and Section 1519 counts. The district court set sentencing for May 14, 2019. Doc. 153.

3. Roeder filed a motion for judgment of acquittal under Federal Rule of Criminal Procedure 29, which the district court treated as a motion for an extension

of time to file a more complete motion. Doc. 157; Doc. 158. He also filed a motion for new trial under Rule 33, asserting a *Brady* violation by the government for allegedly failing to disclose that its expert, Sergeant Brian Daly—after being excused as a witness—requested a letter from the government noting that he had missed work to testify at trial. Doc. 163. On April 9, 2019, the day after the government filed its response to his motion for new trial, Roeder moved to continue his sentencing from May 14, 2019 to June 14, 2019. Doc. 165. The district court granted the motion, and set sentencing for June 20, 2019. Doc. 175.

On May 11, 2019, Roeder filed a supplemental motion for judgment of acquittal, challenging the district court's rulings on expert testimony and the sufficiency of the evidence underlying his convictions. Doc. 179. On June 19, 2019, the day before Roeder's sentencing, the district court denied the motion, holding that there was sufficient evidence supporting the convictions. Doc. 194.

The district court held sentencing on June 20, 2019, where it denied Roeder's motion for new trial, and sentenced him to 14 months' imprisonment. Doc. 199; Doc. 201. The district court required Roeder to self-report to prison on August 19, 2019. Doc. 199.

4. On August 6, 2019, Roeder filed an emergency motion for an extension of time to self-report. Doc. 219. The district court granted the motion, and extended the time for Roeder to self-report to September 18, 2019. Doc. 222.

Twelve days before that extended self-report date, Roeder filed another emergency motion seeking a stay pending appeal. Doc. 228. In that motion, Roeder again challenged the district court's rulings on expert testimony and the sufficiency of evidence. Doc. 228, at 5-15. Roeder also challenged—for the first time—the district court's decision to conduct a *Batson* inquiry *sua sponte* in response to his use of peremptory challenges to strike two women of color. Doc. 250, at 16.

On October 2, 2019, before the district court could rule on that motion, Roeder filed a renewed motion for new trial under Criminal Rule 33. Doc. 249. In his renewed Rule 33 motion, Roeder again claims that the government should have disclosed Sergeant Daly's request for a work excuse letter.[3] Roeder also argues that the government committed another *Brady* violation. Specifically, Roeder claims that a portion of Daly's testimony was false and that the government relied upon that false testimony at trial. Doc. 249. As a whole, Roeder's renewed Rule 33 motion relies on similar arguments that the district court rejected in his initial Rule 33 motion. Doc. 201. The renewed motion remains pending before the district court. The government's response is due on November 4, 2019.

On October 8, 2019, the district court denied Roeder's emergency motion for a stay pending appeal and required him to self-report on November 5, 2019.

[3] Roeder does not address this argument in his motion to the Court.

Doc. 250. On October 16, 2019, Roeder filed a motion for release pending appeal in this Court, essentially raising the same issues the district court just rejected in its October 8, 2019 opinion.

DISCUSSION

The Bail Reform Act of 1984 creates a presumption that a convicted defendant sentenced to imprisonment "shall * * * be detained" during appeal. 18 U.S.C. 3143(b)(1). A defendant may be released pending appeal if he shows that: (1) he is not a flight risk or danger to public safety; (2) the appeal is not for purposes of delay; and (3) the appeal "raises a substantial question of law or fact likely to result in [a] reversal [or] an order for a new trial." 18 U.S.C. 3143(b)(1)(B)(i)-(ii); *United States* v. *Bayko*, 774 F.2d 516, 522 (1st Cir. 1985). Roeder bears the burden of making this showing. See, *e.g.*, *United States* v. *Miller*, 753 F.2d 19, 24 (3d Cir. 1985).

The government does not contend that Roeder is a flight risk or danger to public safety. Therefore, the only issue before this Court is whether Roeder's appeal raises a substantial question that is likely to result in reversal or a new trial.

