

# 13-2158

*To Be Argued By:*  
SARALA V. NAGALA

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**United States Court of Appeals**

**FOR THE SECOND CIRCUIT**

**Docket No. 13-2158**

UNITED STATES OF AMERICA,  
*Appellee,*

-vs-

MARCUS DWYER,  
*Defendant,*

DARIO PABEY,  
*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF CONNECTICUT

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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## **Statement of Jurisdiction**

The United States District Court for the District of Connecticut (Janet C. Hall, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on June 3, 2013. Defendant's Appendix ("DA") 6. On June 6, 2013, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). DA6, DA107. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

**Statement of Issues  
Presented for Review**

The defendant challenges his sentence as procedurally and substantively unreasonable:

- A. Did the district court (1) properly apply separate Guidelines enhancements for abduction and carjacking; (2) fully consider the defendant's arguments for a reduced sentence; and (3) appropriately explain the reasons for the sentence imposed?
- B. Is a sentence of 180 months substantively reasonable for a habitual criminal who robbed a bank and its customers of more than \$43,000 using a dangerous weapon, threatened the victims that co-conspirators were going to blow the bank up if they did not cooperate, and abducted a bank customer in order to steal his vehicle for use as a getaway car?

# United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 13-2158

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UNITED STATES OF AMERICA,  
*Appellee,*

-vs-

DARIO PABEY,  
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ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF CONNECTICUT

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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## **Preliminary Statement**

On August 6, 2012, defendant-appellant Dario Pabey and his co-conspirators Marcus Dwyer and Jennifer Jacques robbed a bank in the small town of Killingworth, Connecticut. Pabey and Dwyer pointed what appeared to be a handgun in frightened victims' faces; bound an employee's hands behind his back with zip ties while he lay on the floor; abducted a customer and stole his car to use as a getaway vehicle; switched into a

car driven by Jacques and changed their clothes to avoid detection; and then burned evidence of the robbery. They stole more than \$43,000 from the bank and its customers and left the victims emotionally scarred for life.

Dario Pabey's criminal history stretches back to 1997, when he was first arrested for shooting a gun into a woman's vehicle. Between 1999 and 2012, Pabey committed numerous other crimes, including an assault during one of his periods of incarceration. Based largely on his criminal history and the violent nature of the bank robbery, the district court sentenced Pabey to 180 months of imprisonment, three years of supervised release, and restitution for the amount stolen from the bank and its customers. Pabey argues on appeal that the district court committed both procedural and substantive error in imposing the 180-month sentence of imprisonment. Both arguments lack merit, and the district court's sentence should be affirmed.

### **Statement of the Case**

Pabey was indicted by a federal grand jury on September 7, 2012, for bank robbery, in violation of 18 U.S.C. § 2113(a). DA2, DA8. Pabey pleaded guilty on February 25, 2013. DA5. On May 24, 2013, United States District Judge Janet C. Hall sentenced him primarily to 180 months of imprisonment, DA104-05, from which he filed a

timely appeal, DA6, DA107. Pabey is currently serving his sentence.

#### **A. The offense conduct**

In the summer of 2012, Pabey, Dwyer, and Jacques began to plot a bank robbery. Pre-Sentence Report (“PSR”) ¶ 9. Initially, the trio planned to rob a bank in Maine, and they traveled to Maine to survey the bank. PSR ¶ 9. The group eventually decided not to rob the Maine bank, but to rob instead FDIC-insured TD Bank in Killingworth, Connecticut. PSR ¶¶ 9-10.

On August 6, 2012, Dwyer and Jacques picked up Pabey at his house. They first visited a store where they intended to buy zip ties, but they did not purchase any. PSR ¶ 10. When Pabey and Dwyer returned to the car in the parking lot, Dwyer tried on the clothes that he would wear during the robbery, a blue shirt and khaki pants. PSR ¶ 10. The trio then went to a second store, where Dwyer bought zip ties. PSR ¶ 10.

About twenty minutes before the bank was to close that afternoon, Jacques dropped Pabey and Dwyer off in the bank parking lot and drove to a designated meeting spot. PSR ¶ 12. Pabey and Dwyer then entered the bank, wearing black masks and demanding that the employees and customers get down on the floor. PSR ¶ 13. Dwyer was carrying a weapon that appeared to be a handgun. PSR ¶ 13. Dwyer jumped the

teller door and forced employees at weapon-point to the vault, demanding that they open the safe. PSR ¶¶ 13, 15.

