UNITED STATES DISTRICT COURT
District of Kansas
(Topeka Docket)

UNITED STATES OF AMERICA,

Plaintiff,

v. **CASE NO. 5:22-cr-40055-TC-RES**

ROGER GOLUBSKI,

Defendant.

GOVERNMENT'S RESPONSE TO THE DEFENDANT'S MOTION TO DISMISS INDICTMENT FOR LACK OF NOTICE AND FAILURE TO STATE AN OFFENSE

The United States of America, by and through undersigned counsel, respectfully submits this response to the defendant's Motion to Dismiss Indictment For Lack of Notice and Failure to State an Offense (Doc. 72). For the reasons below, the defendant's motion should be denied.

I. RELEVANT PROCEDURAL AND FACTUAL BACKGROUND

On September 14, 2022, a federal grand jury returned an indictment under seal charging the defendant with six counts of violating 18 U.S.C. § 242 between May 1998 and December 2002 by sexually assaulting two victims while acting under color of law. (Doc. 1). On April 24, 2024, a federal grand jury returned a superseding indictment that

made no substantive changes but modified the date ranges of the charged conduct to September 1997 through December 2002. (Doc. 73.) The superseding indictment charges that the defendant "willfully deprive[d]" the victims of "the right, secured and protected by the Constitution and laws of the United States, not to be deprived of liberty without due process of law, which includes the right not to be deprived of bodily integrity." (Doc. 73.) The superseding indictment alleges that the defendant did so: by "digitally penetrating S.K. and making S.K. perform oral sex on him in GOLUBSKI's vehicle, all without S.K.'s consent" (Count One); by "sexually assault[ing] S.K. in GOLUBSKI's vehicle, [and] by genitally penetrating S.K., without S.K.'s consent" (Count Two); by, "without S.K.'s consent, . . . on multiple occasions perform[ing] oral sex on S.K., ma[king] S.K. perform oral sex on him, digitally penetrat[ing] S.K., and genitally penetrat[ing] S.K., in and next to GOLUBSKI's vehicle" (Count Three); by, "without O.W.'s consent, . . . genitally penetrat[ing] O.W. in O.W.'s house" (Count Four); by, "without O.W.'s consent, . . . ma[king] O.W. perform oral sex on him in GOLUBSKI's vehicle" (Count Five); and by, "without O.W.'s consent, . . . on multiple occasions ma[king] O.W. perform oral sex on him and genitally penetrat[ing] O.W. in O.W.'s house" (Count Six). (Doc 73.)

On April 12, 2024, the defendant filed the motion currently before the Court (Doc. 72), as well as a Motion to Dismiss the Indictment as Barred by the Statute of Limitations (Doc. 71).[1] This case has not yet been set for trial.

[1] The government responds separately to the Motion to Dismiss the Indictment as Barred by the Statute of Limitations. (Doc. 71.)

The government hereby incorporates the "summary of crimes charged in the indictment" in the government's motion for an order permitting admission of evidence pursuant to Federal Rules of Evidence 413 and 404(b), which set forth details of the facts underlying the charges in this case. (Doc. 50.)

II. ELEMENTS OF 18 U.S.C. § 242

"'Section 242 is a Reconstruction Era civil rights statute making it criminal to act (1) 'willfully' and (2) under color of law (3) to deprive a person of rights protected by the Constitution or laws of the United States.'" *United States v. Lanier*, 520 U.S. 259, 264 (1997) (citing *Screws v. United States*, 325 U.S. 91 (1945)). A defendant acts "willfully" when they act "in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite." *Screws*, 325 U.S. at 105. "The fact that [a] defendant[] may not have been thinking in constitutional terms is not material where their aim was not to enforce local law but to deprive a citizen of a right and that right was protected by the Constitution." *Id*. at 106.

III. ARGUMENT

It has long been clearly established that there is a constitutional right to bodily integrity that is violated by sexual assault by a state actor. The defendant argues that sexual assault by a state actor does not in itself constitute a deprivation of constitutional rights (Doc. 72 at 2-7) and/or that he lacked fair warning that sexual assault by a state actor was unconstitutional (*id.* at 7-9). Both arguments fail. The defendant's motion should thus be denied.

A. There is a constitutional right to be free from sexual assault by a state actor.

First, the right to bodily integrity, protected by the Fourteenth Amendment's Due Process Clause, has been universally cited as among the most fundamental rights guaranteed by the Constitution. As the Supreme Court explained as far back as 1891, "[n]o right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891). The Supreme Court has repeatedly reaffirmed this cornerstone right to bodily integrity. *See, e.g.*, *Ingraham v. Wright*, 430 U.S. 651, 673 (1977) ("Among the historic liberties" protected by the Due Process Clause is the right against "unjustified intrusions on personal security" at the hands of state officials); *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982) (same); *Albright v. Oliver*, 510 U.S. 266, 272-73 (1994) (noting that the "protections of substantive due process" apply to "the right to bodily integrity").

