UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

UNITED STATES OF AMERICA, Plaintiff	*	CRIMINAL NO. 3:11-cr-00202-03
	*	DISTRICT JUDGE R. G. JAMES
vs.	*	
	*	MAG. JUDGE K. L. HAYES
TONY L. JOHNSON, Defendant	*	

BRIEF FOR THE UNITED STATES IN OPPOSITION TO DEFENDANT'S APPEAL OF THE SENTENCE AND JUDGMENT ISSUED BY A MAGISTRATE

STEPHANIE A. FINLEY
United States Attorney

MARY J. MUDRICK (LA 01992) (TA)
Assistant United States Attorney
300 Fannin St., Ste. 3201
Shreveport, LA 71101
(318) 676-3600

THOMAS E. PEREZ
Assistant Attorney General

MARK L. GROSS
(DC Bar. No. 183442)
JENNIFER LEVIN EICHHORN
(MA Bar No. 548242)
CHRISTINE M. SISCARETTI (TA)
(NY Bar No. 4327748)
Attorneys
U.S. Department of Justice
Civil Rights Division
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-0025

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STATEMENT OF JURISDICTION

This matter was filed in the United States District Court, Western District of Louisiana, and was presented before the Honorable Karen L. Hayes, Magistrate Judge, pursuant to 18 U.S.C. 3401. On August 12, 2011, defendant Tony L. Johnson pled guilty to violating 18 U.S.C. 245(b)(2)(A). See R. 44-1:1-20.[1] On February 7 and 8, 2012, respectively, Magistrate Hayes sentenced Johnson, R. 44-1:45-46, and entered final judgment. R. 34. On February 21, 2012, Johnson filed a

[1] "R. __:__refers to the document number recorded on the district court docket sheet and, as appropriate, the district court's pagination of the document. "Br. __" refers to the district court's pagination for the defendant's opening brief.

timely notice of appeal to the district court. R. 40. This Court has jurisdiction pursuant to 18 U.S.C. 3402.

STATEMENT OF THE ISSUE

Whether the Magistrate abused her discretion in sentencing defendant Johnson to six months' incarceration for his role in hanging a raccoon in a noose from a flagpole in front of a junior high school with the intent to intimidate the black children attending the school, thereby violating 18 U.S.C. 245(b)(2)(A).

STATEMENT OF THE CASE

On August 10, 2011, the United States filed a Bill of Information charging the defendant Tony L. Johnson (Johnson) and codefendants Brian Wallis and James Lee Wallis, Jr. (Lee Wallis), with violating 18 U.S.C. 245(b)(2)(A) by hanging a dead raccoon in a noose from a flagpole in front of Beekman Junior High School with the intent to intimidate the black students attending the school because of their race and color, and because they were attending this public school. R. 1.[2] On August 12, 2011, Johnson pled guilty before the Magistrate. See R. 44-1:1-20. On February 7, 2012, the Magistrate sentenced Johnson to six months of

[2] 18 U.S.C. 245(b)(2)(A) states, "whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with – * * * any person because of his race, color, religion or national origin and because he is or has been – (A) enrolling in or attending any public school or public college * * * shall be fined under this title or imprisoned."

incarceration to be followed by one year of supervised release.[3] R. 44-1:45-46. Judgment was entered on February 8, 2012. R. 34. Johnson timely appealed on February 21, 2012. R. 40.

STATEMENT OF FACTS

1. Factual Background

In the fall of 2007, the community of Beekman, in Morehouse Parish, Louisiana, was engaged in a racially charged debate over the busing of a substantial number of black students, ages approximately 11-14 years, to Beekman Junior High School. See R. 8-2:1; 44-1:32. Jena, Louisiana, which is approximately two hours from Beekman, was the location of the well-known "Jena 6" incident, which involved the hanging of nooses at a school to intimidate black students there. See R. 8-2:1.

