

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DAVID HINES,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS APPELLEE

JOHN M. GORE
Acting Assistant Attorney General

TOVAH R. CALDERON
VIKRAM SWARUUP
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 616-5633

STATEMENT REGARDING ORAL ARGUMENT

The United States agrees with David Hines that oral argument is not necessary in the case. Hines challenges only the substantive reasonableness of his 40-month sentence, which was a substantial downward departure from the applicable United States Sentencing Guidelines range of 63 to 78 months.

The United States believes, however, that 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 Hines, pleaded guilty and are challenging their sentences. And, if the Court decides that argument would be helpful, 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 Hines raises purported disparities between his sentence and those of his co-defendants to challenge its substantive reasonableness.

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. Hatley*, No. 17-30288
- *United States v. Lassalle*, No. 17-30418
- *United States v. Savoy*, No. 17-30419

TABLE OF CONTENTS

	PAGE
STATEMENT REGARDING ORAL ARGUMENT	
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE ISSUE.....	2
STATEMENT OF THE CASE.....	2
1. <i>Factual Background</i>	2
2. <i>Procedural History</i>	5
SUMMARY OF ARGUMENT	7
ARGUMENT	
THE DISTRICT COURT’S WITHIN-GUIDELINES SENTENCE IS SUBSTANTIVELY REASONABLE AND DOES NOT CREATE ANY UNWARRANTED SENTENCING DISPARITIES.....	9
A. <i>Standard Of Review</i>	9
B. <i>The 40-Month, Within-Guidelines Sentence Is Substantively Reasonable In Light Of The Record And Does Not Create Any Unwarranted Disparity</i>	9
1. <i>The 40-Month Sentence Is Substantively Reasonable In Light Of Hines’s Extensive Wrongdoing, And This Court Should Reject Hines’s Invitation To Reweigh Factors That The District Court Considered</i>	9
2. <i>Hines’s Disparity Argument Is Legally Flawed Because He Fails To Compare His Sentence To Sentences Nationwide, And There Is No Disparity Between His Sentence And Those Of His Co-Defendants</i>	15

TABLE OF CONTENTS (continued):	PAGE
CONCLUSION	20
CERTIFICATE OF SERVICE	
CERTIFICATE OF COMPLIANCE	

TABLE OF AUTHORITIES

CASES:	PAGE
<i>United States v. Bailey</i> , 405 F.3d 102 (1st Cir. 2005)	17
<i>United States v. Bunke</i> , 412 F. App'x 760 (6th Cir.), cert. denied, 563 U.S. 1002 (2011).....	16
<i>United States v. Camero-Renobato</i> , 670 F.3d 633 (5th Cir. 2012)	12
<i>United States v. Campos-Maldonado</i> , 531 F.3d 337 (5th Cir.), cert. denied, 555 U.S. 935 (2008).....	9
<i>United States v. Cedillo-Narvaez</i> , 761 F.3d 397 (5th Cir.), cert. denied, 135 S. Ct. 764 (2014).....	17
<i>United States v. Cooks</i> , 589 F.3d 173 (5th Cir. 2009), cert. denied, 559 U.S. 1024 (2010).....	10
<i>United States v. Cooper</i> , 274 F.3d 230 (5th Cir. 2001).....	10
<i>United States v. Cozzi</i> , 613 F.3d 725 (7th Cir. 2010), cert. denied, 562 U.S. 1216 (2011).....	16-17
<i>United States v. Duhon</i> , 541 F.3d 391 (5th Cir. 2008).....	9, 18
<i>United States v. Gandara-Gonzalez</i> , 377 F. App'x 405 (5th Cir.), cert. denied, 562 U.S. 936 (2010).....	12
<i>United States v. Gomez-Herrera</i> , 523 F.3d 554 (5th Cir.), cert. denied, 555 U.S. 1050 (2008).....	12
<i>United States v. Guillermo Balleza</i> , 613 F.3d 432 (5th Cir.), cert. denied, 562 U.S. 1076 (2010).....	15-18
<i>United States v. Hargrett</i> , 156 F.3d 447 (2d Cir.), cert. denied, 525 U.S. 1048 (1998).....	10

CASES (continued): **PAGE**

United States v. Harris, 740 F.3d 956 (5th Cir.),
cert. denied, 135 S. Ct. 54 (2014).....15

