No. 17-30298

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

BRET BROUSSARD,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not object to Bret Broussard'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 Broussard, 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 because there is overlap in the legal and factual issues presented. The appeals of the related cases are as follows:

- *United States* v. *Bergeron*, No. 17-30280
- *United States* v. *Hatley*, No. 17-30288 (raising some of the same United States Sentencing Guidelines and sentencing disparity issues as Broussard)
- *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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JURISDICTIONAL STATEMENT

This appeal is from a judgment of conviction and sentence under 18 U.S.C. 242 following a guilty plea. See ROA.306-314.[1] The district court had jurisdiction under 18 U.S.C. 3231, sentenced Bret Broussard to a 54-month term of incarceration, and entered its judgment on April 6, 2017. ROA.252-259.

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[1] "ROA.___" refers to page numbers of the Record on Appeal. "Br. ___" refers to page numbers in appellant's opening brief.

Broussard timely appealed on April 13, 2017. ROA.261. 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 correctly rejected Broussard's motion to vacate his guilty plea under the Federal Vacancies Reform Act.

2. Whether the district court used the correct range under the United States Sentencing Guidelines to sentence Broussard.

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

4. Whether the district court's selection of a 54-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) employees. 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 Bret Broussard, who had been a lieutenant in IPSO's narcotics unit.[2] ROA.319. Broussard admitted in his guilty plea to participating in one of the April 29, 2011, assaults in the jail's chapel: that of a pre-trial detainee identified as S.S. ROA.319. That day, Broussard arrived at the jail to assist with a shakedown, a process in which jail officials search inmates and their spaces for contraband. ROA.1076. As he was walking the halls, Broussard approached a narcotics unit officer, Byron "Ben" Lassalle, who had S.S. kneeling against a wall. ROA.1076. There were several officers present, and one of them asked the others what part of the jail did not have security cameras. ROA.319; ROA.1076-1077. After another officer indicated that the chapel lacked cameras, an IPSO supervisor told the officers to "take care" of S.S. ROA.319. Broussard knew that this meant that the other officers, including Lassalle, intended to use unlawful force against S.S. ROA.319; ROA.1077.

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[2] A total of 12 defendants were charged in connection with the IPSO abuses. Ten (including Broussard) 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) (Doc. 168). Broussard testified at the trial. ROA.1056-1106.

"Knowing their intent, and intending to further their unlawful objective," Broussard went with the other officers into the chapel. ROA.319; see also ROA.1077. There, Lassalle beat S.S.—who was kneeling, compliant, and presenting no threat to anyone—with a baton. ROA.319; ROA.1079. According to Broussard, Lassalle struck S.S. after swinging the baton from above his shoulder a half dozen times. ROA.1079-1080. S.S. reacted in pain to each strike. ROA.319. Nonetheless, Broussard admitted that he watched and did nothing, even though S.S. was compliant and not posing a threat, even though Broussard outranked Lassalle, and even though Broussard "recognized that he had a duty to intervene and stop the unjustified use of force." ROA.319-320; see also ROA.1080-1081; ROA.1092. Broussard also watched as Lassalle put the baton between his legs and into S.S.'s mouth, forcing S.S. to perform fellatio on the baton. ROA.1081-1082. Again, Broussard did nothing to intervene even though he had a duty and opportunity to do so. ROA.320.

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.596. 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 centimeters long by 5 centimeters wide." ROA.650-651. S.S.'s lip was also

swollen. ROA.419. 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.651.

Broussard also admitted in his testimony at Sheriff Ackal's trial to several other illegal uses of excessive force. For example, Broussard admitted that on April 29, 2011, after the assault of S.S., he came across another inmate named Anthony Daye. ROA.1085. Other officers had Daye subdued and compliant on his side, and Broussard walked up to them and struck Daye in the stomach region with his fist. ROA.1085-1086; ROA.1096; see also ROA.726-727. As a result of this assault and assaults by other officers, Daye suffered significant injuries. See ROA.629. Daye was in physical pain, emotional distress, and had to use a wheelchair because he could not walk for two to three weeks. ROA.1446-1447; see also ROA.629.

Broussard also admitted that he used excessive force "[d]ozens" of times before the April 29, 2011, incidents. ROA.1067. He admitted that one such instance occurred when he was a patrol deputy; he said that he made a "bad decision" and beat with a baton a man who had been mouthing off even though there was no risk of harm or flight. ROA.1066. He then named his baton after the man (Walter) and bragged about his use of excessive force. ROA.1066-1067.

Not only did Broussard personally use excessive force, he also was aware of numerous instances of excessive-force violations by his subordinates in the narcotics unit and did nothing to halt the violence of those who reported to him. ROA.1071. For example, Broussard witnessed two narcotics agents assault a man named Ricky Roche while Roche was shackled to a bench. ROA.1075. Broussard did nothing to stop or report this assault. ROA.1075. To the contrary, he conspired with the other officers to cover up the excessive-force violation; specifically, one officer assaulted the other after the incident to falsely concoct a narrative that Roche assaulted the officer and that the officers were merely defending themselves by beating Roche. ROA.882-883. Moreover, narcotics agents conducted "jump-outs"—where they would drive around town, jump out of their car, and throw citizens who were standing on the street to the ground for no reason. ROA.700-705. Broussard participated in these jump-outs and did nothing to stop the other officers who also participated in them even though he was their direct supervisor. ROA.704-705; see also ROA.713; ROA.1159-1161. As a result of this conduct, Broussard—along with Ben Lassalle and Jason Comeaux—was seen as among the worst offenders at IPSO, which was rife with excessive-force violations. See ROA.1121-1122.

Engaging in and condoning excessive force were not Broussard's only wrongful conduct. During his testimony, he also admitted to stealing money from

citizens whom he searched or arrested. ROA.1099. And Broussard also admitted that he lied to federal agents who were investigating the IPSO abuses. ROA.1078.

2. Procedural History

Broussard waived indictment and was charged via bill of information on February 23, 2016. ROA.8-11. The bill of information, which was signed by an Assistant United States Attorney and two attorneys from the Department of Justice's Civil Rights Division, was authorized by the United States Attorney for the Western District of Louisiana and the Principal Deputy Assistant Attorney General of the Civil Rights Division (whose names appeared in the signature block). ROA.9-10. Broussard pleaded guilty to violating 18 U.S.C. 242, which prohibits willful deprivation of rights under color of law. ROA.8-9; ROA.12. As part of his guilty plea, Broussard acknowledged that the maximum sentence for his conviction was ten years. ROA.267. Broussard also stipulated to a factual basis for the plea. ROA.318-321.

