No. 17-30280

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

WADE BERGERON,

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 believe that oral argument is necessary in this case because Wade Bergeron's challenge to his below-Guidelines sentence does not raise any difficult issues. Rather, the issues he raises are straightforward and, to the extent they are reviewable, subject to a deferential standard of review. The United States believes 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 Bergeron, pleaded guilty and are challenging their sentences. If the Court decides that argument would be helpful, the United States believes that this Court's disposition would benefit from scheduling any oral arguments in these cases for the same sitting. There is at least some overlap in the issues presented; Bergeron's brief cross-references briefs from the other cases; and Bergeron seeks consolidation of the appeals. The related cases are as follows:

- *United States* v. *Broussard*, No. 17-30298 (raising similar issues regarding individualized sentence and effect of cooperation on sentence)
- *United States* v. *Hatley*, No. 17-30288 (raising similar issues regarding effect of cooperation on sentence)
- *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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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 following a guilty plea. See ROA.72-80.[1] The district court had jurisdiction under 18 U.S.C. 3231, sentenced Wade Bergeron to a 48-month term of incarceration, and entered its judgment on April 6, 2017. ROA.27-31; ROA.70.

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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 10, 2017. ROA.32. 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's sentencing decision provided sufficient reasoning regarding the United States' motion recommending a downward departure.

2. Whether the district court provided Bergeron with an individualized sentence.

3. Whether the district court's selection of a 48-month sentence, which was a downward departure and downward variance from the 78- to 97-month advisory range under the United States Sentencing Guidelines, was substantively reasonable in light of the factual circumstances.

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 perceived 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 Wade Bergeron, who had been a deputy sheriff in IPSO's narcotics unit.[2] ROA.86. Bergeron pleaded guilty to one of the assaults that occurred in the jail's chapel on April 29, 2011, but he admitted to witnessing assaults of three inmates that day in his testimony at Sheriff Ackal's trial. ROA.86-88; ROA.909. On the day of the assaults, Bergeron was searching cells when he walked into the chapel, an area of the jail not covered by video surveillance, and witnessed at least one fellow officer assaulting an inmate, who was restrained and presenting no threat to anyone. ROA.906-908. Bergeron described the beating as "extreme" but he did nothing to intervene while the inmate was struck between 20 and 50 times. ROA.908-909. Bergeron then witnessed the beating of a second inmate by the same officer in a similar manner. ROA.910. In addition to beating the second inmate, the other officer "put his baton in the

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[2] A total of 12 defendants were charged in connection with the IPSO abuses. Ten (including Bergeron) 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). Bergeron testified at Sheriff Ackal's trial. ROA.864-939.

inmate's mouth" and "simulated oral sex." ROA.910. Bergeron witnessed the entire course of the second assault but did nothing to stop it. ROA.910.

Bergeron was more actively involved in the assault of the third inmate, Anthony Daye, and his guilty plea relates to that assault. ROA.86-88. Other officers brought Daye, who was handcuffed, into the chapel ostensibly to question Daye. ROA.86-87; ROA.911. But Bergeron was well aware, in light of the prior assaults, that the other officers intended to assault Daye. ROA.87; ROA.911-912. Once Daye was in the chapel, Bergeron joined the other officers to beat Daye with a baton for no reason. ROA.87; ROA.912. Each officer beat Daye about 20 to 30 times over a period of two to three minutes. ROA.456. Daye was handcuffed and compliant during the beating, and Bergeron "knew that there was no legitimate law enforcement purpose for the force that he and others used on [Daye]." ROA.87; ROA.912. One of the other officers, who witnessed multiple beatings, described the assault of Daye as the worst beating he saw because of its violence. ROA.456-457.

Daye suffered bodily and emotional injuries as a result of the beating. ROA.87; ROA.1178-1179. Daye's legs and arms were injured and he could not move. ROA.360; ROA.700. He was transported to the medical unit in a wheelchair. ROA.361; ROA.700. Even three weeks after the assault, "several

injuries" were visible and apparent on Daye's body. ROA.387-388. Daye was in pain and could not walk on his own for two to three weeks. ROA.1178-1179.

