

No. 17-____

IN THE
Supreme Court of the United States

JEMEL MAURICE LYLES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Petitioner Jemel Maurice Lyles presents the following question for review:

Is the “sophisticated means” sentencing enhancement for fraud under U.S.S.G. § 2B1.1(b)(10) applicable in every case in which a defendant adopts a false identity or creates a fictitious document?

**PARTIES TO THE PROCEEDING AND
CORPORATE DISCLOSURE STATEMENT**

Petitioner Jemel Maurice Lyles is an individual.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jemel Maurice Lyles respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's memorandum decision is unreported and can be found at *United States v. Jemel Maurice Lyles*, No. 17-4158, 2018 WL 1357929 (Mar. 16, 2018). The District Court's judgment was entered February 28, 2017 in *United States v. Jemel Maurice Lyles*, 15-cr-00168-DKC (D. Md.).

**CONSTITUTIONAL PROVISIONS, TREATIES,
STATUTES, ORDINANCES, AND REGULATIONS
INVOLVED**

U.S.S.G. § 2B1.1(b)(10)(C) provides, in pertinent part, as follows:

If . . . the offense otherwise involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means, increase [the defendant's offense level] by 2 levels.

JURISDICTIONAL STATEMENT

The Court of Appeals affirmed the judgment of the District Court on March 16, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

When Hasheen Wilson sought a loan to start a business in 2012, Steven Evans introduced him to Michael Anderson, as the Chief Financial Officer of Capital Group Holdings (“CGH”). The government contended that “Michael Anderson” was an alias used by Petitioner. The government also asserted that Petitioner and Mr. Evans told Mr. Wilson that, for a fee of \$72,000, CGH could obtain for Mr. Wilson a \$1 million Standby Letter of Credit (“SBLC”), which Mr. Wilson could use as collateral to obtain a non-recourse loan. According to the government, Mr. Wilson was told that Hampstead Private Finance Group would “monetize” the SBLC, by extending to Mr. Wilson an \$800,000 non-recourse loan collateralized by the \$1 million SBLC. Mr. Wilson testified that he wired the \$72,000 fee, but never received the SBLC or the loan.

Petitioner was convicted of conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349, wire fraud, in violation of 18 U.S.C. § 1343, and two counts of money laundering, in violation of 18 U.S.C. § 1957. At sentencing, the government argued that in calculating the sentencing range applicable to Petitioner under the United States Sentencing Guidelines, the Court should apply U.S.S.G. § 2B1.1(b)(10)(C) to enhance Petitioner’s

Offense Level because the offense involved the use of “sophisticated means.” Finding that the offense involved the use of fictitious entities and false identities, the court agreed, and increased Petitioner’s Offense Level by 2, to 16. At Petitioner’s criminal history, this resulted in a Guideline range of 27 – 33 months, versus the 21 – 27 months that would be applicable without this adjustment. The District Court sentenced Petitioner to 33 months’ incarceration.

ARGUMENT

IT WAS ERROR TO ENHANCE PETITIONER’S SENTENCE FOR USE OF “SOPHISTICATED MEANS.”

In cases of fraud, the United States Sentencing Guidelines provide for an increase of 2 offense levels where the crime involves “sophisticated means.” U.S.S.G. § 2B1.1(b)(10)(C). The sophisticated means enhancement is reserved for schemes that involve “especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense.” U.S.S.G. § 2B1.1 Note 9(b). For the enhancement to apply, the government bears the burden of proving “more than the concealment or complexities inherent in fraud.” *United States v. Adepoju*, 750 F. 3d 250, 257 (4th Cir. 2014); *United States v. Hance*, 501 F. 3d 900, 909 (8th Cir. 2007) (for “sophisticated means” enhancement to apply in fraud prosecution, government must prove that defendant’s offense is “notably more intricate than that of the garden-variety” fraudulent scheme). *United States v. Lewis*, 93 F. 3d 1075, 1080 (2d Cir. 1996) (“[w]hether a

scheme is sophisticated must be viewed in light of the fraudulent conduct and differentiated, by assessing the intricacy or planning of the conduct, from similar offenses conducted by different defendants”).

Here, the Fourth Circuit found no error in the District Court’s application of the “sophisticated means” enhancement in sentencing Petitioner.¹ This was error, because the government failed to meet its burden to show that Petitioner’s conduct was “especially complex or intricate *above and beyond the typical*” fraud offense.

