

No. 20-_____

IN THE
SUPREME COURT OF THE UNITED STATES

MARK PHILLIP CARTER *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- (1) Whether the undue influence enhancement in USSG § 2G1.3(b)(2)(B) should be expanded, in direct conflict with precedent from the Sixth, Eighth, and Ninth Circuits
- (2) Whether a district court can ignore factual objections to a presentence report and then not explain what facts it relies upon at sentencing
- (3) Whether USSG § 2G1.3(b)(4)(A) and (B) are surplausage of each other
- (4) Whether *United States v. Head*, 340 F.3d 628, 630 n.4 (8th Cir. 2003), should be expanded to eliminate the circuit court's responsibility to address issues raised by the Appellant in principal briefing

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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OPINIONS BELOW

Mark Carter respectfully prays that a writ of certiorari issue to review the judgment of the Eighth Circuit Court of Appeals in Case No. 19-1153, entered on May 29, 2020, and made final with the denial of rehearing and rehearing en banc on July 13, 2020. The opinion of the Eighth Circuit Court of Appeals appears in the Appendix to the petition and is reported at *United States v. Carter*, 960 F.3d 1007 (8th Cir. 2020). The appeal stemmed from the final judgment in the criminal case, which was filed by the United States District Court in the Southern District of Iowa on January 16, 2019, *United States v. Carter*, case number 4:18-cr-00053-002.

JURISDICTION

The date on which the United States Court of Appeals for the Eighth Circuit entered judgment was May 29, 2020. A petition for rehearing en banc and petition for rehearing by the panel was denied on July 13, 2020.

The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS AND SENTENCING GUIDELINES INVOLVED

18 U.S.C. § 1591(a)(1) and (b) state:

(a) Whoever knowingly-

(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person;

...

(b) The punishment for an offense under subsection (a) is—

(1) if the offense was effected by means of force, threats of force, fraud, or coercion described in subsection (e)(2), or by any combination of such means, or if the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had not attained the age of 14 years at the time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life; or

(2) if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had attained the age of 14 years but had not attained the age of 18 years at the time of such

offense, by a fine under this title and imprisonment for not less than 10 years or for life.

USSG § 2G1.3(b)(4) states:

If (A) the offense involved the commission of a sex act or sexual contact; or (B) subsection (a)(3) or (a)(4) applies and the offense involved a commercial sex act, increase by 2 levels.

USSG § 2G1.3(b)(2)(B) states:

A participant otherwise unduly influenced a minor to engage in prohibited sexual conduct, increase by 2 levels.

USSG § 1B1.2(c) states:

A plea agreement (written or made orally on the record) containing a stipulation that specifically establishes the commission of additional offense(s) shall be treated as if the defendant had been convicted of additional count(s) charging those offense(s).

STATEMENT OF THE CASE

Mark Carter pleaded guilty to one count of 18 U.S.C. § 1591(a)(1) and 1591(b)(2), “Sex Trafficking of Children” for his conduct in assisting a sixteen-year-old girl (“Victim A”) in prostitution and being reckless with regard to her age. Carter pled guilty to the subpart with the lower statutory minimum, and the higher age limits, admitting that Victim A was over 14, but under 18, at the time of the offense, and not pleading guilty to any sort of force, fraud or coercion. 18 U.S.C. §1591(b)(2). The remaining eight counts in his superseding indictment were dismissed.

Despite the fact that eight counts of Carter’s nine-count superseding indictment were dismissed, the presentence report was riddled with information about the dismissed conduct and with factual assertions that Carter had always contested as being untrue. Carter filed extensive factual objections to the presentence report (DCD 346) and filed a sentencing memorandum

detailing both his factual and legal objections. (DCD 376). The government acknowledged that Carter objected to “nearly every paragraph in the offense conduct section of the PSR” and told the court it was “not seeking to prove up every paragraph of the PSR line by line[.]” (DCD 379, p.2-3). At the sentencing hearing, the government only called one witness to testify – “Victim 2,” who was the subject of one of the dismissed counts. Notably, the government did not call Victim A to testify, nor did it offer any statement from her. The government’s reasoning for not calling Victim A to testify was because she “has not talked to law enforcement.” (ST p.31, l.15-17). Essentially, the government claimed that Victim A was unduly influenced without her testimony, statement, or cooperation in any form. Notably, Victim 2 testified that it was usually Victim A (her friend) – not Carter – that provided her transportation. (ST p.13-15).

The district court did not rule on any of Carter’s factual objections and adopted the government’s suggested guideline calculations without any further comment on the factual objections, the grouping objections, or his findings of facts underlying those determinations. (ST p. 28, l. 8-11). Carter requested the mandatory minimum sentence of 120 months, the government asked for no less than 151 months, and the district court sentenced Carter to 175 months in prison.