Pabey, meanwhile, ensured no victims could leave or call for help during the robbery. He demanded that the victims all give him their wallets, car keys, and cellular phones. PSR ¶ 13. He told the victims (falsely) that there were other members of the robbery crew outside the bank who would blow up the bank and harm those who did not cooperate. PSR ¶ 13. While Dwyer was in the vault, Pabey stepped over an employee prostrate on the floor and bound the employee's hands behind his back with a plastic zip tie. PSR ¶ 14. He also stole money from the bank patrons. PSR ¶ 14. In the middle of the robbery, an elderly woman and her son entered the bank. Dwyer and Pabey forced the woman, who was visibly struggling to even bend her knees, to lie on the floor. DA96.

Pabey was in the process of binding another person with zip ties when Dwyer announced that he had the money from the vault. PSR ¶ 16. Pabey then grabbed a bank patron by the arm and physically forced that patron to accompany Pabey and Dwyer from the bank. PSR ¶ 16. Once they were outside, Pabey and Dwyer told the victim to point out his car. PSR ¶ 16. Pabey already had the patron's car keys, and Dwyer and Pabey drove away in the victim's car to the spot where Jacques was waiting. PSR ¶ 16. Before abandon-

ing the victim's car, Pabey stole cash from its glove compartment. Government's Appendix ("GA") 19.

Once Pabey and Dwyer got into Jacques' car, they immediately changed their clothes so that they would be harder to identify and apprehend. PSR ¶ 16. The trio went to a residential location in a neighboring town where they burned the masks, the weapon, and the items they had stolen from the victims. PSR ¶ 17. Pabey then took a taxi back to his home. PSR ¶ 17.

In their hurry to escape from the bank, Pabey and Dwyer failed to take from the bank the bags in which they had carried in the zip ties and other supplies, such as duct tape. PSR ¶ 18. The zip ties left at the bank were an exact match to the ones Dwyer had purchased earlier in the day. PSR ¶ 18.

In total, Pabey and his co-conspirators stole \$43,573 from TD Bank and its patrons. PSR ¶ 15.

## **B. The proceedings below**

A federal grand jury sitting in New Haven, Connecticut, indicted Pabey and Dwyer on one count of bank robbery, in violation of 18 U.S.C. § 2113(a), on September 7, 2012. DA2, DA8. Pabey was arrested that evening and was arraigned on September 10, 2012. DA3.

On February 25, 2013, Pabey entered a plea of guilty to the one-count indictment before United States Magistrate Judge Holly B. Fitzsimmons. DA5. In the plea agreement, the parties agreed on the following Guidelines calculations: a base offense level of 20, pursuant to U.S.S.G. § 2B3.1; a two-level increase pursuant to U.S.S.G. § 2B3.1(b)(1) because the property was that of a financial institution; a four-level increase pursuant to U.S.S.G. § 2B3.1(b)(2) because a dangerous weapon was used during commission of the offense; a four-level increase pursuant to U.S.S.G. § 2B3.1(b)(4) because a person was abducted to facilitate the offense; and a one-level increase pursuant to U.S.S.G. § 2B3.1(b)(7)(B) because the loss was between \$10,000 and \$50,000. DA11-12. The government also calculated that two additional levels should be added pursuant to U.S.S.G. § 2B3.1(b)(5) because the offense involved carjacking. DA12. Three levels were to be subtracted for acceptance of responsibility. DA12. Thus, the defendant calculated his total offense level as 28, while the government calculated it as 30. DA12.

Pabey's long criminal history was detailed in the PSR. In 1997, when Pabey was 17 years old, he was arrested for being in possession of a pistol without a permit, for which he was sentenced to four years of imprisonment, with one year to serve, and three years of probation. PSR ¶ 41. This arrest occurred after Pabey became angry

that a woman had reported a friend of his to the police. PSR ¶ 41. Pabey slapped the woman to the ground and fired four shots into the woman's vehicle. PSR ¶ 41.

Pabey's probation was revoked in July 1999, when he was convicted of first-degree robbery and sentenced to five years' imprisonment. PSR ¶¶ 41, 42. During this incident, Pabey pointed a gun in the faces of two different men and robbed them. PSR ¶ 42. In 2003, while he was incarcerated, Pabey was convicted of third-degree assault for attacking his cellmate. PSR ¶ 43. In 2005, Pabey was convicted of sale of hallucinogens. PSR ¶ 44. He has three other convictions for larceny from 2012, as well as one conviction for operating a motor vehicle while his license was suspended. PSR ¶¶ 45-49. Additionally, Pabey was cited for 22 disciplinary infractions while incarcerated between 1998 and 2012. PSR ¶ 50. These infractions included fighting, flagrant disobedience, possessing contraband, and causing disruption. PSR ¶ 50.