On November 6, 2007, the three defendants in this case were talking while they were next door to Beekman Junior High School. See R. 8-2:1. They complained about the busing program that increased the number of black students at the school, and their belief that this program was ruining the community and lowering the standards of the school. See R. 8-2:1-2. Brian Wallis suggested that

[3] Codefendants Brian Wallis and Lee Wallis entered plea agreements on September 2, 2011. R. 11, 18. On February 7, 2012, the Magistrate also sentenced Brian Wallis and Lee Wallis, respectively, to five months' and eight months' incarceration, both to be followed by one year of supervised release. See R. 25, 27; see R. 29, 30.

they hang a dead raccoon that was in his truck from the school's flagpole to "scare the little nigger kids." R. 8-2:2. The codefendants commented and agreed on this plan. Lee Wallis got a rope from the truck and Johnson chose to tie a noose, rather than a different knot, because of the historic significance of a noose used for lynching black people. See R. 8-2:2. Again, everyone agreed with this approach. The defendants also were aware of the significance of a raccoon as a derogatory reference to blacks. See R. 8-2:2.

Brian Wallis held the raccoon while Johnson placed the noose around the animal's neck. Brian Wallis tightened the rope and then hung the raccoon, by the noose, from the flagpole in front of the school. See R. 8-2:2. Brian Wallis commented "[t]hat will show the little niggers" and defendant Johnson said it "would be like Jena 6." R. 8-2:2. Everyone immediately left the area.

The next morning, the school principal, several teachers, and several parents of school children saw the raccoon hanging by a noose from the school's flagpole. R. 44-1:27. One teacher estimated that as many as 40 students saw the raccoon hanging by a noose. R. 44-1:27-28. After this incident, the sheriff's office provided 24-hour security at the school until security cameras were installed around the school. R. 44-1:28. In addition, parents of school children, both white and black, contacted the school principal and superintendent to express their concern and discuss future action to address school security. R. 44-1:27, 32.

Administrators held assemblies with the Junior High school children, who were ages 11-14, to address the incident and future security. R. 44-1:28, 32.

On August 12, 2011, Johnson pled guilty before the Magistrate to violating 18 U.S.C. 245(b)(2)(A) for his role in hanging the raccoon by a noose in front of the junior high school to scare the black students. See R. 44-1:1-20.

2. Sentencing

On February 7, 2012, the Magistrate held Johnson's sentencing hearing. See R. 44-1:22-47. Initially, the Federal Bureau of Investigation case agent testified about the impact of defendant's crime, including the people who saw the raccoon hanging by a noose, the security steps taken, and school assemblies held with the students to address the incident and allay their fears. See R. 44-1:26-32. Next, counsel for both parties addressed Johnson's objections to enhancements under the United States Sentencing Guidelines due to the victims' vulnerabilities, their race and age, which were included in the calculation of Johnson's sentence. See R. 44-1:32-36. The Magistrate overruled Johnson's objections. See R. 44-1:36-39.[4]

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[4] Johnson has not challenged this aspect of the Magistrate's ruling on appeal. The Magistrate held that there was evidence beyond a reasonable doubt to conclude that Johnson targeted the student victims because of their race and age. R. 44-1:37-39. The Magistrate upheld the three-level enhancement based on the victims' race under Sentencing Guidelines § 2H1.1, comment n.4, which authorizes the enhancement when a defendant selects a victim based on the victim's race. See R. 44-1:38. The Magistrate further held that the two-level enhancement based on the victims' age was permissible under Sentencing

(continued…)

The Magistrate also heard and considered defense counsel's argument that Johnson's post-incident conduct over the past four years, including his employment, his marriage, and his lack of other criminal conduct, was exemplary. R. 44-1:39. Counsel also argued that Johnson was the first of the three defendants to plead guilty in this matter and that he provided the government substantial cooperation for this case and a separate matter. R. 44-1:40. Johnson testified and expressed remorse for his actions. R. 44-1:40-41.