The April 29, 2011, beatings were not the first or only unlawful conduct Bergeron engaged in as a law enforcement officer. See ROA.87 (noting that the plea agreement "does not contain all of the relevant information known to" Bergeron). Bergeron admitted in his testimony at Sheriff Ackal's trial to several excessive force violations dating back to 2008. ROA.866; ROA.869. Bergeron admitted, for example, to participating in "jump-outs"—a process in which narcotics officers would drive around town, hop out of their cars, and slam innocent people into the ground to intimidate them—on hundreds of occasions. ROA.868-870. Bergeron knew that this conduct violated use-of-force training. ROA.871-872. On another occasion, Bergeron and two other officers beat up two people after drinking at a party while they were off-duty. ROA.873-874; ROA.991-992. The two victims were not doing anything wrong, and there was no reason for the assault. ROA.993. After the incident, Bergeron drafted a false report to justify his conduct even though the victims did not pose any threat to Bergeron. ROA.876-880; ROA.998-1000.

Bergeron also participated in the assault of an arrestee named Ricky Roche. Bergeron, along with Byron "Ben" Lassalle and Gerald Savoy, assaulted Roche in violation of excessive-use-of-force policies because Roche had previously

assaulted Savoy. ROA.896-899. The three officers beat Roche for two minutes even though he was subdued and compliant. ROA.612-613. To justify the use of force, Bergeron created a false report that stated that Roche had struck him; Bergeron also falsified a photograph of the injury by having Lassalle hit him. ROA.900-902.

Not only did Bergeron engage in multiple excessive force violations and create multiple false reports, but he also lied on several occasions about his unlawful conduct. ROA.913. He admitted that he lied to federal agents who were investigating the IPSO abuses. ROA.913; ROA.920. And he conspired with two fellow officers, Jason Comeaux and Lassalle, to create a false story about the April 29, 2011, assaults. ROA.914; ROA.921; see also ROA.461-463. After creating this false story, Bergeron lied during a deposition in a civil case brought by Daye. ROA.915; ROA.920. Finally, Bergeron stole money from arrestees and used it for personal purposes in violation of applicable policies. ROA.929.

2. Procedural History

Bergeron waived indictment and was charged via bill of information on February 23, 2016. ROA.8-10. 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.72-80. As part of his guilty plea, Bergeron acknowledged that the maximum sentence for his Section 242 conviction

was ten years. ROA.74. Bergeron also stipulated to a factual basis for the plea. ROA.86-88.

The United States Probation Office then prepared a presentence investigation report (PSR). ROA.98-114. The PSR calculated Bergeron's total offense level as 28, which, combined with his lack of criminal history, led to an advisory range of 78 to 97 months under the United States Sentencing Guidelines (Guidelines). ROA.112. The sole objection to the Guidelines calculation was from the United States, which contended that Bergeron's offense level should be enhanced for obstructing justice because he conspired to lie and lied during the deposition in Daye's civil case. ROA.115. Bergeron responded to this objection, but the Probation Office determined that the enhancement should apply. ROA.115.

The United States submitted a motion to the district court that recommended a nine-level downward departure in Bergeron's offense level under U.S.S.G. § 5K1.1 because he provided substantial assistance in the investigation of the IPSO abuses. ROA.141-146. Bergeron submitted a sentencing memorandum, which explained potentially mitigating factors, along with letters in support of his request for a probationary sentence. ROA.126-140.

The court held a sentencing hearing on March 28, 2017. ROA.62-71. The court agreed with the Probation Office and sustained the United States' objection

in regard to the obstruction-of-justice enhancement. ROA.63. The court then heard from a witness who testified to Bergeron's good character; Bergeron's counsel, who sought a probationary sentence because of Bergeron's rookie status in IPSO, his remorse, and his cooperation; Bergeron himself, who acknowledged his wrongdoing; and counsel for the United States, who also stated that Bergeron had been remorseful and had provided substantial cooperation. ROA.64-69.

The district court judge observed that these sentencing hearings were among the worst in his 30 years on the bench because the conduct of these law enforcement officers reflected poorly on other officers who were risking their lives for little pay. ROA.69. After acknowledging that he had considered the United States' Section 5K1.1 motion and the statements of counsel, the court adopted the PSR's factual findings. ROA.70. The court then sentenced Bergeron to a 48-month term of incarceration "after careful consideration of all the factors contained in 18 U.S.C. 3553." ROA.70. The court told Bergeron that it had selected the sentence based on "your history, your characteristics, your involvement in the instant offense." ROA.70.

