

No. _____

**In The
Supreme Court of the United States**

RANDY LEE CARNEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

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Dated: May 24, 2019

QUESTION PRESENTED

When sentencing defendants, some district courts announce that they would impose the same length of imprisonment even if their conclusions of law and calculation of the Sentencing Guidelines range are later found to be in error. Does that alternative sentence render any such error harmless, even though the error had serious consequences collateral to the length of imprisonment?

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The Fourth Circuit's unpublished opinion in this case is reprinted at App. 1a-9a.

JURISDICTION

The Fourth Circuit entered its judgment on January 30, 2019, and it denied Carney's petition for panel or en banc rehearing on February 26, 2019. App. 1a-9a; 24a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Criminal Procedure 52(a) provides that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."

STATEMENT OF THE CASE

A. The district court designated Carney as a career offender and issued an "alternative sentence" if that designation were later found to be erroneous.

Petitioner Randy Lee Carney was indicted for federal drug offenses involving crack cocaine, and he pleaded guilty without a plea agreement. (JA 11-40).

Prior to sentencing, the United States Probation Office submitted a presentence report asserting that Mr. Carney was a "career offender" under U.S.S.G. § 4B1.1 because he had committed

the federal offense after being convicted of two prior predicate felonies: one for a controlled substance offense and one for a crime of violence. (JA 105). The presentence report identified Carney's prior assault conviction as the crime of violence. (*Id.*). The career offender designation increased Carney's criminal history category from IV to VI and elevated the base offense level from 24 to 32, resulting in a Guidelines imprisonment range of 151 to 188 months. (JA 101-06).

Carney objected to the career offender designation, along with the resulting offense level, criminal history category, and guideline range. (JA 108-09). Carney argued that his prior assault conviction was not a crime of violence because it could have been committed with a *mens rea* of mere "culpable negligence" under North Carolina law. (*Id.*). Without the career offender designation, the guideline imprisonment range was 57 months to 71 months. (JA 80).

At the initial sentencing hearing, the district court questioned whether sentencing should be postponed for a decision from the Fourth Circuit in the then-pending case of *United States v. Thompson*, 874 F.3d 412 (4th Cir. 2017), which presented a similar issue of *mens rea* under North Carolina law and the Sentencing Guidelines. (JA 55-56). Although the district court noted that *Thompson* would not necessarily resolve the question at hand, the court stated that a continuance was "prudent for both sides and for the Court." (JA 55). The court then stated, "I really do try to get it right. . . . and to the extent that the Fourth Circuit announces a decision, it will help me do that; it will help you do

that, and it will help inform these things.” (*Id.*). The parties agreed to continue sentencing to wait for *Thompson*.

The Fourth Circuit decided *Thompson* on October 26, 2017, but that opinion did not provide the guidance that the parties had hoped for.

At the re-convened sentencing hearing, the district court overruled Carney’s objection and determined that he was a career offender, holding that his assault conviction qualified as a crime of violence “in light of” this Court’s decision in *Voisine v. United States*, 136 S. Ct. 2272 (2016). (JA 68-70). The district court noted that “[t]he issue obviously is preserved” and stated that the case “will be yet another one that continues to percolate it[s] way towards Richmond [*i.e.*, towards the Fourth Circuit].” (JA 70).

With the objection overruled, the court determined—in accordance with the presentence report—that Carney’s criminal history category was VI, and that the applicable guideline range was 151 to 188 months. (JA 70). The court then heard arguments by the parties as to an appropriate sentence. The district court ultimately imposed a sentence of 120 months of imprisonment and three years of supervised release. (JA 85-87).

After announcing its sentence, the district court stated that it would have imposed the same length of imprisonment even if Carney had *not* been a career offender, a so-called “alternative sentence.” (JA 79-81). The court stated that it would have either upwardly departed from the lower Sentencing Guidelines range based on inadequacy of criminal

history, or it would have issued an upward variance for the same reason, in order to impose the same punishment of 120 months of imprisonment. (*Id.*).

Carney timely appealed to the Fourth Circuit.

B. The Fourth Circuit found any error to be harmless, despite the existence of serious consequences collateral to the length of imprisonment.

In his briefs to the Fourth Circuit, Carney first addressed the merits issue: whether his prior assault conviction was actually a crime of violence.