Agreeing with the calculations set forth in the Presentence Report (PSR), the Magistrate concluded that while Johnson's offense level of 14 and Criminal History category I resulted in a sentencing range of 15-18 months, the statutory maximum sentence was one year. R. 44-1:38, 41. The Magistrate also acknowledged the United States' motion under Sentencing Guidelines § 5K1.1 for a downward departure based on Johnson's substantial cooperation. R. 44-1:41-42.

The Magistrate considered the Sentencing Guidelines calculation, the factors set forth in 18 U.S.C. 3553(a), and "appropriate policy concerns" in determining Johnson's sentence. R. 44-1:42. The Magistrate specifically acknowledged that she would "deviate" downwards from the Sentencing Guidelines due to Johnson's

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(…continued)
Guidelines § 3A1.1 because the victims' young age was a vulnerability that was not duplicative of the underlying offense. R. 44-1:37-38; see R. 44-1:35-36.

substantial cooperation with the government. R. 44-1:42. She further noted his "true remorse" for his actions and her belief that he would not commit this crime again. R. 44-1:42. The Magistrate also addressed the significance of the crime, including the harmful and "inexcusable" racially-motivated act and the fear it caused among young children at the school. R. 44-1:42. The Magistrate expressed her intent that the sentence not "in any way minimize the seriousness of what happened in this matter" for either Johnson or others (R. 44-1:42) stating:

> [a]nd the kind of actions that were taken by you against these young children simply because they were going to school in a place that you didn't want them to go to school is really inexcusable. And it's the kind of thing that the 21st century just cannot abide. * * * and the idea that * * * we still have people in this country who look at the race of a school child and judge them in any way on the basis of race is just a sad comment.

R. 44-1:42-43. The Magistrate imposed a sentence of six months' incarceration followed by one year of supervised release that included a course on cultural diversity and sensitivity. R. 44-1:43. The Magistrate specifically acknowledged defendant's post-conduct status as the "primary breadwinner for [his] family" and his term of incarceration as reasons not to impose any fine. R. 44-1:44.

SUMMARY OF ARGUMENT

The Magistrate's six-month sentence of incarceration is fair and reasonable. The Magistrate considered the circumstances of Johnson's offense as well as his personal characteristics, including his positive post-offense conduct and

cooperation with the government, in determining his sentence. Johnson's advisory Guidelines range was 15-18 months, which was reduced to the statutory maximum of 12 months, and further reduced by the Magistrate to a term of six months.

Johnson's argument that *any* term of incarceration exceeds the goals set forth in 18 U.S.C. 3553(a) ignores the Magistrate's reasonable and proper considerations of defendant's role in a serious offense and the need for deterrence in determining defendant's sentence. Johnson has not in any way refuted the reasonableness of his sentence. See *United States* v. *Murray*, 648 F.3d 251, 258 (5th Cir. 2011) (upholding below-Guidelines sentence as substantively reasonable), cert. denied, 132 S. Ct. 1065 (2012). Johnson essentially is requesting that this Court reweigh the factors set forth in 18 U.S.C. 3553(a) in his favor, which is not a permissible ground for this Court to modify the Magistrate's sentence. See *United States* v. *Cisneros-Gutierrez*, 517 F.3d 751, 767 (5th Cir. 2008).

ARGUMENT

THE MAGISTRATE'S SENTENCE OF SIX MONTHS' INCARCERATION FOR DEFENDANT'S ROLE IN HANGING A RACCOON BY A NOOSE AT A JUNIOR HIGH SCHOOL WITH THE INTENT TO INTIMIDATE THE BLACK STUDENTS WAS REASONABLE

A. Standard Of Review

This Court's review of the Magistrate's sentence and judgment "is the same as in an appeal to the court of appeals from a judgment entered by a district judge." Fed. R. Crim. P. 58(g)(2)(D); see *United States* v. *Ranson*, No. 5:10-cr-47, 2011

WL 767395, at *1 (M.D. Ga. Feb. 25, 2011). Accordingly, this Court should review defendant's sentence for reasonableness under a "deferential abuse-of-discretion standard." *Gall* v. *United States*, 552 U.S. 38, 52 (2007); see *United States* v. *Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008) (reasonableness reviewed under an abuse of discretion standard).