The court entered its judgment and written statement of reasons on April 6, 2017, wherein it stated that the applicable Guidelines range was 78 to 97 months but that it departed downward because of the United States' Section 5K1.1 motion

and varied further downward. ROA.94-97; see also ROA.27-31. Bergeron timely appealed. ROA.32-33.

SUMMARY OF ARGUMENT

The district court's imposition of a below-Guidelines, 48-month sentence was procedurally and substantively reasonable.

The district court sufficiently considered the U.S.S.G. § 5K1.1 factors in departing downward under that provision. Under this Court's case law, district courts have broad and generally unreviewable discretion to depart under that section of the Guidelines. The district court stated that it had considered information regarding application of the relevant factors in the United States' Section 5K1.1 motion and counsel's statements at the sentencing hearing. The court also had before it Bergeron's sentencing memorandum, which discussed these factors. The court's statement that it had considered pleadings and statements regarding the relevant factors is sufficient. The court need not mechanically address each factor where, as here, it is clear from the record that the court considered the relevant factors in reaching its ultimate sentence.

The district court provided Bergeron with an individualized sentence. There is no evidence that the court was confused about the identity of Bergeron in any way. To the contrary, the court heard testimony from a witness and statements from counsel that were specific to Bergeron; acknowledged that it had considered

the PSR and the Section 5K1.1 motion, which were tailored to Bergeron's circumstances; and discussed Bergeron's specific role at IPSO. Bergeron infers that the court was confused about the defendants' identities because he believes that there is a sentencing disparity between his sentence and those of his co-defendants. But a sentencing disparity between co-defendants is not a permissible basis to challenge a sentence on appeal. And, in any event, there are no unwarranted disparities. Viewed in light of the full factual record, the district court's sentencing decisions are internally consistent and reflect the culpability and cooperation of each defendant. The record and the sentencing decisions make clear that the district court provided individualized sentences for Bergeron and each of his co-defendants after considering their PSRs, the Section 5K1.1 motions, and the testimony at the trial of Sheriff Ackal regarding their conduct.

The below-Guidelines sentence is also substantively reasonable. The Guidelines called for a 78- to 97-month sentence in this case, but the court departed and varied downward to a 48-month sentence. This is presumptively reasonable, and Bergeron has done nothing to rebut that presumption. Instead, Bergeron invites this Court to reweigh factors and facts that the district court considered but rejected as a basis for a lower sentence. In doing so, he echoes nearly verbatim arguments he made in his sentencing memorandum, which the district court fully considered. This is insufficient to rebut the presumption of

reasonableness. Not only does Bergeron ask this Court to reweigh factors in contravention of applicable law, he also downplays his significant wrongdoing, which involved assaulting multiple arrestees and inmates, filing false reports to cover up these abuses, and lying to federal criminal investigators and in a civil deposition regarding these uses of excessive force. A 48-month sentence for this extensive misconduct is reasonable.

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 first determines whether there is procedural error, "such as failing to calculate (or improperly calculating) the Guidelines range, 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—including an explanation for any deviation from the Guidelines range." *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).

I

THE DISTRICT COURT SUFFICIENTLY CONSIDERED THE SECTION 5K1.1 FACTORS

A. Standard Of Review

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

Bergeron's assertion (Br. 12-13) that abuse-of-discretion review should apply is incorrect. He contends that he could not have objected to the sufficiency of the district court's reasoning regarding the Section 5K1.1 motion at the sentencing hearing because the court did not make clear it was granting the motion until it issued its written statement of reasons. However, Bergeron's primary argument (Br. 13) is that the court "fail[ed] to conduct a judicial inquiry into his individual case" and that the district court "fail[ed] to state its reasons for imposing

the § 5K1.1 departure." All of the facts Bergeron needed to know to make this argument were known to him by the end of the sentencing hearing. If at that point Bergeron believed the district court did not fully or sufficiently address the Section 5K1.1 motion or the relevant factors, he could have and should have objected. He nevertheless chose not to object and chose not to give the district court the opportunity to respond to his concerns.

