No. _____

In the
Supreme Court of the United States

OCTOBER TERM, 2019

MARY MOSLEY,

Petitioner,

V.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) DID THE PANEL ERR BY UPHOLDING THE APPLICATION OF AN ENHANCEMENT FOR BRANDISHING OR POSSESSING A FIREARM WHEN MISS MOSLEY WAS ACQUITTED BY A JURY OF THIS CONDUCT ? DID THE USE OF THE ACQUITTED CONDUCT TO ENHANCE MISS MOSLEY'S SENTENCE RUN AFOUL OF THIS COURT'S DIRECTIVES IN *ALLEYNE V. UNITED STATES*, 133 S.CT. 2151 (2013) AND *NELSON V. COLORADO*, 137 S. CT. 1249 (2017) ?

2) DID THE PANEL ERR BY HOLDING THAT THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE JURY'S GUILTY VERDICT?

3) DID THE PANEL ERR BY AFFIRMING THE DISTRICT COURT'S DECISION TO INCREASE MISS MOSLEY'S BASE OFFENSE BY FOUR LEVELS PURSUANT TO U.S.S.G.§ 2B3.1(b)(4)(A) WHEN THE EVIDENCE DOES NOT SUPPORT A FINDING THAT AN "ABDUCTION" OCCURRED DURING THIS ROBBERY?

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REPORTS OF OPINIONS

The decision of the Court of Appeals for the Fifth Circuit is reported as United States v. Mary Mosley, No. 19-20061 (5th Cir. October 29, 2019)(not published). It is attached to this Petition in the Appendix.

JURISDICTION

The decision by the United States Court of Appeals for the Fifth Circuit affirmed the District Court's judgment of conviction and sentence in the Eastern District of Texas.

Consequently, Petitioner files the instant Application for a Writ of Certiorari under the authority of Title 28, U.S.C., § 1254(1).

BASIS OF FEDERAL JURISDICTION

IN THE COURT OF FIRST INSTANCE

Jurisdiction was proper in the United States District Court for the Southern District of Texas because Petitioner was indicted for violations of Federal law by the United States Grand Jury for the Southern District of Texas.

STATEMENT OF THE CASE

1. Procedural History.

On July 26, 2017, a two-count Superseding Indictment was returned in the United States District Court for the Southern District of Texas, Houston Division, naming Mary Mosley, Xavier Cain, Kendric Miller, and Kenneth Glenn, as the defendants. Count 1 charged the defendants with aiding and abetting bank robbery in violation of 18 U.S.C. §§ 2113(a), (d) and 2, which occurred on June 9, 2016. Count 2 charged the defendants with aiding and abetting use and carry of a firearm during a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii) and 2, which occurred on June 9, 2016. ROA.32-34.

On August 21, 2018, Mary Mosley proceeded to a jury trial before the Honorable Nancy F. Atlas, Senior United States District Judge. On August 24, 2018, Mary Mosley was found guilty as to Count 1 and not guilty as to Count 2 of the Superseding Indictment. ROA.1005.

Ms. Mosley was subsequently sentenced to the Custody of the Bureau of Prisons for a Term of 135 months as to Count 1. ROA.1041. She was sentenced to a five-year term of Supervised Release. The Court also imposed a Special Assessment of $100.00 and Restitution in the amount of $117,400, for which she is joint and severally liable with the co-defendants. Thereafter, Ms. Mosley timely filed a notice of appeal.

Miss Mosley appealed. On October 29, 2019, a panel of the Fifth Circuit affirmed the Petitioner's conviction in an unpublished decision.

2. Statement of Facts.

This is a bank robbery case. On June 9, 2016, three armed men robbed the IBC Bank located at 3939 Montrose in Houston, Texas. ROA.346, 449, 564, 654-55. As one man waited in a getaway

vehicle, two others entered the bank through the back door at about 7:47 a.m. ROA.372, 449, 674, 1069. Miss Mosley and another bank employee, Kimberly Saucedo, were in the process of opening the bank for the day. ROA.356. One man held a gun to Saucedo's head and the other man grabbed Miss Mosley. The men ordered the women to open the vault. The men grabbed the cash in the vault and took over $117,000 in cash. ROA.364-68, 462-63, 473, 675-77, 685.

Miss Mosley is a 26-year old single mother of two young children with no criminal history. She is a life-long resident of Houston, Texas. She was primarily raised by her mother, as her father passed away when she was eight years old. She graduated from Worthing High School in Houston in 2011, where she was ranked in the top quarter of her class. She was a member of the National Honor Society, and was named a "Texas Scholar". She also participated in cheerleading and she played soccer. She earned a scholarship to the University of Texas in Austin. Although she did not attend UT, she did attend junior college and Texas Southern University. ROA.2061.

Miss Mosely was romantically involved with David Caldwell for 7 years. They have two children together. Their son is David Caldwell, Jr., who is six years old; and Destinee Caldwell, who is 5 years old. The children reside with Mosely and she has always been the sole financial provider for her family. She and Caldwell are no longer in a romantic relationship. ROA.2060.

From August 2014 to October 2016, Mosely was employed as a banker at International Bank of Commerce (IBC) in Houston, Texas. She earned $26,000 per year plus commissions. On June 9, 2016, the IBC Bank, which is FDIC insured, and located at 3939 W. Montrose Boulevard, Houston, Texas, was robbed by armed men while Ms. Mosley was working.

The men who robbed the bank were known to Miss Mosley. The two men who entered the bank were Miss Mosley's then-boyfriend, Kendric Miller, and Miller's brother, Kenneth Glenn.

ROA.446, 449, 659, 674. Glenn possessed the gun during the robbery. ROA.461, 672. The getaway driver was Xavier Cain, Miss Mosley's cousin. ROA.449, 565. Self-serving testimony from the co-defendants provided as part of their plea agreement with the Government alleged that Miss Mosley left the bank's back door unlocked for the men to enter. ROA.452, 586, 673, 690. The co-defendants also alleged that Miss Mosley had informed them about the requirements for opening the vault and the arrival time of security guards. ROA.451, 581, 663-64.