United States v. Jones, 531 F.3d 163 (2d Cir. 2008).....12

United States v. McElwee, 646 F.3d 328 (5th Cir. 2011).....12

United States v. McKinney, 53 F.3d 664 (5th Cir.),
cert. denied, 516 U.S. 901 (1995).....16

United States v. Medina-Argueta, 454 F.3d 479 (5th Cir. 2006)9

United States v. Pugh, 515 F.3d 1179 (11th Cir. 2008)13

United States v. Simon, 964 F.2d 1082 (11th Cir. 1992),
cert. denied, 507 U.S. 1033 (1993).....13

United States v. Simpson, 796 F.3d 548 (5th Cir. 2015),
cert. denied, 136 S. Ct. 920 (2016)..... 9-10

United States v. Tzep-Mejia, 461 F.3d 522 (5th Cir. 2006)10

United States v. Willingham, 497 F.3d 541 (5th Cir. 2007).....16

STATUTES:

18 U.S.C. 242.....1, 5

18 U.S.C. 32311

18 U.S.C. 3553(a)7, 12

18 U.S.C. 3553(a)(6).....15

18 U.S.C. 3742.....2

28 U.S.C. 12912

GUIDELINES:	PAGE
U.S.S.G. § 5K1.1.....	<i>passim</i>
U.S.S.G. § 5K2.10.....	14-15

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-30270

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DAVID HINES,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS APPELLEE

JURISDICTIONAL STATEMENT

This appeal is from a judgment of conviction and sentence under 18 U.S.C. 242. ROA.96-103; ROA.111-112.¹ The district court had jurisdiction under 18 U.S.C. 3231, sentenced David Hines to a 40-month term of incarceration, and entered its judgment on April 6, 2017. ROA.22-26. Hines timely appealed that

¹ “ROA.____” refers to consecutively numbered pages of the Record on Appeal. “Br. ____” refers to page numbers in appellant’s opening brief.

same day. ROA.27. This Court has jurisdiction under 18 U.S.C. 3742 and 28 U.S.C. 1291.

STATEMENT OF THE ISSUE

Whether the district court's 40-month sentence, which it reached after departing downward from a 63- to 78-month United States Sentencing Guidelines range, was substantively reasonable in light of the facts of the case and the sentences of other defendants who have engaged in similar conduct.

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. The investigation revealed a number of abuses by IPSO officials over a period of more than half a decade. Ultimately, Sheriff Ackal and a number of other supervisors and officers were charged with federal offenses related to these abuses.

Among the officers charged was David Hines, who had been an agent in IPSO's narcotics unit.² ROA.108. Hines pleaded guilty to using unlawful force to

² A total of 12 defendants were charged in connection with the IPSO abuses. Ten (including Hines) pleaded guilty, and one is awaiting trial. Sheriff Ackal was acquitted following a five-day jury trial. ROA.1395-1396. Hines testified at Sheriff Ackal's trial. ROA.1145-1168.

punish an arrestee, Ray Trosclair, in March of 2014. ROA.108. On the day of the incident, Bret Broussard—a lieutenant in the narcotics unit—called Hines and instructed Hines to report to the sheriff’s office. ROA.1150-1151. Hines, along with a fellow narcotics officer, Byron “Ben” Lassalle, did so and met with Sheriff Ackal, Detective Scott Hotard, and two of Sheriff Ackal’s family members.

ROA.1151-1152. Sheriff Ackal told Hines and Lassalle that Trosclair had assaulted one of Ackal’s relatives. ROA.108; ROA.1152-1153. Ackal told Hines and Lassalle to arrest Trosclair and to “[t]ake care of him.” ROA.108; ROA.1152-1153. Hines knew, based on previous conversations with Ackal, that this meant that Ackal wanted Hines and Lassalle “to use unlawful force to punish [Trosclair] for his assault on [Ackal’s] relative.” ROA.108; ROA.1153. Hines and Lassalle—intending to further Ackal’s unlawful objective—went to find Trosclair. ROA.108.

Hines and Lassalle found Trosclair upstairs in an apartment and placed him under arrest. ROA.108; ROA.1153. Trosclair was compliant and followed the officers’ commands. ROA.108-109; ROA.1154. Hines nevertheless used his knee to strike Trosclair “several times in his side” and “struck him two to three times with the baton in the back of his legs.” ROA.1155; see also ROA.109. Afterward, as Trosclair was being removed from the apartment, Lassalle kned Trosclair in the abdomen or groin, even though Trosclair continued to remain compliant and was restrained. ROA.1155-1156; see also ROA.109. Hines admitted that the force he

used “was unjustified and unnecessary” because Trosclair “posed no threat to the Defendant or anyone else at the time of the beating.” ROA.109. All told, Trosclair was beaten for “3 to 4 minutes, despite his not resisting arrest.” ROA.124.