The cases Bergeron cites are inapposite because in those cases, the district court added a term of supervised release or made a factual finding in the written statement of reasons that it did not orally pronounce; accordingly, the defendants could not have objected to those issues at the sentencing hearing. See *United States* v. *Bigelow*, 462 F.3d 378 (5th Cir. 2006) (remanding to conform the written judgment to oral pronouncement); *United States* v. *Fajardo*, 469 F. App'x 393 (5th Cir. 2012) (affirming sentence). In contrast here, the written statement of reasons did not create the issue that Bergeron now raises—sufficiency of the explanation of the Section 5K1.1 factors. That issue existed at the time of the hearing, and Bergeron did not raise it then. Plain error review therefore applies.

B. The District Court Did Not Err, Let Alone Plainly Err, In Its Consideration Of The United States' Section 5K1.1 Motion

The court did not err, let alone plainly err, in considering the Section 5K1.1 motion and factors because the court heard extensive information about Bergeron's cooperation and noted that it had considered this material in departing downward.

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 as a result of his assistance, 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.

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). Accordingly, this Court does "not review the district court's decision to limit a § 5K1.1 departure for reasonableness" because "[t]he district court is vested with complete discretion to determine the size of such a departure, as long as it does not

commit an independent violation of law." *United States* v. *Malone*, 828 F.3d 331, 342 (5th Cir.), cert. denied, 137 S. Ct. 526 (2016).[3]

Bergeron contends (Br. 12-24) that the district court committed a legal error by failing to explain its consideration of the Section 5K1.1 factors. For this proposition, Bergeron relies on *United States* v. *Johnson*, 33 F.3d 8 (5th Cir. 1994). Contrary to Bergeron'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 blindly defer to the government's recommendation. See *id.* at 10 (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, 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

[3] Bergeron's contention (Br. 14-15) that "this Circuit reviews both the decision to depart and the extent of that departure for abuse of discretion" is incorrect and contrary to *Malone*. None of the cases Bergeron cites for that proposition reviews a Section 5K1.1 departure for reasonableness; they all deal with other provisions of the Guidelines.

deferring to the government's recommendation. To the contrary, the district court considered the government's recommendation and declined to fully accept it.[4]

Moreover, the district court is presumed to have considered the Section 5K1.1 factors because it heard argument regarding these factors, reviewed pleadings regarding the factors, and acknowledged that it had considered those materials. Specifically, at the sentencing hearing, counsel for Bergeron indicated, that Bergeron had "cooperat[ed] with the FBI for some period of time" and that he "went in and participated in the interviews, and he also had started giving statements that were beginning to incriminate himself long before he lawyered up." ROA.66. Bergeron's counsel further stated that Bergeron "has done everything asked of him to try to help shed light on these actions, including incriminating himself, including pleading guilty to this felony offense." ROA.67. Counsel for

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[4] The United States recommended a nine-level downward departure in offense level, which would have resulted in a 30- to 37-month sentencing range. The district court rejected both the methodology and the amount of the United States' recommendation, choosing instead to depart and vary downward to a 48-month sentence. See *United States* v. *Marroquin-Medina*, 817 F.3d 1285, 1289 (11th Cir. 2016) (explaining that the United States has discretion in recommending a methodology for a downward departure—such as offense-level-based reductions, month-based reductions, or percentage-based reductions—but that the court has discretion in deciding what methodology to use); 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).

the United States reiterated this, stating that "[t]he narrative that counsel has recounted in terms of Mr. Bergeron's evolution is accurate as far as the government is concerned" and that "once Mr. Bergeron, in particular, came into the office and began cooperating, he was in fact fully cooperative." ROA.68-69. The Section 5K1.1 motion and Bergeron's sentencing memorandum also discussed in detail the nature and extent of his cooperation, including the specific forms that his cooperation took. See ROA.134-136; ROA.141-145. The district court stated that it had considered the Section 5K1.1 motion and counsel's comments. ROA.70. This was sufficient. See *United States* v. *Sanchez*, 481 F. App'x 291, 293 (8th Cir. 2012) ("The record makes it clear that the district court was aware of Sanchez's arguments [regarding the Section 5K1.1 factors], and we therefore presume that the district court considered and rejected them.") (citation and internal quotation marks omitted); *United States* v. *Bright*, 3 F. App'x 232, 237 (6th Cir. 2001) (rejecting the argument that the district court failed to explain its departure because the court "heard the statement of government counsel concerning the appellant's cooperation, including information concerning the significance and usefulness of appellant's assistance, the truthfulness of his proffer, and the nature and extent of his assistance") (citations omitted).