This fundamental constitutional right to bodily integrity includes the right to be from sexual assault by state actors. *See, e.g.*, *United States v. Lanier*, 520 U.S. 259, 265, 272 n.7 ([March] 1997) (stating that the right to be free from sexual assault by state actors is among "[t]he right[s] to due process enforced by § 242[,]" and rejecting defendant's argument that "rights protected by the Due Process Clause" were not covered by § 242); *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 769 (10th Cir. 2013) (noting that, in a case where a victim alleged that an officer raped her, she "asserts a

violation of her right to bodily integrity, which is a substantive-due-process claim"); *Abeyta By & Through Martinez v. Chama Valley Indep. Sch. Dist.*, 77 F.3d 1253, 1255-56 (10th Cir. 1996) ("Sexual assault or molestation by a school teacher violates a student's substantive due process right[] . . . to bodily integrity."); *Jones v. Wellham*, 104 F.3d 620, 628 (4th Cir. [Jan.] 1997) ("The district court instructed the jury that if it found that [state-actor-defendant] forcibly raped [victim] under the circumstances she claimed, this would constitute a violation of her constitutional rights under the Fourteenth Amendment. This effectively defined the Fourteenth Amendment right to bodily integrity specifically at issue in this case and accurately stated what had to be found from the evidence in order to impose liability for its violation.") (citation omitted); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 451-52 (5th Cir. 1994) ("It is incontrovertible that bodily integrity is necessarily violated when a state actor sexually abuses a schoolchild and that such misconduct deprives the child of rights vouchsafed by the Fourteenth Amendment."); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 727 (3d Cir. 1989) ("It may seem ludicrous to be obliged to consider whether it was 'clearly established' that it was impermissible for school teachers and staff to sexually molest students. Nonetheless, we construe the proper inquiry as whether it was established that the students' rights were constitutionally based. Applying this standard, we reiterate [that] freedom from invasion of [plaintiff's] personal security through sexual abuse, was well-established at the time the assaults . . . occurred [in 1980-1985]."), *cert. denied*, 493 U.S. 1044 (1990).

Contrary to this overwhelming weight of authority, the defendant remarkably suggests that sexual assault by a state actor is not a constitutional violation in and of itself. (Doc. 72 at 4). To make this argument, the defendant cobbles together misreadings of *Screws*, which held that 18 U.S.C. § 242 is constitutional and requires that defendants act willfully, 325 U.S. at 105, and *Lanier*, which held that to satisfy "fair warning" in an 18 U.S.C. § 242 sexual assault case, it is not necessary for the right in question to have been identified in a Supreme Court decision or applied in a "fundamentally similar" factual situation, 520 U.S. at 269-70. Essentially, the defendant argues that "more [is] required" than a sexual assault itself. (Doc. 72 at 4.)

Indeed, 18 U.S.C. § 242 does require "more": at the time of the assault, the defendant must have been (1) acting under color of law, and (2) acting willfully. *Screws*, 325 U.S. 105-06. Despite the defendant's vague assertions to the contrary, however, the caselaw is clear that § 242 does not require a defendant to have engaged in something "more" or worse than a sexual assault. Indeed, *Lanier* rejected the argument that "rights protected by the Due Process Clause" were not covered by 18 U.S.C. § 242. 520 U.S. at 272 n.7 ("[Defendant's] contention that *Screws* excluded rights protected by the Due Process Clause of the Fourteenth Amendment from the ambit of § 242 is contradicted by the language of *Screws* itself as well as later cases."). Likewise, the Seventh Circuit recently rejected a similar argument to the one defendant makes here. *See Hess v. Garcia*, 72 F.4th 753, 756, 767 (7th Cir. 2023) ("It is well established that sexual assault by a government official acting under color of law violates the Constitution. . . . We decline the invitation to draw lines between constitutional and unconstitutional sexual assaults by

government officials acting under color of law."; "We decline to recognize a category of constitutionally permissible sexual assault by a public official."). Accordingly, the caselaw clearly establishes that there is a constitutional right to be free from sexual assault by a state actor, and the willful deprivation of such a right under color of law is a violation of 18 U.S.C. § 242.

B. The defendant had fair warning that using his government authority to sexually assault victims was unlawful.

A defendant has fair warning where it was "reasonably clear at the time of the charged conduct that the conduct was criminal." *Lanier*, 520 U.S. at 259. The foundational caselaw described above provided ample notice to the defendant that he could be held liable for his conduct. The defendant's argument—which presumes that such caselaw must be (a) criminal and (b) 18 U.S.C. § 242 caselaw specifically—misapprehends the nature of the fair warning doctrine.