B. Discussion

Johnson asserts that the Magistrate's sentence is substantively unreasonable because, in Johnson's view, six months of incarceration is a term greater than necessary to fulfill the purposes of sentencing. Br. 8-10. More specifically, defendant asserts that he should not have received *any* incarceration due to (a) his good behavior since the unlawful conduct; (b) his cooperation with the United States; (c) his guilty plea, which was entered prior to other defendants' pleas; and (d) the purported lack of a need to deter Johnson from committing future crimes. Br. 8-10. Johnson further asserts that no incarceration is warranted for him, as compared to the codefendants who were sentenced to five and eight months' incarceration, respectively. Br. 9-10.

At bottom, defendant simply argues that the Magistrate did not give as much credit to certain factors as he believes was warranted. To the contrary, the Magistrate gave due consideration to all of the factors Johnson cites, as well as other factors required to be examined under 18 U.S.C. 3553(a). The Magistrate's

six-month sentence of incarceration for Johnson's unlawful, racist and threatening conduct is substantively reasonable.

When reviewing the reasonableness of a sentence, this Court first assesses whether the Magistrate committed any procedural errors before considering whether the sentence is substantively reasonable. See *Gall*, 552 U.S. at 51; *Cisneros-Gutierrez*, 517 F.3d at 764. Procedural errors include an improper calculation of the Sentencing Guidelines range, failure to consider the Section 3553(a) factors, or failure adequately to explain the sentence imposed. See *Cisneros-Gutierrez*, 517 F.3d at 764. Defendant has not challenged the procedural reasonableness of his sentence, nor could he do so successfully. At sentencing, the Magistrate received evidence, heard argument, made factual findings, overruled defendant's objections to the enhancements based on the victims' race and age, and correctly accepted the Sentencing Guidelines calculation set forth in the PSR. See pp. 5-6, *supra*. In addition, the Magistrate heard argument and defendant's statement; considered the Section 3553(a) factors, the Sentencing Guidelines range, and policy statements; and sufficiently explained how various Section 3553(a) factors affected her determination of defendant's sentence. See *United States* v. *Camero-Renobato*, No. 11-20224, 2012 WL 386746, at *1 (5th Cir. Feb. 17, 2012); *United States* v. *Cooks*, 589 F.3d 173, 186 (5th Cir. 2009) (no procedural error when the sentencing court heard argument and stated reasons for a

sentence), cert. denied, 130 S. Ct. 1930 (2010); *United States* v. *Smith*, 440 F.3d 704, 776 (5th Cir. 2006) (a sentencing court need not cite every Section 3553(a) factor to be procedurally reasonable); R. 44-1:39-44; pp. 6-7, *supra*.

1. The Magistrate Reasonably Weighed The Section 3553(a) Factors

A defendant can establish that a sentence is *not* substantively reasonable "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." *Cooks*, 589 F.3d at 186. Johnson does not assert that the Magistrate did not consider relevant factors, but instead argues that the sentence is substantively unreasonable because the Magistrate did not give *enough* credit to certain factors when she sentenced him to a term of incarceration. See Br. 8-10. This claim is without merit. Because a presumption of reasonableness applies to a within-Guidelines sentence, see *Cisneros-Gutierrez*, 517 F.3d at 766, Johnson cannot show that his sentence, which is well below the Sentencing Guidelines minimum, is not substantively reasonable. See *United States* v. *Murray*, 648 F.3d 251, 258 (5th Cir. 2011) (upholding below-Guidelines sentence as substantively reasonable), cert. denied, 132 S. Ct. 1065 (2012).

