

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA
OCTOBER TERM 2021

JONHATHAN CARTER	§	PETITIONER
VS.	§	
THE UNITED STATES OF AMERICA	§	RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
NO. 20-20367

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION
NO. 4:19-cr-380

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ATTORNEY FOR PETITIONER

QUESTION PRESENTED

The four-level abduction enhancement pursuant to U.S.S.G. § 2B1.3(b)(4)(A) was applied to Appellant's bank robbery conviction based on moving victims from one part of an office suite or building to another part. This is the holding in the Third, Fourth, Fifth, and Tenth Circuits. It is contrary to the holdings in the Sixth, Seventh and Eleventh Circuits.

The issue presented is whether a person is "abducted" within the meaning of § 2B1.3(b)(4)(A) if he is moved or ordered to move only a short distance within the same building or office suite.

LIST OF PARTIES

1. The United States of America. Plaintiff-Respondent
Jill Jenkins Stotts Trial Counsel for the Government
John Richard Berry Appellate Counsel for the Government
2. Johnathan Carter Defendant-Petitioner
Tom Moran Trial and Appellate Counsel for Petitioner

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TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

COMES NOW JOHNATHAN CARTER, Petitioner herein, by and through his attorney, **TOM MORAN**, and files this petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit and would show the Court as follows:

I. CITATION TO THE OPINION OF THE COURT BELOW

The Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished opinion on March 30, 2022. A copy is attached as Appendix A.

II. BASIS OF THIS COURT'S JURISDICTION

The opinion of the Court of Appeals was released on March 30, 2022. Petitioner filed no petition for rehearing or rehearing *en banc*. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) to review a final judgment of a United States Court of Appeals.

The District Court had jurisdiction pursuant to 18 U.S.C. § 3231. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S.S.G. § 2B3.1(b)(4)

(4) (A) If any person was abducted to facilitate commission of the offense or to facilitate escape, increase by **4** levels; or (B) if any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by **2** levels.

IV. REASONS FOR REVIEW

This petition seeks review on a pure question law, interpretation of § 2B3.1(b)(4)(A): should

the four-level sentencing enhancement for abduction be applied when a victim is moved within an office or building as the Fifth Circuit held in this case or whether the guideline requires a greater movement of the victim as held by the Sixth, Tenth and Eleventh Circuits.

This Court should grant review pursuant to SUP. CT. R. 10(a) in that the Court of Appeals for the Fifth Circuit entered a decision in conflict with the United States Courts of Appeals for the Sixth Circuit in *United States v. Hill*, 963 F.3d 528 (6th Cir. 2020); the Seventh Circuit in *United States v. Eubanks*, 593 F.3d 645 (7th Cir. 2010); and the Eleventh Circuit in *United States v. Whatley*, 719 F.3d 1206 (11th Cir. 2013).

Conversely, the Fifth Circuit's holding is consistent with the holdings of the Third Circuit in *United States v. Reynos*, 680 F.3d 283 (3rd Cir. 2012); the Fourth Circuit in *United States v. Osborne*, (4th Cir. 2008); and the Tenth Circuit in *United States v. Archuleta*, 865 F.3d 1280 (10th Cir. 2017).

A. Course of the Proceedings Below

Petitioner pled guilty to four counts of aiding and abetting a bank robbery and one count of aiding and abetting brandishing a firearm during a crime of violence. The District Court assessed an above guidelines sentence of 324 months. He gave timely notice of appeal.

The Court of Appeals for the Fifth Circuit affirmed the conviction and sentence in an unpublished opinion released March 30, 2022. No motion for rehearing was filed.

B. Relevant Facts

Appellant pled guilty to aiding and abetting four bank robberies and one count of aiding and abetting brandishing of a firearm during a crime of violence. All of the facts contained herein are presented verbatim from the presentence report.

1. October 2, 2018

According to a HCSO¹ offense report, on October 2, 2018, deputies responded to a robbery alert at Capital One Bank and met with the branch manager. The branch manager advised she was not at the bank when the robbery took place but that four of her employees and a customer were present. Deputies then met with one of the employees present, AW. AW advised that a male wearing a light blue security uniform entered the bank and requested to open an account. The man grabbed some coffee and sat down at her cubicle. AW reported that immediately after the first man sat down, a second male entered the bank and jumped over the teller booths. AW was about to reach for the alarm button, but the man sitting in front of her told her “don’t think about it.” The man in the security guard uniform then instructed her to lay down in front of her cubicle. The man then proceeded to take the bank keys which were wrapped around her wrist and place them in the trash can. The man then forced her to stand back up and led her to a back room, where he advised her to lay down.