The United States Probation Office then prepared a presentence investigation report (PSR). ROA.329-352. In calculating the United States Sentencing Guidelines (Guidelines) range, the PSR calculated the offense level for Broussard's crime as 29 based on a cross-reference to the aggravated assault guideline. ROA.341-342. After taking into account adjustments for Broussard's acceptance of responsibility and his lack of criminal history, the PSR calculated the

Guidelines range as 63 to 78 months. ROA.342-343; ROA.350. Broussard submitted objections to the PSR to the Probation Office (ROA.362-372), and the Probation Office responded to those objections (ROA.353-361).

On February 21, 2017, nearly a year after his guilty plea and a month before his scheduled sentencing hearing, Broussard filed a motion to vacate the guilty plea and to dismiss the case. ROA.21-41. Broussard contended 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 under the Federal Vacancies Reform Act (Vacancies Act). ROA.26-41. The district court, after full briefing, denied the motion in a reasoned order. ROA.126-127. Specifically, the court found that Broussard had waived the Vacancies Act argument by pleading guilty because such a plea waives non-jurisdictional challenges and Broussard's challenge did not impact the court's jurisdiction. ROA.126-127. The court also concluded that Gupta was exercising a duty that could be delegated by the Assistant Attorney General and that the Vacancies Act did not apply to such responsibilities. ROA.127. Finally, the court concluded that even if the Vacancies Act barred Gupta's authorization, the United States Attorney had independent authority to enforce federal criminal laws and authorize the prosecution in this case. ROA.127.

The parties submitted pleadings in advance of Broussard's sentencing hearing. The United States objected to Broussard receiving credit under the Guidelines for acceptance of responsibility in light of his motion to dismiss. ROA.325-328. The United States also submitted a motion under U.S.S.G. § 5K1.1 recommending a six-level downward departure in offense level because of Broussard's substantial assistance in the federal investigation of the IPSO abuses. ROA.406-410. Accepting the United States' recommendations would result in a 46- to 57-month Guidelines range. ROA.410. Broussard submitted a sentencing memorandum advocating for a probationary sentence. ROA.377-399.

The district court ruled on these matters at the sentencing hearing. ROA.290-304. The court first overruled the government's objection to the acceptance-of-responsibility adjustment because it found that Broussard had accepted responsibility but was merely following counsel's advice in filing the motion to dismiss. ROA.292. The court also overruled Broussard's objections, citing the Probation Office's responses to those objections. ROA.292. The court then denied Broussard's request for the court to reconsider the ruling on the motion to dismiss because the "U.S. Attorney has the power to" bring the prosecution and because Broussard "probably waived [the argument] in pleading guilty." ROA.293. The court then heard from Janet Franks, a citizen whom Broussard had assisted in his role as a narcotics agent, and Broussard himself, who apologized to

his family and to the victim. ROA.293-300. Counsel for the United States stated that the government would rely on its pleadings but reiterated that Broussard had been helpful to the government's investigation and that Broussard had been introspective about his wrongdoing. ROA.301-302.

The district court adopted the factual findings in the PSR and sentenced Broussard to a 54-month term of incarceration. ROA.302-303. The court stated that it "selected [the sentence] after considering all of the factors of [18 U.S.C.] 3553, [Broussard's] history, [his] characteristics, [his] involvement in the offense, as well as the statutory provisions and the 5K motion." ROA.303. The court expressed its dismay over the fact that no one came forward "four or five years ago"—a "long time"—to spotlight the IPSO abuses. ROA.304.

The district court subsequently entered its written judgment and statement of reasons. ROA.254-259; ROA.373-376. There, the court reiterated that the Guidelines sentencing range was 63 to 78 months before departures or variances and that it had departed downward to the 54-month sentence because of the United States' Section 5K1.1 motion. See ROA.373-374.

Broussard filed a motion for bail pending appeal (ROA.199-206), which the district court summarily denied (ROA.260). Broussard filed a timely notice of appeal thereafter. ROA.261. Broussard then renewed his motion for bail pending appeal before this Court, which also denied the motion. ROA.429.

SUMMARY OF ARGUMENT

This Court should affirm the district court's judgment and Broussard's within-Guidelines, 54-month sentence.

Broussard's argument that his case should have been dismissed under the Vacancies Act lacks merit for the three reasons identified by the district court. First, he waived that argument by pleading guilty. An unconditional guilty plea waives all non-jurisdictional challenges to a conviction. Even if Broussard were correct on the merits of his Vacancies Act claim, that would only affect the government's authority to bring this case against him, not the district court's power to hear the case. Under such circumstances, an unconditional guilty plea waives the challenge. Second, Broussard's claim fails on the merits. The Vacancies Act restricts only who can perform non-delegable duties of an office in the absence of a Presidentially appointed, Senate-confirmed officer. Authorizing criminal prosecutions is a delegable duty of the Assistant Attorney General. The Vacancies Act does not limit who can perform such a delegable duty, and thus, did not preclude the Principal Deputy Assistant Attorney General from authorizing this case. Third, even if there were some issue with the Principal Deputy Assistant Attorney General's authorization, the prosecution also was authorized by the United States Attorney for the Western District of Louisiana, who has independent authority to enforce federal criminal laws in her district.

The district court used the correct Guidelines range to sentence Broussard. Broussard's argument to the contrary is that he should not be held responsible for the assault of S.S. because although he failed to intervene, he did not personally beat the victim. This finds no support in 18 U.S.C. 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 Broussard responsible for harms resulting from his entire course of conduct, all conduct that he aided or abetted, and 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 Broussard's failure to intervene, and it was foreseeable to and aided by Broussard, who knew that his fellow officers intended to use unlawful force but willfully did nothing to stop it. Contrary to Broussard'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 Broussard responsible for the entire course of the assault and the resulting harms under the Guidelines.

Broussard's remaining Guidelines arguments also lack merit. The district court correctly applied enhancements for physical restraint of the victim, bodily injury to the victim, and use of a dangerous weapon because all of this was

foreseeable to Broussard before the beating commenced. Finally, Broussard argues for the first time on appeal that he played only a minor role in the beating. The district court did not plainly err in rejecting a minor-role adjustment because Broussard was the direct supervisor of the officer who actually beat S.S. and thus had the greatest opportunity to intercede to halt the assault.