Carney also opposed the government's argument that any error by the district court in classifying him as a career offender was harmless because of the court's announcement of an "alternative sentence," on two grounds.

First, Carney noted that it is the government's burden to show harmlessness—a burden that is quite high. He argued that the government could not carry its burden because the district court had: (a) delayed sentencing pending *Thompson* in order to "get it right" on the career offender issue; (b) admitted that the correct ruling on that issue "informs these things [*i.e.*, the proper sentence];" and (c) later announced that the issue was "preserved" and would "percolate it[s] way towards" the Fourth Circuit.

Second, Carney pointed out three ways in which the erroneous career offender designation affected him, aside from the length of the sentence:

1. *Revocation of supervised release in the future:* If Carney were to violate his supervised release after his active term of imprisonment expired, his Sentencing Guidelines range for that violation would be artificially high, because it would be based on the erroneously inflated criminal history category established at the original sentencing.
2. *Treatment by the Bureau of Prisons:* Carney faced worse treatment while in the custody of the Bureau of Prisons for his sentence, because the BOP bases various treatment decisions on the defendant's criminal history category as established at sentencing.
3. *Possible ineligibility for future statutory changes:* The erroneous career offender designation may prevent Carney from receiving the benefit of any future changes to the Sentencing Guidelines or statutes governing crack cocaine offenses, which have been the subject of several retroactive amendments in recent years, such as the Fair Sentencing Act, the First Step Act, and Amendment 782.

A panel of the Fourth Circuit concluded that any error in classifying Carney as a career offender

was harmless, focusing entirely on the length of the term of imprisonment. App. 1a-9a.

The court failed to address the first and third collateral consequences highlighted by Carney. It addressed the second consequence only in a footnote, wrongly claiming that Carney had based that argument solely on a conversation with BOP. (In fact, Carney had cited a formal BOP policy on its website.)

Carney petitioned for panel and en banc rehearing, and the court denied the petition without comment. App. 24a.

C. The Fourth Circuit then adopted Carney’s argument on the merits—in a different case.

About a month after holding that any error in this case was harmless, the same Fourth Circuit panel reached the same merits issue in another case. *United States v. Simmons*, 917 F.3d 312, 322 (4th Cir. 2019), *as amended* (Mar. 6, 2019). In *Simmons*, the court concluded, under plain error review, that the very assault charge classified as a “crime of violence” in calculating Carney’s sentence was in fact *not* a crime of violence under the Sentencing Guidelines.

In other words, Carney’s inability to obtain a reversal on appeal was necessarily based on the question presented here—whether the announcement of an alternative sentence alone can render errors in the original sentence harmless.

REASON FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT, ALONG WITH FOUR OTHER CIRCUITS, ARE IGNORING AND VIOLATING THIS COURT'S DECISION IN *UNITED STATES V. BALL*.

This Court has long held that criminal convictions have serious consequences aside from just the length of imprisonment. *See Ball v. United States*, 470 U.S. 856 (1985). The Fourth Circuit and others are ignoring and violating that precedent when they find sentencing errors to be harmless by disregarding those collateral consequences.

In *Ball*, the defendant—a felon—was convicted in federal court on two new counts: (i) receiving a firearm in violation of 18 U.S.C. § 922(h)(1); and (ii) possessing the same firearm in violation of 18 U.S.C. § 1202(a)(1). 470 U.S. at 857-58. The district court sentenced him to consecutive terms of imprisonment of three years and two years. *Id.*

On appeal, the defendant argued that Congress did not intend that a person could be convicted of those two crimes for the same conduct. *Id.* at 858. This Court agreed. More importantly, this Court rejected the government's requested remedy: remand for the two sentences to be run concurrently. *Id.* at 864-65. This Court held:

The second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the

sentence. The separate conviction, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant's credibility, and certainly carries the societal stigma accompanying any criminal conviction. *See Benton v. Maryland*, 395 U. S. 784, 395 U. S. 790-791 (1969); *Sibron v. New York*, 392 U. S. 40, 392 U. S. 54-56 (1968). Thus, the second conviction, even if it results in no greater sentence, is an impermissible punishment.

Id. *Ball* found it to be self-evident that convictions have serious consequences aside from the immediate term of imprisonment.