The Magistrate reasonably considered and gave due weight to the factors Johnson identified, as well as the other relevant factors set forth in Section 3553(a)

that Johnson ignores. For example, the Magistrate specifically mentioned Johnson's substantial cooperation and "true remorse" as bases to depart below the Sentencing Guidelines range to a sentence that is 50% below the statutory maximum. R. 44-1:41-42. The Magistrate also addressed how the "seriousness" of the offense and the need for deterrence, both for defendant and others, warranted some period of incarceration. See R. 44-1:42-43; 18 U.S.C. 3553(a)(2)(A)-(B). Moreover, the Magistrate specifically stated that she would not impose a fine, which could have been as high as $40,000, due to defendant's post-crime status as the "primary breadwinner" of his family. R. 44-1:44.

Johnson's comparison (Br. 8-9) of his circumstances to the circumstances at *resentencing* in *Pepper* v. *United States*, 131 S. Ct. 1229 (2011), is unpersuasive. In *Pepper*, the Court held that, at resentencing, a district court may consider a defendant's post-criminal and post-incarceration conduct, including efforts at rehabilitation and self-improvement, to support a downward variance from the Sentencing Guidelines range. See 131 S. Ct. at 1236, 1241. Defendant argues (Br. 8-9), that his own lawful, positive steps since he hung the raccoon by a noose at the school are comparable to the defendant in *Pepper* and, accordingly, grounds for him to avoid *any* incarceration. In making this comparison, Johnson fails to give due regard and appreciation to the critical distinction between his case and *Pepper*: the defendant in *Pepper* had served 24 months of incarceration and subsequently

made substantive, positive changes to his life before the Court concluded that *no further* term of incarceration was warranted. See 131 S. Ct. at 1236-1237. Here, of course, Johnson is challenging his initial sentence, yet he has not shown that his post-crime conduct is comparable to the circumstances of the resentencing in *Pepper*, which occurred after Pepper had served two years in prison.

Moreover, Johnson cannot show that the Magistrate abused her discretion by asserting that the Magistrate should have weighed certain Section 3553(a) factors more heavily in her analysis than she did. See *Camero-Renobato*, 2012 WL 386746, at *l; *United States* v. *Lopez*, No. 11-20314, 2012 WL 162283, at *1 (5th Cir. Jan. 19, 2012) (rejecting a challenge to substantive reasonableness that "merely reflects [defendant's] disagreement with the propriety of his sentence and the district court's weighing of the § 3553(a) factors," including defendant's rehabilitation). It is well established that a reviewing court, absent evidence of a "clear error of judgment," *Cooks*, 589 F.3d at 186, may not rebalance or reweigh the Section 3553(a) factors. See *Murray*, 648 F.3d at 257-258 (below-Guidelines sentence upheld as substantively reasonable where the district court considered and addressed the same factors defendant raised below and on appeal).

A defendant's disagreement with his sentence based merely on a request that the reviewing court reweigh the sentencing factors, as Johnson asserts here, is insufficient to demonstrate an abuse of discretion by the sentencing court. See

Camero-Renobato, 2012 WL 386746, at *2 (defendant's request that the reviewing court "re-weigh the § 3553(a) factors" was rejected as "insufficient to justify reversal of the district court") (citing *Gall*, 552 U.S. at 51); *Lopez*, 2012 WL 162283, at *1; *Cisneros-Gutierrez*, 517 F.3d at 767. The Fifth Circuit has explained:

> [the defendant] contends that the sentence is substantively unreasonable because it is greater than necessary to achieve the sentencing goals of § 3553(a). [The defendant's] appellate argument is, in essence, that this court should reweigh the § 3553(a) factors. That we "might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." *Gall*, 552 U.S. at 51 []. [The defendant's] disagreement with the district court's assessment of his sentence is insufficient to show that his sentence is unreasonable or that the sentence imposed represents an abuse of the district court's sentencing discretion.

United States v. *Mireles*, 368 F. App'x 599, 601 (5th Cir.) (rejecting claim that the district court's consideration of the defendant's family circumstances in granting a below-Guidelines sentence was unreasonable where defendant argues that the sentence should be lower), cert. denied, 130 S. Ct. 2424 (2010); see *Cisneros-Gutierrez*, 517 F.3d at 766-767 (rejecting claim to reweigh sentencing factors when the sentence was based, in part, on defendant's role in the crime, his temporary flight from authorities, and the sentencing court's avoidance of sentencing disparities with a codefendant).

As noted, the Magistrate explicitly cited defendant's substantial cooperation with the United States and defendant's "true remorse," and relied upon her belief

that Johnson would not commit this type of crime again when she imposed a below-Guidelines sentence. See R. 44-1:42. This sentence is half of the statutory maximum sentence, and less than half of the Sentencing Guidelines range. See R. 44-1:41-42. Given the multiple factors that the Magistrate must and did consider here, including the need for deterrence and the seriousness of the offense, there is no merit to defendant's assertion (Br. 9) that the Magistrate's acknowledgment that she did not believe defendant would commit this crime again is, by itself, a compelling reason not to impose any term of incarceration. See 18 U.S.C. 3553(a)(2). Similarly, defendant's assertion that his cooperation and post-offense conduct warrant no term of incarceration merely asks this Court to rebalance the Section 3553(a) factors, which is neither permissible nor a basis for showing the Magistrate abused her discretion – after all, the Magistrate expressly referred to both factors when imposing the sentence. See *Mireles*, 368 F. App'x at 601; *Cisneros-Gutierrez*, 517 F.3d at 767; R. 44-1:42-44.

2. Johnson's Assertion That His Circumstances Warrant A Different Sentence Than The Codefendants Is Without Merit

Johnson's assertion (Br. 9) that his sentence is unreasonable due to the "unwarranted sentence disparities" with the codefendant's sentences also is without merit. Johnson has not identified sufficient facts to show that his circumstances at sentencing are sufficiently different from the codefendants' circumstances to warrant a substantially different sentence for him. In fact, the

limited evidence in the record supports the Magistrate's imposition of similar sentences for Johnson and the two codefendants.[5]

First, to the extent that defendant's argument is based on the Magistrate's application of 18 U.S.C. 3553(a)(6), this claim should be rejected. It is well established that the purpose of Section 3553(a)(6) is to eliminate *unjustified* sentencing disparities *nationwide* among similarly situated defendants. See *United States* v. *Guillermo Balleza*, 613 F.3d 432, 435 (5th Cir.), cert. denied, 131 S. Ct. 680 (2010); see also *United States* v. *Durham*, 645 F.3d 883, 897 (7th Cir. 2011), cert. denied, 2012 WL 538438, and 2012 WL 538439 (2012); *United States* v. *Bacon*, 617 F.3d 452, 460 (6th Cir. 2010); *United States* v. *Withers*, 100 F.3d 1142, 1149 (4th Cir. 1996), cert. denied, 520 U.S. 1132 (1997). Defendant has not presented any argument that his six-month sentence is substantially greater than sentences imposed nationally, or in this case, on defendants who pled guilty to violating 18 U.S.C. 245(b)(2)(A). Moreover, when, as here, the Magistrate appropriately and expressly considered the Sentencing Guidelines, that court "necessarily gave significant weight and consideration to the need to avoid unwarranted disparities." *Cisneros-Gutierrez*, 517 F.3d at 767 (citing *Gall*, 552

[5] Because Johnson was the only defendant to appeal his sentence, currently there are no transcripts for the sentencing hearings held for the codefendants. The United States does not believe that further documentation is needed to reject Johnson's claim.

U.S. at 54); see *United States* v. *Carey*, 589 F.3d 187, 196 (5th Cir. 2009) ("a reviewing court's concern about unwarranted disparities is at a minimum when a sentence is within the Guidelines range") (citation omitted), cert. denied, 130 S. Ct. 1930 (2010).

Second, Johnson has not met his burden of showing sufficient facts for this Court to conclude that there is a difference between him and the codefendants that would warrant no incarceration for himself, yet five months' incarceration for Brian Wallis (R. 27) and eight months' incarceration for Lee Wallis (R. 30). See *United States* v. *Pete*, 424 F. App'x 345, 346 (5th Cir. 2011); *United States* v. *Butler*, 358 F. App'x 592, 594 (5th Cir. 2010). The Fifth Circuit has rejected claims that a defendant's sentence is unreasonable when compared to a codefendant's sentence when the defendant fails to present enough facts to evaluate the reasons for codefendants' sentences or to determine whether all of the defendants are similarly situated. See, *e.g.*, *Butler*, 358 F. App'x at 594 (upholding defendant's sentence and rejecting a claim of disparate sentencing among codefendants due to an insufficient record of the reasons for codefendants' sentences and whether they are similarly situated); *Pete*, 424 F. App'x at 346 (insufficient record to show the reasons for codefendants' sentences defeated a claim of unreasonable sentencing based on an alleged disparity among codefendants' sentences).

Johnson relies on the fact that he pled first, yet his plea was entered less than one month before the other defendants. See R. 8, 11, 17. Second, Johnson claims that his plea potentially influenced the other defendants to enter guilty pleas, yet there is no evidence in the record of this purported influence. These claims are inadequate grounds to conclude that Johnson's status is sufficiently different from his codefendants' status to warrant no incarceration at all.

In addition, the circumstances of the offense are substantially similar for Johnson and the codefendants, and their sentences are, accordingly, only marginally different. All of the defendants had a substantial role, and supported each others' decisions and actions when they tied the dead raccoon in a noose and hung it from the flagpole in front of a junior high school in order to frighten (successfully) the school's black students. See R. 8-2:1-2. For example, Johnson chose to tie a noose rather than a different type of knot around the dead raccoon because he knew of the racial implications of a noose, and the other defendants agreed with this approach. See R. 8-2:2. Again, Johnson ignores how his role in this serious, racist and threatening crime and the need for deterrence for himself and for others are appropriate factors that the Magistrate considered and weighed in concluding that a term of incarceration of six months was warranted and reasonable. See R. 44-1:42. In asserting that he warranted a different judgment that did not include incarceration, Johnson has not addressed all of the Section

3553(a) factors, and he has failed to show how he and the other defendants are not, in fact, similarly situated. Accordingly, Johnson cannot establish that the Magistrate abused her discretion and imposed an unreasonable sentence of six months' incarceration, rather than no term of incarceration. See *Gall*, 552 U.S. at 59-60; *Lopez*, 2012 WL 162283, at *1; *Pete*, 424 F. App'x at 346; *Butler*, 358 F. App'x at 594; *Cisneros-Gutierrez*, 517 F.3d at 767.

CONCLUSION

The Magistrate's sentence and judgment should be affirmed. The record fully supports defendant's sentence as reasonable.

Respectfully submitted,

STEPHANIE A. FINLEY
United States Attorney

s/ Mary J. Mudrick
MARY J. MUDRICK (LA 01992) (TA)
Assistant United States Attorney
300 Fannin St., Ste. 3201
Shreveport, LA 71101
(318) 676-3600

THOMAS E. PEREZ
Assistant Attorney General

s/ Jennifer Levin Eichhorn
MARK L. GROSS
(D.C. Bar. No. 183442)
JENNIFER LEVIN EICHHORN
(MA Bar No. 548242)
CHRISTINE M. SISCARETTI (TA)
(NY Bar No. 4327748)
Attorneys
U.S. Department of Justice
Civil Rights Division
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-0025

CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2012, I electronically filed the foregoing Brief Of The United States In Opposition To Defendant's Appeal Of The Sentence And Judgment Issued By A Magistrate with the Clerk of the Court for the United States District Court, Western District of Louisiana, by using the CM/ECF system, which will send notice of the foregoing brief to counsel of record, all of whom are registered CM/ECF users.

s/ Jennifer Levin Eichhorn
JENNIFER LEVIN EICHHORN
Attorney