This Court has explained that a substantial question is "a 'close' question or one that very well could be decided the other way." *Bayko*, 774 F.2d at 523 (citation omitted). "[W]hether a question is 'close' or not is to be made on a case-by-case basis." *Ibid*. But even if a substantial question exists, Section 3143

requires that the alleged factual or legal error "not be harmless or unprejudicial." *Id*. at 522, 523. Thus, where a substantial question exists, but it does not affect the defendant's "substantial rights," he should be detained during his appeal.

Here, the district court oversaw Roeder's seven-day trial and, as noted above, denied Roeder's motion for judgment of acquittal, denied his motion for new trial, and denied his motion for stay of sentence pending appeal. This Court's independent review standard for Section 3143 motions "[r]ecogniz[es] that appellate courts are ill-equipped to resolve factbound disputes," and "cedes particular respect, as a practical matter, to the lower court's factual determinations." *United States* v. *Tortora*, 922 F.2d 880, 882-883 (1st Cir. 1990). While the Court may conduct an independent review, none of the issues identified by Roeder raises a substantial question that warrant his release pending appeal.

A. The District Court's Decision To Bar Expert Testimony On An Ultimate Issue At Trial Does Not Raise A Substantial Issue

Roeder first contends that whether a police officer "criminally charged" under Section 242 "may introduce expert testimony on * * * objective reasonableness" is an "unsettled question" in this Circuit and others. Def.'s Mot. 5.[4] Roeder suggests that based upon the "unsettled law" and particular facts of this

[4] By emphasizing whether an officer is "criminally charged," Roeder suggests that the standard of objective reasonableness under the Fourth Amendment is different between civil and criminal cases. That is incorrect.

case, that whether the district court abused its discretion by preventing expert testimony on the specific issue of objective reasonableness is a "close question," warranting his release pending appeal. Def.'s Mot. 5-6. It is not, and the district court was correct in concluding that Roeder's contention does not raise a substantial question likely to result in reversal or a new trial.

1. To obtain a conviction under Section 242, the government had to prove that Roeder, in elbowing Peters in the nose, subjected Peters to objectively unreasonable force in violation of Peters' rights under the Fourth Amendment. *Graham* v. *Connor*, 490 U.S. 386, 394 (1989). Roeder argues that his expert should have been permitted to essentially tell the jury that his use of force was reasonable, and that the district court abused its discretion in barring such testimony. Doc. 228, at 7-11. The district court correctly rejected this argument.

As the district court recognized, Roeder sought to have his expert testify to an ultimate issue in the case. Doc. 92, at 6-9; Doc. 228, at 7. Under Federal Rule of Evidence 704, testimony on an ultimate issue may be admissible, but the decision whether to admit it is within the district court's discretion. See Fed. R. Evid. 704 advisory committee's note (1972 Proposed Rules) (noting that Rule 704 "does not lower the bars so as to admit all opinions"). Rule 704 thus allows the

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United States v. *Cobb*, 905 F.2d 784, 788 n.6 (4th Cir. 1990); *United States* v. *Bigham*, 812 F.2d 943, 948 (5th Cir. 1987).

district court to consider whether the proposed expert testimony would assist the jury. At the same time, Federal Rule of Evidence 403 allows the court to determine if those expert opinons are unfairly prejudicial. *Ibid*. ("[O]pinons must be helpful to the trier of fact, and Rule 403 provides * * * ample assurance[ ] against the admission of opinions which would merely tell the jury what result to reach[.]"). The district court concluded that allowing expert testimony on objective reasonableness would allow an expert to invade the province of the jury and tell it what result to reach. See Doc. 250, at 7-10; see also Doc. 92, at 6-9. For this reason, the district court "prohibited any expert from testifying that [Roeder's] use of force was or was not reasonable." Doc. 250, at 7. That conclusion was well within its discretion and consistent with case law. See, *e.g.*, *Patrick* v. *Moorman*, 536 F. App'x 255, 258 (3d Cir. 2013); *Thompson* v. *City of Chicago*, 472 F.3d 444, 457-458 (7th Cir. 2006); *Berry* v. *City of Detroit*, 25 F.3d 1342, 1353-1354 (6th Cir. 1994); *Hygh* v. *Jacobs*, 961 F.2d 359, 364-365 (2d Cir. 1992); cf. *United States* v. *Williams*, 343 F.3d 423, 435-436 (5th Cir.) (the district court erred by permitting a police officer to testify on reasonableness under the Fourth Amendment).

