U.S. Department of Justice

Civil Rights Division

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VIA CM/ECF

Lyle W. Cayce
Clerk of the Court
United States Court of Appeals
for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130-3408

Re: *United States* v. *Bret Broussard*, No. 17-30298 (5th Cir.)

Dear Mr. Cayce:

This letter responds to the Court's request that the parties submit letter briefs addressing the effect of *Class* v. *United States*, 138 S. Ct. 798 (2018), on Petitioner Bret Broussard's claim that the bill of information to which he pleaded guilty was defective. Broussard contends that his conviction is void because one of the officials who authorized the bill of information—Vanita Gupta, the then-Principal Deputy Assistant Attorney General for the Civil Rights Division—lacked authority to do so under the Federal Vacancies Reform Act of 1998 (Vacancies Act), 5 U.S.C. 3345 *et seq*.

As explained below, *Class* has no effect on this case because the Supreme Court there held only that a guilty plea, by itself, does not bar a federal criminal defendant from challenging the constitutionality of the statute of his conviction on direct appeal. This case does not concern such a challenge but instead is a *statutory* challenge to the authority of one of the federal officials who approved the criminal proceedings. This statutory challenge falls outside *Class*, and Broussard waived it by pleading guilty. Moreover, even if there were some statutory problem with Gupta's authorization of the bill of information, Broussard's challenge would still fail because the United States Attorney for the Western District of Louisiana independently authorized the prosecution in this case. His challenge also fails on the merits.

A. Prior Proceedings

Broussard pleaded guilty to violating 18 U.S.C. 242 (willful deprivation of rights under color of law) and was sentenced to a 54-month term of incarceration. ROA.8-9; ROA.12; ROA.303. Before pleading guilty, Broussard waived indictment and was charged via bill of information. ROA.8-11. The bill of information was authorized by the United States Attorney for the Western District of Louisiana and by Vanita Gupta, the then-Principal Deputy Assistant

Attorney General for the Civil Rights Division, both of whose names appeared on the charging document. ROA.9-10.

Nearly a year after he pleaded guilty and a month before sentencing, Broussard moved to vacate the guilty plea and dismiss the case. ROA.21-41. Broussard argued that Gupta's authorization of the bill of information violated the Vacancies Act. ROA.26-41. The district court denied the motion because the challenge was waived by the guilty plea, failed on the merits, and would have no impact because the United States Attorney also authorized the prosecution. ROA.126-127. Broussard appealed the denial of the motion, and a panel of this Court affirmed. See *United States* v. *Broussard*, 882 F.3d 104 (5th Cir. 2018). The Court held that Broussard waived his challenge to the bill of information by pleading guilty. See *id*. at 109. The Court explained that Broussard's argument "raises a non-jurisdictional question about the Government's authority to prosecute," and that "Broussard waived any defect in the indictment when he pled guilty." *Ibid*. The Court did not reach the merits of Broussard's Vacancies Act claim. See *ibid*.

Broussard filed a petition for rehearing en banc, contending, among other things, that his Vacancies Act claim falls within the *Menna-Blackledge* doctrine, which permits certain types of constitutional challenges to a conviction notwithstanding a guilty plea. Pet. 5-8. While Broussard's petition was pending, the Supreme Court issued its decision in *Class*, which applies the *Menna-Blackledge* doctrine. This Court requested letter briefing on *Class*'s impact.

B. Class *Has No Effect On This Case Because Broussard Is Not Challenging The Constitutionality Of His Statute Of Conviction, His Allegation Of A Defect In The Bill Of Information Is Not A Constitutional Claim, And, In Any Event, The Alleged Defect Was Curable*

Class has no bearing on this case for three reasons.

1. The holding of *Class* does not apply here because Broussard is not challenging the constitutionality of 18 U.S.C. 242, the statute under which he was convicted. In *Class*, the Supreme Court held that a guilty plea, by itself, does not bar a federal criminal defendant from challenging the constitutionality of his statute of conviction on direct appeal. See 138 S. Ct. at 803. Class was charged with possessing firearms on the U.S. Capitol grounds, in violation of 40 U.S.C. 5104(e)(1). *Id.* at 802. After unsuccessfully challenging that statute on due process and Second Amendment grounds, he pleaded guilty. *Ibid.* Class signed a written plea agreement that waived certain appeal rights but "said nothing about the right to raise on direct appeal a claim that the statute of conviction was unconstitutional." *Ibid.* The Court held that Class had not waived his right on appeal to attack the statute's constitutionality. *Id.* at 803. In contrast, here, Broussard was charged with violating 18 U.S.C. 242, and he has never challenged that statute's constitutionality. Accordingly, *Class*'s holding is inapplicable.

2. The reasoning of *Class* is also inapposite here because it does not apply to *statutory* claims. The Court's decision rested on the *Menna-Blackledge* doctrine, which creates a narrow exception to the general rule that guilty pleas preclude challenges to convictions for only certain types of *constitutional* challenges. *Class*, 138 S. Ct. at 803-805. In *Blackledge* v. *Perry*, the Court held that a guilty plea does not preclude a due process claim for vindictive prosecution. 417 U.S. 21, 30-31 (1974). And in *Menna* v. *New York*, the Court relied on *Blackledge* to hold

that a guilty plea did not bar the type of double jeopardy claim at issue in that case, explaining that "[w]here the State is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty." 423 U.S. 61, 62 (1975) (per curiam) (citing *Blackledge*, 417 U.S. at 30). In discussing and applying this doctrine, the Court in *Class* referred only to constitutional challenges, see 138 S. Ct. at 803-804, and held only that "Class may pursue his *constitutional* claims on direct appeal," *id*. at 807 (emphasis added).

