

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JEREMY HATLEY,

Defendant-Appellant

---

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

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BRIEF FOR THE UNITED STATES AS APPELLEE

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## STATEMENT REGARDING ORAL ARGUMENT

The United States does not object to Jeremy Hatley's request for oral argument. The United States believes that to the extent possible, this Court's disposition would benefit from assignment of this case to the same panel as the appeals of the other former Iberia Parish Sheriff's Office employees who, like Hatley, pleaded guilty and are challenging their sentences. The United States also believes that this Court's disposition would benefit from scheduling any oral arguments in these cases for the same sitting. It is likely that there will be at least some overlap in the legal and factual issues in these appeals. The appeals of the related cases are as follows:

- *United States v. Bergeron*, No. 17-30280
- *United States v. Broussard*, No. 17-30298
- *United States v. Hines*, No. 17-30270
- *United States v. Lassalle*, No. 17-30418
- *United States v. Savoy*, No. 17-30419

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 17-30288

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JEREMY HATLEY,

Defendant-Appellant

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

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BRIEF FOR THE UNITED STATES AS APPELLEE

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**JURISDICTIONAL STATEMENT**

This appeal is from a judgment of conviction and sentence under federal law. Jeremy Hatley pleaded guilty to one count of violating 18 U.S.C. 242 and one count of violating 18 U.S.C. 1001. See ROA.109-116.<sup>1</sup> The district court had jurisdiction under 18 U.S.C. 3231. The district court sentenced Hatley to a 36-

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<sup>1</sup> “ROA.\_\_\_\_” refers to page numbers of the Record on Appeal. “Br. \_\_\_\_” refers to page numbers in appellant’s opening brief. “Mot. Opp. \_\_\_\_” refers to page numbers in the United States’ response to Hatley’s motion to supplement the record on appeal in this Court, filed May 30, 2017, which this Court carried with the case.

month term of incarceration on March 28, 2017, and entered its judgment on April 6, 2017. ROA.35-36. Hatley timely appealed on April 10, 2017. ROA.56. This Court has jurisdiction under 18 U.S.C. 3742 and 28 U.S.C. 1291.

### **STATEMENT OF THE ISSUES**

1. Whether the district court used the correct range under the United States Sentencing Guidelines to sentence Hatley.

2. Whether the district court's sentencing decision was procedurally reasonable and provided sufficient reasoning.

3. Whether the district court's selection of a 36-month sentence was substantively reasonable in light of the factual circumstances and in comparison to the sentences of other similarly situated defendants.

### **STATEMENT OF THE CASE**

#### *1. Factual 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 Iberia Parish Jail's chapel and beat them in retaliation for prior misconduct. Further investigation revealed a number of other abuses by IPSO employees over a period of more than half a decade. During the investigation, several IPSO employees lied to or misled federal officers who

were investigating the abuses. Ultimately, Sheriff Ackal and a number of other supervisors and officers were charged with federal offenses related to these abuses and subsequent cover-up.

Among the officers charged was Jeremy Hatley, who had been a sergeant in IPSO's K-9 Unit.<sup>2</sup> Hatley pleaded guilty and admitted to his participation in one of the assaults in the jail's chapel: that of a pre-trial detainee identified as S.S. ROA.120. Specifically, Hatley was called to the jail "to assist with a shakedown"—a procedure where jail officials search inmates and their spaces for contraband. ROA.120; ROA.293. During the course of the shakedown, Hatley went to the chapel—a portion of the jail not covered by a video surveillance system—and joined a number of agents from IPSO's narcotics unit and a jail supervisor. ROA.120. Hatley admitted that "[a]s he sat in the chapel, [he] understood that [a] Narcotics Agent intended to use unlawful force against inmate S.S. to punish him." ROA.120. Hatley then watched as his fellow officers kicked, punched, and beat S.S. with a baton while S.S. was kneeling, handcuffed, compliant, and "presenting no threat to anyone." ROA.120; see also ROA.657-658. Hatley continued watching as one of his fellow officers placed a "flashlight

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<sup>2</sup> Twelve defendants were charged in connection with the IPSO abuses. Ten (including Hatley) pleaded guilty, and one is awaiting trial. Sheriff Ackal was acquitted following a five-day jury trial. See Jury Verdict, *United States v. Ackal*, No. 16-cr-48 (W.D. La. Nov. 4, 2016).

between his own legs and forced S.S. to mimic performing fellatio on the flashlight, shoving the flashlight into S.S.'s mouth until S.S. began to choke.” ROA.120. Hatley watched the whole incident and did nothing to stop it, even though he has admitted that “he knew he had a duty to intervene and he had the opportunity to do so.” ROA.120.

Bret Broussard, another IPSO officer who was in the chapel at the time of the assault, testified that Hatley initiated the forced fellatio portion of the assault. ROA.919-921. Specifically, he testified that “after Ben [Lassalle, another officer,] had hit [S.S.] with the baton, he was holding the baton down at his side and just kind of standing there. And for some reason, Jeremy Hatley told him, *Make him suck it*, and Ben put the baton between his legs and into the inmate’s mouth.” ROA.920; ROA.930.<sup>3</sup>

S.S. sustained significant injuries as a result of the assault. A fellow inmate who saw S.S. as he returned to his cell after the beating testified that S.S. was “severely bruised.” ROA.434. And a nurse who examined S.S. noted that he had an “X-shaped bruise on [his] upper left thigh” with the left leaning bruise “15 centimeters long by 3 centimeters wide” and the right leaning bruise “17

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<sup>3</sup> Broussard’s testimony contradicts Hatley’s statement (Br. 10) that “there is no evidence that [he] injured SS or encouraged others to injure SS.” The record also contradicts Hatley’s statement (Br. 8) that none of the active participants in the abuse of S.S. “even remember Mr. Hatley being present in the chapel.” See ROA.737-740 (testimony from Byron “Ben” Lassalle—one such participant).



centimeters long by 5 centimeters wide.” ROA.488-489. S.S.’s lip was also swollen. ROA.257. S.S. further reported being “emotionally demoralized” by the assault and rated his pain level while being touched as eight on a scale of one to ten. ROA.489.

During the course of the United States’ investigation into the April 29, 2011, beatings and other incidents, Hatley lied to the Federal Bureau of Investigation (FBI). Specifically, he admitted that on approximately December 11, 2015, he told an FBI agent “that he had never seen any detainees abused in the chapel of the [jail].” ROA.120. He made this false statement even though he “then well knew [that] he was present in the chapel on April 29, 2011, when officers abused S.S.” ROA.120. Testimony during Sheriff Ackal’s trial revealed Hatley discussed the FBI’s investigation with at least one other officer around the time he made this false statement. See ROA.599.

## 2. *Procedural History*

Hatley waived indictment and was charged via bill of information on March 24, 2016. ROA.7-10. That same day, he pleaded guilty before a magistrate judge to one misdemeanor count (Count 1) of 18 U.S.C. 242, which prohibits willful deprivation of rights under color of law, and one felony count (Count 2) of 18 U.S.C. 1001, which prohibits making false statements to federal investigators. ROA.109-116; ROA.7-9. As part of his guilty plea, Hatley acknowledged that the

maximum sentence for his Section 242 conviction was one year and that the maximum sentence for his Section 1001 conviction was five years. ROA.117. Hatley also stipulated to a factual basis for the plea. ROA.120-121. On April 18, 2016, the district court adopted the magistrate judge's recommendation to accept the guilty plea. ROA.27.

The United States Probation Office then prepared a presentence investigation report (PSR). ROA.137-156. In calculating the United States Sentencing Guidelines (Guidelines) range, the PSR grouped together the two counts. ROA.145 (citing U.S.S.G. § 3D1.2(b)). Relying on the guideline applicable for aggravated assault, the PSR calculated the offense level for the Section 242 count as 29. ROA.145-146. The PSR then calculated the offense level for the Section 1001 count as 23 based on a cross-reference to the accessory after the fact guideline. ROA.146 (citing U.S.S.G. § 2X3.1). The PSR used the higher offense level—29 (from the Section 242 count)—as the offense level for the group as a whole. ROA.146 (citing U.S.S.G. § 3D1.3(a)). After taking into account adjustments for Hatley's acceptance of responsibility and his lack of criminal history, the PSR calculated the Guidelines range as 63 to 72 months. ROA.147; ROA.153. Hatley submitted objections to the PSR to the Probation Office (ROA.167-180), and the Probation Office responded (ROA.157-165).

The parties then submitted pleadings in advance of Hatley's sentencing hearing. The United States submitted a motion under Guidelines § 5K1.1 recommending a seven-level downward departure to Hatley's offense level because he provided substantial assistance in the investigation of the IPSO abuses. ROA.182-186. In preparing the Section 5K1.1 motion, the United States took into account Hatley's conduct, his cooperation, and the need to maintain proportionality between Hatley's sentence and those of his co-defendants (in whose cases the United States also filed similar motions). ROA.182-186. The motion explained that the United States "has made an effort to make all of its recommendations proportional among the cooperators so that the recommendations reflect each cooperator's level of culpability and the impact that his cooperation had on furthering the Government's prosecution of abuses at IPSO." ROA.184. Hatley submitted a sentencing memorandum reiterating his objections to the PSR, applying the 18 U.S.C. 3553(a) factors to the facts of his case, and seeking a downward variance to a probationary sentence. ROA.187-203. Hatley also submitted letters from friends and family members in support of his sentencing arguments. ROA.204-249.