2. Roeder asserts that this issue is still "unsettled," warranting a stay of his sentence pending resolution of his appeal. He cites two cases from this Court, but as the district court found, neither one helps him. Doc. 228, at 9; Doc. 250, at 8-9.

First, in *Isom* v. *Town of Warren*, 360 F.3d 7 (1st Cir. 2004), the Court addressed whether a plaintiff could prevail on a Fourth Amendment excessive force claim where one officer used pepper spray to subdue the plaintiff's son. The Court noted that the plaintiff failed to provide expert testimony describing the circumstances in which a "reasonable officer would have used pepper spray." *Id*. at 12. The Court thus found that the plaintiff produced "no evidence from which the jury could rationally draw the conclusion that the officers' actions were objectively unreasonable." *Ibid*.

Second, in *Jennings* v. *Jones*, 499 F.3d 2, 5 (1st Cir. 2007), the plaintiff alleged that a police officer used excessive force when he used an "ankle turn control technique" and broke the plaintiff's ankle during an arrest. The district court granted the officer judgment as a matter of law, concluding that the plaintiff did not produce any evidence that the officer's use of force was unreasonable. *Id*. at 6-7. This Court reversed, noting that the plaintiff produced expert testimony on reasonableness. *Id*. at 15. But the Court made clear that such testimony was not required in every case, stating that "[t]he facts of every case will determine whether expert testimony would assist the jury." *Ibid*. The Court distinguished *Isom* by noting that expert testimony on the reasonable use of pepper spray would have helped the jury because it is "a substance whose use may be unfamiliar to many jurors." *Ibid*. But the Court explained that "[w]here force is reduced to its

most primitive form"—an officer's use of his bare hands—"expert testimony might not be helpful." *Ibid*. (citation omitted).

These cases do not support the conclusion that the use of expert testimony in this context is unsettled, or that the district court abused its discretion by declining to permit any expert testimony on whether Roeder's actions were objectively reasonable. As the district court stated, "both *Jennings* and *Isom* establish that some cases may be susceptible to a common sense determination by the jury of whether an officer's use of force is reasonable." Doc. 250, at 8 (internal quotation marks omitted). They do not establish that such testimony is appropriate or necessary in every excessive force case.

Here, as in *Jennings*, Roeder used the "primitive" technique of an elbow strike. *Jennings*, 499 F.3d at 15. Thus, the district court did not abuse its discretion in concluding that, based on the assistance of jury instructions on objective reasonableness, expert testimony on what factors a reasonable officer may consider in using force, and multiple video recordings of the incident, the jury could have made a "common sense determination" about the reasonableness of Roeder's actions. Doc. 250, at 7-9. This evidentiary ruling was consistent with *Jennings*, *Isom*, and other cases from this Court. See, *e.g.*, *Raiche* v. *Pietroski*, 623 F.3d 30, 37 & n.2 (1st Cir. 2010) (finding expert testimony "provided a clear framework for the jury to assess [an officer's] use of force," but that "[e]ven absent

[the expert's] testimony * * * the jury could have used simple common sense to conclude that [the officer] acted unreasonably by tackling a compliant [citizen] from his stopped motorcycle"). And it is consistent with the view of other circuits.[5]

3. Finally, Roeder asserts that his recently filed motion for new trial, and the material it contains regarding the government's expert, supports his argument that this Court should stay his sentence pending appeal. Def.'s Mot. 6-9. That motion is currently before the district court. Doc. 249. This Court does not consider Rule 33 motions without the trial court's input first. *United States* v. *Graciani*, 61 F.3d 70, 77 (1st Cir. 1995) (adopting rule "requiring a Rule 33 motion to be filed initially in the district court when a direct appeal of a criminal conviction is pending"). Thus, there is no basis for this Court to consider his Rule 33 motion at this stage.