Petitioner was accused of defrauding Mr. Wilson, the victim in this case, by leading him to believe that for a fee of \$72,000, he could obtain through Capital Group Holdings a standby letter of credit (“SBLC”) issued by Deutsche Bank or Standard Chartered Bank. Petitioner was accused of misrepresenting his identity to Mr. Wilson in the course of this scheme, and providing him with falsified documents purporting to originate from banks.

¹ Petitioner’s four convictions – for wire fraud, conspiracy to commit wire fraud, and two counts of money laundering, were grouped under U.S.S.G. § 3D1.2(b). See Presentence Investigation Report (“PSR”) ¶ 19 (J.A. 276). And because the offense level applicable to the money laundering counts exceeded that applicable to the wire fraud and conspiracy counts, Petitioner’s sentencing range was calculated pursuant to the Guideline for money laundering, U.S.S.G. § 3D1.1(b)(1). PSR ¶ 20 (J.A. 276). Nevertheless, Petitioner’s sentence was predicated on his wire fraud conviction because the Base Offense Level for money laundering is “[t]he offense level of the underlying offense from which the laundered funds were derived;” *i.e.*, the mail fraud count. U.S.S.G. § 2S1.1(a).

In *United States v. Adepoju*, 756 F. 3d 250 (4th Cir. 2014), Adetokunbo Adepoju approached an informant with a plan to defraud a bank. Adepoju had improperly obtained the name, date of birth, and Social Security number of a stranger, “T.A.,” and gave them to the informant with instructions to open two accounts at the bank, one in the name of “T.A.,” and a second in the name of “T.A. Trucking.” The defendant then provided the informant with checks payable to T.A. and T.A. Trucking, instructing him to deposit them into the accounts, after which the informant would withdraw the funds and provide the defendant with a portion of them. *Id.* at 252-53. Rather than open the accounts, the informant disclosed the plan to law enforcement agents, who arrested Adepoju. In sentencing Adepoju upon his conviction, the district court concluded that the “sophisticated means” enhancement was appropriate, “based on the effort required to obtain T.A.’s information, obtain the forged checks, and ‘do what would have worked had the [informant] actually opened the account and deposited the checks.” 756 F. 3d at 254.

On appeal, however, the Fourth Circuit found this to be clear error, holding that “sophistication requires more than the concealment or complexities inherent in fraud.” *Id.* at 257-58. The Court held that the use of forged documents and a stolen identity – “the presence of the tools to commit fraud and the plan to use those tools” – was insufficient to constitute “sophisticated means,” because “the realm of especial complexities and intricacies involves more than the forgeries, misrepresentation, and concealment inherent in” fraud. *Id.* at 257, 258. It went on to hold

that the enhancement “require[s] more than just thoughtful or potentially successful planning,” and that misrepresentation of identity and the use of forged documents – “what is required to violate the bank fraud statute in its simplest form – did not constitute the “complexity” required for application of the enhancement. *Id.* at 257.

Similarly, in *United States v. Hance*, 501 F. 3d 300 (8th Cir. 2007), the defendant sent mailings to thousands of individuals, soliciting their participation in a Ponzi scheme. *Id.* at 904. The mailing included “testimonials” from individuals who “claimed high financial reward from the program,” a letter from a bogus attorney verifying the legality of the program, and a “guarantee” that the “U.S. Postal Service [USPS] ha[d] determined that this program [was] entirely legal.” *Id.* In sentencing the defendant upon conviction, the District Court found that the defendant’s rental of the post office box under a false name, and his use of false testimonials and a counterfeit letter from an attorney “verifying” the program’s legality, constituted “sophisticated means.” *Id.* at 909. The Eight Circuit found this to be error, because “[r]enting a post office box under an assumed name is a common means of carrying out mail fraud.” *Id.* at 910.

For the Guidelines’ “sophisticated means” enhancement to apply:

It is not enough for the means used in a scheme to be “complex” or “intricate”;

rather, the means must be “especially” so. The definition of “especially” includes “exceptionally” and “particularly.” Webster’s Third New International Dictionary (1986). That is, the level of complexity or intricacy must set that particular scheme apart from ordinary schemes, and even ordinarily complex or intricate schemes.

United States v. Hulse, 989 F. Supp. 2d 1244, 1226 (M.D. Ala. 2013). This is necessarily so, because:

The essence of fraud involves deceit or deception. More likely than not, *some* complexity will always be required to carry out such deceit. If the only requirement to apply this enhancement were *some* complexity, nearly every fraud would qualify.