The district court held a sentencing hearing on March 28, 2017. ROA.93-108. The court overruled Hatley's objections to the PSR, citing testimony from Sheriff Ackal's trial and the Probation Office's responses to the objections.

ROA.94-95. The court then heard defense counsel's argument, wherein he stated that Hatley had lied to the FBI in December 2015 but corrected the false statement a month later. ROA.97-98. Counsel further discussed Hatley's family and professional background, including his service in Afghanistan. ROA.98-99. Hatley then spoke, apologizing to his family and to the victim who was assaulted. ROA.100. He went on to discuss his service in Iraq and Afghanistan, his family circumstances, and the context surrounding his false statement. ROA.100-107. The United States rested on its pleadings. ROA.107.

The district court adopted the PSR's factual findings and sentenced Hatley to a 36-month term of incarceration, with six months assigned to the Section 242 count and 30 months assigned to the Section 1001 count, running consecutively. ROA.107. The district court stated that it "selected this based on [Hatley's] personal history and personal characteristics and involvement in the current offense" as well as Hatley's "service to [his] country." ROA.107. In determining the sentence, the district court also referenced the United States' Section 5K1.1 motion recommending a seven-level reduction, resulting in a total offense level of 19 with a Guidelines range of 30 to 37 months. See ROA.107; ROA.185.

On March 31, 2017, Hatley filed a written statement of objections regarding the court's sentencing decision. ROA.130-132. The court entered its written judgment and statement of reasons on April 6, 2017. ROA.35-39; ROA.133-136.

There, the court reiterated that the Guidelines sentencing range was 63 to 72 months before departures or variances and that it had departed downward to the 36-month sentence because of the United States' Section 5K1.1 motion. See ROA.133-134.

Four days later, Hatley filed motions for reconsideration and for bail pending appeal, along with a timely notice of appeal. ROA.40-57. The district court summarily denied both motions. ROA.58-59. On April 18, 2017, Hatley renewed his motion for bail pending appeal before this Court, which also denied the motion. ROA.268-269.

### **SUMMARY OF ARGUMENT**

Hatley's within-Guidelines sentence was based on a properly calculated Guidelines range and was both procedurally and substantively reasonable. The district court used the correct Guidelines range—which was driven by the 18 U.S.C. 242 offense—to sentence Hatley. Hatley's principal argument with regard to calculation of the Guidelines range is that he should not be held responsible for the assault of S.S. because he merely failed to intervene. This finds no support in Section 242 or the Guidelines. Under Section 242, willfully failing to intervene to halt an assault when a law enforcement officer has a constitutional duty to do so is no less a crime than committing such an assault. Moreover, the Guidelines hold Hatley responsible for harms resulting from his entire course of conduct, for all

conduct that he aided or abetted, and for all foreseeable conduct of those with whom he engaged in a jointly undertaken criminal activity. The assault of S.S. was the direct result of Hatley's failure to intervene, and it was foreseeable to Hatley, who knew that his fellow officers intended to use unlawful force but willfully did nothing to intervene. Contrary to Hatley's argument, failing to intervene is a serious offense that facilitates and worsens assaults like the one in this case and makes it harder to investigate and prosecute such abuses. Accordingly, the district court correctly held Hatley responsible for the entire course of the assault and the resulting harms under the Guidelines.

Hatley's remaining Guidelines arguments fare no better. The district court did not clearly err by rejecting a minor-role adjustment. Hatley did not meet his burden of showing that he was substantially less responsible than other officers because the record shows that several officers witnessed the assault but did nothing to intervene and that Hatley encouraged a fellow officer to force the victim to perform fellatio on a baton or flashlight. The Court need not address Hatley's arguments regarding grouping of the offenses and the offense level calculation for his 18 U.S.C. 1001 conviction because even if he were correct, that would not affect the Guidelines range, which in effect relied only on the offense level for the Section 242 count.

Hatley's challenges to the procedural reasonableness of his sentence also lack merit. He did not preserve any objection to the adequacy of the district court's reasoning in selecting his total punishment or in choosing a consecutive rather than concurrent sentence. Nevertheless, the district court did not err (let alone plainly err) because it adopted the factual findings in the PSR and noted that it had considered the relevant factors, including Hatley's personal characteristics and his offense conduct, in reaching its within-Guidelines sentence. The record also makes clear that Hatley was provided an individualized sentence because the district court relied on the PSR and the Guidelines § 5K1.1 motion, and the court discussed circumstances specific to Hatley in explaining its sentence. Finally, the district court properly credited Hatley for his substantial assistance under the Guidelines. The court explained that Hatley's Guidelines range was 63 to 72 months, but that it was departing downward to a 36-month sentence, which was within the 30- to 37-month range that resulted from granting the Section 5K1.1 motion.

Finally, the district court's within-Guidelines sentence was substantively reasonable. Hatley's principal argument to the contrary is that there is an unwarranted sentencing disparity between his sentence and the sentences of his co-defendants. However, establishing unreasonableness due to disparity requires Hatley to compare his sentence to sentences for similar conduct nationwide—not

narrowly to his co-defendants. Hatley does not even attempt to make this showing. In any event, any disparity between Hatley and his co-defendants was warranted because his co-defendants pleaded guilty to different offenses than Hatley; specifically, none of them pleaded guilty to a Section 1001 offense. Hatley's attempt to use a disparity argument to challenge the United States' prosecutorial discretion in charging him, but not his co-defendants, with violating Section 1001 is improper. Moreover, in relying on the United States' Section 5K1.1 motion, the district court necessarily considered the proportionality of Hatley's sentence in relation to the other defendants because the recommendation expressly accounted for such comparisons. Hatley's remaining substantive reasonableness arguments ask this Court to reweigh the relevant factors and to consider factual arguments that he did not make to the district court and that are thus not supported by the record. The Court should reject those arguments because they do not rebut the presumption of reasonableness that attaches to a within-Guidelines sentence.

### **ARGUMENT**

This Court's review of a district court's sentencing decision is bifurcated. *United States v. Duhon*, 541 F.3d 391, 395 (5th Cir. 2008). The Court begins by assessing the propriety of the sentencing process. The first step in that inquiry is to ensure that the sentencing court correctly calculated the applicable Guidelines range. See *United States v. Rhine*, 637 F.3d 525, 528 (5th Cir. 2011), cert. denied,



565 U.S. 1116 (2012). The Court then determines if the district court made any other procedural errors, such as “treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence.” *Gall v. United States*, 552 U.S. 38, 51 (2007). If a sentence is procedurally sound or if the procedural error is harmless, this Court considers “the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.” *United States v. Robinson*, 741 F.3d 588, 598 (5th Cir. 2014) (citation omitted). Following this framework, the United States addresses: (1) the Guidelines calculation; (2) other procedural issues; and (3) substantive reasonableness.

## I

### **THE DISTRICT COURT USED THE CORRECT GUIDELINES RANGE TO SENTENCE HATLEY**

#### A. *Standard Of Review*

“[T]his Court reviews the sentencing court’s interpretation or application of the Sentencing Guidelines de novo, and its factual findings for clear error.” *United States v. Robinson*, 741 F.3d 588, 598-599 (5th Cir. 2014). Even if there were an error with the Guidelines calculation, this Court does not reverse if the error is harmless. *United States v. Delgado-Martinez*, 564 F.3d 750, 752 (5th Cir. 2009). A Guidelines calculation error “is harmless if ‘the error did not affect the district

court's selection of the sentence imposed.” *Id.* at 753 (quoting *Williams v. United States*, 503 U.S. 193, 203 (1992)).

*B. The District Court Correctly Concluded That Hatley Could Be Held Responsible For The Assault, And The Guidelines Range Calculation For His 18 U.S.C. 242 Count And Related Adjustments Were Therefore Correct*

A number of Hatley's arguments regarding the calculation of his Guidelines range rely on a shared flawed premise: that he should not be held accountable for the assault of S.S. Specifically, he contends (Br. 21-31) that his 18 U.S.C. 242 violation was a “failure to intervene”—which he posits is separate and apart from the actual assault that he failed to stop. He therefore argues (Br. 21-31) that the district court should not have used the aggravated assault guideline as the cross-reference to determine his base offense level or applied several enhancements. By failing to intervene, however, Hatley is accountable under Section 242 and the Guidelines for his fellow officers' conduct. Accordingly, use of the aggravated assault guideline and related enhancements was proper.