Put simply, the underlying offense is the same in a criminal 18 U.S.C. § 242 case as it is in a corresponding civil 42 U.S.C. § 1983 case; the only difference is that, in a criminal case, the government must also prove willfulness. *See* 18 U.S.C. § 242; *Hope v. Pelzer*, 536 U.S. 730, 740 (2002); *see also United States v. Giordano*, 260 F. Supp. 2d 477, 484 (D. Conn. 2002) (collecting caselaw demonstrating this concept in Fourteenth Amendment substantive due process cases under Section 242).[2] In fact, the Supreme Court has stressed

[2] The civil and criminal underlying offenses and notice standards are the same because, first, the term "color of law" has an identical meaning under both 18 U.S.C. § 242 and 42 U.S.C. § 1983. *United States v. Price*, 383 U.S. 787, 794 n.7 (1966) (citing *Monroe v. Pape*, 365 U.S. 167, 185 (1961)). Second, the constitutional rights at issue in criminal § 242 cases are identical to the constitutional rights at issue in civil § 1983 cases. *See, e.g.*, *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 929 n.13 (1982) (characterizing § 242 as the "criminal counterpart of 42 U.S.C. § 1983"); *Chapman v. Houston Welfare Rights Org.*, 441 U.S.600, 662

that the fair warning standard of 18 U.S.C. § 242 is no more burdensome than the standard used for determining whether a civil defendant has a right to qualified immunity in a civil 42 U.S.C. § 1983 action. *Lanier*, 520 U.S. at 270-71 ("[T]he object of the clearly established immunity standard is not different from that of fair warning as it relates to law 'made specific' for the purpose of validly applying § 242. The fact that one has a civil and the other a criminal law role is of no significance. . . . To require something clearer than clearly established would, then, call for something beyond fair warning.") (internal quotations and citations omitted); *see also Hope*, 536 U.S. at 740 (explaining that the "clearly established" qualified immunity standard used in civil cases is identical to the "fair warning" standard in § 242 cases). Thus, the foundational caselaw discussed above, even when established in the civil context, provided fair warning to the defendant that he could not use his government authority to sexually assault victims.

Moreover, even if there were not clear caselaw on point at the time—which there was—the unlawfulness of using police authority to sexually assault victims is so obvious that it should have been readily apparent to the defendant. *See, e.g.*, *Lanier*, 520 U.S. at 271 (explaining that, though there may not be a prior decision specifically on point to provide fair warning in a particularly egregious case, "[t]here has never been . . . a section

(1979) (White J., Concurring) (apart from differences in the nature of the remedy, 42 U.S.C. § 1983 and 18 U.S.C. § 242 "are commensurate"); *United States v. Johnstone*, 107 F.3d 200, 206 (3d Cir. 1997) (no difference between a civil and criminal case regarding the relevant constitutional standard); *United States v. Reese*, 2 F.3d 870, 884 (9th Cir. 1993) (recognizing 42 U.S.C. § 1983 as an authoritative source of rights which may underlie § 242 prosecutions); *United States v. Cobb*, 905 F.2d 784, 788 n.6 (4th Cir. 1990) (recognizing that § 242 is criminal analog of 42 U.S.C.§ 1983, that Congress intended statutes to apply similarly in similar situations, and that civil precedents are equally persuasive in criminal context); *Baldwin v. Morgan*, 251 F.2d 780, 789 (5th Cir. 1958) (holding that § 1983 and § 242 must be construed as "in pari materia").

1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages or criminal liability") (internal quotation marks and alterations omitted); *Coker v. Georgia*, 433 U.S. 584, 597 (1977) ("[Rape] is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the . . . victim and for the latter's privilege of choosing those with whom intimate relationships are to be established. Short of homicide, it is the ultimate violation of self."); *United States v. Morris*, 494 F. App'x 574, 581 (6th Cir. 2012) ("Beyond the relevant case law, it is more than obvious that the right to not be raped by a law enforcement officer lies at the core of the rights protected by the Due Process Clause, so that its unlawfulness should have been 'readily apparent to the officer . . . .'") (quoting *Fils v. City of Aventura*, 647 F.3d 1272, 1291 (11th Cir. 2011)). Accordingly, the defendant had fair warning that he could be held liable for using his government authority to sexually assault victims.

IV. CONCLUSION

For the foregoing reasons, the government respectfully submits that the defendant's Motion to Dismiss Indictment For Lack of Notice and Failure to State an Offense (Doc. 72) should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2024, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all parties.

/s/ *Tara Allison*
Tara Allison
Trial Attorney