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. See *United States* v. *McCarthy*, 97 F.3d 1562, 1577 (8th Cir. 1996) (holding that a district court is not required "to examine each of the listed factors in § 5K1.1 on the record and explain exactly just what weight it gives to each in its departure decision"), cert. denied, 519 U.S. 1139 (1997); accord *Bright*, 3 F. App'x at 237. The court considered the government's recommendation, its own perception of Bergeron's testimony at Sheriff Ackal's trial, and statements of counsel at the sentencing hearing regarding the cooperation. The downward departure therefore falls within the district court's broad discretion, and any failure to explain the factors was not error.

Even if the district court erred by providing insufficient reasoning, such an error would be harmless. The court had an extraordinary amount of information before it: the PSR for each of the ten defendants who pleaded guilty, testimony from Sheriff Ackal's trial in which extensive information regarding each defendant's wrongful conduct was presented, the Section 5K1.1 motions for each defendant explaining the specific nature of each defendant's cooperation, and arguments from counsel for the United States and for each defendant. After considering all of this information, the court selected sentences for each defendant that reflected their relative culpability and cooperation. The court did not blindly defer to the United States' recommendations or to the Guidelines recommendations

in the PSR.[5] In light of this delicate balancing, it is clear that the court would render the same 48-month sentence if Bergeron's sentence were vacated for insufficient reasoning. Any other approach would upset the deliberate equilibrium that the court established at the initial sentencing proceedings. See *Malone*, 828 F.3d at 341 (holding that even if the district court muddles the steps of the sentencing analysis, the error is harmless if the record suggests that the district court would have reached the same sentence anyway).[6]

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[5] The district court sentenced Jeremy Hatley to a sentence within the range that the United States recommended, but sentenced Bergeron, Bret Broussard, and David Hines above the United States' recommended range (but still below the original Guidelines calculation), demonstrating that the court believed the United States had recommended too great of a downward departure in light of the district court's independent evaluation of the factors.

[6] There is no evidence, as Bergeron suggests (Br. 17-18) that the district court considered non-assistance factors in ruling on the Section 5K1.1 motion in violation of *United States* v. *Desselle*, 450 F.3d 179 (5th Cir. 2006), cert. denied, 549 U.S. 1179 (2007). In any event, even if there were a *Desselle* error, it would be harmless under *Malone*, where this Court concluded that using non-assistance-related factors in the Section 5K1.1 analysis is not prejudicial error if the district court could have reached the same sentence by applying the 18 U.S.C. 3553(a) factors. 828 F.3d at 341.

II

THE DISTRICT COURT PROVIDED BERGERON WITH AN INDIVIDUALIZED SENTENCE

A. Standard Of Review

Bergeron did not object to the district court's sentencing decision on the basis that he was deprived of an individualized sentence even though he could have done so. Accordingly, review is for plain error only. See *United States* v. *Lopez-Velasquez*, 526 F.3d 804, 806 (5th Cir.), cert. denied, 555 U.S. 1050 (2008).

B. The District Court Provided Bergeron With An Individualized Sentence And Did Not Err, Plainly Or Otherwise

Bergeron has two theories (Br. 24-28) for why he was denied an individualized sentence. Neither has merit and therefore the district court did not err, let alone plainly err.

First, Bergeron suggests (Br. 25-27) that he did not receive an individualized sentence because his sentence when compared to the sentences of Ben Lassalle and Jason Comeaux "do not reflect the varying degrees of culpability of the defendants." Bergeron has no evidence that the court confused the defendants or otherwise failed to provide an individualized sentence; to the contrary, he attempts to draw the inference that the court confused the defendants from the disparities in their sentences. However, this Court has held that disparity between a defendant's sentence and sentences of his co-defendants is not a basis to disturb the sentence.

See *United States* v. *Guillermo Balleza*, 613 F.3d 432, 435 (5th Cir.), cert. denied, 562 U.S. 1076 (2010). "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).