This Court explicitly reaffirmed that holding in *Rutledge v. United States*, 517 U.S. 292, 302–03 (1996), where it reemphasized the significance of those “collateral consequences.” In *Rutledge*, the government argued that the defendant would not face any such collateral consequences because he was subject to multiple life sentences without the possibility of release. This Court, however, held that it “need not conclusively resolve” that question because the mere imposition of an additional \$50 fine for the improper second conviction was “as

much of a collateral consequence” as those recognized by *Ball*, rendering the second conviction not harmless. *Id.*

Ball did not use the phrase “harmless error” or cite Rule 52(a). But the lower courts have correctly understood *Ball* to provide the test for analyzing harmlessness under Rule 52(a): a conviction is not harmless simply because it does not affect the immediate sentence of imprisonment. See *United States v. Wallace*, 447 F.3d 184, 190 (2d Cir. 2006) (citing *Ball* and rejecting government’s argument that erroneous multiple convictions were harmless); *United States v. Rea-Beltran*, 457 F.3d 695, 702 (7th Cir. 2006) (rejecting government’s argument that erroneous failure to accept guilty plea was harmless and quoting *Ball*’s reference to “potential adverse collateral consequences”); *United States v. Mendoza*, 902 F.2d 693, 697-98 (8th Cir. 1990) (citing *Ball* and rejecting government’s argument that erroneous multiple convictions were harmless); *United States v. Brooks*, 610 F.3d 1186, 1194 n.1 (9th Cir. 2010) (same); *United States v. Morris*, 247 F.3d 1080, 1084-85 (10th Cir. 2001) (rejecting government’s argument that erroneous multiple convictions were harmless and quoting *Ball*’s reference to “potential adverse collateral consequences”); see also *United States v. Maddox*, 48 F.3d 555, 560 (D.C. Cir. 1995) (rejecting government’s argument that erroneous failure to accept guilty plea was harmless, because of collateral consequences, but not citing *Ball*).

Furthermore, while the cases applying *Ball* have done so to invalidate additional convictions or to reverse failures to accept pleas of not guilty, the

principle of *Ball* applies equally in the context of the Sentencing Guidelines. Indeed, one of the exact collateral consequences specified by *Ball* is functionally identical to first collateral consequence identified by Carney in this case.

In *Ball*, the Court held that “the presence of two convictions on the record may . . . result in an increased sentence under a recidivist statute for a future offense.” 470 U.S. at 865. Here, likewise, the erroneous career offender designation may result in an increased sentence if the defendant violates his supervised release in the future. See U.S.S.G. § 7B1.4(a) (providing that the criminal history category used at revocation “is the category applicable at the time the defendant originally was sentenced to a term of supervision”).¹ Rule 52(a) applies equally to all errors in a criminal proceeding, and there is no reason why the collateral consequence identified in *Ball* should not matter in the sentencing context.

Further, the collateral consequence of a possible higher sentence on revocation of supervised release is not speculative—it is quite possible, at least as possible as the defendant in *Ball* committing a crime in the future and suffering an enhanced sentence under a recidivist statute. The size of the sword hanging over a defendant’s head matters, especially when that sword often falls.

¹ An upward variance or upward departure, as in a district court’s hypothetical alternative sentence, does not actually alter the criminal history category for purposes of U.S.S.G. § 7B1.4(a) on revocation of supervised release.

Defendants who are sentenced under certain misapplications of the Sentencing Guidelines also face the other two collateral consequences identified by Carney: worse treatment by the BOP, and the inability to take advantage of certain future statutory changes that may reduce sentences retroactively. These consequences may not be entirely certain, but then again, it is the government's burden to establish harmlessness to a reasonable degree of certainty. *See Molina-Martinez v. United States*, 136 S. Ct. 1338, 1348 (2016).

The present case is not the first case in which the Fourth Circuit has improperly ignored *Ball* and collateral consequences in finding a sentencing error to be harmless. In *United States v. Lee*, 540 F. App'x 157, 158 (4th Cir. 2013), the defendant argued that the district court miscalculated the Sentencing Guidelines range by incorrectly determining that two prior offenses were separated by an intervening arrest. The Fourth Circuit concluded that because the defendant had received the statutory minimum sentence of imprisonment, any such error was harmless. *Id.* The court rejected the defendant's argument that the miscalculation "could negatively impact his future sentencing or his classification and privileges within the Bureau of Prisons," holding without explanation that the defendant's "speculation regarding future events and consequences is insufficient to preclude a finding of harmless error." *Id.*