Id. at 1226-27 (citation omitted); *see also United States v. Montano*, 250 F. 3d 709, 715 (9th Cir. 2001) (defendant’s efforts to conceal smuggling did not support sophistication enhancement under U.S.S.G. § 2T3.1(b)(1) because they were “inherent in the activity of smuggling”).

Here, however, the District Court held that the “sophisticated means” enhancement is applicable whenever a fraudulent scheme involves more than the “bare minimum” – *i.e.*, obtaining money by a false promise. However, few, if any, fraudulent schemes

involve a false promise, standing alone. For example, under the District Court's test, an individual who sells a phony watch would see his sentence enhanced for sophisticated means if he disguised his identity from the purchaser, or showed the purchaser the (falsified) watch. But of course, no fraudster attempting to sell a phony watch would reveal his identity, and no victim would purchase such a watch without at least seeing that it existed.

In sum, the fraud scheme at issue here was not "complex or intricate above and beyond the typical" fraud offense, and certainly not "especially" so. In fact, the means used to commit this fraud were merely "the forgeries, misrepresentation, and concealment inherent in" fraud. *See Adepoju*, 756 F. 3d at 257, 258. The application of the "sophisticated means" enhancement to this case was error, and, if applied generally, would make that "enhancement" a standard provision, applicable in every fraud case.

CONCLUSION

For the foregoing reasons, the application of the "sophisticated means" enhancement to Petitioner was error. This Court should reverse, and remand the case for re-sentencing.

Respectfully submitted,

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June 11, 2018

APPENDIX

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UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 17-4158

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JEMEL MAURICE LYLES,
Defendant-Appellant.

Appeal from the United States District Court for the District
of Maryland, at Greenbelt. Deborah K. Chasanow, District
Judge. (8:15-cr-00168-DKC-1)

Submitted: February 23, 2018
Decided: March 16, 2018

Affirmed by unpublished per curiam opinion.

Jemel Maurice Lyles appeals the district court's
judgment after his jury conviction for conspiracy to
commit wire fraud in violation of 18 U.S.C. § 1349 (2012),
wire fraud in violation of 18 U.S.C. §§ 2, 1343 (2012), and

two counts of money laundering in violation of 18 U.S.C. §§ 2, 1957 (2012). The district court sentenced him at the high end of his Sentencing Guidelines range to 33 months in prison, three years of supervised release, and restitution of \$72,000. On appeal, he contends that the district court erred in instructing the jury on money laundering, enhancing his sentence for use of sophisticated means, and imposing a substantively unreasonable sentence. We affirm.

Lyles first contends the district court erred in instructing the jury on the elements of money laundering under 18 U.S.C. § 1957, and specifically, as to “specified unlawful activity.” Because he did not object to the instruction in the district court, we review this issue for plain error. *See United States v. Hale*, 857 F. 3d 158, 172 (4th Cir. 2017). Therefore, to prevail on appeal, he “must show: (1) there was an error; (2) the error was ‘clear or obvious, rather than subject to reasonable dispute;’ (3) ‘the error affected [his] substantial rights, which in the ordinary case means it affected the outcome of the district court’s proceedings;’ and (4) ‘the error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.’” *United States v. Fuertes*, 805 F. 3d 485, 497 (4th Cir. 2015) (quoting *United States v. Marcus*, 560 U.S. 258, 262, 130 S. Ct. 2159, 176 L.Ed. 1012 (2010)).

We have reviewed the record and conclude that Lyles fails to make the required showing. He contends that the district court’s instructions were inadequate as to the term “specified unlawful activity” but does not assert the evidence was insufficient to convict him or that his underlying crime of wire fraud did not constitute “specified unlawful activity” under 18 U.S.C. §§ 2, 1957.

Even if he showed any error that was clear or obvious, rather than subject to reasonable dispute, and that his substantial rights were affected, we would not exercise our discretion to notice it in this case. “ ‘Central to this inquiry is a determination of whether, based on the record in its entirety, the proceedings against the accused resulted in a fair and reliable determination of guilt.’” *United States v. Ramirez-Castillo*, 748 F. 3d 205, 217 (4th Cir. 2014) (quoting *United States v. Cedelle*, 89 F. 3d 181, 186 (4th Cir. 1996)). “Accordingly, only if in the context of the proceedings taken as a whole, the error either led to the conviction of a defendant who is actually innocent or otherwise seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings should we exercise our discretion ... to notice it.” *Cedelle*, 89 F. 3d at 185-86 (internal quotation marks and citations omitted). We conclude that Lyles has not shown our failure to correct any potential error would result in a miscarriage of justice, or that the proceedings did not result in a fair and reliable determination of guilt.