PSR para. 8

2. November 19, 2018

16. According to a HCSO offense report, on November 19, 2018, deputies responded to a robbery alert at Capital One Bank and met with three bank employees and one customer, as follows: AA, AW, LOA, JF, and LA, respectively.

17. AA advised deputies that the first robber was wearing a grey hoodie with a light colored hood, blue jeans and black shoes. AA reported that the second robber was wearing a

¹“HCSO” means Harris County Sheriff’s Office. The sheriff’s office investigated all four robberies.

black ski mask, black hoodie, tan pants, black shoes, and black gloves. AA advised he was sitting down at his station when the first robber wearing the light grey hoodie entered the bank. The robber advised he wanted to open an account and began to pat his pockets at which time he stated he forgot his wallet. The first robber then said, "alright let's go" and jumped the counter towards one of the stations. The robber proceeded to order everyone on the ground with their face down. AA observed the first robber unzip his hoodie and grab a dark-colored plastic bag. AA reported that, although he did not see a firearm, he felt in fear of his life. The second robber then jumped over the counter as well and told AA to give him the keys to the drawers. Both robbers grabbed the money from the drawers and heard the robbers yelling "leave the dye packs." AA managed to see the robbers leaving in a four-door blue Nissan Altima with an unknown license plate.

18. AW advised she was sitting down at her station when the first robber walked in and advised he wanted to open an account. The man proceeded to tell AW he had forgotten his wallet then walked over to the bank teller area and jumped over to the teller side. The man advised everyone to get down on the ground. The second robber then jumped over the teller area and demanded to see the manager. AW advised the second robber that the manager was not there. AW advised that she did not see a firearm but was in fear for her life. AW observed the robbers leave the bank as she lay on the ground. AW also reported to the deputies that she believed the first robber was the same robber who had robbed another Capital One Bank on October 2, 2018 (Count 1S) where she was stationed at the time. It is noted that the first robber AWton (sic) reported was determined to be Johnathan Carter who in the October 2, 2018 robbery was wearing the blue colored security guard uniform. Additionally, his fingerprints were recovered at the scene of the November 19, 2018

robbery.

19. LOA advised that she saw the first robber jump over the teller area and demand that she open her money drawer which she complied with. LOA observed the first robber holding a dark-colored plastic bag. LOA was ordered to lay back down on the ground. LOA observed how the robbers threw the dye packs on the ground. The first robber then forced her back up and demanded she take him to the safe. LOA advised the first robber that she did not know the code, at which point the first robber let her go. LOA reported she did not see a gun but was in fear for her life.

20. JF advised that he was in the back of the bank but walked towards the front of the bank when one of the robbers saw him. JF was ordered to the ground. JF did not report seeing a weapon but feared for his life.

21. LA advised deputies she went to the bank to deposit money. She reported the bank robbers ordered her to the back of the teller stations. LA reported she had \$300 in her possession and her phone. The robbers took her money and threw the phone over the counter. LA reported she did not see a weapon but feared for her life. Her iPhone 7 Plus was damaged when it was thrown. The iPhone 7 Plus was valued at \$800.

PSR paras. 16-21.

3. February 21, 2019

RAB and SB briefly explained they had entered the bank while the attempted robbery was taking place. They were both forced to the back of the bank near a restroom. They remained there until the bank manager retrieved them.

PSR para. 24.

4. February 22, 2019

Deputies spoke to one of the bank tellers, JM, who advised he saw one of the robbers jump over into the teller area holding a firearm. Two other bank robbers forced other employees and customers into a back room. JM advised that the first bank robber then pulled a mask over his face and pointed a gun at him (JM), while ordering him to lay on the ground (later determined to be Johnathan Carter). Johnathan Carter then ordered JM to stand up and demanded JM open his money drawer, which JM complied with. Johnathan Carter proceeded to stuff his pant pockets with the money. Johnathan Carter then told JM to open additional money drawers, but JM advised him he did not have the keys to the other money drawers. At this point, Carter ordered JM to the back of the bank to lay down with the other employees and customers. JM advised that after he was taken to the back of the bank everything got quiet. The employees and customers locked the room and waited until law enforcement arrived.