The Fifth, Sixth, Seventh, and Tenth Circuits have likewise failed to apply *Ball* in the sentencing context, instead finding an error to be harmless

despite collateral consequences. *See United States v. Huerra*, 884 F.3d 511, 520 (5th Cir. 2018) (holding that error in application of the Sentencing Guidelines would not affect treatment by BOP, and therefore error was harmless); *United States v. Brown*, 221 F.3d 1336, at *14 (6th Cir. 2000) (unpublished) (holding that error in application of the Sentencing Guidelines that do not affect the defendant’s actual sentence are harmless, even if they affect the defendant’s treatment by the BOP); *United States v. Wilken*, 498 F.3d 1160, 1170 (10th Cir. 2007) (same); *United States v. Molinaro*, 428 F. App’x 649, 655 (7th Cir. 2011) (holding that error in application of the Sentencing Guidelines was harmless because the error would not “have any practical consequence that would affect [the defendant’s] substantial rights” while incarcerated by the BOP”).

There appear to be no other reported cases addressing collateral consequences in the sentencing context when addressing harmless error. In short, five circuits have spoken—and all five have ignored and violated *Ball*.

This Court should grant the Petition to reaffirm the core principle of *Ball* that consequences outside of the immediate length of imprisonment matter, and to make clear that *Ball* applies in the context of errors under the Sentencing Guidelines.

II. THE CIRCUITS ARE SPLIT ABOUT WHETHER TO CONSIDER COLLATERAL CONSEQUENCES WHEN IT COMES TO HARMLESS ERROR IN SENTENCING.

All of the circuits, when deciding whether Guidelines errors are harmless, are improperly ignoring *Ball*'s holding that collateral consequences render an error not harmless. But the problem goes further. While none of those circuits cited *Ball* or reached the right result, two of them at least *considered* collateral consequences while ultimately holding that those consequences were not enough to establish harm, while the other two held that collateral consequences are *entirely irrelevant*. In other words, while the circuits are uniform in improperly ignoring *Ball*, they are split about whether collateral consequences even matter in the first place.

The Fifth and Seventh Circuits at least considered collateral consequences when it came to harmless error in the sentencing context—they simply found that there was no harm in those specific instances. *See Huerra*, 884 F.3d at 520 (holding that error in application of the Sentencing Guidelines would not affect the defendant's treatment by BOP, and therefore that error was harmless); *Molinaro*, 428 F. App'x at 655 (holding that error in application of the Sentencing Guidelines was harmless because the error would not "have any practical consequence that would affect [the defendant's] substantial rights while incarcerated" by the BOP).

By contrast, the Sixth and Tenth Circuits explicitly disavowed that collateral consequences could ever be relevant. In *Wilken*, 498 F.3d at 1170, the defendant argued that even if the district court's application of the reckless endangerment enhancement under the Sentencing Guidelines did not affect the length of his sentence of imprisonment, it would negatively affect the security designation assigned to him by the BOP. The Tenth Circuit rejected that argument and did not consider whether there was any actual harm, holding that "we determine whether a sentencing error is harmless with reference only to the sentence imposed." *Id.* *Wilken* cited the Sixth Circuit's opinion in *Brown*, 221 F.3d, at *14, which concluded that any effects of the sentencing error on the BOP's treatment of the defendant categorically "do not affect the defendant's 'substantial rights'" under harmless error.

The Fourth Circuit, in the present case and *Lee*, has summarily rejected attempts to rely on collateral consequences on the grounds that the consequences were "speculative." It is unclear from that language on which side of the circuit split the Fourth Circuit falls.

This Court should grant the Petition to resolve this circuit split, so that the lower courts are instructed that they should consider collateral consequences (under the framework of *Ball*) when analyzing harmless error.

III. THE FOURTH CIRCUIT, ALONG WITH FOUR OTHER CIRCUITS, ARE VIOLATING THE PRINCIPLES UNDERLYING THIS COURT'S RECENT DECISION IN *ROSALES-MIRELES*.