Based on the United States Probation Office's calculations, Pabey accumulated 13 criminal history points, placing him in criminal history category ("CHC") VI for Guidelines purposes.<sup>1</sup> The resulting proposed Guidelines ranges were: 168-

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<sup>1</sup> In the plea agreement, the parties had calculated Pabey's criminal history category as V, but had reserved the right to recalculate it. DA12.

210 months (PSR calculation, based on total offense level 30 and CHC VI); 151-188 months (government's plea agreement calculation, based on total offense level 30 and CHC V); and 130-162 months (Pabey's plea agreement calculation, based on total offense level 28 and CHC V). See PSR ¶ 75, DA12.

At sentencing on May 24, 2013, the court first heard argument on the defendant's claim that his conduct did not fit either the definition of carjacking under Connecticut state law or a layperson's idea of carjacking. DA72-73. Although the court acknowledged that a traditional carjacking might involve ejecting a person forcibly from a car, it also recognized that the Guidelines define "carjacking" broadly to include the "taking or attempted taking of a motor vehicle from the person or presence of another by force and violence or by intimidation." DA73 (quoting U.S.S.G. § 2B3.1, Application Note 1). Using this definition, the court concluded that Pabey's conduct of taking car keys from a customer, forcing him out of the bank, demanding that the customer identify his car, and then driving the car away unquestionably qualified as "carjacking" under the Guidelines. DA74.

The court then took up Pabey's alternative argument that imposing both the carjacking enhancement and the abduction enhancement would amount to double-counting because the victim was led outside the bank for the purpose

of identifying his car to Pabey and Dwyer. DA74-75. In Pabey's view, imposing the additional two-level enhancement for carjacking would be duplicative because the harm caused by the act was already fully accounted for in the four-level enhancement for abduction. GA4-5.

In response, the government argued that the victim actually suffered two distinct harms: being dragged out of the bank and, separately, having his car stolen by men who had just pointed a weapon at him and others and stolen thousands of dollars from a bank. DA75, GA23. The government also argued that the movement of other individuals inside the bank, including the three tellers who were forced to the vault, independently would have justified application of the abduction enhancement, which requires only that a victim be "forced to accompany an offender to a different location." U.S.S.G. § 1B1.1, Application Note 1(A). *See* GA23-24.

The court agreed with the government on both points. The court concluded that the victim who was taken out of the bank had been abducted for purposes of the Guidelines and, alternatively, that the forced movement of employees in the bank would also qualify for the enhancement. DA75-76. The court also recognized that the victim whose car was stolen had suffered two distinct harms and that Pabey and Dwyer could simply have stolen the victim's keys and used them to identify the vehicle, without abducting

him. DA76. For both of these reasons the court rejected the defendant's argument that applying both the carjacking and the abduction enhancements would be double counting. DA75-76.

Ultimately, the court imposed both the carjacking and abduction enhancements and agreed with the government's and PSR's calculations of the total offense level. DA77-78. After subtracting three points for acceptance of responsibility, the resulting offense level was 30. Given that Pabey's prior convictions placed him into criminal history category VI, the court calculated his advisory Guidelines range as 168-210 months of imprisonment. DA78.

The court then heard argument regarding the parties' view of the appropriate sentence. Counsel for Pabey argued for a non-Guidelines sentence of nine or ten years because of Pabey's long addiction to drugs, unstable upbringing, and lack of education. DA79-84. Counsel requested a sentence that would allow Pabey to overcome his addictions and get an education in prison, so that he could learn to read and write. DA81-83. Counsel also argued that Pabey's more recent prior convictions were larcenies resulting from and caused by his addiction, which led to an overstatement of his criminal history category. DA84, GA6. Pabey's aunt spoke about his troubled upbringing and about Pabey's seven-year-old son, and asked the court for leniency for her nephew. DA84-85.