After the incident, Hines filed a false police report to cover up the wrongful assault. ROA.109; ROA.1156-1157. In that report, Hines stated that Trosclair had resisted arrest, which caused the injuries. ROA.1156-1157. Hines now admits, however, that he “fabricat[ed] justifications for the use of force” and that he “faile[d] to describe that he and [Lassalle] beat [Trosclair] without justification.” ROA.109.

Trosclair sustained significant injuries as a result of the assault. Specifically, Trosclair had a “large bruise on the outside portion of his left thigh,” a scratch on the left side of his face, and a “scratched left elbow.” ROA.124. In addition, Trosclair “indicated he had trouble walking for two to three days after the beating.” ROA.124.

Hines’s wrongful conduct as a narcotics agent extended past the Trosclair beating and false police report. Indeed, Hines testified that the Trosclair incident was not the first time he observed and participated in the use of excessive force. ROA.1150. He admitted to using excessive force on five or six other occasions. ROA.1165. Lassalle testified that Hines was generally “down” for “[b]eating people up.” ROA.667. Moreover, Hines—after talking with Lassalle—told

federal investigators who were looking into IPSO that Trosclair resisted arrest, which he again used to justify the excessive force. ROA.1162; see also ROA.683-684. Hines now admits that he lied to investigators. ROA.1162.

2. *Procedural History*

Hines waived indictment and was charged via bill of information on March 7, 2016. ROA.7-9. That same day, he pleaded guilty to one felony count of violating 18 U.S.C. 242, which prohibits willful deprivation of constitutional rights under color of law. ROA.96-103. As part of his guilty plea, Hines acknowledged that the maximum sentence for his conviction was ten years. ROA.104. Hines also stipulated to a factual basis for the plea. ROA.107-110.

The United States Probation Office then prepared a presentence investigation report (PSR). ROA.117-135. The PSR calculated Hines's total offense level as 26, which, combined with his lack of criminal history, led to an advisory range of 63 to 78 months under the United States Sentencing Guidelines (Guidelines or U.S.S.G.). ROA.126-127; ROA.133. Neither Hines nor the United States objected to the PSR's Guidelines calculation. ROA.136. The United States submitted a motion to the district court that recommended an eight-level downward departure in Hines's offense level under U.S.S.G. § 5K1.1 because he provided substantial assistance in the investigation of the IPSO abuses. ROA.137-140. The United States stated in that motion that "Hines provided important corroboration to

co-defendant Byron Benjamin Lassalle's testimony regarding Ackal's role in ordering the beating of Trosclair." ROA.139. Hines submitted a sentencing memorandum seeking a below-Guidelines sentence and various letters in support. ROA.142-169.

The court held a sentencing hearing on March 28, 2017. ROA.88. The court began the hearing by asking whether "this was the case where the victim was innocent of any crime." ROA.89. Counsel for the United States responded by explaining that Trosclair had been accused of "abusing a member of Louis Ackal's family" but there had been no adjudication of that allegation. ROA.89. Hines's counsel then stated that he had submitted a sentencing memorandum and several letters from Hines's family and community members. ROA.89-90. Counsel further discussed Hines's youth, history of public service, lack of criminal history, remorse, cooperation with the government, family circumstances, and community service. ROA.90-91. Hines made his own statement, apologizing to his family and to Trosclair. ROA.91-92. Counsel for the United States rested on its pleadings and Section 5K1.1 motion but acknowledged that Hines was not involved in certain earlier IPSO abuses that were discussed at Sheriff Ackal's trial and that he was following the instructions of his superiors. ROA.92-93. Counsel explained, for example, that the beatings in Iberia Parish jail's chapel, in which

many other defendants were implicated, took “place before Mr. Hines was involved.” ROA.93.

After adopting the findings of the PSR and acknowledging the United States’ Section 5K1.1 motion, the district court sentenced Hines to a 40-month term of incarceration “[p]ursuant to the Sentencing Reform Act and after consideration of all the factors of 3553(a)” and Hines’s “personal characteristics or involvement.” ROA.93-94. The court entered its judgment and written statement of reasons on April 6, 2017; there, the court stated that the applicable Guidelines range was 63 to 78 months but that it departed downward to the 40-month sentence because of the United States’ Section 5K1.1 motion. ROA.113-114; see also ROA.22-26. Hines timely appealed that same day. ROA.27.