On appeal to the Eighth Circuit, Carter challenged the district court’s calculation of his guidelines by giving him a 2-level increase for undue influence under USSG § 2G1.3(b)(2)(B); for applying a 2-level increase under section 2G1.3(b)(4)(A); and for improperly grouping victims as if he had been convicted of a count to which he had not pled to or been convicted of. Carter also challenged the sentence as both procedurally and substantively unreasonable.

The Eighth Circuit, ignoring both the government’s burden of proof and Victim A’s notable absence, affirmed Carter’s enhanced sentence for exercising “undue influence” over

Victim A, resulting in a departure from Eighth Circuit precedent as well as a circuit split. The Eighth Circuit also held as a matter of first impression that sections 2G1.3(b)(4)(A) and (B) were not surplusage of each other, distinguishing the phrases “involved the commission of” and “involved” in the two subsections, and affirmed the enhancement. (Opinion p. 6-7). The court dismissed Carter’s procedural error argument because the district court’s adoption of the factual findings submitted by the government without ruling on any of the defendant’s objections or amending the presentence report, was apparently sufficient procedure. (Opinion p. 9). Finally, the court failed to address Carter’s argument that multiple adult victims had been impermissibly double counted to enhance his sentence.

REASONS FOR GRANTING THE WRIT

I. THE EIGHTH CIRCUIT’S EXPANSION OF THE UNDUE BURDEN ENHANCEMENT IS IN SQUARE CONFLICT WITH EIGHTH CIRCUIT PRECEDENT AND OTHER CIRCUITS

The Eighth Circuit’s expansion of the undue influence enhancement in USSG § 2G1.3(b)(2)(B) without regard to the government’s burden is in conflict with decisions from the Sixth, Eighth and Ninth Circuits. The government sought a two-level adjustment for undue influence under USSG § 2G1.3(b)(2)(B) over Victim A without any type of testimony or statement from Victim A. Because there was less than a ten-year age difference between Carter and Victim A, the government should have had the burden by a preponderance of the evidence to support the enhancement. *United States v. Myers*, 481 F.3d 1107, 1109 (8th Cir. 2007); USSG § 2G1.3(b)(2)(B), Application note 3(B). However, the district court and Eighth Circuit failed to recognize and identify this burden. As a result, the Eighth Circuit’s affirmance of the undue influence enhancement directly conflicts with the Circuit’s opinion in *Myers*.

In *Myers*, the Eighth Circuit affirmed a denial of the undue influence adjustment despite

the presumption having been triggered by an age gap because the minor victim had willingly participated in the sexual acts with the defendant and had contemplated running away with another man before the defendant. *Myers* at 1109. Here, where there was no presumption, Victim A voluntarily participated in prostitution, arranged some of her own calls, arranged calls for other women, and had been engaged in prostitution prior to Carter. The government produced no evidence from Victim A, and very weak testimony from Victim 2 which did not demonstrate undue influence. Yet the panel did not identify the government's burden, much less that, "The predicate facts supporting an enhancement must be found by a preponderance of the evidence." *Myers*, 481 F.3d at 1110. This brings Carter's case into direct conflict with *Myers*.

Similarly, the instant case is in direct conflict with *United States v. Calvo*, 596 Fed. Appx. 541 (9th Cir. 2015) (unpublished). In *Calvo*, the Ninth Circuit reversed a district court's finding of undue influence of a minor because the defendant had rebutted the presumption by showing that the victim was predisposed to engage in the conduct at issue and voluntarily consented to it. *Calvo*, 596 Fed. Appx. 541, *543. Here, Carter does not have to rebut any presumption and Victim A was predisposed to the conduct at issue. The government offered no evidence of Victim A's predisposition or lack thereof. These differing standards places Carter's case in direct conflict with *Calvo*.

Carter's case is also in direct conflict with *United States v. Davis*, 924 F.3d 899 (6th Cir. 2019). In *Davis*, the district court relied "almost exclusively" on the rebuttable presumption triggered by the sixteen year age gap between Davis and the victim, and overlooked the fact that, like here, the victim had both previously engaged in prostitution and willingly engaged in prostitution during the events of this case. *Id.* at 905. As a result, the case was remanded for resentencing with instructions for the district court to make factual findings relating to the undue

influence enhancement. *Id.*

This conflict with the Eighth Circuit's precedent as well as with the Ninth Circuit and the Sixth Circuit is unlikely to resolve itself. A defendant's federal rights should not depend on the circuit in which he is convicted or the composition of the panel on any particular day. This case offers an ideal vehicle for resolving the circuit split and also for clarifying the circumstances in which the undue influence enhancement can be applied, and certiorari should be granted.