PSR para. 29

In arriving at the offense level, the presentence report contains the following paragraph as to each robbery:

Because a person was abducted to facilitate commission of the offense or to facilitate escape, the offense level is increased by 4 levels, pursuant to U.S.S.G. § 2B3.1(b)(4)(A).

The District Court adopted the presentence report.

C. Court of Appeals' Analysis

The entire court of appeals analysis on the issue was:

Both appellants raise preserved challenges to the district court's application of a U.S.S.G. § 2B3.1(b)(4)(A) enhancement for abduction to facilitate commission of the bank robberies, arguing that the enhancement does not apply when, as here, forced movement has been only within or between rooms of a structure. They acknowledge,

however, that they have raised the issue only to preserve it for further review, conceding correctly that this argument is foreclosed by this court’s precedent to which this panel is bound. *See United States v. Johnson*, 619 F.3d 469, 472 (5th Cir. 2010); *Jacobs v. Nat’l Drug Intel. Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008).

Slip op. 2-3.

D. Reasons to Grant Review

There is a wide split among the circuits on the application of § 2B3.1(b)(4)(A). In the Fifth Circuit, a victim is “abducted” and the four level sentence enhancement is applied if a robber moves or orders a victim to move any distance, even within the same office or building. In other circuits, such as the Sixth Circuit in *Hill*, moving a victim within the same building or office does not qualify as an abduction.

This split can have tremendous effects on a defendant. Using Petitioner as an example, the adjusted offense level was 26 or 27 for each of the four counts of conviction. PSR, paras. 51, 58, 65, 72. His criminal history category was I. PSR, para. 82. The guideline sentence range was 63-78 months for level 26 with the abduction enhancement and 41-51 months without it. On the count with an adjusted offense level of 27, the guideline range is 70-87 months with the abduction enhancement and 46-57 months without it. The result is that persons who commits the same acts in the Sixth Circuit, for example, have a guideline sentence range with a maximum less than the minimum in the Fifth Circuit.

The sentencing guidelines were designed to reduce wide disparities in sentencing. The circuit split involving § 2B1.3(b)(4)(A) creates a huge disparity.

This Court should grant review to resolve the circuit split and construe § 2B3.1(b)(4)(A) in light of the rule of lenity. As Justice Gorsuch wrote in the Court’s recent decision in *Wooden v.*

United States, __ U.S. __, 142 S. Ct. 1063, 1081 (2022) (Gorsuch, J., concurring),

Respectfully, all this suggests to me that the key to this case does not lie as much in a multiplicity of factors as it does in the rule of lenity. Under that rule, any reasonable doubt about the application of a penal law must be resolved in favor of liberty. Because reasonable minds could differ (as they have differed) on the question whether Mr. Wooden’s crimes took place on one occasion or many, the rule of lenity demands a judgment in his favor. The rule seems destined as well to play an important role in many other cases under the Occasions Clause—a setting where the statute at issue supplies little guidance, does not define its key term, and the word it does use (“occasions”) can lead different people to different intuitions about the same set of facts. No list of factors, however thoughtful, can resolve every case under a law like that. Many ambiguous cases are sure to arise. In them, a rule of decision is required—and lenity supplies it.

Justice Gorsuch’s opinion was a concurring opinion on the application of the “Occasions Clause” of the Armed Career Criminal Act. It, however, provides a framework to apply the rule in construing § 2B3.1(b)(4)(A). Judges in seven of the 12 geographical circuits have considered the issue and after thoughtful consideration have disagreed with three circuits holding movement within a building or office is not an abduction while four held it is or at least can be.

This Court should vacate Petitioner’s sentence and remand it to the District Court for resentencing.

WHEREFORE PREMISES CONSIDERED, Petitioner prays that this Court grant his petition for writ of certiorari, order full briefs and oral argument, vacate his sentence and remand for re-sentencing.

Respectfully submitted,

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Attorney for Petitioner

Appendix A
Opinion of the Court of Appeals

United States Court of Appeals
for the Fifth Circuit

No. 20-20367
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

March 30, 2022

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JOHNATHAN CARTER; MELVIN RAY,

Defendants—Appellants.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:19-CR-380

Before WIENER, DENNIS, and HAYNES, *Circuit Judges.*

PER CURIAM:*

Johnathan Carter and Melvin Ray appeal the 324-month, above-guidelines sentences imposed following their guilty plea convictions for aiding and abetting bank robbery and for aiding and abetting the brandishing

* 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.