Even if Bergeron's argument (Br. 27) that "[t]he disparity between the sentences * * * leads to great concern that the district court misidentified Mr. Bergeron at sentencing" were a permissible basis for appeal, his argument would still fail because the record belies his premise—that there is a sentencing disparity. Specifically, Bergeron's contention (Br. 25-27) that he was less culpable than Lassalle and Comeaux and therefore should have received a lower sentence finds no support in the record. To start, Bergeron *did* receive a lower sentence than Lassalle, who was sentenced to 54 months. And, with regard to Comeaux, Bergeron focuses on the fact that Comeaux was charged with more counts rather than on the total scope of all relevant wrongdoing. Viewed in totality, Bergeron is not any less culpable than Comeaux as Bergeron (like Comeaux) engaged in multiple excessive-force violations and attempts to cover-up the wrongdoing and thwart the investigation. See pp. 4-6, *supra*. In addition, Bergeron's comparison completely omits differences in levels of cooperation. While Bergeron's cooperation was important to the investigation, Comeaux's—as the United States represented to the district court—was pivotal. The district court, which weighed

culpability and cooperation, was within its discretion to sentence Bergeron to a longer term of imprisonment than Comeaux, and there is no evidence that the court was confused. See *Guillermo Balleza*, 613 F.3d at 435 ("[S]entence disparities between co-defendants * * * who received departures for substantial assistance are not unwarranted disparities."); *United States* v. *Duhon*, 541 F.3d 391, 397 (5th Cir. 2008) (noting that differing levels of assistance is a relevant factor in considering sentencing disparities).

Second, Bergeron contends (Br. 27-28) that he was deprived of an individualized sentence because Jeremy Hatley and Bret Broussard have also argued that they were deprived of individualized sentences. As a threshold matter, neither Hatley nor Broussard was denied an individualized sentence for the reasons stated in the United States' answering briefs in those cases. In any event, even if there were some issue regarding Hatley or Broussard's sentences, Bergeron's argument (Br. 27) that the district court "necessarily misidentified" him does not follow. There is no evidence whatsoever that the district court was confused as to Bergeron's identity, and, indeed, Bergeron has pointed to no such evidence. To the contrary, the court at sentencing heard statements from a witness, along with counsel for Bergeron and the United States, as well as Bergeron himself. ROA.64-69. Each of these individuals spoke about issues that were specific to Bergeron. ROA.64-69. Moreover, the district court heard that information and specifically

stated (ROA.70) that it had considered the PSR (ROA.98-114) and the Section 5K1.1 motion (ROA.141-146), which were tailored to Bergeron's circumstances. Finally, the court also acknowledged that Bergeron was a line officer rather than a supervisor, stating that "the best that I could say is [that] you had lousy leadership." ROA.69-70.

Not only did the district court state that it had considered information specific to Bergeron, but the sentences it ultimately reached for the various defendants confirm that there was no confusion. Specifically, the sentences for Hatley, Broussard, and Bergeron are internally consistent and sensible in light of the record. Of the three defendants, Hatley received the lowest total punishment (36 months) for his misconduct: failing to intervene in an assault of an inmate and lying to federal investigators. Bergeron's 48-month sentence was longer because his wrongdoing dated back farther than the April 29, 2011, chapel incidents and involved multiple other abuses. And Broussard's 54-month sentence was even longer because he, like Bergeron, engaged in multiple abuses, but unlike Bergeron was also a supervisor who condoned abuses by his subordinates. The sentences of the three defendants reflects their relative culpability, further demonstrating that the district court was not confused and that the district court provided each defendant with an individualized sentence that was tailored to his circumstances.

Simply put, the court considered Bergeron's Guidelines range and departed and varied downward based on facts specific to Bergeron to reach the 48-month sentence. 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 or below the Guidelines range. See *United States* v. *Campos-Maldonado*, 531 F.3d 337, 338-339 (5th Cir.), cert. denied, 555 U.S. 935 (2008). Because there is no evidence that Bergeron was deprived of an individualized sentence, Bergeron cannot rebut this presumption.

III

THE DISTRICT COURT'S BELOW-GUIDELINES SENTENCE IS SUBSTANTIVELY REASONABLE

A. Standard Of Review

This Court reviews Bergeron'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 48-Month, Below-Guidelines Sentence Is Substantively Reasonable In Light Of The Record*

The properly calculated, unchallenged Guidelines range in this case called for a 78- to 97-month sentence. ROA.63. The district court departed and varied downward from that range and sentenced Bergeron to a 48-month sentence. Bergeron has provided no reason why such a below-Guidelines sentence is substantively unreasonable, nor can he in light of his assaults on multiple arrestees and inmates, which extend far past the single offense to which he pleaded guilty.