SUMMARY OF ARGUMENT

Hines’s 40-month, within-Guidelines sentence was substantively reasonable and did not create any unwarranted disparity.

Hines did not and does not challenge the applicable Guidelines range, which was 63 to 78 months. The court departed downward from that range. Hines’s 40-month sentence is presumptively reasonable, and Hines does not rebut the presumption. Citing no authority in support, Hines merely asks this Court to reweigh factors that the district court considered and rejected as a basis for an even lower sentence. The district court, which was well aware of Hines’s specific

conduct, sentenced Hines to 40 months because he beat a compliant arrestee who was not resisting; falsified a report regarding the incident; lied about the incident to federal investigators; and admitted to engaging in five to six other excessive force incidents. A 40-month sentence for this extensive wrongdoing was well within the district court's discretion.

There are also no unwarranted sentencing disparities. Hines compares his sentence to those of his co-defendants. This, however, ignores the applicable legal standard, which requires him to compare his sentence to nationwide sentences for similar conduct. Conducting the proper inquiry reveals that a 40-month sentence for beating an arrestee without justification and trying to cover it up is well within the range of reasonable sentences. Even if this Court compares Hines's sentence to that of his co-defendants, there is no unwarranted disparity. Specifically, Hines's comparison of his sentence to that of Robert Burns fails because Burns pleaded guilty only to a misdemeanor offense, while Hines pleaded guilty to a felony. Hines's comparison of his sentence to that of Jason Comeaux, who also received a 40-month sentence, fails as well because Comeaux's cooperation with the United States' investigation was more extensive than Hines's. The district court was within its discretion to balance culpability and cooperation and to conclude that the same sentence for Hines and Comeaux was appropriate.

ARGUMENT

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 Hines'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. The 40-Month, Within-Guidelines Sentence Is Substantively Reasonable In Light Of The Record And Does Not Create Any Unwarranted Disparity

1. The 40-Month Sentence Is Substantively Reasonable In Light Of Hines's Extensive Wrongdoing, And This Court Should Reject Hines's Invitation To Reweigh Factors That The District Court Considered

The Guidelines called for a 63- to 78-month sentence in this case (ROA.133), and Hines never challenged that advisory range. The district court

sentenced Hines to 40 months after departing downward from that range in light of the United States' motion under Guidelines Section 5K1.1.³ ROA.94; ROA.113-116. That sentence is presumptively reasonable. See *Simpson*, 796 F.3d at 557. The “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).

Hines, who argues only that the court should have balanced the factors differently, does not rebut the presumption. Hines's principal argument (Br. 25, 27-30) seems to be that the district court should have given more weight to the notion that his offense conduct was “vastly less serious” than the conduct of the

³ Accepting the United States' recommendation under Section 5K1.1 in full would have led to a 27- to 33-month sentencing range. ROA.140. The district court, however, did not fully accept that recommendation and instead departed downward to a 40-month sentence, which was within its discretion. See *United States v. Cooper*, 274 F.3d 230, 248 (5th Cir. 2001) (holding that a “district court has almost complete discretion to determine the extent of a departure under § 5K1.1”); see also *United States v. Hargrett*, 156 F.3d 447, 450 n.1 (2d Cir.) (“A downward departure based on Section 5K1.1 does not require the district judge to pick a new offense level and a particular sentence within the range set for that level; rather, the court may simply pick a sentence of so many months without mention of an offense level.”), cert. denied, 525 U.S. 1048 (1998). A sentence that results from a downward departure under a provision of the Guidelines such as Section 5K1.1 is considered a within-Guidelines sentence. See *United States v. Tzep-Mejia*, 461 F.3d 522, 525 (5th Cir. 2006).

other defendants. Specifically, he seems to suggest (Br. 27-30) that the court should have given him a lower sentence because he was not involved in the beatings in Iberia Parish Jail's chapel that occurred on April 29, 2011. But the district court heard five days of testimony regarding the chapel abuses and Hines's wrongdoing at the trial of co-defendant Sheriff Ackal; the court was therefore well aware that Hines participated in a later and different offense than the majority of the other defendants. See ROA.92-93 (United States' counsel's statement that the 2011 chapel beatings occurred "before Mr. Hines was involved"). Both sets of offenses were extensively discussed at the *Ackal* trial, and Hines's particular offense conduct was described at length in the PSR (ROA.123-124), the factual findings of which the district court adopted (ROA.93). Though the chapel abuses were grotesque (and led to substantial sentences for those involved), that does not diminish the seriousness of *Hines's* offenses. Hines admitted to beating a compliant, non-resisting arrestee despite knowing that it was unlawful. ROA.108-109. He also admitted to falsifying a report about the incident (ROA.109; ROA.1156-1157), lying about it to federal officers investigating IPSO abuses (ROA.1162), and engaging in a half dozen other excessive-force violations (ROA.1165). For this extensive misconduct, a 40-month sentence was reasonable and within the district court's discretion.