Saucedo, a bank teller, testified that on June 9, 2016, she was working with Miss Mosley at IBC Bank, which ordinarily opens for business at 7:45 a.m. ROA.345, 352, 356. A security guard does not arrive until much later in the day. ROA.362. Saucedo testified that Miss Mosley is a sales associate and normally comes in to open the bank. ROA.361. At about 5:30 or 6:00 a.m. on the day of the robbery Miss Mosley called Saucedo to ask if Saucedo was working that day. ROA.380. Miss Mosley had never called Saucedo before. ROA.380. When Saucedo arrived at the bank at about 7:25 a.m., Miss Mosley was already there, which Saucedo found to be odd. ROA.353, 401, 828. She was parked in the front where employees were not supposed to park. ROA.353-54.

As the women approached the front door, Miss Mosley was on her phone. ROA.357. Saucedo unsuccessfully tried to open the front door. ROA.357. She could not open the door because the employees who had closed the bank the night before inadvertently had left magnetic locks in place, which required the doors to be opened from the inside. ROA.356, 420. Miss Mosley told Saucedo they would have to enter through the back door, which had an alarm. ROA.357, 422. Employees were not supposed to use that door unless they first called the bank's head of security, Ernesto Batista. ROA.357, 417. Miss Mosley called Batista to let him know they were entering through the back. ROA.357, 419. Batista testified that he told Miss Mosley to make sure that she locked the back

door after entering. ROA.427. The back door did not automatically lock; someone had to push a button in the handle to lock it. ROA.392, 408-09, 423. As the women walked to the back door, bank surveillance video showed a white truck appear in the parking lot, which Saucedo did not notice. ROA.383-84.

At about 7:47 a.m., two men entered the bank through the back door. Saucedo remembered a man in a green hoodie appearing in front of her with a gun. ROA.364-66, 372. She thought Miss Mosley had gone to the restroom and did not know if the robbers had grabbed her. ROA.396, 412. The man told Saucedo to get on the floor, to look down, and to open the vault. ROA.366-67. Saucedo initially moved away from the main vault toward the coin vault at her teller station. ROA.373. The robbers forced Saucedo toward the main vault. ROA.374. One man kept his hand on Saucedo as she crawled to the vault, and the robbers brought Miss Mosley there as well. ROA.372, 374. The vault was behind a door that required a code to open, and Miss Mosley entered her code. ROA.369. Saucedo, Miss Mosley, and the two men entered the vault room. ROA.375.

To open the vault, two employees had to enter their unique codes. ROA.369. Saucedo entered her code first before Miss Mosley did the same. ROA.375. Miss Mosley initially entered the wrong code, however, so she had to re-enter it. ROA.376. Saucedo said the men started grabbing money. ROA.376. She thought they took over $100,000 because the bank had recently received a new shipment of cash. ROA.377, 400. She said that the bank received a new shipment of cash on the same day every week. ROA.400. After the men left, the women remained in the vault for about ten minutes before Miss Mosley told her to push the panic buttons and called Batista. ROA.379. During Saucedo's testimony, the Government played video from the bank surveillance cameras, which depicted the events to which Saucedo testified. ROA.370-71.

Houston Police Sergeant David Helms was one of the officers who investigated the bank robbery. ROA.741. He testified that the men who robbed the bank took $117,400 from the vault. ROA.742. Sgt. Helms testified that Miss Mosley became a suspect based on the totality of circumstances, which included the fact that video from the surveillance cameras showed she had remained on the phone during the robbery. ROA.747. Sgt. Helms's suspicions were also raised because it was unusual for a bank to be robbed prior to opening because the robbers needed a way to gain entry into the bank. ROA.746.

Police initially interviewed Miss Mosley at the scene and then again the following week, but she denied knowledge of the robbery. ROA.751-52. In the meantime, police obtained Miss Mosley's phone records. ROA.754. The phone records showed that the night before and the morning of the robbery, Miss Mosley had made and received numerous calls to and from Miller and Cain. ROA.521. In fact, at the time of the robbery, there was a call from Miss Mosley to Cain that lasted over 8 minutes. ROA.523. That call did not disconnect and encompassed the entire time of the robbery. ROA.523. Sgt. Helms testified that this "open line" call had piqued his interest because, in his experience, it was the type of call in which someone outside the bank could let suspects on the inside know when the police were coming. ROA.777.

During the investigation, police recovered the white truck that had been used as the getaway vehicle located in the parking lot of an apartment building near the bank. ROA.743. Inside the truck, police found a baseball cap on which they discovered Cain's DNA. ROA.759.

Miss Mosley was arrested on October 10, 2016, and she asked to speak with Sgt. Helms and his partner, Detective Jessica Bruzas. ROA.760. The interview was video recorded and played for the jury. *See* ROA.773; see also Gov't Exh. 40A (video recording). Miss Mosley eventually told the

officers in the interview that she was dating Miller. ROA.769. Miss Mosley told the officers that she did not come forward sooner because she was afraid. ROA.805. She told them about a conversation she had with Miller, wherein she told Miller that she worked in a small bank; that the bank typically has no more than $100,000 in cash; that security comes in later than she arrives; and that two bank employees had to be present to open the vault. ROA.769. She admitted to Sgt. Helms that she knew Miller was going to rob the bank that day because he had told her it would occur that week, and she knew it would be that day once she saw the white truck. ROA.769.

Miss Mosley said she believed Miller's brother, Glenn, was in the truck, and she eventually admitted that Cain was also there. ROA.770. She further admitted that she was speaking to Cain on the morning of the robbery and that she knew the robbery was happening after speaking with him. ROA.770. Miss Mosley claimed that the day before or the morning of the robbery, Miller had told her not to speak to him on the number that she had for him, which she said was a "burner" phone, i.e., it was untraceable. ROA.770-71. Miss Mosley also told Sgt. Helms about a conversation with Miller and Glenn wherein Miller said they were going to "hit her bank," and asked Glenn if he was willing to participate. ROA.772. According to Miss Mosley, Glenn agreed. ROA.772.

Miss Mosley told Sgt. Helms that after the robbery Cain, Miller, Glenn, and another man named Avery Johnson, had bought new cars, which he confirmed in his investigation. ROA.776.After the interview, Sgt. Hems believed that Miss Mosley, Miller, Glenn, and Cain were all involved in the robbery. ROA.777. During Sgt. Helms's testimony, the Government played a video showing a portion of Miss Mosley's interview. ROA.773.

Glenn, Cain, and Miller all testified against Miss Mosley at trial. Glenn testified that he knew Miss Mosley because she was dating his brother, Miller, and she was a cousin to his friend Cain.

