IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-30298

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

BRET KLEIN BROUSSARD,

Defendant-Appellant

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

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

Pursuant to Federal Rule of Appellate Procedure 9 and Fifth Circuit Local Rule 9.5, the United States submits this opposition to defendant-appellant Bret Broussard's motion for bail pending appeal.[1] Broussard pleaded guilty to one felony count of violating 18 U.S.C. 242 (deprivation of rights under color of law).

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

See ROA.306-314.[2] On March 28, 2017, the district court sentenced Broussard to a 54-month term of incarceration, which was below the Sentencing Guidelines range. ROA.303. The district court denied Broussard's post-judgment motion for bail pending appeal on April 12, 2017, and Broussard filed the instant motion on April 19, 2017. ROA.260. As discussed below, Broussard cannot rebut the presumption against bail pending appeal because he cannot demonstrate that there is a substantial question of law or fact in this appeal. See 18 U.S.C. 3143(b).

BACKGROUND

This case is one of several that resulted from a federal investigation into Iberia Parish Sheriff Louis Ackal and other Iberia Parish Sheriff's Office (IPSO) officials. Federal investigators initially learned that on April 29, 2011, members of IPSO's Narcotics Unit took five inmates to the chapel of the Iberia Parish Jail (IPJ)—an area not covered by the jail's video surveillance system—and beat them with a baton in retaliation for prior misconduct. Further investigation revealed a number of other abuses by IPSO officials. Ultimately, Sheriff Ackal and a number

[2] References to "Mot. __" are to page numbers in Broussard's motion for bail pending appeal, filed in this Court on April 19, 2017. References to "ROA.___" are to the page numbers in the electronic record on appeal.

of other supervisors and officers were charged with federal offenses related to these abuses.[3]

Among the officers charged was Bret Broussard, who was a Lieutenant in the Narcotics Unit of IPSO. On February 23, 2016, Broussard pleaded guilty to a felony count of 18 U.S.C. 242, which prohibits willful deprivation of constitutional rights under color of law. ROA.306-314. Broussard admitted in his guilty plea that on April 29, 2011, he met IPSO supervisors, an IPJ supervisor, and other members of IPSO's Narcotics Unit, while officers had an inmate, S.S., on his knees in the hallway. ROA.319. The various officers then discussed where they could go to avoid cameras, and they ultimately went to the chapel. ROA.319. Broussard admits that at this point he "understood that the Narcotics Unit deputies intended to use unlawful force against inmate S.S. to punish him, and were going to take the inmate to a place where they could do that without getting caught on camera." ROA.319. "Knowing their intent, and intending to further their unlawful objection," Broussard went to the chapel with the other officers. ROA.319. Broussard admits that he then "watched as a Deputy Sheriff struck S.S. numerous times with a baton while inmate S.S. was compliant, kneeling on the chapel floor, and presenting no threat to anyone." ROA.319. Broussard watched while S.S.

[3] Three officers were indicted. Ackal was acquitted following a five-day jury trial. One officer pleaded guilty after an indictment, and the third is awaiting trial. Nine other officers, including Broussard, pleaded guilty to informations.

reacted in pain after each strike. ROA.319. Broussard admits that he "recognized that he had a duty to intervene and stop the unjustified use of force on inmate S.S." but that he "willfully chose not to intervene to stop the beating, despite having the opportunity to do so and despite being one of the senior officers in the chapel." ROA.319-320. Broussard also watched and did nothing to intervene while "the Deputy Sheriff with the baton placed the baton between his own legs and forced S.S. to mimic performing fellatio on the baton, until S.S. began to choke." ROA.320. Broussard acknowledges that he did nothing even though he "knew he had a duty to intervene and he had the opportunity to do so." ROA.320.