Hines’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,” which this Court has repeatedly 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 non-Guidelines 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). In light of these authorities, it is unsurprising that Hines cites no case where this Court has reversed a within-Guidelines sentence for substantive unreasonableness. To the contrary, the only case of this Court that Hines cites (Br. 26) affirms rather than reverses a defendant’s sentence. See *United States v. McElwee*, 646 F.3d 328 (5th Cir. 2011) (affirming above- and within-Guidelines sentences).⁴

⁴ The out-of-circuit cases Hines cites also do not reverse a within-Guidelines sentence for substantive unreasonableness on a defendant’s challenge and thus provide no support for his argument. See *United States v. Jones*, 531 F.3d 163 (2d Cir. 2008) (reversing on procedural reasonableness grounds because it was
(continued...)

Instead of citing authority to support his arguments, Hines repeatedly misstates the record. For example, Hines states (Br. 30) that he “was truthful with the FBI, from the very start” and contrasts (Br. 28) his conduct with that of the other defendants by stating that “[a]ll of the other defendants lied about the misconduct.” But Hines’s own admission that he lied to federal investigators who were looking into IPSO abuses contradicts these assertions. ROA.1162. Hines also contrasts (Br. 27) his conduct with officers who “connived a scheme of false statements to hide the truth,” even though he and Lassalle worked together to cover up the use of excessive force against Trosclair by lying to federal investigators. ROA.683-684; ROA.1162. Hines finally suggests (Br. 33) that there is a “complete absence” of criminal history in his record and that therefore there is an “unusually low risk of recidivism.” While it is true that Hines has never been arrested or convicted (and the Guidelines range accounted for that (ROA.126-127)), he admitted to a half dozen excessive-force violations before the Trosclair beating. ROA.1164-1165.

(...continued)

not clear whether the district court believed the Guidelines were mandatory); *United States v. Pugh*, 515 F.3d 1179 (11th Cir. 2008) (reversing a probationary sentence on the United States’ appeal for being too low and substantively unreasonable where the Guidelines range was 97 to 120 months); *United States v. Simon*, 964 F.2d 1082 (11th Cir. 1992) (no challenge to sentence), cert. denied, 507 U.S. 1033 (1993).

Hines's remaining arguments fare no better. He contends (Br. 34-36) that the district court had "an incorrect understanding of the factual basis" of his guilty plea because the court started the hearing by asking whether this case was the one where the victim was innocent of any crime. ROA.89. Hines gets this backwards. The court's statement demonstrates that it understood the point that Hines repeatedly makes in his brief: that the factual basis for Hines's conviction, assaulting an arrestee, was different from the factual bases of the other defendants' convictions, assaulting individuals who were in jail, a point that counsel for the United States also made at the sentencing hearing.⁵ ROA.92-93. Indeed, Hines's suggestion (Br. 36) that the court confused him and Wade Bergeron is puzzling because Bergeron received a *longer* sentence than Hines. ROA.1318. There is no evidence that the court was confused, and there is no basis to conclude that any confusion prejudiced Hines.

Lastly, Hines's argument (Br. 36-37) that he should have received a downward departure based on the victim's conduct under U.S.S.G. § 5K2.10 is also flawed. Hines did not seek a departure under this guideline before the district court, and a departure would be unwarranted. The provision applies only where

⁵ Though the status of the victims has no legal bearing, the court's questions regarding the victim's status demonstrates that the court was aware of the unique factual circumstances of Hines's case, which was the only case that did not involve assaults of inmates at the Iberia Parish jail.

“the victim’s wrongful conduct contributed significantly to provoking the offense behavior.” U.S.S.G. § 5K2.10. Hines’s offense behavior (striking Trosclair) occurred when Trosclair was “restrained and compliant” and “posed no threat” to anyone, as Hines admits. ROA.109.