ROA.445-46. He testified that he and Miller had robbed the bank while Cain was the getaway driver. ROA.449. They used a stolen white truck as the getaway vehicle. ROA.453. Avery Johnson was also supposed to participate but apparently backed out of the crime. ROA.454. Glenn first heard about robbing the bank two weeks before it happened. ROA.449, 485. According to him, Miss Mosley told Miller that she needed money and that they could "hit her job." ROA.450. During a subsequent conversation, Glenn claimed Miss Mosley told him and Miller that the security guard did not arrive until about 9:00 or 9:30 a.m. and that they should get to the bank about 7:00 a.m. ROA.451. The plan was for them to enter the front door and to take both women to the vault. ROA.452, 456. Miss Mosley had told them that both employees had to enter their "password" to open the vault. ROA.456. The men could see the women having a problem with the front door, however. ROA.492.

Glenn testified that Miss Mosley was on the phone with Cain, who was relaying information to Glenn and Miller. ROA.456, 492. Miller carried a trash bag for the money. ROA.464. Glenn described how they opened the vault and took the money, while identifying himself and Miller on surveillance video. ROA.465-69. After exiting the bank through the back door, they drove in the truck a few blocks to a "clean car." ROA.470.

Cain drove them to the southwest side of town where they split the money, and he received approximately $30,000. ROA.471-72. He also testified that Miller said he would take care of Miss Mosley's share of the proceeds but he never saw Miller give Miss Mosley any money. ROA.474.

Cain testified similarly that Miss Mosley was involved in the robbery, and that she and Miller had set it up. ROA.564-65, 616. He said that he first became aware of the robbery a week or two beforehand, and that he was initially supposed to enter the bank but he switched to being the driver because he did not want Miss Mosley to know that he was involved. ROA.570. He stole the white

truck to be used as the getaway vehicle the night before the robbery. ROA.570-71. Miller had called Miss Mosley, but, because she did not answer, Cain then called her. ROA.575-76.

Video surveillance showed the white truck drive into the parking lot where Miss Mosley was already parked and then exit. ROA.579. Cain testified that he was driving, and that he subsequently called Miss Mosley to ask where Saucedo was because they could not rob the bank without Saucedo's code for the vault. ROA.579. Cain knew about the need for the vault code because Miss Mosley had told Miller. ROA.579. Cain explained that they were supposed to get in the bank "through Mary" because she was supposed to let them in the front door. ROA.575. Cain said the men split up the money in a parking lot. ROA.595. Cain got rid of the bills he thought were "marked" by buying tire rims. ROA.596. Cain testified that he did not have conversations with Miss Mosley about the robbery prior to the day of the offense. ROA.598.

Finally, Miller testified that he met Miss Mosley and began dating her about a month before the robbery. ROA.658-59. Miller claimed Miss Mosley told him that she wanted to move and needed money. ROA.660-61, 667. Miller never gave any money to Miss Mosley, but he took a cut for her for himself, which he spent on a car. ROA.686. He testified on cross-examination that Miss Mosley never asked for a share of the proceeds and that she may have committed the crime for "love." ROA.716-17. Miller testified that he received about $30,000. ROA.687. Miller, a convicted criminal, testified as part of his plea deal that Miss Mosley was a participant in the robbery, that she knew all of the details prior to the crime, and that she was not forced to participate. ROA.693.

Houston Police Detective Jude Vigil testified that he analyzed the cell phone records of Miss Mosley, Miller, Cain, and Glenn for the night before and the day of the robbery. ROA.891; see also ROA.1967-2037 (Gov't Exh. 47A). The records revealed that there were 20 communication events

(texts or calls) between Miss Mosley and Miller and 7 events between Miss Mosley and Cain. ROA.905. The records included cell tower locations, which showed where the phones were located at the time of the calls and texts. ROA.891. At approximately 7:26 a.m., Miss Mosley called Batista, which is consistent with the time that she and Saucedo entered through the back door. ROA.512.

The United States rested after Detective Vigil's testimony about the phone records. ROA.926. Pursuant to Federal Rule of Criminal Procedure 29, Miss Mosley moved for a judgment of acquittal, arguing that the prosecution failed to prove the elements of aiding and abetting bank robbery because there was no testimony that she aided and abetted Miller or Cain in robbing the bank. ROA.927. The district court denied the motion, finding there was "ample circumstantial evidence to take the case to the jury and for the jury to find against [Miss Mosley]." ROA.927-28.

In her defense, Miss Mosley re-called both Sgt. Helms and Cain. ROA.938, 960. The gist of the defensive theory was that Miller was a manipulative criminal who had used and abused Miss Mosley in order to commit the crime. Miss Mosley received no part of the money taken from the bank.

After a three-day jury trial, Miss Mosley was convicted of Count One in the Superseding Indictment. The jury acquitted her of Count Two involving the firearm.

The Presentence Report (PSR) assigned Miss Mosley a base offense level of 20 for Count One.[1] Miss Mosley was assigned a two-level increase pursuant to U.S.S.G. § 2B3.1(b)(1) because the property of a financial institution was taken. The PSR also assigned Miss Mosley a six-level adjustment pursuant to U.S.S.G. § 2B3.1(b)(2)(B) because the PSR officer found that a co-defendant

[1]"PSR" refers to the Presentence Investigation Report filed by the United States Probation Department (under seal).

brandished or possessed a firearm. The PSR assigned Miss Mosley a four-level adjustment pursuant to U.S.S.G. § 2B3.1(b)(4)(A) because the PSR officer found that a Miss Mosley's co-worker had been "abducted" during the robbery to facilitate commission of the offense or to facilitate escape. The PSR also assigned Miss Mosley a two-level upward adjustment pursuant to U.S.S.G. § 3B1.1(c) because the PSR officer found that Miss Mosley was an organizer or leader. The PSR also assigned Miss Mosley a two-level adjustment pursuant to U.S.S.G. § 3B1.3 because the PSR officer found that Miss Mosley abused a position of public or private trust or used a special skill in a manner that significantly facilitated that commission or concealment of the offense. The PSR did not assign a three level adjustment for acceptance of responsibility since Miss Mosley contested the charges against her and proceeded to a jury trial. These adjustments made the total offense level 38. Based on a criminal history category I, the guideline range of imprisonment was 235 months to 293 months.