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[5] Other circuits have similarly held that the scope of expert testimony in excessive force cases, including testimony on an ultimate issue, is a fact-specific determination within the trial court's discretion. In *Kopf* v. *Skyrm*, 993 F.2d 374, 378 (4th Cir. 1993), which Roeder cites, the Fourth Circuit rejected a "blanket rule that expert testimony is generally inappropriate in excessive force cases," and concluded that the more specialized the tool used by police, the more likely expert testimony would assist a jury in analyzing objective reasonableness. Def.'s Mot. 5; see also *United States* v. *Brown*, 871 F.3d 532, 538 (7th Cir. 2017) (noting that "[t]he everyday experience of lay jurors fully equips them to answer the reasonableness question," and that expert testimony may be helpful where "something peculiar about law enforcement * * * informs the issues to be decided by the finder of fact") (citation and quotation marks omitted).

In any event, the district court rejected similar arguments in Roeder's initial motion for new trial. In that motion, he argued that Sergeant Daly falsely testified that elbow strikes are *only* appropriate when defending against "a fixed blade," or when an officer faces "serious bodily harm." Doc. 201, at 9 n.4. The district court found that Sergeant Daly's testimony "referenced a subject's use of a blade as *one example* of a circumstance where an elbow strike to the nose may be reasonable." Doc. 201, at 9 n.4 (emphasis added). The district court also noted that Sergeant Daly explained that in the context of a specific training module, police recruits are trained that an elbow strike should be used in response to "serious bodily harm." Doc. 201, at 9 n.4. Thus, the district court found no reason to believe that Sergeant Daly's testimony was false or misleading. That finding is entitled to deference in light of the district court's observation of Sergeant Daly at trial. *Tortora*, 922 F.2d at 882-883 (1st Cir. 1990). In his current motion for new trial, Roeder simply adds affidavits to make the same points the district court has already addressed. Doc. 249-5; Doc. 249-6.

B. Roeder's Sufficiency Arguments Do Not Present Substantial Issues Likely To Result In Reversal Or A New Trial

In his motion in this Court, Roeder simply incorporates by reference the arguments he made in the district court. There, he argued that the government

failed to prove that his striking of Peters was objectively unreasonable under Section 242. Doc. 228, at 12. For the Section 1519 count, Roeder argued that the government did not establish that the false statements in his police report were material. Doc. 228, at 13-14. Roeder offers little support for these contentions. At any rate, they do not establish a basis to grant his motion for a stay of sentence pending appeal.

1. Section 242. To prevail on his sufficiency argument, Roeder must show that a reasonable jury, "view[ing] the evidence, both direct and circumstantial—and including all plausible inference drawn therefrom—in the light most favorable to the verdict," could not have found him guilty beyond a reasonable doubt. *United States* v. *Rivera Calderón*, 578 F.3d 78, 88 (1st Cir. 2009). Roeder cannot meet this demanding standard. Indeed, on three separate occasions, the district court rejected Roeder's argument that the evidence was insufficient to support the jury's verdict that his use of force was objectively unreasonable. See, *e.g.*, Doc. 194; Doc. 201; Doc. 250.

