No. _____

In the
Supreme Court of the United States

OCTOBER TERM, 2021

LORI MAJORS,

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

DID THE DISTRICT COURT ERR BY ASSIGNING A TWO-LEVEL UPWARD ADJUSTMENT PURSUANT TO U.S.S.G. §3A1.1(b)(1) BASED ON ITS ERRONEOUS FINDING THAT THE CASE INVOLVED A "VULNERABLE VICTIM" ?

DID THE DISTRICT COURT ERR BY ASSIGNING A SIX-LEVEL UPWARD ADJUSTMENT PURSUANT TO U.S.S.G. § 2A4.1(b)(1) FOR "RANSOM DEMAND"?

WAS THE DISTRICT COURT'S SENTENCE PROCEDURALLY AND SUBSTANTIVELY UNREASONABLE ?

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The decision of the Court of Appeals for the Fifth Circuit is reported as *United States v. Majors*, No. 20-40629 (5th Cir. November 2, 2021)(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, Ms. Majors files the instant Application for a Writ of Certiorari under the authority of 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 Eastern District of Texas because Ms. Majors was indicted for violations of Federal law by the United States Grand Jury for the Eastern District of Texas.

CONSTITUTIONAL PROVISIONS

U.S. CONST. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in this favor; and to have Assistance of Counsel for his defense.

STATEMENT OF THE CASE

1. Procedural History.

On February 6, 2019, Lori Majors was charged in a four-count Indictment returned by the Grand Jury for the United States District Court, Eastern District of Texas, Sherman Division. ROA. 10-14.[1] Ms. Majors was named in Counts I and IV. Count I alleged a violation of 18 U.S.C. §1201(a)(1)(c) and 18 U.S.C. § 2, Conspiracy to Commit Kidnaping and Aiding and Abetting. Count IV alleged a violation of 18 U.S.C. §1956(h), Conspiracy to Launder Monetary Instruments in Violation of 18 U.S.C. § 1956 (a)(B)(I).

On December 13, 2019, Ms. Majors appeared before United States Magistrate Judge Christine A. Nowak and entered a plea of guilty to Counts 1 and 4 of the Indictment without a plea agreement. The District Court subsequently sentenced Ms. Majors to a 480-month term of imprisonment for Count 1 and a 240-month term of imprisonment for Count 4, to be served concurrently. ROA.174-175, 131-137.

Ms. Majors then timely filed a notice of appeal. On November 2, 2021, a panel of the Fifth Circuit affirmed the Petitioner's conviction in an unpublished decision.

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[1]In the references to the Record on Appeal, references are made according to the pagination assigned by the Clerk of the Court.

2. Statement of Facts.

Lori Majors is a 46-year old woman who has had a difficult life marked by instability and family violence. She is the mother of three sons. Ms. Majors has been blind in her right eye since around 1995, when she was stabbed with a fork by Toby Long, the father of her children. She has been through a dozen surgeries through Southwestern Medical Center and Parkland Hospital in Dallas, Texas related to this injury. Ms. Majors has experienced depression, anxiety, bipolar disorder, and attention deficit disorder (ADD) since the 1990s; and she began living with post-traumatic stress disorder (PTSD) after she was stabbed in the eye around 1995. Ms. Majors has been involved in multiple, physically abusive relationships, which also resulted in her children being physically abused; and she was in a physically abusive relationship until her arrest for this offense.

This criminal case arose from the following factual context. On April 5, 2018, deputies with the El Paso County Sheriff's Office in Colorado were dispatched to a burglary in progress. The reporting party, Evelyn Starkey, reported two men had entered her house; shoved her in the bathroom; threatened to kill her adult son, Jay Starkey, if she did not cooperate; and broke into a locked room in her basement containing a large amount of money. ROA.290.

During the investigation, Mrs. Starkey revealed that her late husband stored large amounts of cash in a locked room located in the basement of their home, which she referred to as the "safe." She reported the safe contained approximately $482,000 in U.S. currency. Additionally, Mrs. Starkey advised her husband stored his firearms in the safe. Mrs. Starkey reported a large amount of cash was stolen from the safe and some of her jewelry had also been stolen. The case agent estimated approximately $500,000 had been taken from Mrs. Starkey's residence.

In the Factual Basis, Lori Majors stipulated on or about March 29, 2018, she met with Justin Majors, Cheryl Jordan, Bryan Majors, Max Majors, and Ashley Stonebarger to discuss the plan to rob Evelyn Starkey; and each agreed to go forward and split the proceeds of the robbery. She explained on April 15, 2018, she unlawfully and willfully combined, conspired, and agreed to extort, kidnap, or rob Evelyn Starkey; and she demanded ransom, reward, or for any other reason or benefit. In committing or in furtherance of the commission of the offense, she traveled in interstate commerce from Texas to Colorado, and she used a motor vehicle as a means, facility, and instrumentality of interstate commerce. Additionally, Lori Majors met with Justin, Jordan, Max, Bryan, and Stonebarger in Colorado, where they discussed the plan to rob Mrs. Starkey; and each of them agreed to go forward and split the proceeds of the robbery.

Ms. Majors stipulated Justin Majors and Max Majors awoke the victim and told the victim they had her son tied up and her son would be hurt if she did not tell where the money was located. Justin Majors and Max Majors confined and extorted Mrs. Starkey as Justin Majors went downstairs to look for the safe and money. Max Majors then moved Mrs. Starkey from her bed and confined her in the bathroom until he and Justin Major left the residence with the money. Lori Majors further stipulated the proceeds of the robbery were split between her, Justin Majors, Max Majors, and Bryan Majors.

The PSR assigned Ms. Majors a base offense level of 32 for Count One.[2] Pursuant to U.S.S.G. §2A4.1(b)(1), the PSR assigned a six-level increase based on its finding that a ransom demand was made. The PSR assigned a three-level downward adjustment for acceptance of responsibility. For Count Four, the PSR assigned Ms. Majors an adjusted offense level of 40. The PSR officer, however, found that grouping rules applied to this case. USSG §3D1.2© provides that counts are grouped together when one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts. Pursuant to U.S.S.G. §3D1.3(a), the offense level is the highest

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

offense level of the counts in the group. Count 4 results in the highest offense level. Accordingly, the adjusted offense level became 40. The PSR officer assigned a three-level decrease for acceptance of responsibility.