The district court also acted reasonably in the sentencing process. Broussard argues for the first time on appeal that the district court provided inadequate reasoning for its within-Guidelines sentence. The court, however, adopted the factual findings in the PSR and acknowledged that it had considered the relevant factors and Broussard's conduct, history, and cooperation. Under this Court's case law, a more detailed explanation is unnecessary. The same is true of the court's explanation of its downward departure under U.S.S.G. § 5K1.1. The district court has broad discretion to depart downward under that provision if the United States files a motion explaining that the defendant provided substantial assistance to an investigation. The United States filed such a motion here, which the district court expressly considered along with its own perception of Broussard's testimony at Sheriff Ackal's trial. The court departed downward significantly pursuant to the United States' recommendation. This was well within its discretion.

Broussard's argument that he was not provided an individualized sentence is belied by the record. At the sentencing hearing, the district court provided

reasoned rulings on motions that were specific to Broussard and heard from a community member whom Broussard assisted, Broussard himself, and counsel for the United States, who described Broussard's particular cooperation and reflections on the offense. The court also acknowledged that it had considered Broussard's specific offense and characteristics, along with the PSR and the United States' Section 5K1.1 motion, both of which were tailored to Broussard's circumstances. There is no evidence for the proposition that Broussard's sentence was anything but individualized.

Broussard's within-Guidelines, 54-month sentence was also substantively reasonable. Broussard admitted that he failed to intervene while Ben Lassalle (whom Broussard supervised) assaulted S.S.; that he perpetrated dozens of other excessive force violations; and that he failed to stop a culture of abuse in the narcotics unit, which he also supervised. In light of the breadth of his conduct and his supervisory role, a 54-month sentence was reasonable. This Court should reject Broussard's invitation to reweigh the relevant factors.

Broussard's disparity arguments also do not render the sentence unreasonable because he ignores the applicable legal standard, which requires him to compare his sentence to those of defendants who engaged in similar conduct nationwide. Instead, Broussard focuses narrowly on his co-defendants—a comparison that is both legally and factually flawed. Specifically, unlike the co-

defendants who received lower sentences, Broussard was a supervisor who had a more direct opportunity to halt not only the abuse of S.S. but also other IPSO narcotics unit abuses. The district court was well within its discretion to consider these factors and to sentence Broussard to 54 months.

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 in this brief addresses Broussard's motion to vacate

his guilty plea before turning to: (1) the Guidelines calculation; (2) other procedural issues; and (3) substantive reasonableness.

I

BROUSSARD WAIVED HIS FEDERAL VACANCIES REFORM ACT ARGUMENT THROUGH HIS GUILTY PLEA, AND THE ACT DOES NOT PRECLUDE THIS PROSECUTION

A. Standard Of Review

This Court reviews de novo the district court's denial of Broussard's motion to vacate his guilty plea and dismiss the indictment. See *United States* v. *Kay*, 513 F.3d 432, 440 (5th Cir. 2007), cert. denied, 555 U.S. 813 (2008).

B. The District Court Correctly Rejected Broussard's Federal Vacancies Reform Act Argument, Which Was Waived And Fails On The Merits

Broussard argues (Br. 9-26) that the Federal Vacancies Reform Act (Vacancies Act) precluded Vanita Gupta, who was the Principal Deputy Assistant Attorney 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. This argument fails for three independent reasons, as the district court correctly held. ROA.126-127.

1. Broussard Waived His Vacancies Act Argument By Pleading Guilty

The district court correctly concluded that 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; see also ROA.293.

An unconditional guilty plea waives all non-jurisdictional challenges to a defendant's prosecution. See *United States* v. *Bell*, 966 F.2d 914, 915 (5th Cir. 1992). Because Broussard moved to dismiss his case under the Vacancies Act nearly one year after he unconditionally pleaded guilty to violating 18 U.S.C. 242 (ROA.21-41), he waived all non-jurisdictional challenges to the bill of information and prosecution. Accordingly, the sole question before this Court is whether the Vacancies Act challenge is jurisdictional.

A jurisdictional challenge is one that challenges "*the court's* very power to hear the case." *United States* v. *Scruggs*, 691 F.3d 660, 666 (5th Cir. 2012) (emphasis added), cert. denied, 133 S. Ct. 1282 (2013). Broussard, however, disputes the *government's* power to prosecute a case—not the *court's* power to hear it. His Vacancies Act challenge is therefore non-jurisdictional and waived. See *United States* v. *Yousef*, 750 F.3d 254, 260 (2d Cir.) (holding 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"), cert. denied, 135 S. Ct. 248 (2014).

Broussard's contention (Br. 20-21) that the lack of signature by a proper authorizing official creates a jurisdictional defect is foreclosed by this Court's precedents. This Court has held that defects affecting the government's authority to file an indictment does not create a jurisdictional problem. See *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 by a guilty plea), cert. denied, 502 U.S. 1045 (1992); *United States* v. *Surty*, 68 F.3d 467 (5th Cir. 1995) (holding that "any defect concerning the signature by the attorney for the Government was waived by [the defendant's] guilty plea"). Other courts have agreed that an unconditional guilty plea waives arguments challenging the government's authority to prosecute the case. For example, the Eighth Circuit has held that a defendant's guilty plea waived his arguments that the independent counsel who authorized his prosecution was improperly appointed and exceeded his authority. See *United States* v. *Fitzhugh*, 78 F.3d 1326, 1330, cert. denied, 519 U.S. 902 (1996).

Ignoring these cases, Broussard cites (Br. 20) *United States* v. *Cox*, 342 F.2d 167 (5th Cir.) (en banc), cert. denied, 381 U.S. 935 (1965). But that case has nothing to do with the effect of a guilty plea on later filed challenges to the indictment. Rather, there, this Court held that deciding whether to sign and

prepare an indictment was committed to the discretion of the executive branch and that the judicial branch could not order executive officers to sign or prepare such indictments. See *Easton*, 937 F.2d at 162 (explaining that "*Cox* did not decide whether the government attorney's signature is a jurisdictional or procedural requirement").