Contrary to Hatley's argument, there is no distinction in criminal liability under Section 242 between a willful failure to prevent an assault under color of law and an assault committed under color of law. Section 242 prohibits the 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), cert. denied, 510 U.S. 1094 (1994). As the Tenth Circuit has held, inmates have a "constitutional right to be free from cruel and unusual punishment," and officers have "a concomitant constitutional duty to protect [them] from such harm." *United States v. Serrata*, 425 F.3d 886, 896 (2005). Accordingly, courts have consistently held that officers like Hatley have "a legal obligation to act to prevent the assault" of inmates and have "flatly reject[ed] any suggestion otherwise." *Ibid.*; see also *United States v. McKenzie*, 768 F.2d 602, 605 (5th Cir. 1985) (upholding Section 242 conviction of an officer who witnessed an assault by his fellow officers because he "was aware of what was transpiring and did not stop it"), cert. denied, 474 U.S. 1086 (1986); *Watkins v. Donnelly*, 551 F. App'x 953, 961 (10th Cir. 2014) ("[P]rison officials have a duty pursuant to the Eighth Amendment to protect inmates from violence inflicted by fellow officials."). Willfully disregarding the duty to intervene to stop an assault is no less a violation of Section 242 than assaulting an inmate. Hatley is responsible for this violation and the consequences thereof.<sup>4</sup>

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<sup>4</sup> Failing to intervene is not, as Hatley contends (Br. 24-25), a lesser crime than assault. In the United States' experience, when officers present during an assault fail to intervene, their presence can exacerbate injuries and lead to additional violations of the law. For example, the presence of additional officers  
(continued...)

Hatley is also accountable for the resulting assault 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). Where a defendant jointly undertakes criminal activity with others, he is responsible for all acts and omissions that are “(i) within the scope of the jointly undertaken criminal activity, (ii) in furtherance of that criminal activity, and (iii) reasonably foreseeable in connection with that criminal activity,” regardless of whether the joint criminal activity legally constitutes or is charged as a conspiracy. U.S.S.G. § 1B1.3(a)(1)(B). The defendant is also responsible for “all harm that resulted from [such] acts and omissions.” U.S.S.G. § 1B1.3(a)(3).<sup>5</sup>

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(...continued)

may prevent victims from escaping or retreating to a safe place. Victims in such situations may also feel less empowered to come forward because they have to contradict the statements of multiple officers. And, officers who witness and do not intervene to prevent unlawful conduct are more likely to engage in a cover-up, impeding investigations and preventing the administration of justice. In short, officers who fail to intervene are not mere bystanders; they breach their constitutional duties and make the underlying uses of excessive force worse and harder to stop.

<sup>5</sup> Though defendants who fail to intervene are legally similarly situated to those who perpetrate assaults, defendants like Hatley can make a *factual* argument that they are less culpable and thus deserve a sentence at the lower end of the Guidelines range or a downward variance. Hatley made such a factual argument here, the district court considered it, and the court ultimately sentenced him to 18 months less than Ben Lassalle who actually assaulted S.S. See *United States v. Lassalle*, No. 16-cr-35 (W.D. La. Apr. 6, 2017); see also pp. 51-52, *infra*.

In light of these provisions, it was appropriate for the Guidelines calculation to be premised on the entire course of conduct and ultimate consequences of Hatley's failure to intervene, as well as the conduct of the other officers that occurred while Hatley was in the chapel. Hatley acknowledged that he violated Section 242 and that he "did nothing to stop the Narcotics Agent's assault on S.S., even though he knew he had a duty to intervene and he had the opportunity to do so." ROA.120. Moreover, Hatley admitted that he "understood that the Narcotics Agent intended to use unlawful force against inmate S.S." before the assault began. ROA.120. Hatley also "accept[ed] responsibility for not taking a stand to protect [the victim]." ROA.103. In short, Hatley has acknowledged that the assault resulted in part from his failure to intercede and halt it, and the assault was the foreseeable result of Hatley and his fellow officers' jointly undertaken criminal activity.

In light of Hatley's guilty plea and his acknowledgement of the result of his course of conduct (*i.e.*, the assault), the district court was correct to rely on the resulting assault to calculate the Guidelines range for the Section 242 offense. Hatley cites no authority to the contrary. As discussed below, the PSR correctly selected the offense level and enhancements thereto based on the aggravated assault that resulted from Hatley's conduct.

*1. Base Offense Level*

Hatley challenges (Br. 22-26) the PSR and district court's use of the aggravated assault guideline to calculate the base offense level for his Section 242 conviction. The base offense level for a violation of Section 242 is "the offense level from the offense guideline applicable to any underlying offense." U.S.S.G. § 2H1.1(a)(1). The application notes make clear that the "[o]ffense guideline applicable to any underlying offense" means the offense guideline applicable to any *conduct* established by the offense of conviction that constitutes an offense under federal, state, or local law." U.S.S.G. § 2H1.1(a)(1) cmt. n.1 (emphasis added). As discussed above, relevant *conduct* includes not only the actions of the defendant himself, but also any acts that he aided or abetted, U.S.S.G. § 1B1.3(a)(1)(A), and any foreseeable acts of others that were "within the scope of the jointly undertaken criminal activity," U.S.S.G. § 1B1.3(a)(1)(B).

The district court and PSR correctly concluded that the guideline applicable to the underlying offense was the aggravated assault guideline, Guidelines § 2A2.2. Aggravated assault occurs where, among other circumstances, there is a "felonious assault that involved (A) a dangerous weapon with intent to cause bodily injury (i.e., not merely to frighten) with that weapon; [or] (B) serious bodily injury." U.S.S.G. § 2A2.2 cmt. n.1. It is undisputed that Hatley's fellow officers beat S.S. with a baton and that the beating led to bodily injury to S.S. (ROA.144);

therefore there is no dispute that these other officers committed the underlying offense of aggravated assault.

The only question is whether the district court erred by holding Hatley accountable for that aggravated assault. It did not, because the other officers' conduct was within *Hatley's* relevant conduct under the Guidelines. See *United States v. Koon*, 34 F.3d 1416, 1447 n.25 (9th Cir. 1994) (“[A]n officer who failed to intercede when his colleagues were depriving a victim of his Fourth Amendment right to be free from unreasonable force in the course of an arrest would, like his colleagues, be responsible for subjecting the victim to a deprivation of his Fourth Amendment rights.”), *aff’d in part, rev’d in part*, 518 U.S. 81 (1996). Hatley aided and abetted the assault because he willfully chose not to intervene even though he “knew he had a duty to intervene and he had the opportunity to do so.” ROA.120; see also U.S.S.G. § 1B1.3(a)(1)(A). Though he was not charged with conspiring with the other officers, Hatley “understood that [his fellow officers] intended to use unlawful force against inmate S.S.” before the assault began but nevertheless chose to participate in the assault without intervening to stop it. ROA.120. The other officers' conduct becomes Hatley's relevant conduct because the aggravated assault was the foreseeable result of the criminal activity that Hatley jointly undertook with his fellow officers by failing to intercede. U.S.S.G. § 1B1.3(a)(1)(B).

Hatley is also directly responsible for the aggravated assault. Hatley's failure to intervene was an omission, and, under the Guidelines, he is responsible for "all harm that resulted from" it. U.S.S.G. § 1B1.3(a)(3). The harm that resulted from Hatley's failure to act was the aggravated assault of S.S., as Hatley has acknowledged. See *Serrata*, 425 F.3d at 907 (applying the aggravated assault guideline to an officer who was convicted of violating Section 242 because of his failure to intervene in his fellow officers' assault of an inmate); see also *Anderson v. Branen*, 17 F.3d 552, 557 (2d Cir. 1994) ("An officer who fails to intercede is liable for the preventable harm caused by the actions of the other officers where that officer observes or has reason to know \* \* \* that excessive force is being used.").<sup>6</sup>

## 2. *Dangerous Weapon Enhancement*

Hatley also contends (Br. 26) that the district court should not have applied the enhancement for use of a dangerous weapon under U.S.S.G. § 2A2.2(b)(2)(B), which requires a four-level increase where "a dangerous weapon (including a

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<sup>6</sup> Even if Hatley's underlying offense was misprision of a felony (as he contends (Br. 25 n.24)), he would be legally responsible for the assault. A defendant who commits misprision of a felony is liable for "all conduct relevant to determining the offense level for the underlying offense that was known, or reasonably should have been known, by the defendant." U.S.S.G. § 1B1.3 cmt. n.9. The underlying offense for any misprision would be the aggravated assault perpetrated by the other officers, about which Hatley knew. Accordingly, Hatley would be held liable for the aggravated assault even if, as he now contends, misprision is the appropriate framework to view his failure to intervene.



firearm) was otherwise used” in an assault. Under the Guidelines, a dangerous weapon is “an instrument capable of inflicting death or serious bodily injury,” U.S.S.G. § 1B1.1 cmt. n.1(D), and “includes any instrument that is not ordinarily used as a weapon (e.g., a car, a chair, or an ice pick) if such an instrument is involved in the offense with the intent to commit bodily injury,” U.S.S.G. § 2A2.2 cmt. n.1. Hatley does not dispute that the flashlight or baton used in the assault of S.S. is a dangerous weapon, and he does not dispute that such a weapon was “used” in the commission of the assault. See *United States v. Johnstone*, 107 F.3d 200, 212 (3d Cir. 1997) (flashlight used to strike an arrestee is a dangerous weapon); *United States v. Dautovic*, 763 F.3d 927, 931, 934 (8th Cir. 2014) (and so is a baton), cert. denied, 135 S. Ct. 1441 (2015).