Based upon a total offense level of 37 and a criminal history category of IV, the guideline imprisonment range was 292 -365 months.

Ms. Majors filed objections to the PSR. Ms. Majors objected to the application of the six-level increase. ROA. 315-318, 257-262. The Government objected because a two-level increase for vulnerable victim was not applied. At the sentencing hearing, over the objection of Ms. Majors, the District Court applied the two-level increase for vulnerable victim. ROA.257. This made the guideline range of imprisonment 292-365 months for Count One. ROA.266. The statutory maximum sentence for Count Four was twenty years. At the sentencing hearing, there was initially some confusion about the guideline range of imprisonment due to the grouped counts and the statutory maximum sentence of Count Four.

The District Court subsequently sentenced Ms. Majors to a total of 480 months imprisonment. ROA. 277. The notice of appeal was then timely filed. On November 2, 2021, the Fifth Circuit affirmed Ms. Majors conviction and sentence in an unpublished, per curiam decision. *See United States v. Majors*, No. 20-40629 (5th Cir. 2021).

REASONS WHY CERTIORARI SHOULD BE GRANTED

THE DISTRICT COURT ERRED BY ASSIGNING A TWO-LEVEL UPWARD ADJUSTMENT PURSUANT TO U.S.S.G. §3A1.1(b)(1) BASED ON ITS ERRONEOUS FINDING THAT THE CASE INVOLVED A "VULNERABLE VICTIM".

The District Court erred in applying the two-level enhancement from §3A1.1(b)(1), which applies if "the defendant knew or should have known that a victim of the offense was a vulnerable victim". U.S.S.G. § 3A1.1(b)(1) (2016). There was insufficient evidence to support the application of this increase, as the evidence did not indicate that the victim in this case was targeted for any reason except that she was known to keep large amounts of cash in her residence. The victim's age was incidental to the offense conduct. In fact, the evidence shows that the co-defendants believed that Ms. Starkey was not going to be home when they robbed her residence. Finally, the District Court based this enhancement on the victim's age instead of any particularized characteristics, which is required for the correct application of this adjustment.

Ms. Majors objected in the district court to the application of the section 3A1.1(b)(1) enhancement on the grounds that there was insufficient evidence that she knew or should have known that the victim was vulnerable or that was the reason for the victim to be targeted. Therefore, this Court will "review the district court's

interpretation of the guidelines de novo[, and] we review a finding of unusual vulnerability for clear error and to determine whether the district court's conclusion was 'plausible in light of the record as a whole.'" *United States v. Robinson*, 119 F.3d 1205, 1218 (5th Cir. 1997).

The following colloquy occurred during the sentencing hearing regarding the application of this guideline increase:

> **MS. FISHER:** Yes, Your Honor. Your Honor, when this robbery was planned, they did not intend for Ms. Starkey to be home. There was no gun that was brought to this robbery. They -- they did not choose Ms. Starkey because of her age or whatnot. They chose her because it was rumored that she kept an excessive amount of cash in her home, Your Honor. And so I believe that the guidelines stipulate in there about whether or not there was evidence to suggest that the victim in a case was chosen because she had some kind of impaired capacity to detect or prevent the crime at the time of offense. And, again, I don't believe that there's any evidence to suggest that they chose her because of any impairment that she may have had or even because of her age. Again, they chose her because she was known to have excessive amounts of money, and I believe that the statements that were made by everybody, there was no intention that Ms. Starkey was going to be home. I believe that she had left on a vacation of some sort or to see a family member and then, unfortunately, came back early. And so we would ask the Court not to find the two point enhancement for the vulnerable victim in this matter.
>
> **THE COURT:** Mr. Gonzalez.
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> **MR. GONZALEZ:** Your Honor, the Government relies on United States versus Bailey, and that can be found at -- let me find the cite for this -- at 405 F.3d 102. It's a First Circuit case, and it gives the pertinent definitions. It says under United States Sentencing Guideline

3A1.1(b)(1), the base offense level should be raised two levels if the Defendant knew or should have known that the victim of the offense was a vulnerable victim. The guidelines define vulnerable victim as a person, A, who is a victim of the offense of conviction, which in this case it is, and B, who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct. In this case I would argue that it's both the age and physical and mental condition of the victim in this case, Your Honor. It goes on to say that a sentencing judge must make two separate determinations before imposing a 3A1.1(b)(1)enhancement. First, a judge must conclude that the victim of the crime was vulnerable, that is, that the victim had an impaired capacity to detect or prevent the crime. Second, a judge must find that the defendant knew or should have known of the victim's unusual vulnerability. Here obviously, Your Honor, the impairment that I'm referring to is, one, the age; two, her physical and mental state at the time. And they knew at least one of the factors -- well, they knew two of the factors. They knew that she was of advanced age, and they also knew that she had recently lost her husband. So I would argue that, based on that knowledge, that this enhancement is applicable.

THE COURT: Okay. Well, I agree with the Government. You know, looking at this, we're dealing with a victim who I would consider would be vulnerable in the sense that she was in her early eighties, and considering her physical and mental condition at that time, but also – And, of course, the way the enhancement works, it only has to be one of those. It doesn't have to be -- I think she qualifies for all three in the sense that she also is particularly susceptible to criminal conduct. You know, it is without question they knew her husband passed away, which is where this money came from and why she had so much in relation to that, and that puts her in an especially vulnerable position, knowing that she is now by herself and her husband is deceased. So I do think she qualifies for that. And then it's clear the Defendant knew that her husband passed away, and I -- based on her being the source of why this all happened, I would also presume that she knew of what her age was. And if she didn't, she certainly should have known, considering the

> context of this case. So I do agree that -- and sustain the Government's objection that that enhancement should be applied under 3A1.1(b)(1) for vulnerable victim, and I find that by a preponderance of the evidence. So I'll add two points to the offense level. ROA. 254-257.

The U.S. Sentencing Guidelines provide a 2-level enhancement to a defendant's offense level if "the defendant knew or should have known that a victim of the offense was a vulnerable victim." U.S.S.G. § 3A1.1(b)(1) (2016). According to the Guidelines commentary, a vulnerable victim must be "unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to criminal conduct." USSG § 3A1.1 cmt. n.2. Examples of vulnerable victims, provided by the Guidelines, are a cancer patient desperate for a cure and a handicapped person who cannot adequately defend against a robber. *See id*.