The government focused on the severity of Pabey's crime and its impact on the victims of the robbery. DA87-88. A representative from the bank first noted that several bank employees left their jobs or left the Killingworth branch after the robbery. DA87. The government then stated that victims remembered Pabey as saying that he and Dwyer had co-conspirators outside the bank who would blow it up if the victims did not cooperate. DA89. The government also noted that nearly all of the Sentencing Guidelines robbery enhancements were applied here, indicating the severity of this robbery, and further argued that this robbery was an escalation of Pabey's longstanding criminal activity. DA90-91. The government concluded with the notion that although Pabey's addiction was not a choice, his commission of this bank robbery was a choice that deserved a sentence of 168-188 months of imprisonment. DA91.

Ultimately, the court imposed a sentence of 180 months of imprisonment, three years of supervised release, a \$100 special assessment, and restitution in the amount of \$43,573. DA104-05. The court noted that it was sympathetic to Pabey's troubled upbringing and his lack of education, DA94-95, but that his act of "absolute terroriz[ing] people" in the bank was extremely serious. DA95-96. The court acknowledged that Pabey "is and can be a better person than what was shown to us that day" in the bank, but stat-

ed that it had an obligation to protect the public and think about the “next bank teller who goes to work tomorrow morning who has to worry about facing Mr. Pabey and Mr. Dwyer coming into a bank.” DA97. Based on the seriousness of the offense, Pabey’s history and characteristics, the need to protect the public and the need to deter both Pabey and others from committing this type of serious crime, the court imposed a sentence principally of 180 months. DA99.

### **Summary of Argument**

The district court did not commit procedural or substantive error in imposing a 180-month sentence on Pabey. On the contrary, the court justified its decision to impose both the carjacking and abduction enhancements, finding that Pabey’s and Dwyer’s conduct met the Guidelines definitions of both “carjacking” and “abduction.” The court also adequately considered the mitigating circumstances on the record, including Pabey’s drug addiction, and sufficiently explained its reasons—including the seriousness of the crime and Pabey’s long criminal history—for imposing the 180-month sentence.

Moreover, the sentence is substantively reasonable, given the seriousness of the offense and Pabey’s criminal history. The court recognized the trauma that Pabey and his co-conspirators had put the victims through and acknowledged that Pabey had had a long history of breaking

the law, both while he was incarcerated and while he was not. The district court acted well within its discretion in imposing this sentence.

## **Argument**

### **I. The district court imposed a procedurally and substantively reasonable sentence.**

#### **A. Relevant facts**

The facts pertinent to consideration of this issue are set forth in the “Statement of the Case” above.

#### **B. Governing law and standard of review**

After the Supreme Court’s holding in *United States v. Booker*, 543 U.S. 220 (2005) rendered the Sentencing Guidelines advisory rather than mandatory, a sentencing judge is required to: “(1) calculate[] the relevant Guidelines range, including any applicable departure under the Guidelines system; (2) consider[] the calculated Guidelines range, along with other § 3553(a) factors; (3) impose[] a reasonable sentence.” See *United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir. 2006).

This Court reviews a sentence for reasonableness. See *Rita v. United States*, 551 U.S. 338, 341 (2007); *Booker*, 543 U.S. at 260-62. In this context, reasonableness has both procedural and

substantive dimensions. See *United States v. Watkins*, 667 F.3d 254, 260 (2d Cir. 2012). This Court reviews a district court’s application of the Guidelines *de novo*, while factual determinations underlying a district court’s Guidelines calculation are reviewed solely for clear error. *Id.* at 261.

A district court commits procedural error when it “(1) fails to calculate the Guidelines range; (2) is mistaken in the Guidelines calculation; (3) treats the Guidelines as mandatory; (4) does not give proper consideration to the § 3553(a) factors; (5) makes clearly erroneous factual findings; (6) does not adequately explain the sentence imposed; or (7) deviates from the Guidelines range without explanation.” *Id.* (quoting *United States v. Conca*, 635 F.3d 55, 62 (2d Cir. 2011)).

Substantive review, which concerns the length of the sentence imposed, is exceedingly deferential. *Watkins*, 667 F.3d at 261. This Court has stated that it will “set aside a district court’s *substantive* determination only in exceptional cases where the trial court’s decision ‘cannot be located within the range of permissible decisions.’” *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc) (quoting *United States v. Rigas*, 490 F.3d 208, 238 (2d Cir. 2007) (emphasis in *Rigas*)). In particular, sentences are substantively unreasonable only if they are so “shockingly high, shockingly low, or other-

wise unsupportable as a matter of law’ that allowing them to stand would ‘damage the administration of justice.’” *United States v. Broxmeyer*, 699 F.3d 265, 289 (2d Cir. 2012) (quoting *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009)). In the “overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances.” *United States v. Friedberg*, 558 F.3d 131, 137 (2d Cir. 2009) (internal quotations omitted).