Rather, Hatley’s argument (Br. 26) is that he himself did not use the dangerous weapon and thus the enhancement should not apply. However, the enhancement does not require the defendant to personally use the weapon. To the contrary, the enhancement applies anytime a dangerous weapon “was otherwise used” during the commission of an assault. U.S.S.G. § 2A2.2(b)(2)(B).

Accordingly, courts have consistently held that the dangerous weapon enhancement applies where it was foreseeable that a co-defendant would use such a weapon. See, e.g., *United States v. Old Chief*, 571 F.3d 898, 902 (9th Cir.), cert. denied, 558 U.S. 1016 (2009); *United States v. Jourdain*, 433 F.3d 652, 658 (8th

Cir.), cert. denied, 547 U.S. 1139 (2006). Hatley knew his fellow officers intended to use unlawful force when he was in the chapel before the assault even began.

ROA.120. Moreover, those officers had their batons with them before the assault occurred. ROA.837-843. Because it was reasonably foreseeable that one of the officers would use the baton to strike S.S., the district court did not err in applying the dangerous weapon enhancement.

### 3. *Bodily Injury*

Hatley contends (Br. 27) that the district court should not have applied the bodily injury enhancement under Guidelines § 2A2.2(b)(3)(A) because his offense “did not include any intent or action to cause bodily injury to SS.” But the Guidelines require a three-level enhancement “[i]f the victim sustained bodily injury” during an assault. U.S.S.G. § 2A2.2(b)(3). Bodily injury is defined as “any significant injury; e.g., an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought.” U.S.S.G. § 1B1.1 cmt. n.1(B). As noted above, Hatley is responsible not only for the harm that was the object of his conduct but also any harm that resulted from his conduct. U.S.S.G. § 1B1.3(a)(3). As this Court has held, “[t]he injury sustained, *not* the actions of the defendant, should be the focus of the inquiry.” *United States v. Lister*, 229 F. App’x 334, 340 (5th Cir.), cert. denied, 552 U.S. 967 (2007). It was foreseeable to Hatley that S.S. would suffer bodily injury because Hatley knew that the other

officers intended to use unlawful force and that S.S. was restrained and compliant. ROA.120. Despite this knowledge and despite having an opportunity to do so, Hatley did not intervene. Hatley cites no authority for the proposition that he personally had to cause or intend bodily injury to the victim. Accordingly, the district court correctly applied the bodily injury enhancement to Hatley's offense level.

#### 4. *Color Of Law Enhancement*

Hatley contends (Br. 28) that the district court should not have adopted a six-level "color of law" enhancement under U.S.S.G. § 2H1.1(b)(1)(B). That enhancement applies "[i]f (A) the defendant was a public official at the time of the offense; or (B) the offense was committed under color of law." U.S.S.G. § 2H1.1(b)(1). The enhancement applies here. Hatley was in the course of his employment as an IPSO sergeant on April 29, 2011. ROA.120. In his plea agreement, he admitted that he was acting under color of law when he failed to intervene in the assault. ROA.119. Acting under color of law was also an element of the offense to which Hatley pleaded guilty. See 18 U.S.C. 242; ROA.123. Hatley's argument (Br. 28) that this enhancement should not apply because he did not fail to intervene under color of law collapses on itself because failing to intervene is a crime here *because* he was acting under color of law. This Court should reject Hatley's argument.

5. *Physical Restraint Enhancement*

Hatley makes two arguments (Br. 29-30) that the district court should not have applied Guidelines § 3A1.3, which provides for a two-level enhancement “[i]f a victim was physically restrained in the course of the offense.”

First, Hatley contends (Br. 29) that the enhancement should not apply in a jail environment because inmates “are always physically restrained to some degree.” That argument is foreclosed by *United States v. Clayton*, 172 F.3d 347 (5th Cir. 1999). There, an officer was convicted under Section 242 after he kicked and beat an arrestee who was handcuffed and face down. *Id.* at 349-350. This Court held that the physical-restraint enhancement applied regardless of “the lawfulness of the defendant’s restraint of the victim at the time the unreasonable or excessive force occurs,” so long as the defendant “took advantage of the restraint” to commit the unlawful assault. *Id.* at 353. That was the case here; even if S.S. was lawfully restrained to some degree as an inmate, the IPSO officers took advantage of that restraint to act unlawfully. ROA.658 (describing the circumstances of the assault and noting that S.S. was kneeling and handcuffed when he was beaten).

Second, Hatley contends (Br. 29-30) that the enhancement should not apply because he did not personally restrain S.S. or intend that S.S. be restrained. But the guideline does not require the defendant to personally restrain the victim or for

the defendant to intend to restrain the victim. To the contrary, it applies “[i]f a victim was physically restrained in the course of the offense.” U.S.S.G. § 3A1.3. As discussed above, S.S. was restrained while Hatley failed to intervene and violated Section 242. This was sufficient for the district court to apply the enhancement, and Hatley cites no authority to the contrary.

*C. The District Court Was Well Within Its Discretion To Reject A Minor-Role Adjustment*

Hatley next contends (Br. 30-31) that he should have been given a four-level downward adjustment of his offense level under Guidelines § 3B1.2 because he played only a minor role in the offense. The district court rejected this argument, relying on the *Ackal* trial testimony and the Probation Office’s response to the objection. ROA.94-95. The Probation Office in turn explained that the victim, S.S., had stated in interviews that while one officer—Ben Lassalle—beat him, the warden and other officers, including Hatley, watched and laughed. ROA.162. The Probation Office thus found that there was a “lack of information to suggest that [Hatley] was substantially less culpable than the average participant exhibiting similar conduct.” ROA.162. This finding was not clearly erroneous.

Section 3B1.2 provides “a range of adjustments for a defendant who plays a part in committing the offense that makes him *substantially* less culpable than the average participant in the criminal activity.” U.S.S.G. § 3B1.2 cmt. n.3(A) (emphasis added). “The defendant ‘bears the burden of proving, by a

preponderance of the evidence, [his] minor role in the offense.’” *United States v. Alaniz*, 726 F.3d 586, 626 (5th Cir. 2013) (quoting *United States v. Zuniga*, 18 F.3d 1254, 1261 (5th Cir.), cert. denied, 513 U.S. 880 (1994)). A minimal participant “demonstrates a lack of knowledge or understanding of the scope and structure of the enterprise.” *United States v. Angeles-Mendoza*, 407 F.3d 742, 753 (5th Cir. 2005). “It is not enough that a defendant does less than other participants; in order to qualify as a minor participant, a defendant must have been peripheral to the advancement of the illicit activity.” *United States v. Villanueva*, 408 F.3d 193, 204 (5th Cir.) (citation and internal quotation marks omitted), cert. denied, 546 U.S. 910 (2005).

Hatley has not met his burden of demonstrating that he is substantially less culpable than the average officer who participated in the beating of S.S. The record suggests that at least five other officers—Ben Lassalle, Wade Bergeron, Bret Broussard, Wesley Hayes, and Robert Burns—were in the chapel with Hatley and S.S. at the time of the assault. ROA.657; ROA.660-661; ROA.737-740; ROA.841-842. It is also clear that several of these officers did not themselves strike S.S. Hatley presented no evidence to the district court that he was less culpable than the other defendants who did not directly assault S.S. See ROA.657 (Lassalle did the actual beating). Accordingly, as the PSR correctly concluded,

“there is \* \* \* a lack of information to suggest that the defendant was substantially less culpable than the average participant.” ROA.162.

Indeed, at least one witness at the *Ackal* trial testified that Hatley initiated the incident where Ben Lassalle forced S.S. to perform fellatio on a flashlight or baton. Specifically, Bret Broussard testified that “after Ben [Lassalle] hit [S.S.] with the baton, he was holding the baton down at his side and just kind of standing there. And for some reason, Jeremy Hatley told him, *Make him suck it*, and Ben put the baton between his legs and into the inmate’s mouth.” ROA.920. Hatley provided no evidence or testimony at his own sentencing hearing to rebut Broussard’s testimony.

In light of this factual record, Hatley has not met his burden of demonstrating that he is substantially less culpable than the average participant in the beating of S.S. Accordingly, the district court did not clearly err by rejecting the minor-participant adjustment. Rejecting the adjustment was plausible in light of the record developed at the *Ackal* trial. See *United States v. Perez-Solis*, 709 F.3d 453, 469 (5th Cir. 2013).

*D. Any Error Regarding Calculations Of The 18 U.S.C. 1001 Offense Level Or The Grouping Of The Two Offenses Would Be Harmless Because Accepting Hatley’s Arguments Would Not Alter The Guidelines Range*

Hatley also contends (Br. 32-33, 35-36) that the district court incorrectly calculated the offense level for the Section 1001 conviction and incorrectly

grouped together the Section 242 and Section 1001 counts. Specifically, Hatley contends (Br. 32-33) that his offense level for his Section 1001 conviction should have been six rather than 23 because the court should have applied Guidelines § 2B1.1 instead of Guidelines § 2J1.2. Hatley's argument (Br. 33) is that the latter section only applies where there is an underlying terrorism or sex offense. Hatley also contends (Br. 35-36) that the Section 242 offense and the Section 1001 offense should not have been grouped together because they "are not 'closely' related" under Guidelines §§ 3D1.2 or 3D1.3.

This Court need not address these issues because even if Hatley were correct, the ultimate Guidelines range would not change. As discussed above, the PSR correctly calculated the Guidelines offense level for the Section 242 offense. This offense level—26 (base offense level of 29 followed by a three-level adjustment for acceptance of responsibility)—led to a Guidelines range of 63 to 72 months regardless of any calculation related to the Section 1001 offense. See ROA.145-147; ROA.153. The district court adopted this Guidelines range and then adjusted it based on the United States' motion for a seven-level downward departure under Guidelines § 5K1.1, resulting in a 30- to 37-month range. See ROA.133-134; ROA.185. Using this advisory range under 18 U.S.C. 3553, the district court sentenced Hatley to 36 months. See ROA.107.



If Hatley were correct that the offense level for his Section 1001 conviction should have been six and that the two counts should not have been grouped, his Guidelines range would remain 30 to 37 months. Applying Hatley's argument, if the two counts were ungrouped, there would be two separate groups. The offense level for the first group, which would consist only of the Section 242 offense, would be unchanged at 29. See ROA.145-146. The offense level for the second group, which would consist of only the Section 1001 offense, would be six (according to Hatley (Br. 33)). Where there are multiple groups, the district court would need to calculate the combined offense level to determine the advisory Guidelines range. See U.S.S.G. § 3D1.4. "The combined offense level is determined by taking the offense level applicable to the Group with the highest offense level and increasing that offense level" based on the offense level of the lower group. U.S.S.G. § 3D1.4.

Taking the offense level of the highest group, which would be 29 from the Section 242 group, the offense level would not increase because the Section 1001 group's offense level of six is "9 or more levels less serious than the Group with the highest offense level." U.S.S.G. § 3D1.4(c). Accordingly, the combined offense level would be 29. After accounting for a three-level adjustment for acceptance of responsibility and Hatley's lack of criminal history, the Court would end up back at the 63- to 72-month range that the district court adopted and from

which it departed downward to arrive at the 30- to 37-month range. See ROA.153; see also ROA.185. Thus, the inquiry that Hatley asks this Court to take—reevaluating the offense level for the Section 1001 offense or reevaluating the propriety of the grouping of the two counts—would be futile, as it would leave unchanged the applicable Guidelines range. See *United States v. Hughes*, 618 F. App’x 770, 774 (5th Cir. 2015) (error is not reversible if correction would not favorably affect the Guidelines calculation for the defendant).

A faulty premise lurks under Hatley’s argument: that if there were two separate groups and the offense level were lower for the Section 1001 offense, he would have received fewer than 30 months allocated to that offense. But this is not how sentencing for multiple counts works under the Guidelines. The court does not sentence count by count or group by group depending on the offense level assigned to each count or group. Rather, the court calculates the *combined* offense level for all of the counts or groups and uses that to determine the Guidelines range. U.S.S.G. § 3D1.5. The court then determines the “combined length of the sentences” or “total punishment” using that range. U.S.S.G. § 5G1.2 cmt. n.1; see also *United States v. Garcia*, 322 F.3d 842, 845 (5th Cir. 2003) (“[T]otal punishment is calculated from the Guidelines Sentencing Table by correlating the appropriate criminal history category . . . with the defendant’s combined offence [sic] level.”) (citation and internal quotation marks omitted); *United States v.*

*Iniguez*, 368 F.3d 1113, 1115 (9th Cir. 2004) (en banc) (“[T]he ‘total punishment’ is a matter within the sentencing court’s discretion.”) (citation omitted). As this Court has held, “[w]hen a defendant is sentenced on multiple counts under a single indictment, the court computes a total punishment by looking at the combined offense level with the appropriate criminal history category to arrive at a sentencing range.” *United States v. Lucas*, 157 F.3d 998, 1001 (5th Cir. 1998). The total punishment is then “formally imposed on each count.” U.S.S.G. § 5G1.2 cmt. n.1. In light of these principles “[t]he total punishment can be more than the maximum statutory penalty for any particular offense if the defendant is sentenced on multiple counts.” *Lucas*, 157 F.3d at 1001.

Importantly, in a multiple-count case, the offense level of the count for which there is a lower statutory maximum can drive the total offense level and total punishment (even above the statutory maximum for that lower offense), as long as the sentence formally imposed on each count is below that count’s statutory maximum. As this Court approvingly stated, a “sentence on multiple counts [is] not limited by the statutory maximum for a particular count, even though that count dictates the offense level and calculation of total punishment for all the offenses.” *Lucas*, 157 F.3d at 1001 n.6 (citing *United States v. Griffith*, 85 F.3d 284, 289 (7th Cir.), cert. denied, 519 U.S. 909 (1996)).

That is what the district court did. The total punishment of 36 months was within the Guidelines range that the district court used and would be within the Guidelines range that would result from the combined offense level even if Hatley's arguments regarding the Section 1001 offense level and grouping were accepted. The court formally imposed that 36-month sentence by distributing six months to the Section 242 offense and 30 months to the Section 1001 offense. As discussed above, it does not matter that the Section 242 offense drove the Guidelines calculation and the total punishment because the sentence formally imposed on each count was below that count's statutory maximum. This sentencing decision was within the district court's discretion, which, as discussed in more detail below, it exercised reasonably.

Accordingly, this Court need not address the merits of Hatley's arguments regarding the offense level calculation for his Section 1001 offense or his arguments regarding the grouping of the two counts because accepting those arguments would leave the Guidelines calculation unchanged. See *United States v. Chon*, 713 F.3d 812, 822 (5th Cir.) (holding that there is no need to consider legal issues that would not affect the ultimate sentencing range), cert. denied, 134 S. Ct. 255 (2013).

## II

### **THE DISTRICT COURT’S SENTENCING DECISION WAS PROCEDURALLY REASONABLE AND PROVIDED SUFFICIENT REASONING**

#### *A. Standard Of Review*

This Court ordinarily reviews the procedural steps that the district court took in reaching its sentence for abuse of discretion. See *United States v. Diaz Sanchez*, 714 F.3d 289, 293 (5th Cir. 2013). However, “[w]hen a defendant fails to raise a procedural objection below, appellate review is for plain error only.” *United States v. Lopez-Velasquez*, 526 F.3d 804, 806 (5th Cir.), cert. denied, 555 U.S. 1050 (2008). To prevail under plain error review, a defendant must show that there is (1) an error, (2) “that is plain,” (3) “that affects substantial rights,” and (4) that so seriously affects the fairness of the proceedings as to warrant discretionary intervention by this Court. See *United States v. Mares*, 402 F.3d 511, 520 (5th Cir.) (citation omitted), cert. denied, 546 U.S. 828 (2005).

#### *B. Hatley’s Various Arguments Regarding The Procedural Propriety Of The District Court’s Sentencing Decision Are Not Preserved, Fail On The Merits, Or Both*

Hatley contends that the district court’s sentencing decision was procedurally flawed on several grounds. First, he contends (Br. 38-44) that the district court erred by failing to discuss the 18 U.S.C. 3553(a) factors in sufficient detail. Second, he argues (Br. 34) that the district court did not sufficiently explain

why it chose consecutive sentences for the two counts rather than concurrent sentences. Third, he contends (Br. 36-37) that the district court confused him for another defendant, thereby depriving him of an individualized sentence. Finally, he argues (Br. 48-49) that as a procedural matter, it is not clear that the district court credited him under Guidelines § 5K1.1 for his cooperation with the United States' investigation. None of these arguments is meritorious.

*1. Hatley Did Not Preserve His Objection To The District Court's Explanation For Its Sentencing Decision, Which In Any Event Was Sufficient*

Hatley contends that the district court did not sufficiently explain its consideration of the Section 3553(a) factors, but he failed to make this argument before the district court and review is therefore only for plain error.<sup>7</sup>

Hatley cannot show that the district court erred, let alone plainly erred. That is because this Court has held that any error in failing to explain a sentence "is diminished when the sentence is within the Guidelines range," as is the case here. *United States v. Mondragon-Santiago*, 564 F.3d 357, 365 (5th Cir.), cert. denied, 558 U.S. 871 (2009). On appeal, this Court presumes that in reaching a sentence

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<sup>7</sup> Hatley's counsel stated that he "object[ed] to the sentence as being unreasonable." ROA.108. Under this Court's precedent, however, that "objection sufficed to alert the district court of his disagreement with the substance of the sentence, but not with the manner in which it was explained." *United States v. Mondragon-Santiago*, 564 F.3d 357, 361 (5th Cir.), cert. denied, 558 U.S. 871 (2009).

within the Guidelines range, the district court considered the Section 3553(a) factors. *Ibid.* (While reviewing a within-Guidelines sentence, “we ‘infer that the judge has considered all the factors for a fair sentence set forth in the Guidelines in light of the sentencing considerations set out in § 3553(a).’”) (quoting *United States v. Campos-Maldonado*, 531 F.3d 337, 338 (5th Cir.), cert. denied, 555 U.S. 935 (2008)). “[L]ittle explanation is required” where the sentence is within the Guidelines range. See *Mares*, 402 F.3d at 519. In reviewing the district court’s sentencing decision, this Court conducts a “totality-of-the-circumstances review into whether the district court evaluated the parties’ sentencing arguments and rooted its sentence in permissible sentencing factors.” *Diaz Sanchez*, 714 F.3d at 294.