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. *Hines’s Disparity Argument Is Legally Flawed Because He Fails To Compare His Sentence To Sentences Nationwide, And There Is No Disparity Between His Sentence And Those Of His Co-Defendants*

Hines contends (Br. 30-31) that there is an unreasonable sentencing disparity between his sentence and those of 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).

Hines 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. 30-31) focuses narrowly on two of 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. Conducting the proper legal inquiry—comparing Hines’s sentence to those of other defendants nationwide—makes clear that Hines’s 40-month sentence was within the range of reasonable sentences for assaulting an arrestee and trying to cover it up. See, e.g., *United States v. Bunke*, 412 F. App’x 760 (6th Cir.) (48-month sentence for a corrections officer who kicked a compliant inmate), cert. denied, 563 U.S. 1002 (2011); *United States v. Cozzi*, 613 F.3d 725 (7th Cir. 2010) (40-month sentence for single instance of excessive force where officer beat a man with a sap and filed a false police report), cert. denied, 562 U.S. 1216

(2011); *United States v. Bailey*, 405 F.3d 102 (1st Cir. 2005) (41-month sentence for a corrections officer who kneed an inmate, filed a false report about it, and lied about the incident). This ends the inquiry.

Even if Hines were correct on the law and this Court compared his sentence to those of his co-defendants, there are no unwarranted disparities. Hines compares (Br. 31) his sentence to that of Robert Burns, who received a six-month sentence. ROA.1330-1331. This comparison is facially flawed because Burns pleaded guilty only to a misdemeanor violation of Section 242, whereas Hines pleaded guilty to a felony violation of the same statute. See Plea Agreement, *United States v. Burns*, No. 16-cr-33 (W.D. La. Feb. 23, 2017) (Doc. 4). 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). In addition, Hines’s wrongdoing, striking Trosclair and five or six other arrestees multiple times (ROA.109; ROA.1155; ROA.1165), was more extensive than that of Burns, who struck only a single detainee, intimidated two others with a dog, and failed to intervene in the assault of four other inmates

(ROA.551-580). The district court was within its discretion to take into account the legal and factual differences between Burns and Hines.

Hines also compares (Br. 30-31) himself to Jason Comeaux. The district court sentenced Comeaux to 40 months, the same sentence Hines received. ROA.1337-1338. Though Comeaux's abuses as an IPSO officer were quantitatively and qualitatively worse than Hines's, Comeaux provided much more assistance to the United States in uncovering the IPSO abuses. Specifically, while Hines's cooperation provided "important corroboration" of Ben Lassalle's account of the Trosclair beating (ROA.139), Comeaux's cooperation was more extensive, and, as the United States represented to the district court, that cooperation was pivotal to the investigation. The district court heard testimony from both Hines and Comeaux at Sheriff Ackal's trial, and the court had before it the United States' assessment of their cooperation in two separate motions under Section 5K1.1. The court's conclusion that after balancing culpability and cooperation, Hines and Comeaux deserved the same sentence was within its discretion. See *Guillermo Balleza*, 613 F.3d at 435 ("[S]entence disparities between co-defendants * * * who received departures for substantial assistance are not unwarranted disparities."); *Duhon*, 541 F.3d at 397 (noting that differing levels of assistance is a relevant factor in considering sentencing disparities).

Hines's remaining disparity argument relies on a misstatement of the record. Specifically, Hines suggests (Br. 31-32) that his sentence should have been lower because unlike his co-defendants (whose conduct was "unlawful *ab initio*"), his conduct "beg[an] as lawful conduct and crosse[d] the thin blue line." Hines's premise is flawed. His arrest of Trosclair did not inadvertently escalate into a use of excessive force. To the contrary, as he has admitted, Hines intended to use excessive force against Trosclair before he even arrived to make the arrest. ROA.108 (admission that Hines knew Ackal wanted him to use unlawful force and that he went to arrest Trosclair intending to further this unlawful objective). Hines, no less than the co-defendants to whom he compares himself, intended to use excessive force and did so.

CONCLUSION

This Court should affirm the district court's judgment and 40-month sentence.

Respectfully submitted,

JOHN M. GORE
Acting Assistant Attorney General

s/ Vikram Swaruup
TOVAH R. CALDERON
VIKRAM SWARUUP
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 616-5633

CERTIFICATE OF SERVICE

I certify that on August 21, 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 type-volume limitation in the version of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4155 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.

s/ Vikram Swaruup
VIKRAM SWARUUP
Attorney

Date: August 21, 2017