Bergeron 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). Bergeron makes no attempt to show that the district court failed to account for factors that should have received significant weight or that it gave significant weight to an improper factor. Rather, Bergeron's sole argument (Br. 29) is that the district court erred "in weighing the sentencing factors."

Bergeron's argument (Br. 29-39) consists of little more than a ten-page summary of various facts with no citations to any material in the record or to any authority. This is insufficient to rebut the presumption of reasonableness. To the contrary, Bergeron'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.").

The district court considered the factors that Bergeron now wants this Court to reweigh and concluded that they did not support a lower sentence. Indeed, much of Bergeron's opening brief on appeal is a verbatim repetition of his sentencing memorandum, which contains arguments regarding mitigating factors that the district court considered but rejected. Compare Br. 30-37, with ROA.129-136. As this Court has held, "the 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).

In his appellate brief (as in his sentencing memorandum), Bergeron extensively discusses his employment history (Br. 32-33), his family responsibilities (Br. 33), his remorse (Br. 34), and his cooperation (Br. 35-37). The district court, however, considered each of these factors. The PSR, the factual findings of which the district court adopted, for example, discussed Bergeron's employment history and familial responsibilities. ROA.108-110. Both Bergeron and his counsel discussed his remorse at the sentencing hearing. ROA.65-68. And the district court had before it extensive information regarding Bergeron's cooperation, including his testimony at Sheriff Ackal's trial (ROA.864-939), the United States' Section 5K1.1 motion (ROA.141-145), his counsel's statement discussing his cooperation (ROA.66-67), and the United States' counsel's statement at the sentencing hearing regarding the cooperation (ROA.68-69).

Accordingly, even if, as Bergeron suggests (Br. 34), he presented "significant mitigation" evidence to the district court, he cannot rebut the presumption of reasonableness by pointing to that court's weighing of the factors. See *United States* v. *Koss*, 812 F.3d 460, 472 (5th Cir. 2016) (Defendant's "disagreement with the district court's balancing of the mitigating factors in light of the § 3553(a) factors does not rebut the presumption of reasonableness that attaches to her within-Guidelines sentence."), cert. denied, 137 S. Ct. 1812 (2017); *United States* v. *Duke*, 788 F.3d 392, 398 (5th Cir. 2015) (finding no abuse of

discretion where "[t]he district court considered this mitigating evidence but determined that the nature and circumstances of the offense, the history and characteristics of the defendant, the need to reflect the seriousness of the offense, and the need to deter future criminal conduct justified the sentence imposed").

In asking this Court to reweigh factors that the district court already considered, Bergeron ignores the record and downplays his role in the IPSO abuses. For example, with no citation to the record, Bergeron asserts (Br. 31) that he "rarely participated" in IPSO abuses. This is contrary to Bergeron's own testimony during the trial of his co-defendant, Sheriff Ackal. In that testimony, he admitted that he participated in the narcotics unit's jump-outs by slamming innocent citizens into the ground in violation of use-of-force rules. ROA.868-872. Bergeron also randomly assaulted two individuals for no reason after drinking at a party. ROA.873-875. And Bergeron admitted to assaulting Ricky Roche, an arrestee, for no reason. ROA.896-899. Bergeron also created false reports and otherwise tried to cover up all of these abuses. ROA.876-880; ROA.900-902; ROA.914-915; ROA.921. None of this wrongdoing appears anywhere in Bergeron's application of the Section 3553(a) factors. This Court should reject Bergeron's attempt on appeal to recast his conduct and his invitation to reweigh factors without consideration of all of the relevant facts that were before the district court. See *United States* v. *Stephens*, 717 F.3d 440, 447 (5th Cir.) ("While

Stephens attempts to minimize the severity of his offenses by noting that the offense conduct did not result in harm to any actual victims and that Stephens was led along by his co-conspirators and law enforcement agents, we fail to see how such arguments can overcome the presumption of reasonableness."), cert. denied, 134 S. Ct. 459 (2013).

In sum, the district court gave a below-Guidelines sentence 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 below-Guidelines sentence.

CONCLUSION

This Court should affirm the district court's judgment and 48-month sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 25, 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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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 6414 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 25, 2017