The district court did so here. The court overruled Hatley’s objections before stating that it would “adopt the factual findings in the presentence report” and that it selected its 36-month sentence “based on [the defendant’s] personal history and personal characteristics and involvement in the current offense as well as the 5K motion and [the defendant’s] service to [his] country.” ROA.107. In so stating, the district court made clear that it took into account the Section 3553(a) factors, including the applicable Guidelines range that was reflected in the PSR, “the nature and circumstances of the offense and the history and characteristics of the defendant,” and “the need for the sentence imposed \* \* \* to reflect the

seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.” 18 U.S.C. 3553(a). Moreover, by adopting the United States’ Section 5K1.1 motion, the district court took into account several of the Section 3553(a) factors on which the motion relies in reaching the ultimate recommendation. ROA.184 (noting the recommendation accounted for Hatley’s culpability and the need to maintain proportionality of his sentence in relation to those of the other co-defendants).

This Court has held that such an explanation is sufficient, particularly where, as here, there was no objection to the explanation. See, *e.g.*, *United States v. Sharp*, 624 F. App’x 189, 194 (5th Cir. 2015) (finding an explanation was reasonable where the district court considered the Guidelines range and adopted the factual findings of the PSR); *United States v. Salazar-Garcia*, 294 F. App’x 92, 94 (5th Cir. 2008) (finding sufficient explanation where “the judge properly calculated and applied the advisory Guidelines sentence, and as justification for the sentence adopted the findings in the presentence report”). Hatley’s argument that “the district court failed to state or mention on the record that it had considered the §3553(a) factors” is contrary to this Court’s precedent, which does not require mechanical recitation of the factors. Br. 30 (emphasis omitted); *United States v. Smith*, 440 F.3d 704, 707 (5th Cir. 2006) (rejecting the argument that a district



court needs to “engage in robotic incantations that each statutory factor has been considered”) (citation and internal quotation marks omitted).

Hatley cites (Br. 38-39) *United States v. Key*, 599 F.3d 469 (5th Cir. 2010), cert. denied, 562 U.S. 1182 (2011), but that case does not help him. In *Key*, this Court rejected a defendant’s procedural reasonableness argument, holding that the district court could incorporate arguments made by the parties as a rationale for its sentence. *Id.* at 474-475. Applying that rule, the Court affirmed a 216-month sentence even though the Guidelines range was only 46 to 57 months. *Id.* at 472-473. *Key* confirms that the district court’s consideration of the Section 3553(a) factors in support of Hatley’s within-Guidelines sentence, including its acceptance of the United States’ recommendation in its Section 5K1.1 motion, was more than sufficient. Hatley’s argument that the district court’s rationale was insufficient therefore fails under any standard of review, particularly plain error review. See *Mondragon-Santiago*, 564 F.3d at 365.

2. *Hatley Did Not Preserve His Objection To The District Court’s Explanation Of The Need For A Consecutive Sentence, Which Was Also Sufficient*

Hatley contends (Br. 34) for the first time on appeal that the district court erred by failing to explain why it was imposing consecutive sentences for the two counts rather than concurrent sentences. Hatley’s argument is that this failure ran afoul of 18 U.S.C. 3584(b), which states that “[t]he court, in determining whether

the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 3553(a).” Hatley cannot show that the district court erred, let alone plainly erred, in imposing consecutive sentences. See *United States v. Izaguirre-Losoya*, 219 F.3d 437, 441 (5th Cir. 2000) (holding that plain error review applies where a defendant did not contemporaneously object to the volume of a district court’s reasoning in choosing consecutive over concurrent sentences), cert. denied, 531 U.S. 1097 (2001); see also *Setser v. United States*, 566 U.S. 231, 236 (2012) (“Judges have long been understood to have discretion to select whether the sentences they impose will run concurrently or consecutively with respect to other sentences that they impose.”).

As discussed above, the district court considered the Section 3553(a) factors, including Hatley’s “personal history and personal characteristics and involvement in the current offense.” ROA.107. Hatley’s contention (Br. 34) that the district court erred because it “failed to mention the term ‘3553(a) factors’ or to provide any indication that it had analyzed the §3553(a) factors” in deciding to impose a consecutive sentence is contrary to the record and applicable precedent. See *Izaguirre-Losoya*, 219 F.3d at 440 (finding sufficient consideration of the Section 3553(a) factors where the “district court was advised of those factors by the PSR and by the arguments of defense counsel” even absent any statement from the

district court regarding those factors); *United States v. Richardson*, 87 F.3d 706, 710 (5th Cir. 1996) (sufficient consideration of Section 3553(a) factors where the district court stated that the consecutive sentence “adequately address[ed] the sentencing objectives of punishment and deterrence”); see also ROA.107.

Hatley seems to suggest (Br. 34) that Section 3584 requires the district court to separately discuss the Section 3553(a) factors as to each count for which a consecutive sentence is imposed. Yet, Hatley cites no precedent for this proposition, and there is none. Courts have upheld district courts’ decisions to impose consecutive sentences where they considered the Section 3553(a) factors generally without requiring specific discussion of the Section 3553(a) factors as to each count. See, e.g., *United States v. Rutherford*, 599 F.3d 817, 821-822 (8th Cir.), cert. denied, 562 U.S. 938 (2010). Accordingly, the district court, by discussing the Section 3553(a) factors generally, provided sufficient reasoning for its selection of a consecutive sentence.

Even if Hatley could show error, which he cannot, the error would not be plain because his total punishment was within the Guidelines range. See *United States v. Kiel*, 658 F. App’x 701, 713 (5th Cir. 2016) (no plain error with regard to the reasoning for selection of a consecutive sentence where “the district court had the authority to render the sentence actually imposed”), cert. denied, 137 S. Ct. 650 (2017); see also *United States v. Candia*, 454 F.3d 468, 473 (5th Cir. 2006) (“[A]

rebuttable presumption of reasonableness \* \* \* applies to a consecutive sentence imposed within the parameters of the advisory federal guidelines.”); *United States v. Gonzalez*, 250 F.3d 923, 931 (5th Cir. 2001) (“[E]ven assuming that there was error and it was plain, we conclude that the total sentence imposed did not affect Gonzalez’s substantial rights because Gonzalez’s sentence is supported by the record and is not contrary to law.”).

3. *The Record Makes Clear That Hatley Was Provided With An Individualized Sentence*

Hatley’s argument that he was deprived of an individualized sentence also lacks merit. Hatley contends that the following statement attributed to the district court in the sentencing hearing transcript demonstrates that the court was confused about his identity: “I’m going to overrule [Hatley’s objections to the PSR] for two reasons: I remember your testimony in the Ackal trial and the reasons stated by the probation office.” Br. 37 (emphasis omitted); accord ROA.94. Because Hatley did not testify at Sheriff Ackal’s trial, he contends (Br. 37) that the court confused him for one of his fellow officer-defendants who did testify.

This argument fails for multiple reasons. First, there is no evidence that the district court deprived Hatley of an individualized sentence. On the contrary, the record clearly shows that the district court listened to Hatley’s extensive statement and discussed facts specific to him, such as his service abroad. ROA.100-107 (Hatley’s statement and district court’s response that the sentence accounted for

Hatley’s “service to [his] country”). Second, even if the district court mistakenly believed that Hatley testified at the *Ackal* trial, the court specifically referred to the probation officer’s response as an additional reason for overruling Hatley’s objections, and there is no question that the response and PSR on which the court relied addressed the facts and arguments that were specific to Hatley. ROA.94. Third, in reaching the ultimate sentencing decision, the district court relied on the United States’ Section 5K1.1 motion (ROA.107), which was tailored to Hatley’s specific conduct and which made clear that Hatley had not testified at the *Ackal* trial (ROA.184). Fourth, Hatley’s failure to make any contemporaneous objection or seek clarification of the district court’s statement suggests that even he did not believe that the district court was confused. A more plausible explanation is that the district court meant that it was taking into account *the* testimony at the *Ackal* trial—which touched upon Hatley’s role in the offense, the beating of S.S., and the impact on S.S., and was thus within the district court’s discretion to consider. See, e.g., ROA.657-659; ROA.737-740; ROA.841-843; ROA.919-921; ROA.930.

This Court applies a presumption of procedural regularity—that the district court has considered all the relevant factors and has issued an individualized sentence—where the sentence is within the Guidelines range. See *Campos-Maldonado*, 531 F.3d at 338-339. Because there is no evidence that Hatley was deprived of an individualized sentence, Hatley cannot rebut this presumption.

4. *The District Court Credited Hatley For His Substantial Assistance, And The Record Is Clear As To How It Did So*

Hatley erroneously argues (Br. 48-49) that the district court did not explain how he got credit for his cooperation with the United States' investigation. Hatley did not object during the sentencing hearing to the district court's explanation regarding the effect of the United States' Guidelines § 5K1.1 motion. Review of this question, therefore, is for plain error. See *Mares*, 402 F.3d at 520.