II. THE EIGHTH CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH SUPREME COURT PRECEDENT AS WELL AS EIGHTH CIRCUIT PRECEDENT ON MATTERS OF EXCEPTIONAL IMPORTANCE

- A. It is of exceptional importance whether a district court can completely ignore all objections by a defendant to his presentence report, resulting in a sentence utilizing a presentence report that contains unproven, objected to allegations for the sentencing process.**

The Eighth Circuit's holding that a district court does not need to rule on factual objections to a presentence report, articulate what facts it is relying on in coming to its conclusions, or need to give substantial insight into its reasons for a sentence is in direct conflict with its own precedent in *United States v. Bryant*, 913 F.3d 783 (8th Cir. 2019) and *United States v. Feemster*, 572 F.3d 455 (8th Cir. 2019). In *Bryant*, the Eighth Circuit held:

A district court abuses its discretion when it (1) fails to consider a relevant factor that should have received significant weight; (2) gives significant weight to an improper or irrelevant factor; or (3) considers only the appropriate factors but in weighing those factors commits a clear error of judgment.

Bryant at 788 (internal quotations omitted). In *Feemster*, the Eighth Circuit held that the district court is required to give "substantial insight" into the reasons for its sentence. *Feemster* at 463. In effect, the Eighth Circuit has now overruled *Feemster* without explicitly stating so. It now holds that a district court can utilize a presentence report that contains dozens of disputed facts, and then fail to identify what facts it is relying on to call the defendant "depraved," before

sentencing the defendant to a term substantially higher than what even the government asked for. This is also in direct conflict with the Ninth Circuit’s holding in *United States v. Flores*, 725 F.3d 1028, 1040 (9th Cir. 2013), which found that a district court may only rely on an *unchallenged* PSR at sentencing to find by a preponderance of the evidence that the facts underlying a sentencing enhancement have been established. Here, Carter objected to 51 paragraphs in his PSR. (DCD 376, DCD 346). Many of these paragraphs contained allegations that directly affected the sentencing guideline range, while other paragraphs clearly impacted the court’s opinion as to the appropriate sentence under 18 U.S.C. § 3553. Carter’s dozens of unnoticed and unruled on objections resulted in a sentence that was procedurally and substantively unreasonable.

Moreover, the Supreme Court in *Gall v. United States* required a district court judge to “explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications,” and that “failing to adequately explain the chosen sentence” constitutes “procedural error,” 552 U.S. 38, 46 (2007). Even though Carter’s sentence was not outside the guidelines, as in *Gall* (although Carter submits the guidelines were wrongly calculated, and his sentence is greater than the properly calculated guidelines), *Gall* nonetheless provides that the court must adequately explain its reasoning. *Id.* at 52. Other circuits have consistently made clear that remand is required when the district court has failed to provide substantial insight into its sentence. *See, e.g., United States v. Genao*, 869 F.3d 136 (2d Cir. 2017); *United States v. Penson*, 526 F.3d 331 (6th Cir. 2008); *United States v. Lyons*, 733 F.3d 777 (7th Cir. 2013); *United States v. Flores*, 725 F.3d 1028 (9th Cir. 2013); *United States v. Pool*, 937 F.2d 1528 (10th Cir. 1991). As such, the Eighth Circuit’s opinion is in direct conflict with both the United States Supreme Court and other Circuits.

B. By ignoring a critical issue Carter raised in his principal brief that enhanced his sentence, the Eighth Circuit’s decision sets a dangerous precedent.

The district court relied on unproven, disputed conduct contained in dismissed counts to enhance Carter’s sentence. Carter objected to the court’s impermissible grouping of adult victims of dismissed counts at the district court level and on appeal. The government, for the first time on appeal, wrongly claimed that both §2G1.3(d)(1) and §2G1.1(d)(1) supported the court’s grouping. (Gov’t Br. p. 51). The district court did not make this finding at sentencing, and indeed § 2G1.1 was never at issue at the time of sentencing because it was not the guideline for the offense of conviction. In Carter’s reply brief, he explained why the government’s new argument failed: §2G1.1 was not the guideline that applied to his case, and §2G1.3(d)(1) only applied to additional “minor” victims, whereas here the grouped counts all involved adult victims. (Reply Br. p. 5-6). Inexplicably, the Eighth Circuit held it would not decide the issue because Carter had not addressed the inapplicability of the government’s recently cited guidelines until his reply brief -- ignoring the real argument Carter had raised about dismissed counts being grouped to enhance his sentence under USSG § 1B1.2 or § 3D1.4, which are clearly addressed in Carter’s principal brief. (Opinion p. 8; Br. p. 26 -29).