In *United States v. Rosales-Mireles*, 138 S. Ct. 1897, 1903 (2018), this Court held, under plain-error review, that a miscalculation of the Guidelines range “will in the ordinary case . . . seriously affect the fairness, integrity, or public reputation of judicial proceedings, and thus will warrant relief.” In doing so, this Court highlighted several reasons why it is important for a district court to calculate the Guidelines range correctly—two of which were in fact *collateral* to the length of the sentence: (a) the Sentencing Commission relies on data developed during sentencings, necessitating accurate sentencing calculations; and (b) the BOP “relies . . . on aspects of the Guidelines calculation in designing and classifying prisoners based on security and program needs.” *Id.* at 1907-09 & n.2.

While the doctrines of plain error and harmless error serve different purposes, the Court’s holding in *Rosales-Mireles* that collateral consequences matter applies equally in both contexts.

Furthermore, this Court noted in *Rosales-Mireles* that “remands for resentencing are relatively inexpensive proceedings compared to remands for retrial.” *Id.* at 1907-08. A remand for resentencing is all that defendants in Carney’s position are seeking.

This Court should grant the Petition to make clear that the principles of *Rosales-Mireles* apply not just to Rule 52(b), but also to Rule 52(a).

CONCLUSION

The circuits are split about whether to consider collateral consequences in sentencing, but they are unfortunately not split in unanimously ignoring and violating this Court's decision in *Ball* (and the principles underlying *Rosales-Mireles*). For both of those reasons, the Court should grant the Petition.

Respectfully submitted,

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APPENDIX

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[ENTERED: January 30, 2019]

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4081

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

RANDY LEE CARNEY,

Defendant – Appellant.

Appeal from the United States District Court for the
Eastern District of North Carolina, at Raleigh. James
C. Dever III, District Judge. (5:16-cr-00223-D-1)

Argued: December 13, 2018

Decided: January 30, 2019

Before GREGORY, Chief Judge, and DUNCAN and
DIAZ, Circuit Judges.

Affirmed by unpublished opinion. Judge Duncan wrote the opinion, in which Chief Judge Gregory and Judge Diaz concurred.

ARGUED: Mark Russell Sigmon, SIGMON LAW, PLLC, Raleigh, North Carolina, for Appellant. Phillip Anthony Rubin, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee. **ON BRIEF:** Robert J. Higdon, Jr., United States Attorney, Jennifer P. May-Parker, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

DUNCAN, Circuit Judge:

Randy Lee Carney appeals the district court's judgment sentencing him to 120 months' imprisonment. He contends that the court erred in applying the career offender enhancement to his sentence because one of the offenses on which it relied did not qualify as a predicate offense. Finding no reversible error, we affirm.

I.

Carney was indicted by a grand jury on two counts of distribution and possession with the intent to distribute crack cocaine, in violation of 21 U.S.C. § 841(a)(1). He pleaded guilty to both counts.

Before sentencing, the probation office prepared a presentence report (a "PSR"), which

determined that Carney was a career offender under U.S.S.G. § 4B1.1(a).¹ This designation was based on two prior felony convictions: a 2012 conviction for possession with intent to sell and deliver marijuana and a 2013 conviction for assault on a law enforcement officer causing physical injury (“ALEOCPI”), N.C. Gen. Stat. § 14-34.7(c). The latter conviction involved Carney’s assault of a Raleigh police officer, which left the officer with “a broken nose, a cracked tooth and whiplash.” J.A. 74, 100. The career offender enhancement increased Carney’s total offense level from a base offense level of 24 to 32, and after a three-level reduction for acceptance of responsibility, to 29. The enhancement also increased his criminal history category from IV to VI. Accordingly, Carney’s advisory Guidelines range rose from 57 to 71 months without the career offender designation to 151 to 188 months with the enhancement.

Carney objected to the probation officer’s determination that he was a career offender, contending that his 2013 ALEOCPI conviction did not constitute a crime of violence and was therefore not a predicate offense for the career offender enhancement. Carney’s sentencing hearing was continued several times pending our decision in *United States v. Thompson*, 874 F.3d 412 (4th Cir. 2017), which determined whether North Carolina assault inflicting serious bodily injury constitutes a crime of violence, because as the district court in this case explained, it

¹ Under the Guidelines, a defendant is a career offender if, as relevant here, the defendant “has at least two prior felony convictions of either a crime of violence [as defined in § 4B1.2(a)] or a controlled substance offense.” U.S.S.G. §§ 4B1.1(a), 4B1.2(a).