Nearly a year after the district court accepted the guilty plea, Broussard filed a motion to vacate the plea because he argued that the Federal Vacancies Reform Act rendered the Bill of Information to which he pleaded invalid. ROA.26-41. Specifically, as discussed in more detail below, he argued that because the Bill of Information was authorized by Vanita Gupta, the then-Principal Deputy Assistant Attorney General of the Civil Rights Division, it was invalid. ROA.26-41. The district court rejected this argument, finding that it was waived by the guilty plea and that it failed on the merits. ROA.126-127.

At the sentencing on March 28, 2017, the district court adopted the Probation Office's Presentence Investigation Report (PSR). ROA.302-303. The court overruled Broussard's objections to the report, relying on the Probation

Office's written responses to the objections. ROA.292. The court also overruled the United States' objection that Broussard should not be entitled to acceptance of responsibility credit in the Guidelines calculation because of his motion. ROA.292. The PSR concluded that Broussard had a total offense level of 26 and a criminal history of I, resulting in a Sentencing Guidelines range of 63 to 78 months.[4] ROA.350. After hearing from Broussard, the court sentenced him to a below-Guidelines, 54-month term of imprisonment. ROA.303.[5]

Broussard filed a motion for bond pending appeal in the district court on April 2, 2017. ROA.199-207. The district court entered judgment on April 6, 2017 (ROA.254), and summarily denied the bond motion on April 12, 2017 (ROA.260). Broussard filed the instant motion on April 19, 2017.

DISCUSSION

The Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.*, creates a presumption that a convicted defendant sentenced to a term of imprisonment "shall * * * be detained" while an appeal is pending. 18 U.S.C. 3143(b)(1). It allows for the

[4] The district court acknowledged that the United States had filed a 5K1.1 motion recommending a five-to-eight-level reduction. See ROA.292.

[5] On the same day Broussard was sentenced, the district court sentenced six of his co-defendants to below-Guidelines sentences. Three of the co-defendants sentenced have appealed, and one—Jeremy Hatley—has filed a motion for bail pending appeal. Three more co-defendants are scheduled to be sentenced on May 2, 2017.

release of a defendant pending appeal only if the defendant shows, among other things, that (1) he does not pose a flight risk or a danger to public safety, (2) the appeal is not for the purpose of delay, and (3) the appeal "raises a substantial question of law or fact" likely to result in reversal, a new trial, a non-custodial sentence, or a reduced prison sentence "less than the total of the time already served plus the expected duration of the appeal process." 18 U.S.C. 3143(b)(1)(B). A defendant must establish these elements by clear and convincing evidence. See *United States* v. *Williams*, 822 F.2d 512, 517 (5th Cir. 1987).

For purposes of this motion, the United States concedes that Broussard is not a flight risk or a danger to public safety and that he has not filed this appeal for the purpose of delay. Accordingly, the sole issue before this Court is whether the appeal raises "a substantial question of law or fact" likely to result in reversal of the conviction, a new trial, a non-custodial sentence, or sentence that will be shorter than this appeal. 18 U.S.C. 3143(b)(1)(B).[6]

A "substantial question," this Court has explained, is "one that is 'close' or 'that could very well be decided the other way' by the appellate court." *United States* v. *Clark*, 917 F.2d 177, 180 (5th Cir. 1990) (citing *United States* v. *Valera-Elizondo*, 761 F.2d 1020, 1024 (5th Cir. 1985)). Such a question must raise

[6] This burden is particularly high because Broussard has admitted that "[t]he appeal should not take a prolonged period." Mot. 12.

"substantial doubt (not merely a fair doubt) as to the outcome of its resolution." *Valera-Elizondo*, 761 F.2d at 1024. In his motion, Broussard contends that there are four issues that merit bail pending appeal. None of these satisfies the 18 U.S.C. 3143 standard.

A. Federal Vacancies Reform Act

Broussard's principal argument for bail pending appeal is that his conviction is invalid because the Federal Vacancies Reform Act (Vacancies Act) nullifies the Bill of Information to which he pleaded guilty. Mot. 6-8. Broussard argues that the Vacancies Act precluded Vanita Gupta—who was the Principal Deputy Assistant General of the Civil Rights Division at the time the Bill of Information was filed—from authorizing this litigation because she was not the Assistant Attorney General or Acting Assistant Attorney General of the Civil Rights Division. Mot. 6-7. This argument fails for at least three independent reasons and is thus not a substantial legal issue likely to result in reversal.