Miss Mosley filed objections to the PSR. Miss Mosley objected to the four (4) level increase for "abduction", a two (2) level increase for being an organizer and a six (6) level increase for the brandishing of a firearm during the commission of the bank robbery. The District Court sustained Miss Mosley's objection regarding the two (2) level increase for role. In sustaining Miss Mosley's objection, the District Court stated:

> All right, the next objection is still in Paragraph 18 of the PSR and then it refers essentially to being held as an organizer, a role enhancement. There's a plus two 18 here because the Defendant in essence is considered an organizer of this bank robbery. Ms. Stotts, as you put it, we both sat through this trial, and I am going to tell you I have serious problems with giving the two levels for organizer to Ms. Mosley. I will tell you essentially why and then I'll give you the chance to comment back. In light of all the evidence at trial, the proof shows that Ms. Mosley, with due respect to her, naively and wrongfully but probably ignorantly gave information to Mr. Miller piecemeal, a little bit here, a little bit there, you know, during whatever their time together was. The fact that she did that was incredibly bad judgment. Incredibly bad judgment. But on the other hand, Ms. Mosley did not organize other people or pick

> the time for the robbery or understand or was even made aware of when it was going to happen, how it was going to happen, who was going to participate, who would be recruited. She was not given money to share in the proceeds. So the punch line is that she, as frankly was indicated by her in her interviews with the Government after the fact in the investigation, post-robbery investigation, I think she was manipulated and used by these guys who were basically professional robbers. So I don't see her as an organizer.
>
> *****
>
> I am going to sustain this objection. No organizer role in this.

The District Court re-scored the Total Offense Level as 36. With a criminal history category I, the advisory sentencing guideline range became 188-235 months. Miss Mosley requested a downward to a term of imprisonment of 60 months. Miss Mosley then gave a statement to the District Court. She stated:

> Good morning, my name is Mary Mosley and I stand before you today to ask you for your forgiveness and mercy for my actions for not speaking up when the situation occurred and not law enforcement of it. I acted out of stupidity and fear. I do wish that everyone find it in their hearts to forgive me for something that could have been prevented. I learned my lesson. I made a terrible mistake and it cost me my children, my family, my job, and especially my life. I let so many people down and it wasn't fair to them. I ask that you have mercy on me. I put my family in harm's way and children in fear. If I could go back and do things differently, I would. I worked there for two and a half years. I loved my job. And I was blessed to have gone so far is life, being a young mother, working in that field, doing something with my life. Where I'm from some people don't get those opportunities that I did. I was supposed to be a role model. I have two children, a 5-year-old and a 4-year-old, that needs me and depends on me (indisc.) I've been rying to help other young people to avoid being in this type of situation by letting others influence and manipulate them into doing things -- to doing what's not right. Always go to authorities, they will help. Now that I look at things differently, again I do apologize that I did not speak up earlier and use my voice and I acted out of foolishness in doing this for our safety. I've never been incarcerated or in trouble. I was a good citizen that helped in my community and I hope that is taken into consideration. Thank you. ROA.1035-1036.

The District Court then announced that it would vary downward from the sentencing guidelines. The District Court varied down to a total offense level of 33, making the advisory guideline range of imprisonment 135-168 months. The District Court made the following statement:

> Ms. Mosley made multiple repeated mistakes in violating the trust that she had given to her by the bank and her employer by telling the information that she shared with individuals whom she knew were -- I'm trying to think of a word that would appropriate -- that she knew were troublemakers. Her cousin told her they were troublemakers or essentially signaled it. And Ms. Mosley, had she in fact been afraid to do the right thing by telling authorities or her employer that she was worried people were going to hit the bank, continued for her own purposes with the scheme. I still don't think she was an organizer. I'm going to stand by my ruling wholeheartedly. Ms. Mosley was trying to curry favor with some guy who she'd been warned was not an upstanding citizen, who plainly did not have a job, who though did abuse or take advantage of her. And I say abuse in the sense of mentally preyed on her emotions. And the fact that she'd lend him her car or she'd give him information and let him drive her to work and sharing more, repeatedly over time sharing more and more confidential information of the bank is significant. The fact that Ms. Mosley was on the telephone with I believe Mr. Cain the whole time the bank robbery was going on is a sign that Ms. Mosley was in it with both feet. But on the other hand, a sign that Ms. Mosley was a patsy, and speaking to Mr. Carter's point about being naïve and frankly not having the backbone to stand up for herself, she got no money for it. So she was a patsy, but a knowing patsy who helped to ingratiate herself in order to get a guy or to get some money, whatever the multiple reasons were. On the other hand, Ms. Mosley was an upstanding citizen who had no prior run-ins or other problems with the law until this series of incidents. Certainly no convictions. And, Ms. Mosley, I need to tell you, your wrong and your refusal to acknowledge how you knowingly, knowingly helped these guys rob a bank, your bank, is much deeper a commitment of criminal acts than you failing to report it to the authorities. Which is all you've apologized for here. And I am telling you, you knowingly committed a crime by assisting these bad guys, these people with long criminal histories who had no legal means of support, in committing a robbery. And so when you think over time about what you should be forgiven for or you think about how you goofed, I hope you will understand your errors were from beginning to end sharing information and enabling this robbery all the way through the robbery. So you need to think and be working on accepting responsibility for choices that you make in the future. Because hopefully you will get courses and you will get some counseling and you will get a better understanding of the fact that you had a responsibility to follow the rules. You were entrusted with information which you just shared with people likely to abuse it, particularly as you went on through the planning process where you allowed them to use you knowingly. So it's not just not speaking up, it was aiding repeatedly. If it had

> just been one mistake where they said to you something to the effect we're going in there, you need to help us, we could talk about 60 months. But that's not the conversation. So please understand you chose to make repeated information available to those guys and assist them. In any event, I also am taking into account the fact that Ms. Mosley at the time was 23 years old and she was young and she was naïve. She's still young. And so I think that also deserves some recognition and some leniency. I have no reason to believe that you are not a very good person, Ms. Mosley. A very good person who loves your family and whose family loves you. And for Mr. Carter saying you have been abandoned, you have no support, that's not true. Because you've got these letters and the letters are important and you need to keep a copy and read them and reread them and speak to and be living, living the person they think you are, who you've displayed to them. But you cannot get out of this criminal conviction with months. No way. I am going to give a sentence at the bottom end of the guideline range that I think more accurately reflects the wrongdoing and responsibility by Ms. Mosley, and that is to give her 135 months in custody. I am giving a supervised release term of five years. I will be willing after two years or maybe three to shorten that, if I'm requested and if Ms. Mosley continues to be well behaved on supervision. Ms. Mosley, what you did, the Government has accurately described and does reflect repeated mistakes in violation of trust and an effort to assist in the robbery that otherwise could not and would not have occurred. ROA.1037-1040.

The District Court then sentenced Ms. Mosley to a 135-month term of imprisonment. ROA.1041. Miss Mosley appealed. Her conviction and sentence was affirmed by a Panel of the Fifth Circuit on October 29, 2019.

REASONS WHY CERTIORARI SHOULD BE GRANTED

The District Court erroneously adopted the PSR's recommendation and applied a 6- level enhancement to the base offense level based on a finding that a firearm was "brandished or possessed" pursuant to USSG §2B3.1(b)(2)(B). Miss Mosley was acquitted of the separate firearm count in the Superseding Indictment. The use of this acquitted conduct to enhance Miss Mosley's sentence runs afoul of this Court's clear directives in *Alleyne v. United States*, 133 S.Ct. 2151 (2013) and *Nelson v. Colorado*, 137 S. Ct. 1249 (2017). Co-Defendant Cain testified that he nor Miss Mosely were aware that a weapon was going to be used during the commission of the bank robbery. The District Court erred in denying Miss Mosley's objection to the six-level increase and the sentence should be vacated.

The evidence was insufficient to support the jury's guilty verdict. The Government failed to prove that Miss Mosley was guilty of aiding and abetting the bank robbery, Because the evidence is wholly insufficient to sustain the jury's guilty verdict, this Court should vacate Ms. Mosley's conviction and sentence.

The application of a sentencing enhancement for abduction was improper and not supported by the evidence. The bank teller was not abducted within the intended meaning of the Sentencing Guidelines. The district court erred in enhancing Miss Mosley's sentence on this basis and the sentence should be vacated.

ARGUMENTS AND AUTHORITIES

QUESTIONS FOR REVIEW

QUESTION #1

I. DID THE PANEL ERR BY UPHOLDING THE APPLICATION OF AN ENHANCEMENT FOR BRANDISHING OR POSSESSING A FIREARM WHEN MISS MOSLEY WAS ACQUITTED BY A JURY OF THIS CONDUCT ? DID THE USE OF THE ACQUITTED CONDUCT TO ENHANCE MISS MOSLEY'S SENTENCE RUN AFOUL OF THIS COURT'S DIRECTIVES IN *ALLEYNE V. UNITED STATES*, 133 S.CT. 2151 (2013) AND *NELSON V. COLORADO*, 137 S. CT. 1249 (2017) ?

The District Court erroneously adopted the PSR's recommendation and applied a 6- level enhancement to the base offense level based on a finding that a firearm was "brandished or possessed" pursuant to USSG §2B3.1(b)(2)(B). Miss Mosley was acquitted of the separate firearm count in the Superseding Indictment. Co-Defendant Cain testified that he nor Miss Mosely were aware that a weapon was going to be used during the commission of the bank robbery.

The District Court overruled Miss Mosley's objection, stating:

> "the issue is whether or not the Defendant, on the gun, should be held liable or responsible. The law is extremely clear that when someone is involved in a robbery and someone else uses a gun, there is a responsibility of all of the participants of the robbery. So it is held as relevant conduct for the Defendant. I'll note that the brandishing that's referred to in the objection is actually not correct. It does say six levels on the PSR, Paragraph 30, it says six levels are added as a firearm was brandished or possessed. Actually, the firearm was held to be used, not brandished. So the form language the Probation used is understating the actual involvement of the gun, as I see it and as the law sees it. So there's a plus six. The Defendant's objection is overruled on that as well. The law is quite that the guidelines do require any participant to be held accountable. That's true across the board in this case." ROA.1016.

When sentencing a defendant for robbery, U.S.S.G. § 2B3.1(b)(2) advises the District Court to calculate the guidelines for defendants convicted of robbery to include the following increases to

the base offense level: (I) If a firearm was discharged, increase by 7 levels; (ii) if a firearm was otherwise used, increase by 6 levels; (iii) if a firearm was brandished or possessed, increase by 5 levels; (iv) if a dangerous weapon was otherwise used, increase by 4 levels; or (v) if a dangerous weapon was brandished or possessed, increase by 3 levels.

The District Court committed procedural error by denying the objection to the five-level sentencing enhancement for brandishing or possessing a firearm pursuant to U.S.S.G. § 2B3.1(b)(2)(c). The government's own witness testified that he and Miss Mosley did not know a firearm would be used in the robbery. The government did not sustain its burden of proof that regarding whether it was "reasonably foreseeable" that a firearm would be brandished or possessed by a co-defendant. decision in Alleyne v. United States, 133 S.Ct. 2151 (2013), which held that any fact that increases the mandatory minimum sentence for a crime must be submitted to the jury, supports her argument that the evidence regarding the foreseeability of the firearm was not sufficient.

This Court's decision in *Nelson v. Colorado*, 137 S. Ct. 1249 (2017) renders unconstitutional the longstanding practice of considering acquitted conduct at sentencing.

In Nelson, this Court invalidated a Colorado statute that required a person whose conviction had been overturned to prove her innocence by clear and convincing evidence in order to receive a refund of costs, fees, and restitution paid pursuant to the invalid conviction. Id. at 1254-55. The Court determined that this statute violated due process and explained that "Colorado may not presume a person, adjudged guilty of no crime, nonetheless guilty enough for monetary executions." Id. at 1255-56. Ms. Mosley is aware that Nelson did not implicate the Guidelines, and that it did not overrule, or even mention, prior Supreme Court precedent holding that courts can consider acquitted conduct for sentencing purposes. See, e.g., United States v. Watts, 519 U.S. 148, 157 (1997) ("We

therefore hold that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.").

Ms. Mosley urges opposition to the use of conduct for which she was acquitted to increase the length of her sentence. "It stands our criminal justice system on its head to hold that even a single extra day of imprisonment can be imposed for a crime that the jury says the defendant did not commit". United States v. Brown, 892 F.3d 385, 408-409 (D.C. Cir. 2018) (Millett, J., concurring); United States v. Bell, 808 F.3d 926, 928-932 (D.C. Cir. 2015) (Millett, J., concurring in the denial of rehearing en banc); see also id. at 928 (Kavanaugh, J., concurring) ("Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial. If you have a right to have a jury find beyond a reasonable doubt the facts that make you guilty, and if you otherwise would receive, for example, a five-year sentence, why don't you have a right to have a jury find beyond a reasonable doubt the facts that increase that five-year sentence to, say, a 20-year sentence?").

The District Court committed clear error by applying the enhancement because there was insufficient evidence to support the enhancement and its use of acquitted conduct should not be used to support this enhancement. In this case, a preponderance of evidence did not support the five-level increase in light of the testimony regarding Miss Mosley's limited role in the robbery. Miss Mosley was a co-defendant in this case, but she was not charged in a conspiracy to rob the bank. Her role in the robbery was limited and she lacked knowledge of the co-defendants plans and schemes. She certainly never possessed or brandished any weapons. She did not receive any proceeds from the monies taken from the bank. Given the unique nature of her limited role in the robbery, it cannot be

said that the five-level increase for possession of the firearm was warranted or supported by the evidence.

The Panel Opinion erred by affirming Miss Mosley conviction and the sentencing enhancments. This petition should be granted, the Fifth Circuit's opinion should be vacated, and the case should be remanded for further proceedings in light of this Court's opinion.

QUESTION FOR REVIEW #2

I. DID THE PANEL ERR BY FINDING THAT THE EVIDENCE IN THIS CASE WAS LEGALLY SUFFICIENT TO SUSTAIN THE JURY'S GUILTY VERDICT?

The evidence introduced at trial is insufficient to sustain the jury's verdict.

The Government charged Miss Mosley with aiding and abetting aggravated bank robbery under 18 U.S.C. §§ 2 and 2113(a), (d). To prove the offense of bank robbery under § 2113(a), "the government must demonstrate that: an individual or individuals used force and violence or intimidation to take or attempt to take from the person or presence of another money, property, or anything of value belonging to or in the care, custody, control, management or possession of any bank." United States v. Ferguson, 211 F.3d 878, 883 (5th Cir. 2000). "The punishment may be enhanced when, in committing or attempting to commit the offense, the defendant assaults another person or puts in jeopardy the life of another person by the use of a dangerous weapon or device," thereby committing aggravated bank robbery under § 2113(d). Id.

Section 2 is the federal aiding and abetting statute. It provides that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. § 2(a). To convict a defendant under § 2, the government must prove the defendant associated with the criminal venture, purposefully participated in it, and sought by his actions to make the venture succeed. United States v. Vaden, 912 F.2d 780, 783 (5th Cir. 1990). An aider and abettor is liable for criminal acts that are the "natural or probable consequence of the crime" that he encouraged. Id; see also United States v. Fagan, 821 F.2d 1002, 1012 (5th Cir. 1987). To be associated with the criminal venture, a defendant must "share[] in the

criminal intent of the principal." United States v. Lopez-Urbina, 434 F.3d 750, 757 (5th Cir. 2005); see also United States v. Sorrells, 145 F.3d 744, 753 (5th Cir. 1998).

Miss Mosley was convicted on the basis of the self-serving testimony of the co-defendants involved in this case. Although she admitted to law enforcement that she answered questions about the bank that the co-defendants asked her over a period of time, there is insufficient evidence that Miss Mosley acted in concert with the co-defendants for the purpose of robbing the bank. Answering an occasional question about her workplace does not rise to the level of aiding and abetting the bank robbery. Miss Mosely received no money from the robbery.

Miss Mosley was romantically involved with one of the other co-defendants, Kendric Miller, at the time of the bank robbery. Sgt. Helms, one of the investigating officers on this case, testified that Miller was a manipulative person. ROA.942. Miller was known to have numerous girlfriends. ROA.955. He further testified that, in fact, Miller "used and abused" Miss Mosley. ROA.955. Miss Mosley told Sgt. Helms that she was afraid of Miller. ROA.942. Miller asked Miss Mosley questions about the bank over a period of time, and she answered them. Miss Mosley was not involved in any type of planning of the bank robbery and did not know what Miller planned to do with the information she gave him.

Testifying co-defendant Xavier Cain testified that Miss Mosley was not involved in any of the planning discussions that occurred with him and the three other co-defendants. ROA.978. He stated that she was never present during these discussions. ROA.978.

Because the evidence is insufficient to show that Ms. Mosley was guilty of aiding and abetting bank robbery, Ms. Mosley asks this court to reverse the conviction for Count 1and render a judgment of acquittal. Therefore, this conviction should be overturned.

QUESTION FOR REVIEW #3

I. DID THE PANEL ERR BY AFFIRMING THE DISTRICT COURT'S DECISION TO INCREASE MISS MOSLEY'S BASE OFFENSE BY FOUR LEVELS PURSUANT TO U.S.S.G.§ 2B3.1(b)(4)(A)? THE EVIDENCE DOES NOT SUPPORT A FINDING THAT AN "ABDUCTION" OCCURRED DURING THIS ROBBERY.

The District Court erred by increasing Miss Mosley 's base offense level by four levels because the victims were allegedly abducted. Paragraph 31 of the PSR states that "Four levels are added as a person was abducted to facilitate commission of the offense or to facilitate escape. U.S.S.G. § 2B3.1(b)(4)(A)."

U.S.S.G. § 1B1.1 application note 1(A) defines "abducted" as "a victim was forced to accompany an offender to a different location. For example, a back robber's forcing a bank teller from the bank into a getaway car would constitute an abduction." Miss Mosley, however, contends that conduct does not rise to the level of "abduction." No abduction occurred in this case and the increase pursuant to § 2B3.1(b)(4)(A) is unwarranted.

U.S.S.G. § 2B3.1(b)(4)(A) states, to-wit:

> "If any person was abducted to facilitate commission of the offense or to facilitate escape, increase by 4 levels ...". (emphasis added).

The term "abducted" is defined in U.S.S.G. § 1B1.1, comment. 1(a), which states:

> "'Abducted' means that a victim was forced to accompany an offender to a different location. For example, a bank robber's forcing a bank teller from the bank into a get-a-way car would constitute an abduction."

In United States v. Hawkins, 87 F.3d 722, 727-28 (5th Cir. 1996), the Fifth Circuit held that moving the victims across a parking lot from one vehicle to another was an abduction. *See* also United States v. Davis, 48 F.3d 277, 279 (7th Cir.1995) (moving victim from parking lot into building

was an abduction); United States v. Nale, 101 F.3d 1000, 1003 (4th Cir.1996) (forcing the victim to accompany defendant in stolen vehicle was an abduction); United States v. Oliver, 60 F.3d 547, 554-55 (9th Cir.1995) (affirming abduction enhancement in carjacking offense when the victim-driver was forced to accompany the driver in the stolen car from the scene of the crime); United States v. Elkins, 16 F.3d 952, 953 (8th Cir.1994) (affirming abduction enhancement when the victim was forced to accompany the defendant from the interior of the bank to a parking lot).

In Oliver, *supra*, the Ninth Circuit held that the increase for abduction was proper when the defendants carjacked two individuals and forced one of the victims to accompany them as they drove off in the stolen vehicle. The Court stated that the abduction made a quicker escape possible and prevented the victim from calling the police. The Court found that it was not clear error that the abduction facilitated the escape.

The Eighth Circuit likewise held that the increase pursuant to U.S.S.G. § 2B3.1(b)(4)(A) was warranted in Elkins, supra. Elkins forced a bank patron out of the bank at knife point to a parking lot to the patron's car. Upon reaching the car in the parking lot, Elkins released the patron and escaped in the patron's car. The Eighth Circuit held that this constituted an abduction to facilitate the bank robbery and escape although the patron was not forced into the car. The Court relied on U.S.S.G. § 1B1.1, comment. 1, which defines "abducted" and stated that the fact that she was forced from one location to another, that being from the bank lobby to the parking lot, was sufficient to warrant the increase in the base offense level.

In contrast, Miss Mosley 's actions did not constitute an "abduction". Ms. Saucedo was not forced into a vehicle or moved outside the bank. She was moved within the bank. This action

does not rise to the level of an "abduction". Based on these facts and the definitions set out above, no abduction occurred and the four (4) level increase is unwarranted.

The term "different location" is interpreted on a case-by-case basis. United States v. Hawkins, 87 F.3d 722, 726–28 (5th Cir. 1996). The term is "flexible and thus susceptible of multiple interpretations" and is "not mechanically based on the presence or absence of doorways, lot lines, thresholds, and the like." Id. at 728. In Hawkins, this court held that, despite escaping, the victims were "abducted" when a gunman forced them to walk approximately 40 to 50 feet from a location near his truck to a location near a van in the same parking lot. Id. at 728.

The Sentencing Guidelines provides for a four-level enhancement, "[i]f any person was abducted to facilitate commission of the offense or to facilitate escape." U.S.S.G. § 2B3.1(b)(4)(A). The term "abducted" means "that a victim was forced to accompany an offender to a different location." U.S.S.G. § 1B1.1 cmt.n.1. The Sentencing Guidelines provide an example of the type of conduct for which the enhancement is intended to apply: "[F]or example, a bank robber's forcing a bank teller from the bank into a getaway car would constitute abduction." Id. The movement of store clerks in the robberies at issue does not fall within the intended scope of this sentencing enhancement.

Neither Miss Mosley nor a co-defendant, within the scope of jointly undertaken and reasonably foreseeable activity, forced Ms. Saucedo to a different location and thus, the sentencing enhancement for abduction was erroneously applied.

Miss Mosley acknowledges that the term "different location" had been held to be "flexible and thus susceptible to multiple interpretations" to be "interpreted on a case by case basis, considering the particular facts under scrutiny, not mechanically, based on the presence or absence of doorways, lot lines, thresholds, and the like." United States v. Hickman, 151 F.3d 446, 462 (5th Cir. 1998); see

also United States v. Hawkins, 87 F.3d 722, 727 (5th Cir. 1996) (affirming abduction enhancement where victim was forced to move 40 to 60 feet in parking lot towards a van because 'a different location' is a "flexible" term). Courts should not affirm an expansive interpretation of the term "different location," which serves to deprive the term of its commonsense meaning.

Under even the most "flexible" definition of a "different location" this movement cannot be considered abduction. Although Courts have affirmed abduction enhancements where defendants forced victims into or across parking lots, application of the enhancement to these facts would constitute an unreasonable expansion of the enhancement. Such an interpretation collides with common sense.

Application of the enhancement to these facts, "would virtually ensure that any movement of a victim . . . would result in an abduction enhancement." See United States v. Eubanks, 593 F.3d 645, 654 (7th Cir. 2010) (refusing to affirm an abduction enhancement where employee was forced to back room).

Moving the clerk within the bank does not constitute different locations with the ordinary meaning or within the meaning prescribed by the guidelines. See United States v. Whatley, 719 F.3d 1206, 1222-23 (11th Cir. 2013) (recognizing that the ordinary meaning of the term 'different location' would not apply to each individual office or room in a bank). In light of the example given by the guidelines, the Court in Whatley found that a bank location would be treated as a single location. Id.

The District Court erred by enhancing Appellant's sentence for abduction for this robbery. The Sentencing Guidelines provide a framework under which this Court should interpret the meaning of abduction and different location through the example of an offender forcing a victim from a bank

to a getaway car. To apply the enhancement to the robberies as detailed above would constitute an expansion of the intended enhancement such that virtually any movement whatsoever even mere steps within a bank could be considered abduction.

Miss Mosley submits that too much "flexibility" is an unsound approach. A penal statute (or a quasi-statutory guideline) should be stated as clearly as possible. To the extent a statute or guideline is vague, it should be interpreted narrowly enough that its meaning can be readily understood. This position is supported by ample case law from analogous jurisprudence concerning vagueness of statutes, with those cases recognizing the evils inherent in a penal law which fails to provide clear guidance to possible offenders and which casts a "wide net" allowing for selective application. See City of Chicago v. Morales, 527 U.S. 41, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999).

Rigid adherence to the Hawkins view could justify applying a four-level increase to virtually every store robbery, since it is inevitable that an employee will move around to some degree just to go to a cash register, a safe, etc. Carried to its logical extreme, the"single point where a person is standing" (to use the words of Hawkins) could be defined by one tile on the floor, with an employee doing no more than taking a few steps back as he accompanied a gunman to a cash register (or just merchandise) on a counter.

The reality of the situation is that the term "location," and hence its use in the Guidelines, is ambiguous. That brings to bear a well-recognized doctrine concerning ambiguity in statutory language (or here, Guidelines language) which determines punishment, namely the "rule of lenity." In Yates v. United States, 574 U.S. __, 135S.Ct. 1074, 191 L.Ed.2d 64 (2015), deciding whether a fish was a "tangible object", Part C of the opinion by Justice Ginsburg took note of the rule of lenity:

Finally, if our recourse to traditional tools of statutory construction leaves any doubt about the meaning of "tangible object," as that term is used in [18 U.S.C. §1519], we would invoke the rule that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." Cleveland v. United States, 531 U.S. 12, 25 (2000); see also Rewis v. United States, 401 U.S. 808, 812 (1971).

It is noteworthy that one case cited in Johnson actually involved a much clearer instances of what would commonly be understood as an abduction, such that the result would be satisfying regardless of whether the Hawkins view was utilized. In United States v. Jefferson,285 F.3d 405 (5 Cir. 2001), the Court found an "abduction" in a victim getting forced back into car she had just exited, which in itself is a questionable interpretation – but the fact that Jefferson drove off with her, so that she had to leap from a moving car to avoid a "one way ride," constituted an abduction in any reasonable person's view. In United States v. Hefferon, 314 F.3d 211 (5 Cir. 2002), the opinion primarily was dealing with the question of whether Hefferon "forced" the child victim to go with him to a different location.

Obviously a limited interpretation of "abducted" would be most consistent with that rule. The rule of lenity was never raised and therefore never discussed in Hawkins. In the specific facts of this case, the four-level increase for abduction was inappropriate on the facts of this case. The goal of "flexibility" cannot justify a finding of abduction in a way that the Sentencing Commission does not appear to have intended. Thus, Appellant asks that this Court reverse and remand for a new sentencing hearing.

CONCLUSION

This Petition for Writ of Certiorari should be granted and the decision of the Fifth Circuit should be vacated, and the case should be remanded for proceedings consistent with this Court's opinion.

Respectfully submitted,

/s/ Amy R. Blalock
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RELIEF REQUESTED

FOR THESE REASONS, the Petitioner moves this Court to grant a Writ of Certiorari in order to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

/s/ Amy R. Blalock
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CERTIFICATE OF SERVICE

I certify that on the 27th day of January 2020, I served one (1) copy of the foregoing Petition for Writ of Certiorari on the following individuals by mail (certified mail return receipt requested) by depositing same, enclosed in post paid, properly addressed wrapper, in a Post Office or official depository, under the care and custody of the United States Postal Service, or by other recognized means pursuant to the Rules of the Supreme Court of The United States of America, Rule 29:

Solicitor General
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Washington, D.C. 20530

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/s/ Amy R. Blalock
AMY R. BLALOCK

No. _____

In the
Supreme Court of the United States

OCTOBER TERM, 2019

MARY MOSLEY,

Petitioner,

V.

UNITED STATES OF AMERICA

Respondent.

APPENDIX

OPINION OF THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
October 29, 2019

Lyle W. Cayce
Clerk

No. 19-20061
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MARY MOSLEY,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:17-CR-284-1

Before DAVIS, SMITH, and HIGGINSON, Circuit Judges.

PER CURIAM:*

Mary Mosley appeals her jury trial conviction and 135-month sentence for aiding and abetting a bank robbery. She contends that the trial evidence was legally insufficient to prove her guilt beyond a reasonable doubt and that the district court erroneously applied Guidelines sentence enhancements for abduction and for using a firearm to facilitate the commission of the robbery. We affirm.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Because error was not preserved, we review the sufficiency of the evidence for plain error. *See United States v. Smith*, 878 F.3d 498, 503 (5th Cir. 2017), *cert. denied*, 139 S. Ct. 787 (2019). Mosley argues that her conviction rests on the self-serving testimony of her three co-defendants, and at trial she pursued a theory that one of them, Kendrick Miller, manipulated her into participating in the robbery. However, the jury heard the testimony casting doubt on the co-defendants' credibility and still chose to believe them, a decision we will not second guess. *See United States v. Green*, 293 F.3d 886, 895 (5th Cir. 2002); *United States v. Garza*, 118 F.3d 278, 283 (5th Cir. 1997). The trial evidence sufficiently established that Mosley shared her co-defendants' intent to rob the bank at which she worked; that she engaged in affirmative conduct designed to aid the robbery by, *inter alia*, leaving the back door to the bank unlocked; and that she sought by her actions to make the robbery succeed. *See United States v. Lopez-Urbina*, 434 F.3d 750, 757-58 (5th Cir. 2005). Mosley thus fails to show that her conviction resulted in a manifest miscarriage of justice. *See United States v. Phillips*, 477 F.3d 215, 219 (5th Cir. 2007).

Mosley next contends that the district court erroneously enhanced her sentence based on its finding that Mosley's co-worker, Kimberly Saucedo, "was abducted to facilitate commission of the offense or to facilitate escape." U.S.S.G. § 2B3.1(b)(4)(A). She argues that the evidence shows that Saucedo was moved only within the bank and was not forced to exit the bank. We have consistently held such facts to be sufficient to support the abduction enhancement. *See United States v. Smith*, 822 F.3d 755, 764 (5th Cir. 2016).

Lastly, Mosley asserts that the district court erred by applying an enhancement because "a dangerous weapon was otherwise used" during the commission of the robbery. § 2B3.1(b)(2)(D). She avers that the record fails to

establish that she could have reasonably foreseen that her co-defendant would use a gun, *see* § 1B1.3(a)(1)(B) (relevant conduct); that she was acquitted of aiding and abetting the use and carrying of a firearm during a crime of violence; and that, under *Nelson v. Colorado*, 137 S. Ct. 1249 (2017), the firearms enhancement could not be predicated on conduct for which she was acquitted.

Nelson is inapposite; the district court could rightly consider Mosley's acquitted conduct, which it needed find only by a preponderance of the evidence. *See United States v. Watts*, 519 U.S. 148, 156-57 (1997). Given the testimony that Mosley gave Miller the gun and suggested using it so that the robbery would not look like an "inside job," the district court did not clearly err in finding that she could reasonably foresee the gun being used. *See United States v. Fernandez*, 770 F.3d 340, 342, 344-45 (5th Cir. 2014); *United States v. Wall*, 180 F.3d 641, 644 (5th Cir. 1999). Mosley fails to show sentencing error.

The judgment is AFFIRMED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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NEW ORLEANS, LA 70130

October 29, 2019

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 19-20061 USA v. Mary Mosley
USDC No. 4:17-CR-284-1

Enclosed is a copy of the court's decision. The court has entered judgment under FED. R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through 41, and 5TH Cir. R.s 35, 39, and 41 govern costs, rehearings, and mandates. **5TH Cir. R.s 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED. R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk

Deborah M. Graham

By: _____
Debbie T. Graham, Deputy Clerk

Enclosure(s)

Ms. Amy R. Blalock
Ms. Carmen Castillo Mitchell
Mr. John A. Reed