As a result, Carter was held responsible as if he were convicted of violations of 18 USC 1594(c), based on allegations in dismissed counts that he trafficked additional adult victims, under USSG §3D1.4. (DCD 345). No authority permitted such grouping and, in fact, USSG §1B1.2(c) affirmatively prohibits it. The applicable guideline, USSG § 1B1.2(c), only allows offenses to be counted if the plea agreement contains an explicit stipulation that established the commission of additional offenses. Carter’s plea agreement did not stipulate that he violated 18 U.S.C 1594(c), so these dismissed counts should not have been treated as if Carter pled to them.

The Eighth Circuit’s opinion is devoid of the word “grouping” and contains no references to § 1B1.2 or §3D1.4 – the guidelines raised by Carter on appeal. Instead, the panel opinion focuses solely

on the government's mischaracterization and incorrect guidelines. If this glaring error is not corrected, the opinion drastically expands *United States v. Head*, 340 F.3d 628, 630 n.4 (8th Cir. 2003), so as to apply it to the government's mischaracterization of the issue raised, to the complete disregard of the issue as actually raised by the Appellant. This sets a dangerous precedent that should not be allowed to stand.

III. THE DECISION BELOW INCLUDES AN IMPORTANT MATTER OF FIRST IMPRESSION THAT WAS WRONGLY DECIDED

The Supreme Court should intervene and correct the Eighth Circuit's unprecedeted interpretation of § 2G1.3(b)(4)(A). The Eighth Circuit affirmed a two-level adjustment, holding as a matter of first impression that § 2G1.3(b)(4)(A) and (B) were not surplusage of each other, even though the plain language of subpart (B) ("involved a commercial sex act") must necessarily be included in subpart (A) ("involved the commission of a sex act"). No Circuit has interpreted the guideline in this way and the panel cited no case authority for doing so. A commercial sex act is, by definition, a sex act. *See* 18 U.S.C. § 1591(e)(3).

There was no factual dispute that Victim A engaged in multiple commercial sex acts during this time frame. There were also no allegations that Carter ever committed a sex act with Victim A. Instead, the issue was whether commercial sex acts resulted in a 2-level increase under this guideline when the guideline applies section (a)(2), rather than (a)(3) or (a)(4). USSG 2G1.2(b)(4)(B).

The applicable guideline, § 2G1.3, makes a distinction based on the subpart of the statute of conviction, establishing a base offense level of 30 under 2G1.3(1)(2) for those individuals, like Carter, who were convicted under 18 U.S.C. § 1591(b)(2). But then, the guideline's subsequent specific offense characteristics language is somewhat unclear. The guideline reads,

If (A) the offense involved the commission of a sex act or sexual contact; or (B) subsection (a)(3) or (a)(4) applies and the offense involved a commercial sex act, increase by 2 levels.

On its face, the guideline seems to infer that commercial sex acts only count if subsections (a)(3) or (a)(4) of the guideline are applied – and Carter fell under subsection (a)(2) of the guideline. If a commercial sex act, by definition, must also be a “sex act” as used in the first part of the guideline, it would not make sense for the Sentencing Commission to include both subparts of the guideline. The Eighth Circuit glossed over this and instead attempted to distinguish “involved the commission of” and “involved” in the two subparts. (Opinion at 6-7). If the Sentencing Commission intended the second subpart to cover only *attempted* commercial sex acts, it could have easily prevented any ambiguity and said so.

Even with the Eighth Circuit’s attempt to distinguish the subparts, the Court’s reading of the guideline results in a meaning that is “any sex act including commercial sex acts result in 2 level increases for all offenses; but also commercial sex act including attempted commercial sex acts result in 2 level increases for some of the offenses.” Commercial sex acts are still covered twice and the guideline is still illogical. It is more logical that the first subpart was only intended to apply in cases where the defendant has the sexual contact with the victim, which is not the case here.

Other circuits have upheld the 2-level increase for commercial sex acts despite (a)(1) or (a)(2) applying. However, none of these cases appear to have been asked to address the issue of whether the statute intends commercial sex acts to only apply to (a)(3) or (a)(4) cases, and instead address other arguments, such as whether or not the guideline results in impermissible double counting. *See, e.g., United States v. Hornbuckle*, 784 F.3d 549 (9th Cir. 2015) (upholding application of 2 levels under 2G1.3(b)(4)(A) in an 18 USC § 1591 case, finding the guideline did

not constitute impermissible double counting); *United States v. Willoughby*, 742 F.3d 229 (6th Cir. 2014) (finding no double counting in the guideline and statute because sex act was not an element of the offense.) As such, the Eighth Circuit's ruling is a case of first impression. This issue is likely to reoccur whenever there is a conviction under 18 U.S.C. § 1591(b)(2) that involves a commercial sex act but that does not involve the defendant having sexual contact with the victim.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,



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