This Court, in construing USSG § 3A1.1(b)(1), has taken the commentary's designation that the victim must be "unusually vulnerable" seriously. In *United States v. Angeles-Mendoza*, this Court considered whether a district court clearly erred when it found that aliens—who had been transported from Mexico, had their socks and shoes taken from them, and who were held at gunpoint in a stash house— were vulnerable victims for purposes of the enhancement. 407 F.3d 742, 746-47 (5th Cir. 2005). In support of the enhancement, the district court had made findings that aliens coming from Mexico come under "economic and physical stress, seeking work,

seeking food, seeking to support their families." *Id.* at 747. The court then described the injustice of "someone or more people to take advantage of that mind set, holding them, in effect, hostage." *Id.*

On review, this Court reversed, holding that the district court clearly erred when it applied the 2-level enhancement because the district court's "generalized finding" did not establish "unusual vulnerability." *Id.* This Court explained that "there is no evidence that the aliens in this case were more unusually vulnerable to being held captive than would be any other smuggled alien." Id. at 748.

The holding in *Angeles-Mendoza* was informed by this Court's earlier analysis in *United States v. Moree*, 879 F.2d 1329 (5th Cir. 1999). *See Angeles- Mendoza*, 407 F.3d at 747 n.5. In *Moree*, the victim had been indicted by federal prosecutors on eleven felonies. The perpetrator, who had also been indicted but whose charges were temporarily dismissed, approached the victim and told him that he knew some people who could get his sentencing exposure dramatically reduced for $160,000. This fraudulent offer led to charges against the perpetrator for obstruction of justice. At sentencing, the district court enhanced the perpetrator's offense level based on a finding that the victim was a "vulnerable victim."

On appeal, this Court reversed and remanded, holding that the victim of the offense was not a "vulnerable victim" for Guidelines purposes. This Court explained

that the victim "surely was put on the defensive by his indictment, but he did not suffer from any unusual physical or mental problems nor was his age a factor in [the perpetrator's] scheme." *Id.* at 1336.

§3A1.1 of the Sentencing Guidelines is leveled at defendants who take advantage of individuals who are more vulnerable than the average members of society, such as the elderly, the young, or the sick. *See*, e.g., *United States v. Moree*, 897 F.2d 1329, 1336 (5th Cir.1990). The "vulnerable victim" enhancement reflects the fact that some potential crime victims have a lower than average ability to protect themselves from crime; those who prey on them incur reduced risks and costs in committing their crimes, which necessitates a higher than average punishment to deter the criminal behavior. U.S.S.G. § 3A1.1(b), 18 U.S.C.A. In this case, the co-defendants did not prey on the victim for any other reason beside the fact that they knew she kept large sums of cash in her house.

"Applicability of vulnerable victim sentence enhancement must be determined on case by case basis, and is appropriate only where defendant targets victim based on latter's 'unique characteristics' that make victim more vulnerable or susceptible to crime at issue than other potential victims of that crime." *United States v. Malone*, 78 F.3d 518 (11th Cir. 1996).

The vulnerability that triggers §3A1.1 must be as 'unusual' vulnerability which is present in only some victims of that type of crime." *United States v. Moree*, 897 F.2d 1329 (5th Cir. 1990). In order for the Court to apply the vulnerable victim enhancement to the actions of Ms. Majors, the district court must find both: (1) that a victim of the defendant's crime was unusually vulnerable in some way, and (2) that the defendant targeted that victim because of this vulnerability. *United States v. Coe*, 71 F.Supp.2d 894 (C.D.Ill. 1999), *United States v. Blake*, 81 F.3d 498 (4th Cir. 1996).

The application notes define a "vulnerable victim" as one "who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct." U.S.S.G. § 3A1.1(b) cmt. n.2 Ms. Majors contends that the enhancement cannot be applied based on age alone, but rather requires "a nexus between the victim's vulnerability and the crime's ultimate success." *United States v. Lee*, 973 F.2d 832, 834 (10th Cir. 1992). This Court has indeed held that it has not "articulated the requirements of vulnerability precisely that way, but we have held that vulnerability is "not reducible to a calculation of the victim's age." *United States v. Brown*, 7 F.3d 1155, 1160 (5th Cir. 1993); but *see United States v. Patel*, 485 F. App'x 702, 719 (5th Cir. 2012) (unpublished) (citing advanced age of patient who suffered delayed surgery as evidence of vulnerability); *United States v.*

Thomas, 384 F. App'x 394, 397 (5th Cir. 2010) (unpublished) (pointing to advanced age of car jacking victims alone to find vulnerability plausible).

This Court should examine the case of *United States v. Creech*, 913 F.2d 780, 781-82 (10th Cir.1990). In *Creech*, the defendant used threats of violence to extort young newlyweds. *Id*. at 781. The Tenth Circuit held that the district court erroneously focused on the class of the victim; however, this was clear error because the Court deemed young newlyweds as a class no more vulnerable to extortion than other married couples. *See id*. at 782 ("There is nothing in the record to suggest the concern a bridegroom has for his bride is more than that a husband longer in the tooth has for the light of his life.").

In other words, because of age, mental or physical condition, or any other relevant deficit, a properly applied increase pursuant to § 3A1.1 must involve a victim who is more susceptible to abuse from a perpetrator than most other potential victims of the particular offense. *See Wilson*, 913 F.2d at 138 (holding that the entire city of Raleigh, North Carolina, could not be "vulnerable victims" of a fraudulent tornado relief mail fraud scheme solely because Raleigh had recently suffered a devastating tornado) and *United States v. Paige*, 923 F.2d 112, 113-14 (8th Cir.1991) (reversing an upward adjustment even though the defendant targeted stores

with young clerks to pass fraudulent money orders, because there was no evidence showing that the young clerks were unusually vulnerable).

An appropriate analysis of §3A1.1(b) is found in *United States v. Paige*, 923 F.2d 112, 113 (8th Cir. 1991). In that case, the Court held that "[unless the criminal act is directed against the young, the aged, the handicapped, or unless the victim is chosen because of some unusual personal vulnerability, § 3A1.1[b] cannot be employed." *Id*. at 113. Application of the vulnerable victim guideline is limited to cases in which the victims "are in need of greater societal protection" and the offenses are thus "more criminally depraved" than they would be otherwise. *See United States v. Castellanos*, 81 F.3d 108, 111 (9th Cir.1996).