There was no error, let alone plain error. The district court gave credit under Section 5K1.1 to Hatley and explained as much at the sentencing hearing. Indeed, right after laying out the sentence, the district court explained that it "selected this based on [his] personal history and personal characteristics and involvement in the current offense *as well as the 5K motion*." ROA.107 (emphasis added). And, in the written statement of reasons that followed, the district court emphasized that the ultimate 36-month sentence was a downward departure from the 63- to 72-month Guidelines range and that it departed because of the "government motion for departure." ROA.133-134.

This decision fell well within the district court's discretion. See *United States v. Hashimoto*, 193 F.3d 840, 843 (5th Cir. 1999) ("District courts have almost complete discretion to determine the extent of a departure under § 5K1.1."). The PSR calculated Hatley's offense level as 26. ROA.147. The United States' Section 5K1.1 motion recommended a seven-level reduction in the offense level.

ROA.182-186. Accepting that recommendation resulted in a total offense level of 19, which, in light of Hatley's lack of criminal history, established a Guidelines range of 30 to 37 months (as opposed to the 63- to 72-month range in the PSR).

ROA.185. Hatley's 36-month sentence fell within that range. Hatley, therefore, benefited from the district court's acceptance of the United States' recommendation.

### III

#### **THE DISTRICT COURT'S WITHIN-GUIDELINES SENTENCE IS SUBSTANTIVELY REASONABLE AND DOES NOT CREATE ANY UNWARRANTED SENTENCING DISPARITIES**

##### *A. Standard Of Review*

This Court reviews a defendant's "sentence for substantive reasonableness under an abuse-of-discretion standard of review." *United States v. Duhon*, 541 F.3d 391, 399 (5th Cir. 2008). "When, in its discretion, a court imposes a sentence falling within a properly calculated guideline range, such a sentence is presumptively reasonable." *United States v. Medina-Argueta*, 454 F.3d 479, 481 (5th Cir. 2006). "Appellate review is highly deferential as the sentencing judge is in a superior position to find facts and judge their import under § 3553(a) with respect to a particular defendant." *United States v. Campos-Maldonado*, 531 F.3d 337, 339 (5th Cir.), cert. denied, 555 U.S. 935 (2008).

*B. The 36-Month, Within-Guidelines Sentence Does Not Create Any Unwarranted Sentencing Disparity And Is Substantively Reasonable In Light Of The Record*

Hatley contends (Br. 42-47) that the sentence was substantively unreasonable in relation to that of his co-defendants, notably Robert Burns. Hatley also contends (Br. 38-47) that the sentence was generally unreasonable in light of his specific conduct in the larger scheme of abuses by IPSO officers. Neither argument rebuts the presumption of reasonableness.

*1. Any Disparity In Sentences Between Hatley And His Co-Defendants, Including Robert Burns, Was Warranted Because Hatley, Unlike The Other Defendants, Pleaded Guilty To Violating 18 U.S.C. 1001*

Hatley's disparity argument (Br. 42-47)—which relies on the fact that Burns received a six-month sentence—fails because it ignores a major difference between Hatley and Burns: Burns pleaded guilty only to one misdemeanor count of violating 18 U.S.C. 242, while Hatley pleaded guilty to both that offense and a felony count of violating 18 U.S.C. 1001.

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 similarly situated defendants, *warranted* disparities are permissible. *United States v. Guillermo Balleza*, 613 F.3d 432, 435 (5th Cir.), cert. denied, 562 U.S. 1076



(2010). In assessing whether there is an unwarranted disparity, this Court looks to similar sentences of defendants nationwide who engaged in similar conduct. The “disparity factor requires the district court to avoid only unwarranted disparities between similarly situated defendants *nationwide*, and it does not require the district court to avoid sentencing disparities between co-defendants who might not be similarly situated.” *Ibid.* (emphasis added). In general, therefore, “[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.), cert. denied, 516 U.S. 901 (1995). 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).

Hatley has made no attempt to make the requisite showing: that his sentence varies so greatly from the sentences of defendants nationwide as to require appellate intervention. Rather, his argument (Br. 42-47) focuses narrowly on his co-defendants, particularly Burns. This narrow focus on his co-defendants rather than similarly situated defendants nationwide is fatal to his disparity argument, and he cannot rebut the presumption of reasonableness. See *McKinney*, 53 F.3d at 678. In addition, Hatley’s argument ignores the district court’s reliance on the United States’ 5K1.1 motion (ROA. 107), which (along with similar motions in the cases

of Hatley's co-defendants) was specifically designed to ensure the proportionality of the various sentences (ROA.184).

In any event, the comparison to Burns is flawed. Specifically, the sentencing difference between Hatley and Burns is warranted because they were convicted of different offenses. As noted above, Burns pleaded guilty only to a misdemeanor count of violating Section 242, while Hatley pleaded to both that offense and a felony offense of violating Section 1001. See Judgment, *United States v. Burns*, No. 16-cr-33 (W.D. La. Apr. 6, 2017). As this Court has held, “sentence disparities between co-defendants who were convicted of different charges \* \* \* are not unwarranted disparities under § 3553(a)(6).” *Guillermo Balleza*, 613 F.3d at 435; see also *United States v. Cedillo-Narvaez*, 761 F.3d 397, 406 (5th Cir.) (Defendant “was not similarly situated to [his] co-defendants, because they had been convicted of different offenses.”), cert. denied, 135 S. Ct. 764 (2014).

Hatley at various points in his brief suggests (Br. 45, 47) that an unwarranted disparity arises *because* he pleaded guilty to a Section 1001 count, which none of the other officers did even though they also lied to federal investigators. This, however, is not an appropriate disparity theory. Rather, the different charges between Hatley and Burns were the result of an exercise of unreviewable prosecutorial discretion. See *United States v. Molina*, 530 F.3d 326, 331 (5th Cir.

2008) (“[A]ny disparity resulting from the government’s prosecutorial decisions was not unwarranted because [precedent] permit[s] the government to choose between different statutory penalty schemes applying to the same conduct as long as its selection is not based upon an unjustifiable standard such as race, religion, or other arbitrary classification.”) (citation, internal citations, and internal quotation marks omitted).<sup>8</sup>

The difference in counts of conviction also fatally undermines Hatley’s contention (Br. 39, 42-43) that there was a disparity between his sentence and those of Ben Lassalle, Jason Comeaux, and Wade Bergeron. All of these defendants received *longer* total sentences than Hatley (54 months, 40 months, and 48 months, respectively). Hatley contends (Br. 43) that his sentence should be even shorter than it is in relation to these other defendants because his conduct during the course of the unlawful assaults was less central. However, again, unlike Hatley, none of those defendants pleaded guilty to violating 18 U.S.C. 1001.<sup>9</sup> The

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<sup>8</sup> Though unreviewable, the United States’ charging decision was based on permissible factors, such as differences between the defendants in levels of cooperation, the extent to which the defendants were forthcoming in correcting false statements, the level of assistance with the investigation into IPSO abuses, and the extent to which each defendant attempted to thwart the investigation. See *United States v. Stewart*, 590 F.3d 93, 184 n.20 (2d Cir. 2009), cert. denied, 559 U.S. 1031 (2010).

<sup>9</sup> Judgment, *United States v. Lassalle*, No. 16-cr-35 (W.D. La. Apr. 6, 2017); Judgment, *United States v. Comeaux*, No. 16-cr-45 (W.D. La. Apr. 6, (continued...))

differences in counts of conviction explain any supposed disparity, as discussed above.

Hatley also suggests (Br. 42) that there is a disparity between himself and Burns on the Section 242 count. Both Hatley and Burns pleaded guilty to misdemeanor violations of Section 242, and both received six-month sentences assigned to that offense. Hatley argues (Br. 42) that he should have received a shorter sentence than Burns because Burns intimidated an inmate with his dog while watching the abuses, whereas Hatley failed to intervene without engaging in any such conduct. Hatley did not make this argument to the district court, either in his written objections or in his motion to alter the sentence. See ROA.40-45; ROA.130-132. And, this count-by-count disparity theory finds no support in precedent, which is generally focused on differences in total punishment for similar conduct. Nevertheless, the factual record does not support the notion that Hatley was far less culpable than Burns with regard to the assault. There is record evidence that Hatley encouraged and initiated his fellow officer's action of forcing the victim to perform fellatio on the flashlight or baton. ROA.919-921; ROA.930. Accordingly, there is no basis to conclude that Burns and Hatley were so differently culpable that a six-month sentence for violating Section 242 is

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(...continued)

2017); Judgment, *United States v. Bergeron*, No. 16-cr-32 (W.D. La. Apr. 6, 2017).

inappropriate for both. And, as discussed above, the appropriate comparator is nationwide sentences, not merely that of one co-defendant.

In sum, an unwarranted disparity arises when a defendant is treated differently from other defendants charged with that same offense nationwide. It does not apply to co-defendants. It also does not apply where, as here, one defendant wishes he had a similar record to another defendant, but does not. Hatley voluntarily and freely pleaded guilty to a charge that Burns (and Lassalle, Comeaux, and Bergeron) did not. He cannot now seek to undo that pleading difference through a disparity argument.