Substantive reasonableness review is conducted based on the totality of the circumstances. See *Cavera*, 550 F.3d at 190. Reviewing courts must look to the individual factors relied on by the sentencing court to determine whether these factors can “bear the weight assigned to [them].” *Cavera*, 550 F.3d at 191. In making this determination, however, appellate courts must remain appropriately deferential to the institutional competence of trial courts in matters of sentencing:

That deference derives from a respect for the distinct institutional advantages that a district court enjoys over their appellate counterparts in making an ‘individualized assessment’ of sentence under 18 U.S.C. § 3553(a). Among those advantages is a district court’s unique factfinding position, which allows it to hear evidence, make credibility determinations, and interact di-

rectly with the defendant (and, often, with his victims), thereby gaining insights not always conveyed by a cold record.

*Broxmeyer*, 699 F.3d at 289 (internal citations omitted).

### **C. Discussion**

#### **1. The sentence imposed was procedurally reasonable.**

The district court did not commit procedural error in sentencing Pabey to 180 months in prison. The court properly applied separate sentencing enhancements for separate harms; adequately considered the mitigating circumstances; and sufficiently explained the reasons for its chosen sentence.

#### **a. The district court properly applied separate Guidelines enhancements for abduction and for carjacking.**

Pabey first argues (incorrectly) that application of both the enhancement for carjacking (U.S.S.G. § 2B3.1(b)(5)) and the enhancement for abduction (U.S.S.G. § 2B3.1(b)(4)) amounts to impermissible double-counting. “Impermissible double-counting occurs when one part of the guidelines is applied to increase a defendant’s sentence to reflect the kind of harm that has already been fully accounted for by another part of the guidelines.” *United States v. Volpe*, 224 F.3d

72, 76 (2d Cir. 2000) (internal quotations omitted). *Volpe* recognizes, however, that “multiple adjustments may properly be imposed when they aim at different harms emanating from the same conduct.” *Id.* See also *United States v. Rappaport*, 999 F.2d 57, 60 (2d Cir. 1993) (where enhancements reflect “different facets of the defendant’s conduct,” they are not duplicative). In *Volpe*, for example, this Court considered whether the sentence of a police officer who had sexually abused a defendant could be enhanced both because the prisoner was in the defendant’s control and because the crime was committed under color of law. 224 F.3d at 76. The Court concluded that because the in-custody and color of law enhancements were designed to address separate sentencing considerations—abuse of power over an individual in one’s control and abuse of state authority, respectively—they were aimed at different harms and did not result in double-counting. *Id.*

Similarly, this Court found that the imposition of the bodily injury and dangerous weapon enhancements was not duplicative in *United States v. Sabhnani*, 599 F.3d 215, 251 (2d Cir. 2010), where the defendant had used weapons against a maid who suffered bodily injury while she was trafficked in her employer’s home. There, this Court noted: “[t]he conduct that would subject a defendant to the adjustment for use of a dangerous weapon does not necessarily

subject that defendant to the enhancement for causing serious bodily injury, nor are the kinds of harms at which these adjustments are aimed identical.” *Id.*<sup>2</sup>

As these cases demonstrate, the district court did not impermissibly double-count by imposing both the carjacking and abduction enhancements against Pabey. The harms at which these two enhancements are aimed—and the harm that the victim suffered here—are distinct. Specifically, the victim was first grabbed from the

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<sup>2</sup> The Sixth Circuit’s unpublished decision in *United States v. Wilson*, 485 Fed. Appx. 109, 112 (6th Cir. 2012) is also instructive. There, the Sixth Circuit addressed the exact question of whether the carjacking and abduction enhancements were duplicative for a bank robber who had stolen his getaway car, and concluded that they were not. *Id.* After the robbery, the bank robber had threatened a taxi driver with what appeared to be a firearm, entered the vehicle, and forced the driver to flee from police until he pushed her out of the car and took over driving himself. *Id.* at 110. The Court rejected the defendant’s challenge to imposition of both the carjacking and abduction enhancements, noting that each enhancement punished different aspects of the defendant’s conduct: “[t]his was a carjacking because he took control of the vehicle by threat of force. It was an abduction because the driver was forced to come along.” *Id.* at 112.

floor of the bank and then dragged out of it. PSR ¶ 16. At that point, he did not know what Dwyer and Pabey intended to do with him. Given that Pabey had threatened that co-conspirators were waiting outside the bank to blow it up, PSR ¶ 13, the victim was likely very frightened about what would happen when Pabey forced him out of the bank. Separately, the same victim suffered the harm of having his car stolen by Pabey and Dwyer. PSR ¶16. At the time, he could not have known whether he would ever get his car back.

The district court acknowledged that “two different things . . . happened to this man,” and observed that the close timing of the two events did not make the enhancements duplicative. DA76. It properly concluded, following the logic of *Volpe* and *Sabhnani*, that Pabey’s actions unquestionably caused the victim two separate types of mental anguish.

The carjacking and abduction enhancements here also accounted for different conduct. As the district court recognized, Pabey and Dwyer simply could have taken the bank patron’s keys and used them to identify which car was his without kidnaping him. DA76 (“They could have taken his keys in the bank, they could have had the man stand or lie and never move, taken his keys, gone outside themselves, clicked the gizmo that cars have, figure out which car flashed their lights, and take the car. They never would have had to kidnap him.”). Because Pabey and Dwyer

not only took the customer's vehicle by intimidation, but also unnecessarily abducted the customer in the process, imposition of both enhancements was justified.

Finally, even if the court had only applied the carjacking enhancement for the stealing of the bank customer's car, an independent set of facts also justified imposition of the abduction enhancement: the moving of several bank tellers within the bank. DA76. Under the Guidelines, the term "abducted" means "that the victim was forced to accompany an offender to a different location." U.S.S.G. § 1B1.1, Application Note 1(A). As the court acknowledged, three employees were forced to accompany the robbers to another location—namely, the vault. DA76. Thus, the abduction enhancement was also justified based on the tellers' forced movement, separate from the abduction of the patron who was led out of the bank and whose car was stolen.

**b. The district court appropriately considered the mitigating circumstances.**

Pabey next argues that the district court did not sufficiently consider any mitigating circumstances in imposing the 180-month sentence. That claim is belied by a reading of the record. The district court several times noted Pabey's history and characteristics—including his long

pattern of drug abuse and childhood difficulties—when discussing the appropriate sentence.

The district court noted at the outset of the sentencing proceeding that it adopted the facts set forth in the PSR, which elaborated on Pabey’s upbringing, addiction problems, and prior criminal convictions. DA72. *See* PSR ¶¶ 41-50, 54-70. After considering arguments from counsel, the court opened its sentencing colloquy with the following remarks:

That’s the—I was going to say the problem here today or the challenge here today I guess in sentencing Mr. Pabey, is that he is under the influence. He has been most of his life and so while I’m sympathetic to him in the sense of the childhood he had and abusive father he had to watch [and] that [he] probably was a victim himself occasionally, certainly watch his mother be brutalized. I’m very sorry. Clearly he’s struggled in school. I suspect that the schools didn’t meet his needs in the sense that he presented as a difficult person to learn to read, so what happens when you can’t read in school, you don’t like school. You get frustrated and drop out, and you are in the street. But that all may help us understand why we’re here today, but the fact of the matter is this is the way he’s lived his life . . . .

DA94-95. The court went on to say:

I have talked a little bit about Mr. Pabey's history and characteristics, particularly his childhood. He has a number of convictions. He hasn't really spent that much time in jail. It is extraordinary that [during] the time he spent in jail, he racked up more tickets than I've ever seen in one or two PSR reports. One of the assault charge convictions was I think in jail. . . . I understand that Mr. Pabey is not the worst thing he's ever done in his life which I would say [was] walking into the bank that day. He is and can be a better person than what was shown to us that day, but on the other hand, I have to think about what is a just punishment for what he did that day which is extraordinarily bad, and I have to think about protecting the public. I have to think about the next bank teller who goes to work tomorrow morning who has to worry about facing Mr. Pabey and Mr. Dwyer coming into a bank. That can't happen.

DA96-97. In imposing the sentence, the court said: "With respect to the period of time at the Bureau of Prisons, the Court respectfully and strongly requests that the Bureau of Prisons provide you the opportunity to receive educational benefits including, in particular, to achieve the goal of being able to read and hope-

fully once taught to read, to obtain a GED.”  
DA99.

Finally, after the court had imposed the sentence, it made the following remarks to Pabey:

I know this is a very long sentence, Mr. Pabey, but what you did was extremely bad. I don't know that I have had—I had one murder case, but short of that, I would say this is up there. . . . I hope that my request to the Bureau of Prisons comes through and that you are given the help you need because I think Attorney Paetzold is absolutely right [that the crime was motivated in part by addiction]. ... He needs the help, and I hope you can make it, sir.