The District Court concluded that the victim was vulnerable because of her age. The District Court's finding was erroneous and employed the incorrect legal standard. There is no evidence that the victim in this matter had an impaired capacity to detect or prevent the crime at the time of the offense. Further, Ms. Starkey was known to keep a substantial amount of cash at her home–that is why the co-defendants chose to rob her house. The co-defendants did not target Ms. Starkey because of her age. Finally, the evidence supports the fact that the co-defendants did not intend for Ms. Starkey to be at the house. They did not take a weapon to the robbery because they thought they were burglarizing an empty house. Ms. Starkey's residence was targeted

for no other reason than the codefendants believed that she kept a large amount of cash in the safe.

The court did not determine that the victim, as an individual, was particularly vulnerable by virtue of particularized characteristics or that this victim was targeted because of this vulnerability. Thus, the District Court erred by applying the enhancement pursuant to U.S.S.G.§ 3A1.1. For these reasons, this Court should reverse and remand.

THE DISTRICT COURT ERRED BY ASSIGNING A SIX-LEVEL UPWARD ADJUSTMENT PURSUANT TO U.S.S.G. § 2A4.1(b)(1) FOR "RANSOM DEMAND".

Ms. Majors objected to the specific offense characteristic listed in paragraph 24 and 30 of the PSR. The offense level for both counts was increased by six levels pursuant to U.S.S.G. § 2A4.1(b)(1).[3]

U.S.S.G. 2A4.1(b)(1) reads as follows:

If a ransom demand or a demand upon government was made, increase by 6 levels.

§ 2A4.1(b)(1) provides that a six-point enhancement applies if, during the commission of the crime, "a ransom demand. . . was made." U.S.S.G. § 2A4.1(b)(1).

[3]For Count Four (money laundering), the term of imprisonment is capped by statute at 20 years. *See* 18 U.S.C. § 1956(h) and 18 U.S.C. § 1956(a)(1).

"Ransom" means "a consideration paid or demanded for the release of someone or something from captivity." *United States v. Fernandez*, 770 F.3d 340, 343 (5th Cir. 2014). As this Circuit has noted, "[t]he language is written generally, applying any time a kidnapper demands a ransom, regardless of who is held." *United States v. Pantoja-Rosales*, 494 F. App'x 453, 2012 WL 4788657 (5th Cir. Oct. 9, 2012).

The District Court's decision to overrule Ms. Majors's objection was error. There was insufficient evidence to apply this increase. First, the that a "ransom demand" would be made was outside the scope of any reasonably foreseeable conduct by the codefendants. The plan was to rob the victim's house when she was not at home. Ms. Majors was not present during the robbery and the co-defendants who committed the robbery did not take a firearm or weapon. Further, the so-called ransom in this case does not meet the legally discreet definition of "ransom demand" as that term is used in the sentencing guidelines.

The following colloquy occurred during the discussion of this matter:

THE COURT: Okay. Then, Ms. Fisher, you have some objections.

MS. FISHER: Yes, Your Honor. My objection would be that in paragraph 24 the Defendant objects to the offense for the ransom, six points that was added. I believe in my response I cited some case law in there basically that the various Circuit Courts have held that address the meaning of the phrase "ransom demand", including the Fifth Circuit. Most appear to agree that a demand for money or goods must be communicated in a -- communicated to a third party in order to trigger

the applicability of Section 2A4.1(b)(1) enhancement. As noted earlier today, the cases were *U.S. versus Fernandez* where that Court -- it is a Fifth Circuit court that they define "ransom" for the first time. The Court held that ransom applies any time a defendant demands money from a third party for the release of a victim, regardless of whether that money is already owed. In this case, Your Honor, the two Defendants that went into the home, they made a ransom -- a demand to -- saying that we have your son. And, in fact, we know that that was not the case, but that is a statement that was made. My client, as you're aware, was not in the home during the time of the robbery. Other Circuit Courts that have considered this, Your Honor, is the Seventh Circuit that says that a ransom demand requires that the demand be made, again, to a third party. That Court, in *Reynolds*, rooted its decision in the text of 2A4.1(b)(1), as well as a number of policy considerations. The rationality employed by the Court merits extended quotations. In *Reynolds* they talked about when demands reach third parties, because those who are contacted will experience great stress and may attempt a rescue, escalating the threat of violence. So I believe that the thought of ransom is made when other parties may be involved in a case, and here we don't have that. It was a statement that was made, but the ransom that the courts have considered were where they are not only the people that are involved in the offense at hand, but the people that are going to be potentially involved by making the ransom demand, Your Honor, and we don't have that in this case.

THE COURT: But why couldn't the ransom demand be made upon, in this case, the victim? Why can't the victim also be the third party? Because they tell the victim that her son is in -- that they're holding her son and would do harm to her son unless she gives them X, Y, Z, which is access to the money. So why is that not a ransom demand made to her?

MS. FISHER: Your Honor, I believe because, again, it's not involving other people outside of the crime itself, that the ransom demand made was made to the victim in this case and not others not a part of this offense.

THE COURT: Well, what about those cases indicates that the victim can't also be the third party under this fact scenario?

MS. FISHER: I'm sorry, Your Honor, I –

THE COURT: I said why can't the victim also be the third party under this fact scenario? Those cases didn't deal with the situation we're dealing with here.

MS. FISHER: Because she is part of this offense already. She's already involved in this offense. She is not going to be a third party that is going to come into this offense by way of making the ransom demand.

THE COURT: But you understand they made a ransom demand to her. The fact that her son was not actually kidnapped and in danger, does that matter? That's what they told her.

MS. FISHER: I believe it does, Your Honor, because, again, what the courts consider -- and here it goes on in *Reynolds*, but when a Kidnaping is conducted without the knowledge of anyone except for the victim, the scope of the crime and risk of harm to others, while undoubtedly extensive, is nonetheless not as great. So I believe the courts consider are we -- we have an offense that's being committed. If we go out and bring in other people by way of making that demand, that ransom demand that's going to get other people involved and possibly injured, I believe that's where the courts are holding that that's when a ransom demand should be made. We don't have that here because the ransom demand was made to the person that was already involved in the offense, so it does not allow for others to -- to become involved.