Broussard's argument (Br. 21) that there are constitutional aspects to the Vacancies Act also does not make his challenge jurisdictional. To the contrary, even constitutional challenges to the appointment of the prosecuting official, which this case does not present, are not jurisdictional challenges. See *United States* v. *Suescun*, 237 F.3d 1284, 1288 (11th Cir.) ("[E]ven if we were to assume that Keefer's appointment as temporary United States Attorney was invalid—because it was not made in conformance with the Appointments Clause—we conclude that the appointment did not deprive the district court of jurisdiction to entertain the case.") (footnote omitted), cert. denied, 534 U.S. 863 (2001).[3]

The district court therefore correctly concluded that the Vacancies Act challenge was waived, and this ends the inquiry.

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[3] The D.C. Circuit's decision in *SW Gen., Inc.* v. *NLRB*, 796 F.3d 67 (D.C. Cir. 2015), which Broussard also cites (Br. 25-26), similarly has no bearing on this question. The court there considered the validity of a timely challenge to an unfair labor practice complaint, not an indictment to which the defendant previously pleaded guilty.

2. The Vacancies Act Claim Fails On The Merits Because The Statute Only Restricts Who Can Perform Non-Delegable Duties, And Authorizing Prosecution Is A Delegable Duty

Broussard's claim also fails on the merits. Broussard argues (Br. 10-17) that the Vacancies Act prohibited Gupta from authorizing his prosecution because she was not a Presidentially appointed, Senate-confirmed (PAS) Assistant Attorney General or the Acting Assistant Attorney General 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; 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 officer, 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. 3346-3347. For those periods of time during which there can be no acting officer, 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).[4]

Importantly, however, the Vacancies Act 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. The limitation 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); see also 5 U.S.C. 3348(a)(2)(B). The Department of Justice's Office of Legal Counsel and the legislative history make clear that this restricts the performance and supervision of only non-delegable duties, and that "[m]ost, and in many cases all, the responsibilities performed by a

[4] Under the Vacancies Act, the first assistant to a vacant office "shall perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations of section 3346." 5 U.S.C. 3345(a)(1). Section 3346, in turn, states that an acting officer can serve in that capacity "for no longer than 210 days beginning on the date the vacancy occurs" or, if a nomination is rejected by the Senate or withdrawn, "the person may continue to serve as the acting officer for no more than 210 days after the date of such rejection, withdrawal, or return." Here, Gupta was appointed Principal Deputy Assistant Attorney General for the Civil Rights Division on October 19, 2014. Because the office of Assistant Attorney General for the Civil Rights Division was vacant at the time of her appointment, she automatically took on the duties and authorities of the Acting Assistant Attorney General by operation of section 3345(a)(1). ROA.81-85. Because the President's nomination of Debo Adegbile as Assistant Attorney General for the Civil Rights Division was withdrawn on September 15, 2014, the 210-day period during which an individual (in this case, Gupta) may serve as Acting Assistant Attorney General had already started to run. That period expired on April 13, 2015, at which point Gupta continued to serve only as Principal Deputy Assistant Attorney General with no Assistant Attorney General.

PAS officer" are delegable. ROA.66-79 (question 48); see also S. Rep. No. 250, 105th Cong., 2d Sess. 17-18 (1998) (stating that Section 3348 deals only with "non-delegable functions or duties"). 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.

Under 5 U.S.C. 3348, the Court must look to the relevant statute or regulation that creates the function or duty of the office to determine whether the relevant duties at issue were delegable. Here, 18 U.S.C. 242, the statute under which Broussard was charged, does not assign any function or duty to the office of the Assistant Attorney General. Accordingly, the Court must look to whether the regulation that assigns functions and duties to that office, 28 C.F.R. 0.50, establishes delegable or non-delegable duties. See ROA.89-90.

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 or regulatory language or unmistakable implication from the legislative history. See *United States Telecom Ass'n* v. *FCC*, 359 F.3d 554, 565 (D.C. Cir.) ("When a statute delegates authority to a federal officer or agency, subdelegation to a subordinate federal officer or agency is presumptively

permissible absent affirmative evidence of a contrary congressional intent."), cert. denied, 543 U.S. 925 (2004). 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, under the Vacancies Act, Gupta could perform 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).[5]

3. Any Vacancies Act Issue Has No Effect Here Because The United States Attorney Also Authorized This Prosecution

Even if there were some issue with Gupta's authorization of the bill of information, Broussard's prosecution was also authorized by the United States Attorney for the Western District of Louisiana, whose name appears on the bill of information. ROA.9. Under 28 U.S.C. 547, "each United States attorney, within his district, shall * * * prosecute for all offenses against the United States."

[5] Contrary to Broussard's argument (Br. 11-12), *NLRB* v. *SW Gen., Inc.*, 137 S. Ct. 929 (2017), is 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.

Accordingly, as the district court correctly held, "even if Ms. Gupta acted in violation of the [Vacancies Act], 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.

Broussard contends that because the United States Attorneys' Manual (U.S.A.M.) does not give each United States Attorney "complete power/authority to *decline* a civil rights prosecution," the United States Attorney's authorization of the bill of information is meaningless. Br. 18-19 (emphasis added). In making this argument, however, Broussard ignores numerous other provisions of the U.S.A.M., which, consistent with 28 U.S.C. 547, give United States Attorneys the power to *authorize* prosecutions for violations of criminal civil rights laws. See, *e.g.*, U.S.A.M. § 8-3.010, https://www.justice.gov/usam/united-states-attorneys-manual (last updated July 2017) ("The United States Attorney is responsible for the enforcement of criminal civil rights statutes in accordance with the procedures set forth below"); U.S.A.M. § 8-3.120 ("[E]ither the Civil Rights Division or a United States Attorney's Office (USAO) may investigate and prosecute on its own any type of criminal civil rights violation."); U.S.A.M. § 8-3.140 ("United States Attorneys need not obtain prior authorization by the Civil Rights Division to indict criminal civil rights cases, unless the case has been deemed by the Assistant

Attorney General as a case of national interest or unless approval is required by statute.").

Accordingly, even if the Vacancies Act prohibited Gupta from authorizing the prosecution, Broussard was not prejudiced because the United States Attorney had independent authority under 28 U.S.C. 547 and the U.S.A.M. to prosecute him.