“really do[es] try to get it right.”² J.A. 54. The district court ultimately overruled Carney’s objection, concluding that Carney’s 2013 ALEOCPI conviction qualified as a crime of violence under § 4B1.2(a) and that he was therefore a career offender.

Having determined that Carney was a career offender, the court considered the 18 U.S.C. § 3553(a) factors and sentenced Carney below the Guidelines range to 120 months in custody for each count, to run concurrently. In addition, the district court further announced that it would have imposed the same 120-month sentence even if the career offender enhancement did not apply. The court explained that in a “counterfactual universe” where Carney was not a career offender, it would have reached the same sentence either by an upward departure pursuant to U.S.S.G. § 4A1.3, on the basis that Carney’s criminal history category underrepresented the seriousness of his criminal history and his likelihood of recidivism, or by a variance. J.A. 80–81. This appeal followed.

II.

On appeal, Carney challenges the procedural and substantive reasonableness of his sentence, contending that the district court erred in sentencing him as a career offender because his 2013 ALEOCPI conviction does not constitute a crime of violence under § 4B1.2(a). Specifically, Carney contends that, under the categorical approach, North Carolina ALEOCPI lacks a sufficient mens rea element to categorically qualify as a crime of violence.

² During this period, the court gave Carney notice pursuant to Federal Rules of Criminal Procedure 32(h) that it was considering an upward departure under U.S.S.G. § 4A1.3(a)(1).

Generally, we apply a “deferential abuse-of-discretion standard” in reviewing any sentence, “whether inside, just outside, or significantly outside the Guidelines range.” *United States v. Savillon-Matute*, 636 F.3d 119, 122 (4th Cir. 2011) (quoting *Gall v. United States*, 552 U.S. 38, 41 (2007)). We review a sentence for reasonableness, which has procedural and substantive components: procedural reasonableness evaluates the method used to determine a defendant’s sentence, while substantive reasonableness examines the totality of the circumstances to determine whether the sentence satisfies the standards set forth in 18 U.S.C. § 3553(a). *United States v. Hargrove*, 701 F.3d 156, 160–61 (4th Cir. 2012) (quoting *United States v. Mendoza-Mendoza*, 597 F.3d 212, 216 (4th Cir. 2010)).

Improper calculation of a Guidelines range—such as applying a career offender enhancement where the defendant is not in fact a career offender—constitutes a procedural error that is subject to harmless error review. *United States v. Gomez-Jimenez*, 750 F.3d 370, 382 (4th Cir. 2014); see Fed. R. Crim. P. 52 (stating that federal courts must disregard harmless errors). Accordingly, rather than evaluating the merits of Carney’s challenge to the calculation of the Guidelines range, we may proceed directly to an “assumed error harmless inquiry.” *United States v. McDonald*, 850 F.3d 640, 643 (4th Cir. 2017); see *Gomez-Jimenez*, 750 F.3d at 382; *Hargrove*, 701 F.3d at 162; *Savillon-Matute*, 636 F.3d at 123.

Under this inquiry, we affirm the district court’s sentence if we determine that “(1) the district court would have reached the same result even if it had decided the guidelines issue the other way, and

(2) the sentence would be reasonable even if the guidelines issue had been decided in the defendant's favor." *Gomez-Jimenez*, 750 F.3d at 382. The error will only be deemed harmless when we are "certain that the result at sentencing would have been the same" absent the enhancement. *United States v. Montes-Flores*, 736 F.3d 357, 370 (4th Cir. 2013) (internal quotation marks omitted) (emphasis added). We have explained that we undertake this assumed error harmless inquiry because "it would make no sense to set aside a reasonable sentence and send the case back to the district court since it has already told us that it would impose exactly the same sentence, a sentence we would be compelled to affirm." *Hargrove*, 701 F.3d at 162 (alterations and citation omitted). Therefore, we assume that Carney does not qualify as a career offender under the Guidelines and evaluate whether, without the career offender enhancement, the district court would have reached the same result and whether the result was reasonable.