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of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §§ 2, 924(c)(1)(A)(ii), and 2113(a), (d).¹

We review criminal sentences, including those based on variances, for reasonableness. *Gall v. United States*, 552 U.S. 38, 51 (2007). First, we determine whether the district court committed any “significant procedural error.” *Id.* If the district court’s decision is procedurally sound, we review “the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.” *Id.* We review the district court’s interpretation and application of the Sentencing Guidelines *de novo* and its findings of fact for clear error. *United States v. Fernandez*, 770 F.3d 340, 342 (5th Cir. 2014).

Claims not raised in the district court are reviewed for plain error only. *Puckett v. United States*, 556 U.S. 129, 135 (2009). To prevail on plain error review, an appellant must show a clear or obvious error that affected his substantial rights. *Id.* If those factors are established, we will exercise our discretion to correct the forfeited error only if “the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *Id.* (internal quotation marks and citation omitted).

Both appellants raise preserved challenges to the district court’s application of a U.S.S.G. § 2B3.1(b)(4)(A) enhancement for abduction to facilitate commission of the bank robberies, arguing that the enhancement does not apply when, as here, forced movement has been only within or between rooms of a structure. They acknowledge, however, that they have raised the issue only to preserve it for further review, conceding correctly that this argument is foreclosed by this court’s precedent to which this panel is

¹ There are a total of five counts arising from four separate robberies or attempted robberies. Count 2 applied only to Carter; the district court did not consider that robbery as to Ray.

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bound. *See United States v. Johnson*, 619 F.3d 469, 472 (5th Cir. 2010); *Jacobs v. Nat'l Drug Intel. Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008).

Carter's argument that his sentence is procedurally unreasonable because the district court failed to give adequate reasons for the upward variance, which he raises for the first time on appeal, does not establish reversible plain error. *See United States v. Coto-Mendoza*, 986 F.3d 583, 585-86 (5th Cir.), *cert. denied*, 142 S. Ct. 207 (2021). The record reflects that the district court provided a sufficient explanation for rejecting Carter's arguments for a shorter sentence and that the court had a reasoned basis for its sentencing decision. *See Rita v. United States*, 551 U.S. 338, 356-57 (2007). In any event, Carter has not argued, much less shown, that the alleged error affected his substantial rights or affected the fairness, integrity, or public reputation of judicial proceedings. *See Puckett*, 556 U.S. at 135.²

Nor has Carter shown that his above-guidelines sentence is substantively unreasonable³ because it is greater than necessary to achieve the sentencing goals of 18 U.S.C. § 3553(a). His argument that the district court's failure to consider his mental health and childhood trauma constitutes a clear error of judgment in balancing the sentencing factors is belied by the record and without merit. *See United States v. Gerezano-Rosales*, 692 F.3d 393, 400-01 (5th Cir. 2012). Under the totality of the circumstances, including the significant deference that is given to the district court's consideration of the § 3553(a) factors and the district court's reasons for its sentencing decision, Carter has not shown an abuse of discretion. *See Gall*, 552 U.S. at 51.

² Even if the alleged error were preserved, we would still affirm given the fact that the district court gave an adequate reason and the record supports that determination.

³ This argument was preserved.

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Finally, Ray makes a preserved argument that the district court committed reversible procedural error by enhancing his offense level under U.S.S.G. § 3C1.1 for obstruction of justice. We conclude that he fails to establish reversible error on this point. Ray has not shown that the presentence report, which set forth that Ray sent threatening messages to a witness after she shared her knowledge of one of the robberies, lacked sufficient indicia of reliability. *See United States v. Harris*, 702 F.3d 226, 230 (5th Cir. 2012); *United States v. Trujillo*, 502 F.3d 353, 357 (5th Cir. 2007); § 3C1.1, comment. (n.4(A)); U.S.S.G. § 6A1.3, p.s. Further, in light of the record read as a whole, the district court could plausibly infer that Ray was the individual who sent the threatening messages. *See Fernandez*, 770 F.3d at 342-43.

AFFIRMED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

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March 30, 2022

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

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

No. 20-20367 USA v. Carter
USDC No. 4:19-CR-380-2

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

Charles Whitney

By: Charles B. Whitney, Deputy Clerk

Enclosure(s)

Mr. John Richard Berry
Ms. Carmen Castillo Mitchell
Mr. Thomas Donald Moran
Mr. David Allen Nachtigall