As the district court recognized in denying Roeder's motion for stay of sentence pending appeal, the government's theory was that Roeder struck Peters out of anger and to punish him for their earlier altercation. Doc. 250, at 10. To support this theory, the government offered a vast array of evidence, including video footage of the booking incident. Koehler testified that he saw Peters' truck

hit Roeder and Roeder subsequently launch into a profanity-laced tirade in which he vowed to "get" Peters. Doc. 194, at 12; Doc. 250, at 10-11. Downie testified that he had known Roeder "for years," and that Roeder seemed "anxious," "irritated," and "angry" when he arrived at the police station with Peters. Doc. 194, at 12. Further, each parties' experts testified that officers are trained not to use force to punish someone or out of anger. Doc. 194, at 12; Doc. 250, at 10-11. In addition, Roeder's own witness, Detective Sergeant Jesse Green, who was at the scene of Peters' arrest, testified that he viewed a video recording of the incident, that Peters' non-compliance was "not uncommon," and that he did not think striking Peters was necessary to control him. Doc. 194, at 11. Based on this testimony, the jury could have concluded that an elbow strike to the bridge of the nose was an unreasonable in light of Roeder's training and the totality of the circumstances.

Finally, the jury had an additional resource to help evaluate Roeder's actions: video recordings of the incident from two angles that show the "lead-up to the elbow strike, the elbow strike, and the aftermath[.]" Doc. 250, at 11. The jury watched the recordings several times and could compare what it saw on the recordings to the testimony it heard. Doc. 250, at 9. The jury could have used that comparison to conclude that Roeder's conduct was unreasonable under the circumstances. In sum, as the district court correctly concluded, Roeder "has not

satisfied either the substantiality or likelihood prong of the [Section 3143(b)(1)(B)] analysis regarding his [Section 242] conviction." Doc. 250, at 11.

2. Section 1519. Roeder again asserts that the evidence was insufficient to support his conviction under Section 1519 because the government failed to show that the misrepresentations in his police report were material and designed to impede, obstruct, or influence the FBI's investigation. This argument also does not raise a substantial question; indeed, the district court has twice rejected it. Doc. 194, at 13-14; Doc. 250, at 11-15.

To prove a violation of Section 1519, the government had to show that: (1) Roeder knowingly falsified a document; (2) with the intent to impede, obstruct, or interfere with an investigation; and (3) the investigation was within the jurisdiction of a federal agency. *United States* v. *Yielding*, 657 F.3d 688, 714 (8th Cir. 2011). The jury found that two statements in Roeder's police report were false—that Peters made an obscene comment toward him while posing for a booking photograph and that, when Roeder attempted to handcuff Peters, Roeder used his right hand to control Peters' left arm. Doc. 194, at 6; Doc. 250, at 11. As the district court noted, the false statements in Roeder's report might have explained to the FBI why he used the elbow strike against Peters. Doc. 250, at 12. In other words, those statements were relevant to the determination of whether force was

reasonable under the circumstances, and their false nature reflects Roeder's attempt to impede or influence the investigation.

Moreover, the jury heard testimony from Lieutenant Brian Pomeroy, who trained Roeder at the police academy, about the training Roeder received on how to write accurate reports. Doc. 194, at 9. Lieutenant Pomeroy testified that with police reports regarding the use of force, it is important that they are "complete," "accurate," "truthful," and that officers "put all the information in" because "[those] types of reports are going to be scrutinized even more so." Doc. 194, at 9. Therefore, the government argued at trial that Roeder knew his report would be closely scrutinized when he wrote it, but he crafted it in a way to influence the investigation—*i.e.*, by exaggerating Peters' conduct to make his own conduct seem reasonable.

Finally, in denying Roeder's motion for a stay of sentence pending appeal, the district court concluded that the testimony of FBI Special Agent Hendry, who investigated the booking incident, "supports the jury's conclusion that the statements were false and intended to impede, obstruct, or influence the investigation[.]" Doc. 250, at 12. As the district court noted, Agent Hendry testified that the videos did not show that Peters used an obscenity towards Roeder or that Roeder sought to gain control of Peters as described in Roeder's report. Doc. 250, at 12-15. Because Hendry was investigating the circumstances of the

elbow strike and Roeder knew his report would be scrutinized, the jury could infer that the false statements in the report were intended to impede or influence the investigation. For these reasons, Roeder's challenge to the sufficiency of the evidence on the Section 1519 count does not raise a substantial issue likely to result in reversal or a new trial.