Lyles’ remaining issues challenge his sentence. “As a general matter, in reviewing any sentence whether inside, just outside, or significantly outside the Guidelines range, we review for an abuse of discretion.” *United States v. Bolton*, 858 F. 3d 905, 911 (4th Cir. 2017) (internal quotation marks and citation omitted). We must first ensure that the district court did not commit a significant procedural error. *Gall v. United States*, 552 U.S. 38, 51, 128 S. Ct. 586, 169 L.Ed.2d 445 (2007). “Whether a defendant’s conduct involved sophisticated means is a factual inquiry that we review for clear error.” *United States v. White*, 850 F. 3d 667, 675 (4th Cir.), *cert. denied*, --- U.S. ---, 137 S. Ct. 2252, 198 L.Ed.

2d 687 (2017) (citing *United States v. Adepoju*, 756 F. 3d 250, 256 (4th Cir. 2014)). If there is no procedural error, we review the substantive reasonableness of the sentence for abuse of discretion, taking into account the totality of the circumstances. *Gall*, 552 U.S. at 51, 128 S. Ct. 586. A sentence within the Guidelines range is presumptively reasonable. *White*, 850 F. 3d at 674. The presumption can only be rebutted by showing the sentence is unreasonable when measured against the 18 U.S.C. 3553(a) (2012) factors. *United States v. Louthian*, 756 F. 3d 295, 306 (4th Cir. 2014).

2We have reviewed the record and conclude that the district court did not err or abuse its discretion in sentencing Lyles. He first challenges his enhancement for use of sophisticated means. Because he objected in the district court, we review this issue for clear error. “A clear error occurs where we are left with a firm and definite conviction that a mistake has been committed.” *Adepoju*, 756 F. 3d at 258 (citation omitted).

“Section 2B1.1(b)(10)(C) directs the sentencing court to increase the offense level by two levels if ‘the offense otherwise involved sophisticated means.’ ” *United States v. Wolf*, 860 F. 3d 175, 199 (4th Cir. 2017) (quoting U.S.S.G. § 2B1.1(b)(10)(C)). “[S]ophisticated means’ means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense.” U.S.S.G. § 2B1.1 cmt. n.9(B). “The commentary to the Guideline provides examples warranting application of the sophisticated-means enhancement, including ‘[c]onduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore

financial accounts.” *Wolf*, 860 F. 3d at 199 (quoting U.S.S.G. 2B1.1 cmt. n.9(B)). A second example given is “locating the main office of [a telemarketing] scheme in one jurisdiction but locating soliciting operations in another.” U.S.S.G. 2B1.1 cmt. n.9(B).

“The enhancement applies where the entirety of a scheme constitutes sophisticated means, even if every individual action is not sophisticated.” *Adepoju*, 756 F. 3d at 257 (citing *United States v. Jinwright*, 683 F. 3d 471, 486 (4th Cir. 2012)). “A sentencing court should consider the cumulative impact of the criminal conduct, for the ‘total scheme’ may be ‘sophisticated in the way all the steps were linked together.’” *Jinwright*, 683 F. 3d at 486 (citations omitted). “As we previously observed, ‘[t]he enhancement requires some means of execution that separates the offense before us from the ordinary or generic.’” *Wolf*, 860 F. 3d at 199) (quoting *Jinwright*, 683 F. 3d at 486); *see also Adepoju*, 756 F. 3d at 257 (noting in a bank fraud case that “sophistication requires more than the concealment or complexities inherent in fraud,” and “[t]hus, fraud per se is inadequate for demonstrating the complexity required for [the] enhancement”).

3Having reviewed the record, we find no clear error in the district court applying the sophisticated means enhancement in this case. We also reject Lyles’ argument that his sentence is substantively unreasonable. The district court applied relevant § 3553(a) factors and adequately explained its reasons for sentencing him at the high end of his Guidelines range. On appeal, Lyles contends that his sentence is harsh and unwarranted. However, we conclude he fails to show any unwarranted sentence disparities under 18 U.S.C. §

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3553(a), or to otherwise rebut the presumption that his sentence is reasonable.

Accordingly, we affirm the district court's judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED