No. 21-8247

IN THE SUPREME COURT OF THE UNITED STATES

JOHNATHAN CARTER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether courts are categorically barred from applying the four-level enhancement under Section 2B3.1(b)(4)(A) of the Sentencing Guidelines for abduction -- defined by the Sentencing Commission as forcing someone to accompany the defendant during the crime or escape -- when a victim is forcibly moved within an office or building.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Tex.):

United States v. Carter, No. 19-cr-380 (July 9, 2020)

United States Court of Appeals (5th Cir.):

United States v. Carter, No. 20-20367 (Mar. 30, 2022)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is not published in the Federal Reporter but is available at 2022 WL 964196.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 2022. The petition for a writ of certiorari was filed on June 23, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Texas, petitioner was convicted on three counts of aiding and abetting a bank robbery, in violation of 18 U.S.C. 2 and 2113(a); one count of aiding and abetting armed bank robbery, in violation 18 U.S.C. 2 and 2113(d); and one count of aiding and abetting the brandishing of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 2 and 924(c)(1)(A)(ii). Judgment 1-2. The district court sentenced petitioner to 324 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. A1-A4.

1. Between October 2018 and February 2019, petitioner participated in four bank robberies in Harris County, Texas. Presentence Investigation Report (PSR) ¶¶ 7,35.

The robbers' modus operandi was similar for the first three robberies. On each occasion, one or more of the robbers entered the bank and asked to open an account before suddenly jumping toward or across the bank counter. PSR ¶¶ 8, 17, 26. The robbers then began demanding money and forcibly moved customers or employees to various places in each robbery, including a back room, the area of the bank containing a safe, a back area near a restroom, or the back area holding money drawers. PSR ¶¶ 8, 19, 24, 26.

In the fourth robbery, petitioner jumped into the bank-teller area brandishing a firearm and, holding a bank employee at

gunpoint, ordered him to open a money drawer. PSR ¶ 29. Petitioner then ordered the employee to a back room and forced him to lay face-down with other employees and customers. Ibid.

The robbers stole a total of approximately $62,119 in the four robberies. PSR ¶ 35.

2. A grand jury in the Southern District of Texas returned a superseding indictment charging petitioner with three counts of aiding and abetting a bank robbery, in violation of 18 U.S.C. 2 and 2113(a); one count of aiding and abetting armed bank robbery, in violation 18 U.S.C. 2 and 2113(d); and one count of aiding and abetting the brandishing of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 2 and 924(c)(1)(A)(ii). Superseding Indictment 1-4. Petitioner pleaded guilty to all counts. Judgment 1.

The Probation Office determined petitioner's total offense level based, in part, on application of a four-level enhancement under Section 2B3.1(b)(4)(A) of the Sentencing Guidelines, which applies if "any person was abducted to facilitate commission of the offense or to facilitate escape." See PSR ¶¶ 46, 54, 61. Comments in the Guidelines explain that a victim is "abducted" if he is "forced to accompany an offender to a different location." Sentencing Guidelines § 1B1.1, comment (n.1(A)); Sentencing Guidelines § 2B3.1, comment (n.6). Petitioner acknowledged that, under circuit precedent, the enhancement could apply to his conduct but nevertheless objected to preserve the issue for further review.

PSR Add. 1-2. The district court adopted the Presentence Report, Sentencing Tr. 3-4, and sentenced petitioner to 324 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4.

3. The court of appeals affirmed. Pet. App. A1-A4.

Petitioner contended, inter alia, that the four-level enhancement in Sentencing Guidelines § 2B3.1(b)(4)(A) should be inapplicable "when, as here, forced movement has been only within or between rooms of a structure." Pet. App. A2. Petitioner acknowledged, however, that the court of appeals' prior decision in United States v. Johnson, 619 F.3d 469 (2010), permitted application of the enhancement in such circumstances, and the court of appeals affirmed on that basis. Pet. App. A2-A3.*

ARGUMENT

Petitioner renews his contention (Pet. 2, 7-8) that the abduction enhancement in Section 2B3.1(b)(4)(A) of the Sentencing Guidelines should never apply "when a victim is moved within an office or building." The court of appeals correctly rejected such a categorical bar, and its circumstance-specific approach does not conflict with the approach followed by other courts of appeals or otherwise warrant review of a Sentencing Guidelines issue that the Sentencing Commission could itself address if necessary. This Court has previously denied petitions for writs of certiorari

* The court of appeals also rejected petitioner's contentions that his sentence was procedurally and substantively unreasonable. Pet. App. A3.

raising similar claims. See Buck v. United States, 138 S. Ct. 149 (2017) (No. 16-9520); Whatley v. United States, 571 U.S. 965 (2013) (No. 13-6170); Osborne v. United States, 553 U.S. 1075 (2008) (No. 07-10594); Hawkins v. United States, 519 U.S. 974 (1996) (No. 96-6179). The Court should do the same here.

1. The court of appeals correctly determined that a district court may apply the enhancement in Section 2B3.1(b)(4)(A) of the Sentencing Guidelines to conduct occurring within or between the rooms of a structure where, as here, the circumstances of the case warrant that treatment. See Pet. App. A2-A3; cf. Whitfield v. United States, 574 U.S. 265, 269-270 (2015) ("We hold that a bank robber 'forces [a] person to accompany him,' for purposes of § 2113(e), when he forces that person to go somewhere with him, even if the movement occurs entirely within a single building or over a short distance.").

The term "a different location" in the commentary definition of Sentencing Guideline 1B1.1, comment (n.1(A)), is most appropriately "applied case by case to the particular facts under scrutiny, not mechanically based on the presence or absence of doorways, lot lines, thresholds, and the like." United States v. Hawkins, 87 F.3d 722, 727-728 (5th Cir.) (per curiam), cert denied. 519 U.S. 974 (1996); see United States v. Johnson, 619 F.3d 469, 472 (5th Cir. 2010) (explaining that courts should apply the abduction enhancement flexibly on a "case by case basis"); see also United States v. Reynos, 680 F.3d 283, 290 (3d Cir.)

(endorsing "a flexible definition"), reh'g en banc granted, opinion vacated, 682 F.3d 1053 (3d Cir.), and opinion reinstated, 700 F.3d 690 (3d Cir. 2012); see, e.g., United States v. Archuleta, 865 F.3d 1280, 1288 (10th Cir. 2017) (adopting the Third Circuit's approach); United States v. Osborne, 514 F.3d 377, 389-390 (4th Cir.) (adopting a "flexible, case by case approach to determining when movement 'to a different location' has occurred," which can include "movement within the confines of a single building"), cert. denied., 555 U.S. 1075 (2008). Petitioner does not suggest -- and did not suggest below -- that such an approach was applied improperly here, and a claim of that nature would not warrant certiorari. See Sup. Ct. R. 10.

2. Petitioner errs in asserting (Pet. 2) that the decision below conflicts with decisions of the Sixth, Seventh, and Eleventh Circuits in a manner warranting this Court's review.

In United States v. Hill, 963 F.3d 528 (2020), the Sixth Circuit explored possible meanings for the words "different" and "location" and concluded that "the phrase * * * in this context generally should refer to a place other than the store being robbed, not to a separate area or spot within that store." Id. at 533 (emphasis added); see id. at 532-536. The court recognized, however, that the phrase is "context-dependent," and emphasized that its decision did "not foreclose the 'case-by-case approach' that other courts have taken to this abduction enhancement." Id. at 536 (citing United States v. Whatley, 719 F.3d 1206, 1222-1223

(11th Cir.), cert. denied, 571 U.S. 965 (2013); and Osborne, 514 F.3d at 389-390). Thus, as the Sixth Circuit itself recognized, the approach followed in Hill is not in conflict with the circumstance-specific approach applied in the decision below.

Similarly, the Seventh Circuit carefully considered the "physical dimensions of the structures at issue" in United States v. Eubanks, 593 F.3d 645, 654 (2010), before concluding that the abduction enhancement was unwarranted on the specific facts at issue there. The court found it significant that "the victim was moved no more than six feet," id. at 653, distinguishing the case from United States v. Osborne, in which the Fourth Circuit upheld application of the enhancement to a defendant who had moved the victims a greater distance within the store. And the court emphasized that "there may well be situations in which an abduction enhancement is proper even though the victim remained within a single building." 593 F.3d at 654.

Finally, in United States v. Whatley, the Eleventh Circuit also expressly "decline[d] to adopt a categorical rule" barring application of the enhancement "when a defendant moves victims inside a single building." 719 F.3d at 1222. Instead, the court simply found that the enhancement was unwarranted on the specific facts presented there. Id. at 1222-1223. Although the facts as described there had similarities to the facts here, the overall approaches are not irreconcilable, clear differences might have been apparent from full record review, and any fact-specific

difference in application of otherwise harmonizable approaches does not warrant this Court's review. Petitioner identifies no court of appeals that has disavowed the "case-by-case" approach applied by the court below, under which petitioner himself acknowledged that application of the abduction enhancement was appropriate. See Pet. App. A2-A3; Pet. C.A. Br. 13.

3. Petitioner also contends (Pet. 7-8) that the rule of lenity supports his claim. He did not argue for application of the rule of lenity below, and he offers no compelling reason for this Court to address that argument in the first instance. See Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

Even if the argument had been properly preserved, petitioner's reliance on the rule of lenity is misplaced. The rule of lenity applies only if, "after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended." United States v. Castleman, 572 U.S. 157, 172-173 (2014) (citation omitted). As previously explained, the decision below rejects petitioner's proposed categorical bar on applying the abduction enhancement when a victim is forcibly moved within a building in favor of an approach considering the specific facts and circumstances of each case. See pp. 5-6, supra. That approach is more fact-dependent, but it

does not mean that a court must "simply guess" at the meaning of the phrase "to a different location." Castleman, 572 U.S. at 173.

Moreover, this Court's determination that the advisory Sentencing Guidelines are not susceptible to constitutional vagueness challenges, see Beckles v. United States, 137 S. Ct. 886, 895 (2017), casts serious doubt on whether the rule of lenity applies to interpretations of the Guidelines. Like the due process vagueness doctrine, the rule of lenity derives from concerns of fair warning and avoiding arbitrary enforcement, see id. at 892; United States v. Bass, 404 U.S. 336, 348 (1971), that do not apply to the advisory Sentencing Guidelines, Beckles, 137 S. Ct. at 894; see, e.g., United States v. Gordon, 852 F.3d 126, 130 n.4 (1st Cir.) ("[A]s is now clear from Beckles * * * , concerns about statutory vagueness, which underlie the rule of lenity, do not give rise to similar concerns regarding the Guidelines."), cert. denied, 138 S. Ct. 256 (2017).

4. At all counts, review of this case is unwarranted because whether the enhancement under Section 2B3.1(b)(4)(A) applies to petitioner involves an interpretation of the advisory Sentencing Guidelines. This Court ordinarily does not review decisions interpreting the Sentencing Guidelines because the United States Sentencing Commission can amend the Sentencing Guidelines and accompanying commentary to eliminate a conflict or correct an error. See Braxton v. United States, 500 U.S. 344, 347-349 (1991).

The Sentencing Commission is charged by Congress with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Id. at 348 (citing 28 U.S.C. 994(*o*) and (u)). Congress's conferral of that authority on the Sentencing Commission indicates that it expected the Commission, not this Court, "to play [the] primary role in resolving conflicts" over the interpretation of the Guidelines. Buford v. United States, 532 U.S. 59, 66 (2001).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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