C. *Any Error In The District Court's* Batson *Inquiry Was Harmless And Therefore Cannot Constitute A Substantial Issue Likely To Result In Reversal Or A New Trial*

At trial, the district court *sua sponte* denied Roeder's use of two peremptory challenges based on its view that they were racially motivated. Doc. 250, at 15-23. As a result, two women jurors of color that Roeder sought to strike were seated on the jury. Doc. 250, at 22. Roeder argues that the district court clearly erred in denying these peremptory challenges. But any error would lead to reversal only if it was not harmless. *United States* v. *Bowles*, 751 F.3d 35, 38-39 (1st Cir. 2014). The district court concluded that any error was harmless because, after extensive voir dire of both jurors, including by defense counsel, the court found that the jurors were fair and impartial. Doc. 250, at 22. That conclusion is correct and does not raise a substantial issue.

1. The Equal Protection Clause bars using peremptory challenges to strike jurors on the basis of race. *Batson* v. *Kentucky*, 476 U.S. 79, 89 (1986). That rule applies equally to the defense and prosecution. *Georgia* v. *McCollum*, 505 U.S.

42, 55 (1992). The district court raised the issue of whether Roeder was using peremptory challenges in a racially discriminatory manner after Roeder struck an African-American woman juror, Vinolia McMillan, from the jury pool after previously striking Maria Ligus, who appeared to be Hispanic. Doc. 250, at 16. As a result, the court conducted a *Batson* inquiry and ultimately denied Roeder's peremptory challenges to these two jurors.

There was nothing improper with the district court conducting a *Batson* inquiry and denying Roeder's peremptory challenges to the two jurors. As the government noted below, on the first day of jury selection, Roeder sought to eliminate minorities from the jury pool. Doc. 235, at 13. On the second day of jury selection, Roeder began using his peremptory challenges to strike prospective jurors of color. Doc. 235, at 13. The district court began its *Batson* inquiry after Roeder struck McMillan and Ligus, the only two prospective jurors of color left in the jury box. Doc. 235, at 13.

2. Even if the district court erred in these circumstances by conducting the *Batson* inquiry and denying the two peremptory challenges to McMillan and Ligus, any error was harmless. The Supreme Court has been clear that even "arguably overzealous, effort[s] to enforce the antidiscrimination requirements" of *Batson* are harmless and non-prejudicial. *Rivera* v. *Illinois*, 556 U.S. 148, 160 (2009); see also *Bowles*, 751 F.3d at 38 (finding harmless error when district court conducted

Batson inquiry after defendant moved to strike an Asian-American who was found to be impartial and qualified to serve on the jury). Indeed, Roeder cannot claim harm or prejudice when he failed to challenge Ligus for cause, and McMillan, like many other jurors, stated that she "believed she could put her concerns aside, look at the specific evidence in this case, and hold the government to its burden." Doc. 250, at 22. Thus, because the district court expressly found that both jurors were fair and impartial, and correctly concluded that "the record does not show that Ms. Ligus or Ms. McMillan was unqualified to serve as a juror," any error was harmless. Doc. 250, at 22; *Rivera*, 556 U.S. at 152; see also *Bowles*, 751 F.3d at 39. Thus, this is not a substantial issue likely to result in reversal or a new trial.

CONCLUSION

The Court should deny Roeder's motion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR RELEASE PENDING APPEAL:

(1) complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(a) because it contains 5,196 words; and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Word 2016, in 14-point Times New Roman font.

s/ Junis L. Baldon
Attorney

Date: October 24, 2019

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2019, I electronically filed the UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR RELEASE PENDING APPEAL with the United States Court of Appeals for the First Circuit by using the CM/ECF system.

I certify that all participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Junis L. Baldon
Attorney