THE COURT: Mr. Gonzalez.

MR. GONZALEZ: Well, Your Honor, I would argue that you can have both, that the victim can be the third party, and it would then fit into the cases cited by defense counsel, that being *Sierra-Valesquez* as well as *Fernandez*. In this case the victim, Ms. Starkey, was the third party. When they demanded that she pay the ransom to save her son from any

injury, she then became the third party. And if defense counsel is going to rely on the fact that someone may take actions that would put someone in danger, they didn't -- when they moved Ms. Starkey into the bathroom, she could have had a gun in the bathroom. She could have used that gun to save the life of her son. She didn't know that her son wasn't actually being held. They told her that he was being held. She believed that he was being held. The ransom was made to her so that her son would not be victimized. Additionally, as indicated in the response by the Probation Office, in the factual basis the Defendant admitted and it states that she unlawfully and willfully combined, conspired and agreed to extort, kidnap or rob the victim, and she demanded ransom, reward or any other reason or benefit. So that was included in their factual basis, so I don't think that they're mutually exclusive. I think you can have both. Just because the fact pattern in this case doesn't fit the fact pattern in those other cases doesn't mean that the increase doesn't apply. There was a ransom made. It was a ransom made of the victim, who then became the third party to the -- to the son's detention, and that's where it exists and that's why the ransom enhancement should be applied.

THE COURT: Ms. Fisher, I agree with the Government. I will tell you, I think in one of the other cases I did sustain this objection, and as I confessed in Mr. Majors' case earlier today, I'll confess error when I get it wrong. I think I misunderstood the argument being made by Mr. Gonzalez back then. I'll take the blame for that on that case. But I think the enhancement was properly applied, and I think in this case what you have is it's a role reversal. Just the fact -- just because the son wasn't kidnapped, he's the victim in the scenario of the enhancement here, because the threat, you know, and the ransom demand was made to her, and so I think it qualifies for that. So I am, based on a preponderance of the evidence, going to overrule the objection and find the enhancement under 2 -- Section 2A4.1(b)(1) was properly applied.

The District Court erred in applying this upward increase, because the evidence presented does not support the finding that Ms. Majors made or should be responsible

for any ransom demand. The evidence is also insufficient to support the finding that a demand was actually made that would be properly consider a "ransom demand" under the guidelines, nor does the PSR or the District Court appear to point to that language in support of the application of §2A4.1(b)(1).

Ms. Majors herself never made any ransom demand, as she was not present during the robbery. Further, Ms. Majors had no reason to think that anyone else would do so. This was planned to be a robbery of a residence when the homeowner was not present. The codefendants who entered the residence did not take a firearm with them as they thought no one was at home. The fact that Ms. Starkey, the victim in this case, was present when the codefendants entered the house and was not foreseeable to her.

Second, this case involves a robbery and not a ransom demand as that legally discrete term is used in the sentencing guidelines. Therefore, if the six-level increase applies in this case, it turns on whether a "ransom demand" was made. The phrase "ransom demand" is not defined in the United States Sentencing Guidelines. This phrase is a legally discrete term which has a narrow application in federal sentencing. The issue before the Court is whether a ransom demand must be communicated to a third party to justify the imposition of the ransom demand enhancement. This Court, as well as other circuit courts, have addressed the meaning of the phrase "ransom

demand". Of the Courts that have addressed the narrow issue, most appear to agree that a demand for money or goods must be communicated to a third party in order to trigger the applicability of 2A4.1(b)(1).

In *United States v. Fernandez*, 770 F.3d 340, 343 (5th Cir. 2014), the Court defined ransom for the first time in a published opinion. The Court then held that the ransom enhancement applies "'anytime a defendant demands money *from a third party* for a release of a victim, regardless of whether that money is already owed to the defendant,'" adopting the rationale of *United States v. Sierra–Velasquez,* 310 F.3d 1217, 1221 (9th Cir.2002). Similarly, in *United States v. Reynolds*, 714 F.3d 1039 (7th Cir. 2013) the Seventh Circuit held that "ransom demand" under 2A4.1(b)(1) requires that the demand be made to a third party. The *Reynolds* court rooted its decision in both the text of 2A4.1(b)(1) as well as a number of policy considerations. According to the Court in *Reynolds*, the application of the ransom demand enhancement is warranted:

> "when demands reach third parties because those who are contacted will experience great stress and may attempt a rescue, escalating the threat of violence. Moreover, Kidnaping someone in order to compel others to act, as a substitute for confronting or attempting to rob those others in person, can be a very effective way to accomplish crime that merits heightened deterrence. But when a Kidnaping is conducted without the knowledge of anyone except for the victim, the scope of the crime and risk of harm to others, while undoubtedly extensive, is nonetheless not

as great." *Reynolds* at 1044. *Contra*, e.g. *United States v. Romero*, 906 F.3d 196 (2018).

In this case, it is undisputed that Lori Majors was not present during the intrusion into Ms. Starkey's house and the robbery from the safe. There is no evidence that a demand for money or other consideration was ever communicated to a third party during the time that the victim in this case was restrained. It cannot be said that the actions by the co-defendant during the robbery legally constituted a "ransom demand". The application of the six point increase should not apply to Ms. Majors's guideline calculations. The District Court erred by denying Ms. Majors's objection to this application of this upward adjustment.

THE DISTRICT COURT'S SENTENCE WAS PROCEDURALLY AND SUBSTANTIVELY UNREASONABLE. THE ABOVE-GUIDELINES SENTENCE SHOULD BE VACATED.

The district court is required to state in open court the "specific reason" for imposing an above-guidelines sentence. 18 U.S.C. § 3553(c); *see* also *United States v. Key*, 599 F.3d 469, 474 (5th Cir. 2010). The district court must "thoroughly articulate its reasons," which must be "fact-specific and consistent with the sentencing factors enumerated in section 3553(a)." *United States v. Smith*, 440 F.3d 704, 707 (5th Cir. 2006). The district court's explanation for the sentence must be sufficient "to allow for meaningful appellate review and to promote the perception of fair

sentencing." *Gall*, 552 U.S. at 50; *see* also *Rita v. United States*, 551 U.S. 338, 356 (2007) ("The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority.").