Under the first prong, the record makes clear that the district court would have imposed the same sentence even if the career offender enhancement did not apply. Expressing the "need to incapacitate [Carney]," the district court provided two alternative bases for sentencing Carney to 120 months imprisonment. J.A. 78. First, the court announced that "in an alternative counterfactual universe had [the] career offender [enhancement] not applied," it would have "upwardly departed" to an offense level of 24 and a criminal history category of VI, yielding a Guidelines range of 100 to 125 months. J.A. 80–81. Within this range, the court explained that it would have imposed a 120-month sentence. Second, the

court announced alternatively that it also would have reached the 120-month sentence as a variance. J.A. 81. Here, where the district court explicitly pronounced that it would have imposed the same sentence even without the career offender enhancement and explained the basis for the alternative sentence, the first prong is satisfied.

Carney nonetheless argues that the court's error was not harmless because we cannot be *certain* that the court would have imposed the same sentence. Carney points to the fact that the district court delayed sentencing pending our decision in *Thompson*, 874 F.3d 412, arguing that the court would not have delayed sentencing if it truly believed that Carney's case warranted a 120-month sentence regardless of the correct Guidelines range. Carney also contends that the court's announcement of an alternative sentence is merely standard practice. These arguments, however, are unavailing. We have concluded that the first prong was satisfied in cases where the district court's pronouncement of an alternative sentence was far less clear. In *Savillon-Matute*, for example, we concluded that the district court satisfied the first prong even though it did not specifically state that it would have imposed the same sentence absent the enhancement because the court's sentencing intent was clear from the record. 636 F.3d at 124. In *Gomez-Jimenez*, we affirmed the district court's alternative sentence under assumed error harmlessness review even though it did not provide a separate explanation for the alternative sentence. 750 F.3d at 383. In contrast, here, the court provided a detailed explanation of the basis for and specifics of the parallel result. We therefore conclude that the first prong is satisfied.

Turning to the second prong, we must determine whether Carney's 120-month sentence would be substantively reasonable even if the disputed issue--whether he was a career offender--were resolved in his favor. When reviewing a sentence's substantive reasonableness, we "examine[] the totality of the circumstances to see whether the sentencing court abused its discretion in concluding that the sentence it chose satisfied the standards set forth in § 3553(a)." *Id.* (quoting *Mendoza-Mendoza*, 597 F.3d at 216). In reviewing the § 3553(a) factors, "a sentencing court need not explicitly discuss each factor on the record or robotically tick through § 3553(a)'s every subsection." *United States v. Rivera-Santana*, 668 F.3d 95, 105 (4th Cir. 2012) (internal quotation marks omitted). Rather, we will "credit an articulation as clear and appropriate[] when the reasons can be matched to a factor appropriate for consideration and tailored to the defendant's situation." *Id.* (internal quotation marks omitted).

The record reflects that the district court conducted a thorough, individualized assessment of Carney and his criminal conduct as necessary under the § 3553(a) factors in explaining its sentence.³ The district court considered the nature of Carney's present offense, as well as his history and characteristics. It noted his age and substance abuse problems, as well as his lack of a GED, a high school diploma, or a history of employment. The court also considered Carney's criminal history, which began at

³ Because the district court's alternative sentence on the basis of a variance would have been substantively reasonable, we need not determine the reasonableness of an alternative sentence based on an upward departure.

age eighteen, and emphasized in particular that the crimes of conviction “are not once, but twice.” J.A. 78. The court expressed particular concern over Carney’s 2013 ALEOCPI conviction, calling it a “very serious offense.” *Id.* at 77–78. Considering the “totality of the record,” the court explained that there was a “need to incapacitate [Carney],” to “generally deter, [and] to impose just punishment.” *Id.* at 78. Accordingly, given the district court’s explanation of the § 3553(a) factors and the deferential standard of review we apply when reviewing criminal sentences, we conclude that the sentence would be reasonable even if the disputed issue were resolved in Carney’s favor.⁴

Because the district court made it clear that it would have imposed the same sentence even if Carney was not a career offender, and that sentence is substantively reasonable, we conclude that any alleged Guidelines calculation was harmless.

III.

We affirm the district court’s judgment sentencing Carney to 120 months’ imprisonment.

AFFIRMED

⁴ Carney argues that even if the court’s sentence is reasonable, its error is not harmless because the career offender designation formally elevated his criminal history category from IV to VI, which has adverse consequences for his treatment in prison. According to Carney, had the court reached the same sentence through an upward departure, such a departure would not have formally elevated his criminal history category. However, to support this claim, Carney relies solely upon a conversation he had with the Probation Office and Bureau of Prisons. We find that his argument is therefore speculative, and in the absence of any authority in support of this position, we see no basis on which to conclude that any error was not harmless in this case.