2. *The District Court's 36-Month, Within-Guidelines Sentence Was Substantively Reasonable*

Hatley also challenges (Br. 38-47) the substantive reasonableness of his sentence on a number of other bases. This Court analyzes the substantive reasonableness of a sentence “by considering the totality of the circumstances, granting deference to the district court’s determination of the appropriate sentence based on the § 3553(a) factors.” *United States v. McElwee*, 646 F.3d 328, 337 (5th Cir. 2011) (citation and internal quotation marks omitted). The Court “may not reverse the district court’s ruling just because it would have determined that an alternative sentence was appropriate.” *United States v. Brantley*, 537 F.3d 347, 349 (5th Cir. 2008). The Court applies a presumption of reasonableness when reviewing a within-Guidelines sentence. *Campos-Maldonado*, 531 F.3d at 338.

That “presumption is rebutted only upon a showing that the sentence does not account for a factor that should receive significant weight, it gives significant weight to an irrelevant or improper factor, or it represents a clear error of judgment in balancing sentencing factors.” *United States v. Cooks*, 589 F.3d 173, 186 (5th Cir. 2009), cert. denied, 559 U.S. 1024 (2010).

As discussed above, the 36-month sentence was within the Guidelines range, which was calculated to include the United States’ departure recommendation (which in turn was designed to account for Hatley’s specific conduct along with his level of assistance). ROA.184-185. Accordingly, the sentence is entitled to a presumption of reasonableness. Hatley has not established any basis to rebut the presumption. He does not even argue that the district court considered an impermissible factor or that it committed clear error in balancing the factors. See *Cooks*, 589 F.3d at 186. Rather, Hatley’s sole argument is that the district court did not account for various factors that should have been given significant weight. But, as discussed below, the district court fully considered those factors.

*a. Nature Of Hatley’s 18 U.S.C. 242 Offense*

Hatley contends (Br. 39-40) that the district court did not consider the fact that he did not actually assault the victim and that his offense was not violent or ongoing in nature. Much of this is a rehash of his Guidelines argument that he should not be held responsible for the actual assault on S.S. because he merely

failed to intervene and did not actively beat the victim. See Br. 40 (contending that the district court erred because it “calculated a sentence and sentenced Mr. Hatley as if he actually committed an aggravated assault”). As discussed above, Hatley’s Guidelines calculation argument fails because there is no legal basis to deem a failure to intervene any less serious than engaging in the underlying conduct. See pp. 14-20, *supra*.

Moreover, factually, Hatley is incorrect when he contends (Br. 40) that the district court sentenced him “as if he actually committed an aggravated assault.” The district court was fully aware of Hatley’s specific role in the offense—that he failed to intervene and that his conduct was neither ongoing nor violent. Hatley said as much during his statement to the court during the sentencing hearing, where he repeatedly noted that his mistake was failing to act on one instance. ROA.100; ROA.103. Moreover, Hatley’s counsel also noted that Hatley’s offense was not as severe as those of the defendants who actually assaulted the victim. ROA.99-100. The PSR—the findings of which the district court adopted—also laid out the nature and circumstances of the offense conduct. ROA.143-144. The district court also sat through the five-day *Ackal* trial where it heard explicit details regarding the conduct of those who actually assaulted various inmates and others. Finally, the United States’ Section 5K1.1 motion, on which the district court relied, also took account of Hatley’s specific conduct and culpability. ROA.184. With all this

information, the district court selected the 36-month sentence and stated that it reached that conclusion based in part on Hatley's "involvement in the current offense." ROA.107. Simply put, there is no evidence for the proposition that the district court did not consider the nature of the Section 242 offense.

Hatley's argument amounts to little more than an assertion that he should have received a lower sentence. But, "[a] defendant's disagreement with the propriety of the sentence imposed does not suffice to rebut the presumption of reasonableness that attaches to a within-guidelines sentence." *United States v. Ruiz*, 621 F.3d 390, 398 (5th Cir. 2010); see also *United States v. Stephens*, 717 F.3d 440, 447 (5th Cir.) ("While Stephens attempts to minimize the severity of his offenses by noting that the offense conduct did not result in harm to any actual victims and that Stephens was led along by his co-conspirators and law enforcement agents, we fail to see how such arguments can overcome the presumption of reasonableness."), cert. denied, 134 S. Ct. 459 (2013).

*b. Nature Of Hatley's 18 U.S.C. 1001 Offense*

Hatley also contends (Br. 40) that the district court "did not review the circumstances surrounding the false statement violation." Hatley's argument (Br. 44) is that the 30-month sentence for his false statements violation is "patently unreasonable." Hatley fixates on the idea that the district court did not consider that he corrected his false statement within 30 days of making that statement.



Hatley, however, did not develop any record before the district court regarding this argument. He did not present any evidence about his speed of correction, and thus, there is no evidence in the appellate record on this issue. Hatley is seeking to develop that record for the first time on appeal but he cannot do so for the reasons stated in the United States' response to the motion to supplement. See Mot. Opp. 2-4 (citing *McIntosh v. Partridge*, 540 F.3d 315, 327 (5th Cir. 2008) ("As a general rule, this court 'will not enlarge the record on appeal with evidence not before the district court.'") (quoting *Trinity Indus., Inc. v. Martin*, 963 F.2d 795, 799 (5th Cir. 1992))). Hatley's argument (Br. 40) that the United States conceded that the district court did not consider the nature of the offense misstates the record. The United States contended that the district court considered the evidence regarding the nature of the offense that the parties presented to it but that Hatley strategically chose not to present evidence regarding the speed and motivation for correction of his false statement. Mot. Opp. 6-7. It was Hatley's responsibility to develop the record regarding the nature of the offense—not the district court's.

Hatley repeatedly and erroneously contends that his false statement "was not significant to the government's investigation" and "made no difference in the FBI's investigation." Br. 41, 44, 51; see also Br. 6 (arguing the false statement "had negligible or zero impact on the government's investigation"). This repeated

assertion lacks evidence. Had Hatley attempted to develop a record for this before the district court, the United States would have developed its own record that would have demonstrated how Hatley's false statement affected the investigation. See Mot. Opp. 7. The United States also would have been able to provide context for Hatley's motives in correcting his false statement and his other attempts to thwart the investigation. Indeed, testimony from the *Ackal* trial—which did not include a comprehensive summary of Hatley's obstructive behavior—suggests that Hatley likely conspired with at least one of his co-defendants to cover up the IPSO abuses during the FBI investigation. See ROA.599; see also ROA.571 (testimony that Hatley asked a co-defendant to lie in a deposition in a civil case).

The district court considered the nature and circumstances of the Section 1001 offense in light of the record before it. Hatley's contention on appeal is that it should have considered other evidence, evidence that Hatley did not put before the court and that would have been rebutted if he had. That is improper.

*c. Hatley's History And Characteristics*

Hatley argues (Br. 41-42) that the district court did not adequately consider his lack of criminal history, his family circumstances (including a child with a health issue), his law enforcement background, and his service to his nation. This ignores the record. The district court's Guidelines calculation was premised on Hatley's lack of criminal history. See ROA.147 (PSR calculation noting absence

of criminal history and “criminal history score of zero”). Moreover, the court expressly adopted the PSR, which contained detailed information regarding Hatley’s family circumstances, law enforcement background, and service abroad. ROA.107; ROA.148-150. The court also listened to statements from Hatley and his counsel, both of whom addressed each of these issues. ROA.97-107. And, in ultimately sentencing Hatley, the district court expressly noted that its sentence accounted for Hatley’s “personal history and personal characteristics” in addition to his “service to [his] country.” ROA.107.

The district court considered each of the personal history factors that Hatley contends (Br. 41-42) it should have. See ROA.107. Hatley argues that these mitigating factors should have led to a shorter sentence, but that is insufficient to rebut the presumption of reasonableness. See *United States v. Koss*, 812 F.3d 460, 472 (5th Cir. 2016) (Defendant’s “disagreement with the district court’s balancing of the mitigating factors in light of the § 3553(a) factors does not rebut the presumption of reasonableness that attaches to her within-Guidelines sentence.”), cert. denied, 137 S. Ct. 1812 (2017); *United States v. Duke*, 788 F.3d 392, 398 (5th Cir. 2015) (finding no abuse of discretion where “[t]he district court considered this mitigating evidence but determined that the nature and circumstances of the offense, the history and characteristics of the defendant, the need to reflect the

seriousness of the offense, and the need to deter future criminal conduct justified the sentence imposed”).

In sum, the district court—which had before it information regarding the roles of each defendant (including the various Section 5K1.1 recommendations) and five days of testimony in the *Ackal* trial—appropriately concluded that a within-Guidelines 36-month sentence was appropriate.

### CONCLUSION

This Court should affirm the district court’s judgment and 36-month sentence.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I certify that on July 3, 2017, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Vikram Swaruup  
VIKRAM SWARUUP  
Attorney

## **CERTIFICATE OF COMPLIANCE**

I certify pursuant to Federal Rule of Appellate Procedure 32(g) that the attached BRIEF FOR THE UNITED STATES AS APPELLEE:

(1) complies with the length requirements of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,999 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); 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 2013, in 14-point Times New Roman font.

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Date: July 3, 2017