The district court did not, as the Supreme Court requires, address Ms. Majors's "nonfrivolous reasons for imposing a different sentence," *Rita v. United States*, 551 U.S. 338, 357 (2007), particularly her contention that her history of addiction and abusive relationships did not warrant an above-Guidelines sentence. *See id*. (holding that a district court imposing a within-Guidelines sentence need not provide a lengthy explanation "[u]nless a party contests the Guidelines sentence generally under § 3553(a) . . . or argues for a departure" under the Sentencing Guidelines).

The district court explained the sentence by stating that the guideline range was not sufficient. The Supreme Court has repeatedly held that when a sentencing judge "decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Gall*, 552 U.S. at 50; *Rita*, 551 U.S. at 357. No such consideration or compelling explanation supports the court's upward variance from the high end of the Guidelines range. In order to satisfy the explanation requirement, the district court might have discussed why Ms. Majors's history of addiction,

medical issues, or abusive relationships were irrelevant or did not support a sentence lower than the one imposed. The court committed procedural sentencing error. *Cf. United States v. Peters*, 512 F.3d 787, 789 (6th Cir. 2008) ("[w]hen the defendant or prosecutor presents nonfrivolous reasons for imposing a different sentence . . . a sentencing judge should address the parties' arguments and explain why he has rejected those arguments."

The district court's statements demonstrate its knowledge of the guidelines and suggest that various factors informed its choice of sentence, but they do not answer the key question of why he imposed a major variance. *See United States v. Irey*, 612 F.3d 1160, 1196 (11th Cir. 2010) (en banc) (noting that variances of 33% or more from the top or bottom of the guideline range qualify as major). Without an answer, this Court cannot discharge its duties of appellate review. Accordingly, this case must be remanded for resentencing. Cf. *Parks*, 823 F.3d at 997 ("[t]he court has an obligation . . . to explain deviations from the guideline sentencing range, see 18 U.S.C. § 3553(c)(2), so that the reviewing court can determine whether the departure was justified. If the court does not do this, the case must be remanded for resentencing."; *see* also *United States v. Delvecchio*, 920 F.2d 810, 813 (11th Cir. 1991). The district court did not fulfil its procedural obligations as the Court did not provide the specific reasons for the variance. Remand is required. *See United States*

v. Bostic, 970 F.3d 607 (5th Cir. 2020)("The defendant here argues both the procedural and substantive unreasonableness of his sentence. We conclude that the district court needs to explain better its justification for such a sentence or impose a lesser one").

The district court erred when it sentenced Ms. Majors outside the guidelines via a variance without adequately explaining the grounds. The court "must make an individualized assessment based on the facts presented." *Gall* at 50. This assessment must consider the extent of the deviation. *Id.* The Supreme Court stated that it is "uncontroversial that a major departure should be supported by a more significant justification than a minor one." *Id*. The court "must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Id., Rita v. United States*, 551 U.S. 338, 356 (2007).A sentence above the guidelines does not carry a presumption of unreasonableness. *Gall* at 51. But a major departure should be explained. *Id*. at 50.

Here, the court stated that it took into consideration §3553(a), but it did so without any explanation of how it arrived at the sentence of 480 months. A court's decision to vary carries the "greatest respect" when the court states that a particular case falls outside the "heartland" of the guidelines. *Kimbrough v. United States*, 552 U.S.85 (2007); *see* also *Rita* at 351. Merely reciting the statutory considerations

without applying those considerations to the facts of the case should be viewed cautiously. In *Gall*, the sentencing court made "a lengthy statement" and filed a sentencing memorandum explaining that court's sentencing decision where he applied the §3553(a) considerations to the facts of the case. The court here abused its discretion by merely reciting the sentencing considerations under §3553(a) without any explanation of how the court decided on the sentence. The sentence of 480 months appears to be random and without justification.

The sentence imposed is procedurally unreasonable because it failed to consider the correct guideline range of imprisonment.

The sentence imposed by the District Court was procedurally unreasonable because the District Court erred in its calculation of the sentencing guidelines, as argued in Issues #1 and #2. *Gall v. United States*, 552 U.S. 38, 51 (2007) states that a reviewing court must "ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range." *Id*. The district court failed to consider "a factor that should have received significant weight"—namely, the correct guidelines range. *See United States v. Chandler*, 732 F.3d 434, 437 (5th Cir. 2013); 18 U.S.C. § 3553(a)(4). Since the District Court erred in its guideline calculations, the sentence in this case is procedurally unreasonable.

The 480 Month Sentence Is Substantively Unreasonable

The 480-month sentence was not substantively reasonable because it was grossly excessive, disparate to the sentences of the codefendants, and involved error in the weighing of appropriate considerations. Further, Ms. Majors's argument for procedural unreasonableness are incorporated into the arguments for the substantive unreasonableness as well as additional argument.

When determining whether a non-guidelines sentence is substantively unreasonable, this court considers "the totality of the circumstances, including the extent of any variance from the Guidelines range, to determine whether, as a matter of substance, the sentencing factors in section 3553(a) support the sentence." *United States v. Gerezano-Rosales*, 692 F.3d 393, 400 (5th Cir. 2012). A non-guidelines sentence will be found substantively unreasonable when it "(1) does not account for a factor that should have received significant weight, (2) gives significant weight to an irrelevant or improper factor, or (3) represents a clear error of judgment in balancing the sentencing factors." *United States v. Smith*, 440 F.3d 704, 708 (5th Cir. 2006). "In making this determination, [this court] must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." *Gerezano-Rosales*, 692 F.3d at 401.

The District Court Erred In Weighing Sentencing Factors

The sentence is unreasonable because it represents error in the weighing of the appropriate sentencing factors. A non-guideline sentence unreasonably fails to reflect statutory sentencing factors when it (1) does not account for a factor that should have received significant weight; (2) gives significant weight to an irrelevant or improper factor; or (3) represents a clear error of judgment in balancing all of the sentencing factors. *See United States v. Nikonova*, 480 F.3d 371, 376 (5th Cir. 2007); *United States v. Smith*, 440 F.3d 704, 707 (5th Cir. 2006); *see* also *United States v. Haack*, 403 F.3d 997, 1003 (8th Cir. 2005); *United States v. Long Soldier*, 431 F.3d 1120, 1122–23 (8th Cir. 2005). In the present case, the sentence represents error of judgment in balancing the sentencing factors.