[ENTERED: January 30, 2019]

FILED: January 30, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4081
(5:16-cr-00223-D-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

RANDY LEE CARNEY

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court,
the judgment of the district court is affirmed.

This judgment shall take effect upon issuance
of this court's mandate in accordance with Fed. R.
App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

[ENTERED: January 26, 2018]

UNITED STATES DISTRICT COURT
Eastern District of North Carolina

UNITED STATES)	JUDGMENT IN A
OF AMERICA)	CRIMINAL CASE
v.)	
RANDY LEE CARNEY)	Case Number:
)	5:16-CR-223-1-D
)	
)	USM Number:
)	62758-056
)	
)	<u>Robert E. Waters</u>
)	Defendant's Attorney

THE DEFENDANT:

- ☒ pleaded guilty to count(s) 1 and 2 of the Indictment
- ☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.
- ☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(C)	Distribute and Possess With the Intent to Distribute a Quantity of Cocaine Base (Crack)	6/3/2016	1, 2

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) _____
- ☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

1/26/2018
Date of Imposition of Judgment

/s/
Signature of Judge

James C. Dever III, Chief United
States District Judge
Name and Title of Judge

1/26/2018
Date

DEFENDANT: RANDY LEE CARNEY

CASE NUMBER: 5:16-CR-223-1-D

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

Counts 1 and 2: 120 months per count and shall run concurrently – (Total term: 120 months)

☒ The court makes the following recommendations to the Bureau of Prisons:

The court recommends that the defendant receive intensive substance abuse treatment and vocational and educational training opportunities. The court recommends that the defendant receive a mental health assessment and mental health treatment while incarcerated. The court recommends that he serve his term in FCI Butner, North Carolina.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____
to _____ at _____,
with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

Counts 1 and 2: 3 years per count, but such terms shall run concurrently – (Total term of 3 years)

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's

determination that you pose a low
risk of future substance abuse.
(*check if applicable*)

4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. (*check if applicable*)
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
7. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the

court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you

must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific

purpose of causing bodily injury or death to another person such as nunchakus or tasers).

11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

**ADDITIONAL STANDARD CONDITIONS OF
SUPERVISION**

The defendant shall not incur new credit charges or open additional lines of credit without approval of the probation office.

The defendant shall provide the probation office with access to any requested financial information.

The defendant shall participate as directed in a program approved by the probation office for the treatment of narcotic addiction, drug dependency, or alcohol dependency which will include urinalysis testing or other drug detection measures and may require residence or participation in a residential treatment facility.

The defendant shall participate in a program of mental health treatment, as directed by the probation office.

The defendant shall consent to a warrantless search by a United States Probation Officer or, at the request of the probation officer, any other law enforcement officer, of the defendant's person and premises, including any vehicle, to determine compliance with the conditions of this judgment

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

JVTA

	<u>Assessment</u>	<u>Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 200.00	\$	\$	\$

- ☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.
- ☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss**</u>
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<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
----------------------------	-------------------------------

TOTALS	\$ _____	0.00	\$ _____	0.00
--------	----------	------	----------	------

- ☐ Restitution amount ordered pursuant to plea agreement \$ _____
- ☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for

delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the
☐ fine ☐ restitution

☐ the interest requirement for the
☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offences committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A. ☐ Lump sum payment of \$_____ due immediately, balance due

☐ not later than _____, or

☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B. ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

- C. ☐ Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of \$ _____ over a period of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after the date of this judgment; or
- D. ☐ Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of \$ _____ over a period of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after release from imprisonment to a term of supervision; or
- E. ☐ Payment during the term of supervised release will commence within _____ (*e.g., 30 or 60 days*) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at the time; or
- F. ☒ Special instructions regarding the payment of criminal monetary penalties:

The special assessment in the amount of \$200.00 shall be due in full immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:

The defendant shall forfeit to the United States the defendant's interest in the property specified in the Order of Forfeiture entered on January 26, 2018.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVRTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

[ENTERED: February 26, 2019]

FILED: February 26, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4081
(5:16-cr-00223-D-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

RANDY LEE CARNEY

Defendant - Appellant

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Gregory, Judge Duncan, and Judge Diaz.

For the Court

/s/ Patricia S. Connor, Clerk