First, as the district court found, Broussard "waived the instant challenges by knowingly, voluntarily, and with the advice of counsel, pleading guilty to the Bill of Information in this case." ROA.126. Broussard, through his unconditional guilty plea, waived all non-jurisdictional challenges to his prosecution, including his Vacancies Act claim. See *United States* v. *Bell*, 966 F.2d 914, 915 (5th Cir. 1992). This Court has held that a guilty plea waives all non-jurisdictional

challenges to a prosecution and has defined a jurisdictional challenge as one that disputes "*the court's* very power to hear the case." *United States* v. *Scruggs*, 691 F.3d 660, 666 (5th Cir. 2012) (emphasis added). Broussard's Vacancies Act challenge disputes the government's power to prosecute a case, but not the court's power to hear it. He therefore does not raise a jurisdictional challenge. Accordingly, this argument was waived at the time of the plea. See *United States* v. *Yousef*, 750 F.3d 254, 260 (2d Cir. 2014) (noting that "[e]ven post-plea appeals that call into question the government's authority to bring a prosecution * * * are generally not 'jurisdictional,'" and that such claims therefore have been "denied as waived"); see also *United States* v. *Easton*, 937 F.2d 160, 162 (5th Cir. 1991) (holding that the "requirement of an indictment signature by 'the attorney for the government' is nonjurisdictional" and that a challenge to that requirement was waived).

Second, on the merits, Broussard is wrong to argue that Gupta could not authorize his prosecution because she was not a Presidentially nominated, Senate-confirmed (PAS) Assistant Attorney General or the Acting Assistant Attorney General under the Vacancies Act at the time of the authorization. As explained below, the Vacancies Act does not regulate who can perform a vacant office's delegable duties—which include the majority of duties of the Assistant Attorney General—when there is no acting officer under the Vacancies Act; it only affects

who can perform non-delegable duties. Here, Gupta—in her role as Principal Deputy Assistant Attorney General—was exercising only delegable duties. Accordingly, as the district court recognized, the Vacancies Act's "parameters did not act to limit or invalidate Principal Deputy Assistant Attorney General Vanita Gupta's authority as it related to this prosecution." ROA.127.

The Vacancies Act governs who may perform the functions and duties of an Executive office in the absence of a PAS office, such as the Assistant Attorney General, in the event of a vacancy. 5 U.S.C. 3345-3349d. The Vacancies Act specifies the time periods during which an "acting" officer may perform the "functions and duties" of a vacant office. 5 U.S.C. 3346. For those periods of time during which there can be no acting officer—as was the case here—the office "shall remain vacant" and "only the head of such Executive agency may perform any function or duty of such office." 5 U.S.C. 3348(b).

Importantly, however, Section 3348 of the Vacancies Act specifically and narrowly defines the "function[s] or dut[ies]" of an office that may not, in the absence of an acting officer, be performed by anyone other than the head of the agency. Section 3348 applies only to the performance of a function or duty that is required by statute or regulation "to be performed by the applicable officer (*and only that officer*)." 5 U.S.C. 3348(a)(2)(A) (emphasis added). In other words, as the statutory text makes clear and the Senate committee report confirms, Section 3348 deals only with "non-delegable functions or duties." S. Rep. No. 250, 105th

Cong., 2d Sess. 17-18 (1998). The Department of Justice's Office of Legal Counsel has explained that the Vacancies Act restricts the performance and supervision only of non-delegable duties, and that "[m]ost, and in many cases all, the responsibilities performed by a PAS officer" are delegable. Office of Legal Counsel, *Guidance on Application of Federal Vacancies Reform Act of 1998,* at 72 (Mar. 22, 1999) (ROA.66-79). Accordingly, while the Vacancies Act places restrictions on who can perform non-delegable duties of a PAS office when the office is vacant, it does not restrict the performance of the office's delegable duties.