"A sentence is substantively unreasonable when, after taking into account the totality of the circumstances, 'the sentence is 'greater than necessary' to achieve the sentencing goals set forth in 18 U.S.C. § 3553(a)." *United States v. Wright*, 426 F. App'x 412, 414 (6th Cir. 2011); *see* also *United States v. Tristan-Madrigal*, 601 F.3d 629, 633 (6th Cir. 2010), and *United States v. Bolds*, 511 F.3d 568, 581 (6th Cir. 2007). 18 U.S.C. §3553(a) instructs the district court to impose a sentence sufficient but not greater than necessary to comply with certain factors enumerated in that statute. *See* 18 U.S.C. §3553(a). The district court's compliance is reviewed to

determine whether it is a "reasonable" application of those factors. *See United States v. Booker*, 543 U.S. at 262. Reasonableness review is also described as review for abuse of discretion. *See Gall*, 552 U.S. at 51.

The factors that the District Court included when announcing the sentence included: (1) Ms. Majors was a "ringleader" of the offense; (2) Ms. Majors did not "truly accept" responsibility for the offense; (3) Ms. Majors involved her family in the offense; (4) her age; (5) need for deterrence; (6) the victim's ordeal; and (7) the District Court found that "everything that happened isn't totally accounted for in the guidelines". ROA.275-277.

The District Court placed exclusive emphasis on these factors, and did not address the arguments made by Ms. Majors. The PSR did not assign Ms. Majors an adjustment for leadership or role. The PSR did find that Ms. Majors fully accepted responsibility for her actions and assigned her the full adjustment for that guideline. Yet the District Court adopted the PSR, and stated: "So the Court finds that the information contained in the Presentence Report has sufficient indicia of reliability to support its probable accuracy. The Court adopts the factual findings, undisputed facts and the guideline application in the Presentence Report." ROA.263.

Under an abuse-of-discretion standard, the District Court's decision is error because it represents a misapplication of the law to the facts. since the PSR does not

present adequate facts to support the variance for any type of leadership role or failure to accept responsibility. The other factors the Court mentioned–Ms. Majors's age, her involvement of family, deterrence, consideration of the victim and the idea that the guidelines did not account for the offense conduct–do not support the upward variance of 480 months. All of these factors would have been adequately represented by a sentence within the advisory guideline range of imprisonment.

Further, under the abuse of error standard, the reviewing court must consider the totality of the circumstances including the "extent of any variance." *Id*. at 51. The court abused its discretion by failing to explain how the court decided on the particular sentence and not addressing Ms. Majors's arguments.

Ms. Majors's Sentence is Disparate to the Sentences of Her Codefendants

At 480 months, Ms. Majors's sentence was more than twice as severe than Bryan Majors's sentence of 180 months. Bryan Majors was not two times less culpable than Ms. Majors. Specifically, Bryan Majors entered a "guilty" plea pursuant to an 11(c)(1)(c) to 180 months. The CS who tipped off the authorities stated, "Bryan and Justin got it all together. Bryan was the mastermind of it at first." Bryan and Justin discovered the address of the victim. Bryan was involved in surveilling the victim's home. After the robbery, Bryan threatened to kill Justin's children if Justin did not split the proceeds from the robbery. Multiple cooperating

sources confirmed this threat by Bryan to Justin. ROA.301. Bryan and Justin had multiple discussions about robbing the victim; and Bryan and Justin argued about the plans to rob the victim. It was at Bryan's girlfriend's home in Colorado where the final week of planning took place with the codefendants before the robbery. Justin and Bryan both drove to the hardware store to obtain tools for the robbery. Multiple sources confirmed that Bryan retained $100,000.00 of the proceeds of the robbery and Bryan dispersed monies to the others. ROA.302. Bryan was involved from the very beginning and shared in the planning, execution and splitting of the proceeds of the crime in ways that do not make Bryan less culpable than Ms. Majors.

Regarding co-defendant Max Majors, the record reflects that Max was involved from the beginning. He rented a room in Colorado with Ms. Majors. Max broke into the house with Justin and robbed the victim. Max shared in the proceeds of the crime; purchased a Mercedes Benz; and, even flashed large sums of money online. ROA.301. Max was sentenced to 240 months, half the sentence Ms. Majors received.

Ms. Majors respectfully submits that the District Court's 480 month sentence was an abuse of discretion, and this case should be remanded to the District Court for resentencing. *See United States v. Benton*, No. 92-1632, 1995 U.S. App. LEXIS 44124, (5th Cir. June 21, 1995); *United States v. Aguilar- Rodriguez*, 288 F. App'x 918, 921 (5th Cir. 2008) (case remanded for resentencing as the District Court failed

to provide sufficient justifications to support an upward variance); *United States v. LiraBarraza*, 941 F.2d 745 (9th Cir. 1991).

The District Court's sentence of 480 months was an abuse of discretion as that sentence includes a much greater term of imprisonment than as any of the co-defendants most of whom were equally as culpable and did not provide the same level of cooperation as Ms. Majors, and therefore is unreasonable.

The Extent of the Variance was Grossly Excessive and Unreasonable

There is not enough evidence in the record to justify the sentence imposed when compared to the advisory sentencing range. The offense conduct was not so egregious as to merit a sentence in excess of the Guideline range. The guidelines had already significantly accounted for the facts of the offense. This Court evaluates whether the "degree of the departure or the sentence as a whole is unreasonable." *United States v. Rajwani*, 476 F.3d 243, 250 (5th Cir. 2007), modified on other grounds, 479 F.3d 904 (5th Cir. 2007). Here, the advisory guideline range was 292 to 365 months. ROA. 266. Yet the District Court sentenced Ms. Majors to a 480 month term of imprisonment, which represents almost ten years over the top-end of the range and over fifteen years' difference between the bottom of the guidelines. The sentence was five years over what the Government requested. Under the totality of the circumstances, this was unreasonable. Justice does not require Ms. Majors to suffer an enhanced sentence here. Thus, the sentence should be vacated.