Broussard's claim is statutory, not constitutional. He argues (Pet. 8-15) that Gupta's authorization of the bill of information violates a federal statute, the Vacancies Act. Although he suggests (Pet. 7) that his Vacancies Act challenge "bears constitutional dimensions," his argument is that the Vacancies Act deprived Gupta of power to approve his prosecution, not that the Appointments Clause itself or any other provision of the Constitution would have barred Gupta from exercising that authority if the statute otherwise permitted it. Because Broussard's claim is, at bottom, statutory in nature, he waived it by pleading guilty, and nothing in *Class* changes that outcome.

3. Even if Broussard's challenge could plausibly be construed as constitutional in nature—and it cannot—*Class* makes clear that it is not the type of constitutional claim that can survive a guilty plea. The Supreme Court characterized the alleged constitutional violations at issue in *Class*, *Menna*, and *Blackledge* as defects that would completely deprive the government of power to prosecute a defendant. *Class*, 138 S. Ct. at 804-805. The Court distinguished that category of constitutional violations from "case-related constitutional defects that occurred prior to the entry of the guilty plea" that could "have been cured through a new indictment." *Class*, 138 S. Ct. at 804-805 (internal quotation marks and citation omitted). As an example of this latter category, the Supreme Court cited *Tollett* v. *Henderson*, 411 U.S. 258, 266-267 (1973), where the Court made clear that a guilty plea waived a constitutional defect in the composition of the defendant's grand jury because the government could have cured that defect by indicting him with a properly constituted grand jury. See *Class*, 138 S. Ct. at 805; *Blackledge*, 417 U.S. at 30.

The type of defect that Broussard alleges does not call into question the power of the government to prosecute him. He does not dispute that the United States could have validly charged him with violating 18 U.S.C. 242 had the Attorney General, rather than Gupta, signed the bill of information. See Pet. 12-14. As in *Tollett*, and unlike in *Class*, *Menna*, and *Blackledge*, any alleged constitutional defect relating to Gupta's authorization of the criminal proceedings in this case could have been cured before Broussard pleaded guilty. Indeed, the government could have filed an amended bill of information that either omitted Gupta's name or replaced her name with the Attorney General's. See 5 U.S.C. 3348(b)(2) (head of an Executive agency can perform duties of a vacant office). Thus, even if *Class* controlled this case, Broussard still waived his challenge by pleading guilty because any defect in the bill of information was curable.

C. Any Vacancies Act Defect Was Harmless Because The United States Attorney Also Authorized The Bill Of Information

Even if Gupta had improperly authorized the bill of information in this case, any such error was harmless because the United States Attorney for the Western District of Louisiana also authorized Broussard's prosecution. ROA.9. Under 28 U.S.C. 547, "each United States

attorney, within his district, shall * * * prosecute for all offenses against the United States." Accordingly, as the district court correctly held, even if there were some Vacancies Act issue, "the United States Attorney has the independent, plenary power to enforce federal criminal statutes, including but not limited to 18 U.S.C. § 242." ROA.127. Any violation of the Vacancies Act in this case therefore was harmless. See Appellee Br. 23-25.

D. Broussard's Vacancies Act Claim Fails On The Merits

Even if Broussard's claim were not barred under *Class*, and even if the United States Attorney had not independently authorized the criminal proceedings in this case, Broussard's challenge to Gupta's authority to approve the bill of information fails on the merits. See Appellee Br. 20-23. The Vacancies Act restricts only who can perform the non-delegable duties of a vacant office; it does not restrict who can perform delegable duties of that office. See 5 U.S.C. 3348(a)(2). Here, 18 U.S.C. 242, the statute under which Broussard was charged, does not assign any function or duty to the Office of the Assistant Attorney General for the Civil Rights Division. The question therefore, is whether the regulation that assigns responsibilities to that office, 28 C.F.R. 0.50, establishes delegable or non-delegable duties.

The functions assigned to the Assistant Attorney General for the Civil Rights Division under 28 C.F.R. 0.50, including the function of authorizing Section 242 prosecutions, are delegable. Duties assigned to federal officers are presumptively delegable "absent affirmative evidence of a contrary congressional intent." *United States Telecom Ass'n* v. *FCC*, 359 F.3d 554, 565 (D.C. Cir.), cert. denied, 543 U.S. 925 (2004). Here, 28 C.F.R. 0.50, in contrast to statutes and regulations that expressly contain statements of non-delegability, has no language that rebuts the presumption. Compare 28 C.F.R. 0.50(a) (listing the functions that "shall be conducted, handled, or supervised by, the Assistant Attorney General"), with, *e.g.*, 42 U.S.C. 1997b(b) ("The Attorney General shall *personally* sign any certification made pursuant to this section.") (emphasis added).

Broussard's claim therefore fails on the merits because Gupta, a subordinate officer in the Office of the Assistant Attorney General, permissibly exercised a delegable duty when she authorized this Section 242 prosecution of Broussard.

Sincerely,

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Deputy Chief

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cc: Counsel of Record via CM/ECF