The general duties of the Assistant Attorney General of the Civil Rights Division set forth in 28 C.F.R. 0.50—including authorizing Section 242 cases—are delegable. Duties assigned to the Assistant Attorney General by statute or regulation are presumed delegable and can be performed by other officers, in the absence of contrary statutory language or unmistakable implication from the legislative history. See *United States Telecom Ass'n* v. *FCC,* 359 F.3d 554, 565 (D.C. Cir. 2004) ("When a statute delegates authority to a federal officer or agency, sub-delegation to a subordinate federal officer or agency is presumptively permissible absent affirmative evidence of a contrary congressional intent."). The regulation delegating authority over civil rights enforcement to the Assistant Attorney General does not contain any language that prohibits such further delegation to other officers, and therefore the presumption of delegability remains operable. Compare 28 C.F.R. 0.50(a), with 42 U.S.C. 1997b (setting forth a non-

delegable duty: "The Attorney General shall personally sign any certification made pursuant to this section."). Therefore, authorizing the complaint in this case is one of the general, delegable enforcement responsibilities set forth in 28 C.F.R. 0.50, and then-Principal Deputy Assistant Attorney General Vanita Gupta's performance of this duty did not violate the Vacancies Act. Under the Vacancies Act, Gupta could continue performing the *delegable* duties of the Assistant Attorney General of the Civil Rights Division—including "authoriz[ing] * * * litigation" in this case. See 28 C.F.R. 0.50(a).[7]

Third, even if there were some issue with Gupta's authorization of the Bill of Information, that Information was also authorized by the United States Attorney for the Western District of Louisiana, whose name appears on the document. ROA.9. The United States Attorney is unambiguously permitted by federal law to authorize federal prosecutions in her district. See 28 U.S.C. 547 ("[E]ach United States attorney, within his district, shall -- (1) prosecute for all offenses against the United States."). The United States Attorney has power—without any delegation from the Attorney General or Assistant Attorney General—to authorize prosecution for violation of federal law, and this fact alone disposes of Broussard's

[7] Contrary to Broussard's argument, *NLRB* v. *SW Gen., Inc.*, 137 S. Ct. 929 (2017), is entirely inapposite. That case has to do with who can step in as an acting officer in the absence of a PAS officer and thus perform all of the office's duties, including those that are non-delegable. It has no bearing on who can perform delegable duties when there is no acting officer under the Vacancies Act.

Vacancies Act argument. Accordingly, as the district court correctly held here, "even if Ms. Gupta acted in violation of the FVRA, the United States Attorney has the independent, plenary power to enforce federal criminal statutes, including but not limited to 18 U.S.C. § 242, as relevant to this case." ROA.127.

Because the district court correctly held that his Vacancies Act argument fails for multiple, independent reasons, Broussard has not presented a substantial legal issue on this question.

B. Accountability For Assault

Broussard contends that his sentence was improper because he was sentenced for assaulting the victim—who was beaten with a baton and forced to perform fellatio on it while compliant and on his knees. Mot. 9-11. Broussard contends that he should not be held responsible for the assault under the Sentencing Guidelines because his role was watching the assault and failing to intervene, rather than engaging in the assault itself. Mot. 9-11.

Broussard's argument is contrary to the Sentencing Guidelines and applicable law. As a threshold matter, by failing to intervene, Broussard violated 18 U.S.C. 242, and he should be held accountable for the results of that violation; his lack of active participation in the actual assault is not relevant. The statute prohibits willful "deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States" under color of law. 18

U.S.C. 242. Inmates and pretrial detainees have a constitutional right to be free of lawless violence while in the government's custody, and officers have a duty to protect against such violence. See *United States* v. *Reese*, 2 F.3d 870, 887-888 (9th Cir. 1993). Courts have long recognized that this duty includes a legal obligation to act to prevent assaults that an officer witnesses. See *United States* v. *Serrata*, 425 F.3d 886, 896 (10th Cir. 2005) ("There is no question that [the defendant] had a legal obligation to act to prevent the assault on [an inmate], and we flatly reject any suggestion otherwise."); *United States* v. *McKenzie*, 768 F.2d 602, 605 (5th Cir. 1985) (upholding Section 242 conviction against an officer who witnessed an assault by his fellow officers during an interrogation because he "was aware of what was transpiring and did not stop it"). Willfully disregarding this duty—as Broussard did—is no less a violation of Section 242 than assaulting an inmate. Broussard is responsible for this violation and the consequences thereof.

The Sentencing Guidelines confirm this. Under the Guidelines, a defendant is responsible for "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant." U.S.S.G 1B1.3(a)(1)(A). He is also responsible for "all harm that resulted from [such] acts and omissions." U.S.S.G 1B1.3(a)(3). In light of these provisions, it was entirely permissible for the Guidelines calculation to be premised on, and for the district court to rely on, the entire course of conduct and ultimate consequences that

resulted from Broussard's failure to intervene. Here, Broussard acknowledged that he violated Section 242 and that he "had a duty to intervene and stop the unjustified use of force on inmate S.S." but "willfully chose not to intervene to stop the beating, despite having the opportunity to do so and despite being one of the senior officers in the chapel." ROA.319-320. Moreover, Broussard admitted that he went to the chapel "[k]nowing [other officers'] intent, and intending to further their unlawful objective." ROA.319. In short, Broussard has acknowledged that the assault resulted in part from his failure to intercede and halt it.

In light of Broussard's guilty plea and his acknowledgement of the result of his course of conduct (*i.e.*, the assault), the district court correctly sentenced him for the resulting assault. Broussard has cited no authority—and he cannot—suggesting that he is not responsible for the assault because he did not himself directly perpetrate it. Accordingly, Broussard has not met his burden of establishing a substantial question of law on this issue, nor has he established any likelihood that this Court's ruling on the issue will result in a sentence that is shorter than the duration of this appeal.

C. Vagueness And Overbreadth

Broussard also argues that 18 U.S.C. 242 is overbroad and unconstitutionally vague as applied to him. Mot. 8-9. He argues that the statute did not put him on

notice that his failure to intervene when he knew his fellow officers were assaulting an inmate was illegal. Mot. 8-9. This question is insubstantial.

As noted above, by prohibiting willful deprivation of constitutional rights under color of law, Section 242 necessarily prohibits an officer's willful failure to intervene when he witnesses an assault of an inmate by a fellow officer. In light of that case law, there can be no doubt that Section 242 applies when an officer does not intervene when he knows an inmate is being wrongfully assaulted, as was the case here.

In any event, Broussard did not make an as-applied vagueness or overbreadth challenge in the district court. Broussard pleaded guilty to violating Section 242 as a result of his failure to intervene in his fellow officer's assault of an inmate. He did not at any point in the district court assert that the statute did not apply to him or that the statute was vague or overbroad if it did apply to him. To the contrary, he repeatedly accepted responsibility for his wrongdoing with regard to his failure to intervene in the assault. Accordingly, this challenge is waived and is unlikely to constitute error that would reduce or eliminate his sentence.

Because the statute plainly prohibits the conduct in which Broussard engaged and because he did not raise a vagueness or overbreadth challenge before the district court, Broussard has not met his burden of establishing that this

question is substantial or likely to result in a sentence shorter than the duration of this appeal.

D. Sentencing Disparity

Broussard finally argues that the sentence disparity between him and some of his co-defendants constitutes a substantial legal issue that will reduce his sentence so significantly that his ultimate sentence will be shorter than the duration of this appeal. Mot. 11-12. Not so.

As a threshold matter, Broussard undisputedly received a below-Guidelines sentence. Accordingly, this Court applies a presumption that his sentence was substantively reasonable. See *United States* v. *Gomez-Herrera*, 523 F.3d 554, 566 (5th Cir. 2008). Moreover, the reasonableness of a sentence is reviewed only for abuse of discretion. See *United States* v. *Sura-Villalta*, 380 F. App'x 407, 408-409 (5th Cir. 2010). The presumption against bail pending appeal, the presumption of the substantive reasonableness of a below-Guidelines sentence, and the standard of review together are sufficient without more to reject Broussard's argument that the supposed substantive unreasonableness of his sentence is a substantial legal issue that will significantly reduce the sentence.

In any event, Broussard's underlying challenge to the substantive reasonableness of his sentence—a supposed sentencing disparity—is without merit. The sentencing statute requires courts to consider "the need to avoid

unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. 3553(a)(6) (emphasis added). While district courts must avoid unwarranted sentencing disparities between co-defendants, *warranted* disparities are entirely permissible. *United States* v. *Guillermo Balleza*, 613 F.3d 432, 435 (5th Cir. 2010). Moreover, "concern about unwarranted disparities is at a minimum when a sentence is within the Guidelines range." *United States* v. *Willingham*, 497 F.3d 541, 545 (5th Cir. 2007). And, in general, "[i]t is well settled that an appellant cannot challenge his sentence based solely on the lesser sentence given to his co-defendants." *United States* v. *McKinney*, 53 F.3d 664, 678 (5th Cir. 1995).

Broussard asserts that there were unwarranted sentence disparities between him and his co-defendants. To the contrary, any disparities were warranted for several reasons. First, Broussard was the head of IPSO's Narcotics Unit at the time of the April 29, 2011, incidents in the IPJ chapel. In the chain of command, Broussard was directly above the officers who actually beat the victim in this case. Therefore, he had more of an opportunity to stop the assault than others who were present. Moreover, the district court heard evidence about a number of other abuses that the Narcotics Unit engaged in during a four-year period when Broussard was its leader. Broussard's leadership explains the disparity between his sentence and those of his co-defendants. See *United States* v. *Cooks*, 589 F.3d

173, 186 (5th Cir. 2009) (noting that leadership role can be a warranted basis for disparities). Second, as the district court was aware, Broussard did not provide as much assistance to the United States in investigating the abuses at issue as some of the other defendants. See *United States* v. *Duhon*, 541 F.3d 391, 397 (5th Cir. 2008) (noting that differing levels of assistance is a relevant factor in considering sentencing disparities). Finally, Broussard is not similarly situated to Jeremy Hatley, who pleaded guilty to only a misdemeanor with respect to the Section 242 offense. In contrast, Broussard pleaded guilty to a felony with respect to the same offense.

Regardless of the merit of his substantive reasonableness argument, Broussard concedes that he should serve at least six months confinement. See Mot. 12. And, he acknowledges that the "appeal should not take a prolonged period." Mot. 12. Accordingly, even if his substantive reasonableness argument is correct—and it is not—Broussard cannot satisfy his burden of showing that his legal challenge likely would result in a term of imprisonment that is shorter than the time it would take for his appeal to be resolved, particularly because the United States would not oppose an expedited briefing schedule. 18 U.S.C. 3143(b)(1)(B)(iv).

CONCLUSION

For the foregoing reasons, this Court should deny Bret Broussard's Motion For Bail Pending Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2017, I electronically filed the foregoing UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION FOR BAIL PENDING APPEAL with the Clerk of the Court for the United States Court of Appeals for the Fifth 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/ Vikram Swaruup
VIKRAM SWARUUP
Attorney

CERTIFICATE OF COMPLIANCE

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

(1) complies with the type-volume limitation in Federal Rule of Appellate Procedure 27(d)(2)(C) because it contains 4,186 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 2007, in 14-point Times New Roman font.

s/ Vikram Swaruup
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Date: April 20, 2017