DA102-03.

It is clear from the court's remarks on the record that the district court not only understood the mitigating circumstances, but also took them seriously in fashioning an appropriate sentence for Pabey. The court acknowledged Pabey's difficult upbringing and his addiction several times and specifically stated that Pabey was and could be a “better person” than the man he was when he robbed the bank. DA94-98 (discussing Pabey's childhood and lack of education); *see also* DA80 (court: “He's got a very serious addiction.”). The court also heard Pabey's aunt discuss his addiction and upbringing. DA84-85. While the court

did not explicitly discuss that some of Pabey's prior convictions were for larceny, the court noted that Pabey had several convictions that did not count in his criminal history calculation, DA78, and that he had "racked up more tickets than" the court had ever seen during his incarceration. These comments demonstrate that the court had taken Pabey's prior convictions—and Pabey's subsequent conduct in jail—into account in determining the proper sentence. In sum, the sentencing court did more than enough to address the mitigating factors presented by Pabey at sentencing. *Broxmeyer*, 699 F.3d at 289.

Even if the court had not explained its decision in such detail, however, there is no requirement that a sentencing court discuss each and every mitigating factor on the record. See *Broxmeyer*, 699 F.3d at 295 n.31 ("To the extent [the defendant] charges the district court with procedural error in failing to reference each mitigation argument it considered, or even each aggravating factor on which it relied, his argument is meritless in light of well established precedent."); see also *United States v. Villafuerte*, 502 F.3d 204, 210 (2d Cir. 2007) ("[W]e do not insist that the district court address every argument the defendant has made or discuss every § 3553(a) factor individually."). Indeed, the court need not even mention all of the factors from 18 U.S.C. § 3553(a), much less explain how each of

the factors affect its decision. *United States v. Banks*, 464 F.3d 184, 190 (2d Cir. 2006).

That the district court may not have assigned as much weight to the mitigating circumstances Pabey presented as he would have liked does not mean that the court did not consider those factors, and does not render the sentence procedurally unreasonable. *See Fernandez*, 443 F.3d at 32 (noting that the requirement that the court consider a factor from § 3553(a) “is *not* synonymous with a requirement that the factor be given determinative or dispositive weight,” insofar as the factor is only one of “several factors that must be weighted and balanced by the sentencing judge”). As this Court has made clear, the “weight to be afforded any given argument made pursuant to one of the § 3553(a) factors is a matter firmly committed to the discretion of the sentencing judge and is beyond our review, as long as the sentence ultimately imposed is reasonably in light of all of the circumstances presented.” *Id.* Thus, the court’s fulsome consideration of the mitigating factors brought to light by Pabey, and its weighting of those factors, was more than sufficient to justify its sentence.

**c. The district court sufficiently explained its reasons for the sentence.**

Lastly, Pabey argues that the district court failed to explain sufficiently the reasons for its

sentence. That argument, too, fails on the face of the sentencing transcript. In addition to the long remarks quoted above concerning Pabey's history and characteristics, the district court explained, based on its review of the surveillance video of the robbery,<sup>3</sup> that the sentence imposed in this case was designed to reflect the especially troubling and serious offense conduct, as well as to promote deterrence:

[A] large part of what has to happen here today is to protect the public from it happening again because as I just said a moment ago, I think the chances [that] somebody could have gotten killed in this instance were very high, if not higher. I understand I don't believe Mr. Pabey was the one that carried the gun, but that doesn't matter. He's as culpable certainly in the eyes of the law. He went into a bank with someone else and terrorized people, absolutely terrorized. I have had bank robbers in front of me. I have addict bank robbers in front of me who just had to get some money. In many cases, they are almost pathetic. They go to the counter with a note

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<sup>3</sup> Both the district court and the United States Probation Office reviewed the surveillance video from the robbery in preparation for sentencing. *See* DA76, DA96, DA98, PSR ¶ 8. A motion for leave to file a copy of the surveillance video is being filed concurrently with the filing of this brief.

you can't read. They don't threaten somebody. Sometime[s] the note says please give me \$50. Those are the bank robberies I usually see. This is an extraordinary bank robbery. The fact that three employees—this bank didn't look that big. Three people quit their job because of what they experienced in that whatever time period it took they were in the bank. . . . [Pabey is] the person that bound at least one of the people in the bank. Forced people to get on the floor. While he may have said some calming things, I don't have the sense the victims heard those. They heard the ones we're going to blow this place up. If you move, whatever, all the threats that were made. They were terrorized is the only way to describe these people's experience.

DA95-96.

From these remarks and those quoted at length above, it is clear that the district court explained its sentence sufficiently with reliance on the § 3553(a) factors. In fact, its explanation goes on for approximately five pages of the transcript before it even imposed the 180-month sentence. DA94-99. In determining a just punishment, the court discussed the seriousness of the crime at length—including its impact on the many victims—and spoke about Pabey's history and characteristics. DA94-97. The court also

acknowledged the need to protect the public from future crimes by Pabey, DA97, and the need for him to be rehabilitated while in prison, DA99. Finally, the court also indicated that it considered the Guidelines, and the need to avoid sentencing disparities vis-à-vis Pabey's co-conspirators Dwyer and Jacques, who also had pleaded guilty to bank robbery charges. DA97-98.

In sum, this is not a case where the district court shirked its responsibility to fully explain its rationale for imposing a lengthy prison sentence. Instead, the court carefully considered the relevant factors on the record and fully articulated the reasons it chose to impose a 180-month sentence on Pabey. There was no procedural error here.

**2. The district court's sentence is substantively reasonable.**

Pabey's final argument is that the 180-month sentence is substantively reasonable, an argument that does not withstand this Court's exceedingly deferential review of sentences for substantive reasonableness. *See Broxmeyer*, 699 F.3d at 289. The district court's sentence in this matter, which falls well within both the PSR's calculation of the Guidelines range of 168-210 months and the government's calculation of 151-188 months, is clearly within the range of permissible decisions. *See Cavera*, 550 F.3d at 189;

*see also Friedberg*, 558 F.3d at 137 (“[I]n the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances”) (internal quotations omitted).

In particular, the 180-month sentence is eminently reasonable here—and certainly not so shockingly high or shockingly low that allowing it to stand would damage the administration of justice. *See Broxmeyer*, 699 F.3d at 289. The offense conduct in this case was very serious. As the district court found, Pabey and Dwyer “terrorized” the victims of this bank robbery by pointing a weapon in their faces, threatening that someone was outside to blow up the bank if they did not cooperate, dragging a teller to the vault at weapon-point, binding victims’ hands, prohibiting victims from escaping or seeking help, and eventually stealing a patron’s car to flee. Three of the bank’s employees quit their jobs, and others had to move to different branches, because of the trauma caused by the robbery. DA86-87. As the district court explained, this was an “extraordinary bank robbery” committed by a man who, for a decade and a half, had committed crime after crime, culminating in this extremely serious and violent bank robbery. DA95. A within-Guidelines sentence of imprisonment was appropriate here.

Pabey claims that the sentence is substantively unreasonable for essentially the same reasons that he asserts there was procedural error: double-counting of the abduction and carjacking enhancements, coupled with the district court's alleged failure to account for the less serious nature of some of Pabey's prior convictions. Def.'s Br. at 20. Just as these arguments fail to support reversal for procedural error, they likewise cannot support reversal for substantive error. The district court appropriately imposed both the abduction and carjacking enhancements based on the distinct harms caused by Pabey's actions, and it appropriately weighed Pabey's long criminal history alongside many other appropriate sentencing factors. The court also had the benefit of viewing the surveillance video of the robbery and presiding over the cases of Pabey's two co-conspirators, thereby affording it institutional advantages worthy of significant deference. *See Broxmeyer*, 699 F.3d at 289.

In summary, after a thorough analysis of the various sentencing considerations, the district court imposed the fair, just, and substantively reasonable sentence of 180 months on a longtime criminal who terrified innocent victims during a dangerous bank robbery.

**Conclusion**

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: March 13, 2014

Respectfully submitted,

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**Federal Rule of Appellate Procedure  
32(a)(7)(C) Certification**

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 6,637 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.



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## **Addendum**

United States Sentencing Guideline § 2B3.1,  
Application Note 1:

“Carjacking” means the taking or attempted taking of a motor vehicle from the person or presence of another by force and violation or by intimidation.

United States Sentencing Guideline § 1B1.1,  
Application Note 1(A):

“Abducted” means that a victim was forced to accompany an offender to a different location. For example, a bank robber’s forcing a bank teller from the bank into a getaway car would constitute an abduction.