II

THE DISTRICT COURT USED THE CORRECT GUIDELINES RANGE TO SENTENCE BROUSSARD

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). Plain error review applies, however, if the defendant did not object to particular Guidelines calculations. See *United States* v. *Mudekunye*, 646 F.3d 281, 287 (5th Cir. 2011). This standard requires the defendant to "show a clear or obvious error that affects his substantial rights," and even if this showing is made, this Court "has discretion to correct that error, and generally will do so only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Ibid.*

B. The District Court Correctly Calculated Broussard's Sentencing Range

1. The District Court Correctly Used The Aggravated Assault Guideline To Determine Broussard's Offense Level And Correctly Applied The Related Enhancements Because Broussard Is Responsible For The Entire Scope Of His Conduct And The Resulting Harm

Broussard's principal Guidelines argument (Br. 28-32) is that the district court should not have used the aggravated assault guideline to calculate his base offense level because he merely failed to intervene to stop an assault. By failing to intervene, however, Broussard is accountable under 18 U.S.C. 242 and the Guidelines for his fellow officers' conduct.

As a threshold matter, 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 Broussard 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. Broussard is responsible for this violation and the consequences thereof.[6]

Broussard is also accountable for the resulting assault under the Guidelines. A defendant is responsible for any relevant conduct, which includes "all acts and

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[6] Failing to intervene is not, as Broussard suggests (Br. 32), "decidedly less severe" 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 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 may make the underlying uses of excessive force worse and harder to stop.

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).[7]

Under the Guidelines, 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,

[7] Though defendants who fail to intervene are legally similarly situated to those who perpetrate assaults, defendants like Broussard 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.

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, U.S.S.G. § 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 Lassalle beat S.S. with a baton and that the beating led to bodily injury to S.S. (ROA.334); therefore there is no dispute that Lassalle committed the underlying offense of aggravated assault.

The only question is whether the district court erred by holding Broussard accountable for that aggravated assault. It did not, because Lassalle's conduct was within *Broussard*'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 on other grounds, 518 U.S. 81 (1996). Broussard aided and abetted the assault because he willfully chose not to intervene even though he "knew that he had the duty to intervene" and had "the

opportunity to do so." ROA.320; see also U.S.S.G. § 1B1.3(a)(1)(A). Though he was not charged with conspiring with the other officers, Broussard knew that his fellow officers "intended to use unlawful force against inmate S.S." before the assault began; nevertheless, he chose to participate in the assault and intended to further the other officers' unlawful objective by not intervening to stop it. ROA.319; see also ROA.1077. The other officers' conduct becomes Broussard's relevant conduct because the aggravated assault was the foreseeable result of the criminal activity that Broussard jointly undertook with his fellow officers by failing to intercede. U.S.S.G. § 1B1.3(a)(1)(B).

Broussard is also directly responsible for the aggravated assault. Broussard'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 Broussard's failure to act was the aggravated assault of S.S., as Broussard 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."). Accordingly, use of the aggravated assault guideline to calculate Broussard's base offense level was appropriate.

In addition to challenging the base offense level, Broussard also contends (Br. 33-34) that the district court should not have applied the bodily injury, physical restraint, or deadly weapon enhancements to his base offense level. His argument on all three enhancements is that his failure to intervene did not involve injury, restraint, or use of a weapon.

Broussard ignores that none of these enhancement Guidelines requires that the defendant personally engage in the enhancement conduct. To the contrary, the Guidelines provide for enhancements "[i]f a victim was physically restrained in the course of the offense," "[i]f the victim sustained bodily injury" during an assault, and where "a dangerous weapon (including a firearm) was otherwise used" in an assault. U.S.S.G. § 2A2.2(b)(2)(B); U.S.S.G. § 2A2.2(b)(3); U.S.S.G. § 3A1.3. Courts have therefore consistently applied these enhancements even where the defendant did not personally cause the bodily injury, restrain the victim, or use the weapon. See *United States* v. *Old Chief*, 571 F.3d 898, 900-902 (9th Cir.) (applying dangerous weapon and physical restraint enhancements to a defendant who aided an assault where those elements were foreseeable), cert. denied, 558 U.S. 1016 (2009); *United States* v. *Lister*, 229 F. App'x 334, 340 (5th Cir.) (for bodily injury enhancement, "the injury sustained, *not* the actions of the defendant,

should be the focus of the inquiry"), cert. denied, 552 U.S. 967 (2007); *United States* v. *Jourdain*, 433 F.3d 652, 658 (8th Cir.) (applying dangerous weapon enhancement where defendant was aware of dangerous weapon that was subsequently used by a co-defendant), cert. denied, 547 U.S. 1139 (2006); *United States* v. *Santiago*, 200 F. App'x 928, 934 (11th Cir. 2006) (applying physical restraint enhancement to defendant who did not personally restrain the victim because restraint "was reasonably foreseeable given the nature of the offense"), cert. denied, 549 U.S. 1241 (2007); *United States* v. *Cavender*, 228 F.3d 792, 802 (7th Cir. 2000) (noting that "if the act of restraint was committed by a co-conspirator in furtherance of the conspiracy, and if the act was reasonably foreseeable to Montague, then it may be considered relevant conduct for purposes of Montague's sentencing"), cert. denied, 532 U.S. 1023 (2001); see also *United States* v. *Wilson*, 686 F.3d 868, 873 (8th Cir. 2012) (applying aggravated assault guideline and bodily injury enhancement where jail administrator encouraged inmates to assault a fellow inmate), cert. denied, 133 S. Ct. 873 (2013).

Broussard does not contend that it was not foreseeable to him that S.S. would be physically restrained and suffer bodily injury or that Lassalle would use a dangerous weapon (a baton). To the contrary, as Broussard's own admissions make clear, he knew of the other officers' intent and he intended to further their

unlawful conduct. ROA.319-320; ROA.1077. Accordingly, the district court correctly calculated the Guidelines range.

2. The District Court Was Within Its Discretion Not To Apply A Minor Role Adjustment Because Broussard Was A Supervisor And Did Not Object To The Presentence Report On This Basis

Broussard also contends (Br. 34-35) that he should have been given a two-level downward adjustment of his offense level under U.S.S.G. § 3B1.2 because he played only a minor role in the offense. Broussard, however, did not object to the PSR on this basis or otherwise make this argument to the district court. See ROA.362-372. Review therefore is only for plain error.

There is no error, let alone plain error. 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).

Broussard bears the burden of proving that he played only a minor role, but he did not make this argument to the district court, let alone present any evidence on it. That alone ends the inquiry. In any event, Broussard's participation was not minor. Broussard is one of several IPSO officers who were present when Lassalle assaulted S.S. and who failed to intervene. ROA.819; ROA.822-823; ROA.899-902; ROA.1003-1004. Only one officer actually assaulted S.S., and there is no evidence that among the officers who failed to intervene, Broussard was peripheral. To the contrary, as a lieutenant in the narcotics unit, Broussard was the direct supervisor of Lassalle, who was a narcotics agent and who perpetrated the assault. Broussard was, among the officers present in the chapel during the assault of S.S., uniquely suited to reprimanding Lassalle or otherwise stopping the abuse. But he chose not to do so. Indeed, Broussard acknowledged that he failed to intervene "despite being one of the senior officers in the chapel." ROA.320.

Broussard's argument (Br. 34-35) strips the assault of the context in which it occurred. Specifically, Broussard was well aware of the pattern of excessive force violations at IPSO, as he was both a supervisor and a participant in much of that wrongful conduct. See pp. 5-6, *supra*. In light of that knowledge, he knew exactly

what was about to happen when he heard officers, including those who reported to him, discussing what part of the jail lacked cameras while S.S. was held on his knees in the hallway. ROA.319; ROA.1077. Despite having all of this information, Broussard not only failed to intervene but also assaulted another inmate on the same day. ROA.1085-1086. In sum, considering the context of his knowledge, history, and other conduct later in the day, Broussard was a central player in the abuse of S.S. and in the IPSO abuses more broadly.

In light of the record, Broussard is, at a minimum, not *more* peripheral to the assault when compared to other officers who were not a part of the narcotics unit (such as Robert Burns, Jeremy Hatley, and Wesley Hayes) or who were not supervisors. Accordingly, the district court's decision not to apply the minor-participant adjustment was plausible in light of the record developed at the trial of Broussard's co-defendant, Sheriff Ackal. See *United States* v. *Perez-Solis*, 709 F.3d 453, 469 (5th Cir. 2013).

III

THE DISTRICT COURT ACTED REASONABLY IN THE SENTENCING PROCESS AND PROVIDED SUFFICIENT REASONING FOR ITS WITHIN-GUIDELINES SENTENCE

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). As noted above, 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. The District Court Did Not Err, Let Alone Plainly Err, In The Sentencing Process And In Explaining Its Within-Guidelines Sentence

Broussard contends (Br. 43-47) that the district court did not adequately explain its consideration of the 18 U.S.C. 3553(a) factors or the United States' Section 5K1.1 motion and that the district court denied him an individualized sentence. Because Broussard did not raise any of these purported procedural errors before the district court, this Court reviews them for plain error only. See ROA.128-129 (objecting only to substantive unreasonableness).

1. The District Court Sufficiently Explained Its Sentence By Noting That It Had Considered The Section 3553(a) Factors, The Guidelines Calculation, And The Factual Findings In The PSR

The district court did not err, let alone plainly err, in providing its explanation of the Section 3553(a) factors. 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 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 adopted the factual findings in the PSR and made clear to Broussard that it selected the 54-month sentence "after considering all of the factors of 3553, your history, your characteristics, your involvement in this offense, as well as the statutory provisions and the 5K motion." ROA.302-303. The court—which had heard five days of trial testimony, including Broussard's—evaluated the parties' arguments, including by rejecting the United States' objection to the acceptance-of-responsibility adjustment and by denying

Broussard's request to reconsider the ruling on the motion to vacate the guilty plea, and rooted its sentence in permissible factors. ROA.292-293.

This Court has held that a district court's adoption of the PSR and statement that it had considered the Section 3553(a) factors 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"). The district court was not required to do more. See *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).[8]

[8] Broussard contends (Br. 43-44) that the sentence is an insufficiently explained *downward* departure from the Guidelines range. This argument fails because if there were such an error, it would redound to the benefit of Broussard. In general, the United States challenges unexplained downward departures (as was the case in *United States* v. *Harris*, 293 F.3d 863 (5th Cir.), cert. denied, 537 U.S. 950 (2002), which Broussard cites), and defendants challenge unexplained upward departures. In any event, there was no error, let alone plain error, because the district court both at the sentencing hearing and in its written statement of reasons

(continued…)

2. The District Court Was Not Required To Mechanically Consider Each Of The Section 5K1.1 Factors

Broussard also now contends (Br. 44-45) that the district court erred by failing to explain its consideration of the Section 5K1.1 factors. He raised no such objection to the district court, nor did he present any argument regarding how the district court should have considered the factors. Review is therefore only for plain error.

Under Section 5K1.1, "upon [a] motion of the government stating that the defendant has provided substantial assistance," the district court may depart downward for a range of reasons. The basis for a downward departure under this section includes, but is not limited to, the court's view as to the significance of the assistance, the truthfulness of the defendant's testimony, the nature of the defendant's assistance, any injury suffered by the defendant, and the timeliness of the defendant's assistance. U.S.S.G. § 5K1.1. Section 5K1.1 makes clear that the court must take "into consideration the government's evaluation of the assistance rendered" and that "[s]ubstantial weight should be given to the government's evaluation of the extent of the defendant's assistance." U.S.S.G. § 5K1.1(a)(1); U.S.S.G. § 5K1.1 cmt. n.3.

(…continued)
pointed to the United States' Section 5K1.1 motion as the basis for the departure. ROA.303; ROA.373-374.

Applying these standards, this Court has held that a "district court has almost complete discretion to determine the extent of a departure under § 5K1.1." *United States* v. *Cooper*, 274 F.3d 230, 248 (5th Cir. 2001). "The only ground on which the defendant can appeal the extent of a departure is that the departure was a violation of law." *United States* v. *Hashimoto*, 193 F.3d 840, 843 (5th Cir. 1999). Citing *United States* v. *Johnson*, 33 F.3d 8, 10 (5th Cir. 1994), Broussard points to (Br. 44-45) only one legal error: that the district court did not "conduct[] a judicial inquiry into [his] individual case before independently determining the propriety and extent of any departure."[9] Contrary to Broussard's assertion, however, *Johnson* does not require a district court to expressly discuss each Section 5K1.1 factor. Rather, *Johnson* holds only that a district court cannot limit itself to the government's recommendation or blindly defer to that recommendation. See *ibid.* (reversing because it was "not clear from the record whether the district court felt compelled, as appellants suggest, to deny a departure greater than that recommended by the government"). This Court has not reversed a district court's departure for lack of individualized consideration since *Johnson*. To the contrary,

[9] Broussard has not contended that the district court here considered "non-assistance-related factors in determining the extent of the § 5K1.1 departure," and there is no evidence that the court did so. See *United States* v. *Desselle*, 450 F.3d 179, 183 (5th Cir. 2006), cert. denied, 549 U.S. 1179 (2007). Accordingly, this case does not implicate the only other legal constraint on the district court's generally unbridled discretion regarding Section 5K1.1 motions.

the Court more recently recognized that reversal was appropriate in *Johnson* only because "the [district] court appeared to have a self-imposed policy of wholly deferring to the Government's recommendation in U.S.S.G. § 5K1.1 departures." *United States* v. *Perez-Gutierrez*, 435 F. App'x 413, 416 (5th Cir. 2011).

Unlike in *Johnson*, there is no evidence here that the district court had a policy of blindly deferring to the government's recommendation. To the contrary, the district court considered the government's recommendation and declined to fully accept it. And the district court heard additional information from counsel for the United States regarding the extent of Broussard's cooperation. ROA.301 (counsel's statement that "Mr. Broussard spent * * * considerable time with us in order to help us prepare in order to bring these abuses to light"). Finally, the court stated only that it considered the Section 5K1.1 motion, not that it adopted the recommendations in that motion. ROA.303. No authority required the district court to mechanically discuss each of the Section 5K1.1 factors or to provide a detailed explanation as to the extent of its departure under that section, and Broussard presented no argument about how each factor should apply in this case. See *United States* v. *Laney*, 189 F.3d 954, 964 (9th Cir. 1999) (stating that a district court can give greater weight to the government's application of the factors than the defendant's application of such factors). The court considered the government's recommendation and its own perception of Broussard's testimony at

Sheriff Ackal's trial. The downward departure therefore falls within the district court's broad discretion, and any failure to explain the factors was not error, let alone plain error.

3. The District Court Provided Broussard With An Individualized Sentence

Broussard further contends (Br. 45-47) that he was not provided with an "individualized sentencing hearing." But there is no evidence for this argument, which was not presented to the district court and is subject only to plain error review.

To the contrary, there is ample evidence that the district court considered facts specific to Broussard in determining his sentence. For example, the court started the sentencing hearing by rejecting the United States' objection to the acceptance-of-responsibility adjustment. ROA.292. In doing so, the court demonstrated its command of the specific record because it concluded that Broussard had accepted responsibility while following counsel's advice to file a Vacancies Act motion (which no other defendant did). ROA.292. The court then denied Broussard's motion to reconsider the denial of the Vacancies Act motion, which again contained an argument that only Broussard raised. ROA.292-293. The court also heard from Janet Franks—a citizen whom Broussard had assisted—along with Broussard himself. ROA.292-300. Moreover, the United States' counsel extensively discussed the particularities of Broussard's cooperation,

Broussard's reflections regarding his offenses, and the impact of the other defendants on Broussard. ROA.301-302. After hearing all of this information, the court explained that it reached the sentence after considering factors particular to Broussard, including his history, characteristics, and involvement in the offense. ROA.303. The district court also expressly stated that it was relying on the factual findings in the PSR and the recommendations in the United States' Section 5K1.1 motion, both of which were specifically tailored to address Broussard's particular circumstances and cooperation. ROA.302-303.

Ignoring these facts, Broussard relies (Br. 46-47) on the fact that he was sentenced "on the same day as six other defendants." Broussard makes an assertion that this deprived him of an individualized sentence but provides no authority for such a proposition. No case law restricts district courts from conducting multiple sentencing hearings in a day, and Broussard's argument amounts to little more than an invitation for this Court to manage district courts' calendars. And Broussard's assertion (Br. 47) that the district court's "ruling was little more than a rubber stamp on the Probation Officer's recommendation" ignores the record because the district court adopted the PSR's Guidelines range calculation but departed downward from that range based on factors not considered in the PSR, such as the Section 5K1.1 motion.

Much of Broussard's argument regarding the supposed lack of individualized sentence is premised on the idea that the district court mistook him for a co-defendant, Jeremy Hatley. Br. 41 (contending that "the district court might have confused Hatley and Mr. Broussard"); see also Br. 5. This theory, which lacks any evidence, defies common sense. Hatley was sentenced to 36 months based on his failure to intervene in the assault on S.S. and based on a lie to federal agents investigating the IPSO abuses. By contrast, Broussard not only failed to intervene in the assault of S.S., but he also was a supervisor, perpetrated dozens of other assaults, and condoned abuses by his subordinates; for this more extensive wrongdoing, he received a 54-month sentence. The district court's sentencing determinations are internally consistent and sensible in light of the whole record, and there is no basis to believe that the court was confused.

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. Nothing here rebuts that presumption. To the contrary, the district court heard extensive testimony at the *Ackal* trial and used that, along with information in the PSRs and the Section 5K1.1 motions, to reach an individualized sentence for each defendant (including Broussard) based on each

defendant's charged offenses, conduct, and cooperation. There was no error, let alone plain error.

IV

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 Broussard'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). "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). "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); *United States* v. *Simpson*, 796 F.3d 548, 557 (5th Cir. 2015) ("We presume sentences within or below the calculated guidelines range are reasonable."), cert. denied, 136 S. Ct. 920 (2016).

B. Broussard's Within-Guidelines Sentence Is Substantively Reasonable In Light Of The Record And Does Not Create Any Unwarranted Sentencing Disparity

Broussard contends that his sentence is substantively unreasonable both because it was not warranted under the facts of the case (Br. 36-40, 42-43, 47-48), and because it created an unwarranted disparity with his co-defendants (Br. 39-41). Neither argument is meritorious.

1. Broussard's 54-Month Sentence Was Substantively Reasonable Because He Used Excessive Force On Several Occasions And The Record Shows That He Supervised A Unit That Engaged In Many Such Abuses

The properly calculated Guidelines range in this case called for a 63- to 78-month sentence. The district court departed downward from that range and imposed a 54-month sentence. This was well within the court's discretion in light of the extensive nature of Broussard's wrongdoing, which extended far past the single failure to intervene offense to which he pleaded guilty.

Broussard fails to rebut the presumption of reasonableness that attaches to a within- or below-Guidelines sentence. 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). Broussard, however, merely asks this Court to reweigh the 18 U.S.C.

3553(a) factors. He contends that the district court did not give enough weight to his role as a father of a special needs child (Br. 37-38, 43), his relatively peripheral role in the offense of conviction (Br. 37, 42), his cooperation (Br. 37), his lack of criminal history (Br. 36-38, 42-43), and the impact of his conduct on S.S. (Br. 47). But these were all factors the district court considered. The PSR, the factual findings of which the district court adopted and relied on, extensively discussed Broussard's familial duties (including his special needs child), his lack of criminal history, his role in the offense, and the effect of his conduct on S.S. ROA.333-343. Broussard also suggests (Br. 36-37) that the court did not give sufficient weight to his cooperation and his lack of influence over the other defendants. But the United States expressly presented information regarding these issues to the district court. See ROA.301-302. In sum, contrary to Broussard's assertions, the district court heard extensive testimony from Broussard during the *Ackal* trial and stated that it based its sentencing decision on Broussard's "history," "characteristics," and "involvement in this offense." ROA.303.

Broussard's "arguments concerning the district court's balancing of the § 3553(a) factors amount to a disagreement with the district court's weighing of these factors and the appropriateness of his within-guidelines sentence"—an argument that this Court has rejected. *United States* v. *Gandara-Gonzalez*, 377 F. App'x 405, 406 (5th Cir.), cert. denied, 562 U.S. 936 (2010); *United States* v.

Camero-Renobato, 670 F.3d 633, 636 (5th Cir. 2012) ("A defendant's disagreement with the propriety of his sentence does not suffice to rebut the presumption of reasonableness that attaches to a within-guidelines sentence."). "[T]he district court considered and obviously rejected these arguments as a basis for a [lower] sentence," and they do not rebut the presumption of reasonableness. *United States* v. *Gomez-Herrera*, 523 F.3d 554, 565 (5th Cir.), cert. denied, 555 U.S. 1050 (2008).

Broussard also asserts (Br. 38) that his role was "minimal" and that he committed "the least severe offense." Yet, this ignores ample record evidence that Broussard's role in this offense was not isolated or minimal but was part of a larger scheme where he willfully engaged in excessive force violations and willingly tolerated such conduct by those whom he was supervising. Specifically, as discussed in detail above, Broussard admitted that he personally engaged in multiple uses of excessive force, including beating another inmate on the day of the offense to which he pleaded guilty. See pp. 5-6, *supra*. Moreover, Broussard was a supervisor in the narcotics unit, which was the part of IPSO that engaged in the most widespread and egregious abuses; in that role, he was aware of and condoned constitutional violations on the part of officers who reported directly to him. ROA.1071-1076. Broussard engaged in and knew of IPSO abuses for a significant period of time but did nothing to report or stop them despite his

leadership role. See ROA.1071. This Court should reject Broussard's attempt on appeal to minimize his involvement in egregious abuses that he could have stopped.

In sum, the district court "gave a sentence within guidelines and considered relevant factors without giving undue weight to improper factors." *United States* v. *Harris*, 740 F.3d 956, 969 (5th Cir.), cert. denied, 135 S. Ct. 54 (2014). There is no reason to disturb the within-Guidelines sentence.

2. Broussard Ignores The Legal Standard To Show An Unwarranted Disparity, And There Is No Such Disparity Here, Where Broussard Was A Supervisor Who Engaged In Multiple Abuses

Broussard contends (Br. 39-41) that there is an unwarranted sentencing disparity between his 54-month sentence and the sentences of his co-defendants. This argument fails because it ignores the applicable legal standard and the factual differences between Broussard and his co-defendants.

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). 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). "It 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).

Broussard 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. 39-41) focuses narrowly on his co-defendants. This narrow focus on his co-defendants rather than similarly situated defendants nationwide is fatal to his disparity argument. See *McKinney*, 53 F.3d at 678.

Even if comparison between co-defendants were proper, Broussard ignores the factual differences between his conduct and that of Jeremy Hatley and Robert Burns, the two co-defendants to whom he compares himself (Br. 39-41). Broussard contends that he, Hatley, and Burns played a similar role in the assault of S.S. However, unlike Hatley and Burns, who were officers in IPSO's K-9 unit, Broussard was a supervisor in the narcotics unit at the time of the assault. And he

was the direct supervisor of Ben Lassalle, the narcotics unit agent who actually assaulted S.S. Broussard, therefore, likely had a greater ability to actually stop the assault. See ROA.1071. Indeed, Broussard himself acknowledged that he was one of the "senior officers" present in the chapel while Hatley and Burns were not. See ROA.320.

In addition, Broussard entirely ignores the record developed at the *Ackal* trial, where there was extensive evidence—from Broussard's own testimony and testimony of others—that Broussard had engaged in a long series of abuses, not just the assault of S.S. As noted above, Broussard used excessive force dozens of times during his tenure at IPSO, assaulted another inmate on the same day he failed to intervene in the assault of S.S., stole money from arrestees, and lied to federal officers investigating this case. See pp. 5-6, *supra*. Most importantly, Broussard was the supervisor of the narcotics unit, the members of which engaged in a repeated pattern of willful excessive force violations. ROA.1071. Broussard did nothing to halt these abuses and conspired with narcotics unit agents to cover up the abuses. ROA.882-883; ROA.1075. Accordingly, Broussard was considered among the worst actors in an office replete with constitutional violations.

ROA.1120-1122. His sentence was thus reasonable in comparison to those of his co-defendants.[10]

In sum, even if comparing Broussard's sentence to sentences of his co-defendants were a relevant consideration on appeal, the district court did not abuse its discretion in reaching the 54-month sentence. There is no basis to upset this decision, particularly because a full review of the record reveals that viewed in its totality, Broussard's conduct was among the worst of all the defendants.

[10] In addition, Broussard's argument ignores the district court's reliance on the United States' Section 5K1.1 motion (ROA.406-410), which (along with similar motions in the cases of Broussard's co-defendants) was specifically designed to ensure the proportionality of the various sentences (ROA.408 (noting that "[t]he Government has made an effort to make all of its recommendations proportional among the cooperators")).

CONCLUSION

This Court should affirm the district court's judgment and 54-month sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 2, 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
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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 11,928 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: August 2, 2017