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,

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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,

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CERTIFICATE OF SERVICE

I certify that on the 31st day of January 2022, 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
U.S. Department of Justice
Washington, D.C. 20530

Bradley Elliot Visosky, Assistant U.S. Attorney
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LORI MAJORS
USM # 28508-078
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WASECA, MN 56093

/s/ Amy R. Blalock
AMY R. BLALOCK

No. _____

In the

Supreme Court of the United States

OCTOBER TERM, 2021

LORI MAJORS,

Petitioner,

V.

UNITED STATES OF AMERICA

Respondent.

APPENDIX

OPINION OF THE UNITED STATES COURT

OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
November 2, 2021
Lyle W. Cayce
Clerk

No. 20-40629
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

LORI MAJORS,

Defendant—Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:19-CR-21-1

Before BARKSDALE, COSTA, and ENGELHARDT, *Circuit Judges*.

PER CURIAM:*

Lori Majors pleaded guilty to conspiring to: kidnap and hold a person for ransom or reward, and launder the proceeds of an unlawful activity. *See* 18 U.S.C. §§ 2, 1201(a)(1), (c), and 1956(a)(1), (h). She was sentenced to, *inter alia*, an above-Sentencing Guidelines term of 480-months'

* Pursuant to 5TH CIRCUIT RULE 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 CIRCUIT RULE 47.5.4.

imprisonment. Majors contends the district court erred by: applying "vulnerable victim" and ransom enhancements (including attributing a ransom demand to her); failing to give adequate reasons for its sentencing decision; and imposing a sentence that is substantively unreasonable.

Although post-*Booker*, the Guidelines are advisory only, the district court must avoid significant procedural error, such as improperly calculating the Guidelines range. *Gall v. United States*, 552 U.S. 38, 46, 51 (2007). If no such procedural error exists, a properly-preserved objection to an ultimate sentence is reviewed for substantive reasonableness under an abuse-of-discretion standard. *Id.* at 51; *United States v. Delgado-Martinez*, 564 F.3d 750, 751–53 (5th Cir. 2009). In that respect, for issues preserved in district court, its application of the Guidelines is reviewed *de novo*; its factual findings, only for clear error. *E.g.*, *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008).

For the issues raised on appeal, however, Majors did not preserve two of the claimed errors: the court attributed a ransom demand to her; and it failed to give adequate reasons for its sentencing decision. Therefore, review of those issues is only for plain error. *E.g.*, *United States v. Broussard*, 669 F.3d 537, 546 (5th Cir. 2012). Under that standard, Majors must show a forfeited plain error (clear or obvious error, rather than one subject to reasonable dispute) that affected her substantial rights. *Puckett v. United States*, 556 U.S. 129, 135 (2009). If she makes that showing, we have the discretion to correct the reversible plain error, but generally should do so only if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings". *Id.*

For this claimed procedural error, Majors has not shown the court committed reversible plain error by enhancing her offense level under Guideline § 3A1.1(b)(1) because she "knew or should have known that a

victim of the offense was a vulnerable victim" or under Guideline § 2A4.1(b)(1), which applies in kidnapping proceedings when a ransom demand was made. But, even assuming Majors preserved this claim for appeal (including ransom should not have been attributed to her) and could establish error, any error was harmless. The Guideline § 3A1.1(b)(1) enhancement had no bearing on the calculation of her Guidelines range. *See United States v. Sidhu*, 130 F.3d 644, 652 (5th Cir. 1997) (explaining granting relief for enhancement would not change the controlling Guidelines range). Additionally, the district court's stated reasons show it would have imposed the same sentence even if the enhancements were applied in error, and it would have done so for the same reasons. *See United States v. Redmond,* 965 F.3d 416, 421–22 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 1411 (2021) (holding Guidelines-calculation error harmless because court would have imposed same sentence for same reasons).

Majors' assertion that her sentence is procedurally unreasonable because the court failed to give adequate reasons for the upward variance or for its extent (which, as noted, she did not preserve in district court) does not establish reversible plain error. *See United States v. Coto-Mendoza*, 986 F.3d 583, 585–86 (5th Cir. 2021), *petition for cert. filed* (U.S. June 24, 2021) (No. 20-8439). The court provided a sufficient explanation for rejecting Majors' request for a shorter sentence and demonstrated it had a reasoned basis for its sentencing decision. *See Rita v. United States*, 551 U.S. 338, 356–57 (2007) (noting the district court's explanation must sufficiently show it "has considered the parties' arguments and has a reasoned basis for exercising [its] own legal decisionmaking authority"). In any event, Majors has not asserted, much less shown, that any lack of stated reasons affected her substantial rights. *See Puckett,* 556 U.S. at 135 (explaining appellant, for one prong of plain-error review, must show the clear-or-obvious error affected substantial rights).

Finally, Majors has not shown her sentence is substantively unreasonable because it is greater than necessary to achieve the sentencing goals of 18 U.S.C. § 3553(a). She contends her sentence: is disparate to those of her codefendants; is based on clearly erroneous facts; and constitutes a clear error of judgment in balancing the § 3553(a) sentencing factors. These assertions fail. *See United States v. Gerezano-Rosales*, 692 F.3d 393, 400–01 (5th Cir. 2012) (explaining a non-Guidelines range sentence is unreasonable if it "does not account for a factor that should have received significant weight", "gives significant weight to an irrelevant or improper factor", or "represents a clear error of judgment in balancing the sentencing factors" (citation omitted)). Under the totality of the circumstances, including the significant deference given to the district court's consideration of the § 3553(a) sentencing factors and the court's reasons for its sentencing decision, Majors has not shown an abuse of discretion. *See Gall*, 552 U.S. at 51 (explaining appellate court "must give due deference to the district court's decision that the § 3553 factors, on a whole, justify the extent of the variance").

AFFIRMED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
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NEW ORLEANS, LA 70130

November 02, 2021

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

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

No. 20-40629 USA v. Majors
USDC No. 4:19-CR-21-1

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. 35, 39, and 41 govern costs, rehearings, and mandates. **5th Cir. R. 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.

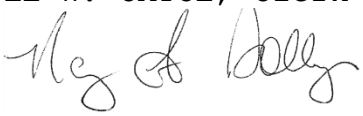
Direct Criminal Appeals. 5th Cir. R. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, 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



By:_____
Nancy F. Dolly, Deputy Clerk

Enclosure(s)

Ms. Amy R. Blalock
Mr. Ernest Gonzalez
Mr. Stephan Edward Oestreicher Jr.
Mr. Bradley Elliot Visosky