

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MATTHEW MICHAEL CIMINO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX

/s/ Kevin Joel Page

JASON HAWKINS
Federal Public Defender
Northern District of Texas
TX State Bar No. 00759763
525 Griffin Street, Suite 629
Dallas, TX 75202
(214) 767-2746
(214) 767-2886 Fax

KEVIN J. PAGE **
Assistant Federal Public Defender
Northern District of Texas
TX State Bar No. 24042691
525 Griffin Street, Suite 629
Dallas, TX 75202
(214) 767-2746
(214) 767-2886

INDEX TO APPENDICES

Appendix A Opinion of Fifth Circuit, *United States v. Cimino*, 2022 WL 899465 (5th Cir. March 28, 2022)(unpublished).

Appendix B Judgment and Sentence of the United States District Court for the Northern District of Texas, entered May 26, 2021.
United States v. Cimino, Dist. Court 4:20-CR-00349-Y-1.

APPENDIX A

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

March 28, 2022

Lyle W. Cayce
Clerk

No. 21-10550
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

MATTHEW MICHAEL CIMINO

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:20-CR-349-1

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

PER CURIAM:*

Defendant-Appellant Matthew Michael Cimino appeals his guilty plea conviction and his sentence for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). He challenges his conviction on two grounds. He first contends that § 922(g)(1) is unconstitutional on its face and

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

No. 21-10550

as applied to him because it exceeds the scope of Congress's authority under the Commerce Clause. He next contends that the factual basis for his guilty plea is insufficient because it does not include, as a mens rea element, that he knew his possession of the firearm was in or affecting interstate commerce. Because he raises both challenges for the first time on appeal, they are reviewed for plain error only. *See Puckett v. United States*, 556 U.S. 129, 135 (2009). Cimino concedes that both of these challenges to his conviction are foreclosed by our precedent and that he only raises them to preserve them for potential future review. *See United States v. Alcantar*, 733 F.3d 143, 145-46 (5th Cir. 2013); *United States v. Dancy*, 861 F.2d 77, 80-82 (5th Cir. 1988).

As for Cimino's sentence, the district court applied an upward departure pursuant to U.S.S.G. § 4A1.3(a)(1) and sentenced him to 42 months of imprisonment. The court determined that Cimino's criminal history category substantially underrepresented the seriousness of his criminal history and the likelihood that he would commit other crimes.

We review the district court's decision to impose an upward departure, as well as the extent of such a departure, for abuse of discretion. *See United States v. Zelaya-Rosales*, 707 F.3d 542, 546 (5th Cir. 2013). At sentencing, the district court explained that the upward departure was based on (1) Cimino's status as a habitual offender, (2) the minimal terms of imprisonment imposed for his previous convictions, (3) his continued engagement in criminal behavior, and (4) the number of prior convictions that were not scored due to their age. These bases are supported by the record and are permissible for purposes of § 4A1.3. *See United States v. Lavalais*, 960 F.3d 180, 189 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 2807 (2021); *United States v. Lopez*, 871 F.2d 513, 514-15 (5th Cir. 1989). Cimino's challenge to the imposed sentence is merely a disagreement with how the district court weighed the relevant factors and thus "is not a sufficient ground for reversal." *United States v. Malone*, 828 F.3d 331, 342 (5th Cir.

No. 21-10550

2016). We have upheld proportionately greater upward departures than the nine month departure at issue here. *See, e.g., Lavalais*, 960 F.3d at 186, 189-90 (upholding a 59-month upward departure from a guidelines maximum of 46 months); *Zelaya-Rosales*, 707 F.3d at 546 (upholding a six-month upward departure from a guidelines maximum of six months).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
Fort Worth Division

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

Case Number: 4:20-CR-349-Y(1)

Frank L. Gatto, assistant U.S. attorney

MATTHEW MICHAEL CIMINO

Rachel M. Taft, attorney for the defendant

On January 20, 2021, the defendant, Matthew Michael Cimino, entered a plea of guilty to count one of the one-count indictment. Accordingly, the defendant is adjudged guilty of such count, which involves the following offense:


<u>TITLE & SECTION</u>	<u>NATURE OF OFFENSE</u>	<u>OFFENSE CONCLUDED</u>	<u>COUNT</u>
18 U.S.C. §§ 922(g)(1) and 924(a)(2)	Felon in Possession of Firearm	June 23, 2020	1

The defendant is sentenced as provided in pages two through three of this judgment. The sentence is imposed under Title 18, United States Code § 3553(a), taking the guidelines issued by the United States Sentencing Commission under Title 28, United States Code § 994(a)(1), as advisory only.

The defendant shall pay immediately a special assessment of \$100.00 for count one of the one-count indictment.

The defendant shall notify the United States attorney for this district within thirty days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Sentence imposed May 25, 2021.


TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

Signed May 26, 2021.

IMPRISONMENT

The defendant, Matthew Michael Cimino, is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of 42 months on count one of the one-count indictment.

The Court recommends that the defendant be incarcerated within the District of Connecticut, or as nearby as possible, and that he receive mental-health treatment.

The defendant is remanded to the custody of the United States marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of 3 years on count one of the one-count indictment.

The defendant, while on supervised release, shall comply with the standard conditions recommended by the U. S. Sentencing Commission at §5D1.3(c) of the United States Sentencing Commission Guidelines Manual, and shall:

not commit another federal, state, or local crime;

not possess illegal controlled substances;

not possess a firearm, destructive device, or other dangerous weapon;

cooperate in the collection of DNA as directed by the probation officer, as authorized by the Justice for All Act of 2004;

report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Federal Bureau of Prisons;

refrain from any unlawful use of a controlled substance. The defendant must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the Court;

participate in an outpatient program approved by the probation officer for treatment of narcotic or drug or alcohol dependency that will include testing for the detection of substance use, abstaining from the use of alcohol and all other intoxicants during and after completion of treatment, contributing to the costs of services rendered (copayment) at the rate of at least \$25 per month; and

participate in outpatient mental health treatment services as directed by the probation officer until successfully discharged, which services may include prescribed medications by a licensed physician, with the defendant contributing to the costs of services rendered (copayment) at a rate of at least \$25 per month.

FINE/RESTITUTION

The Court does not order a fine or costs of incarceration because the defendant does not have the financial resources or future earning capacity to pay a fine or costs of incarceration.

Restitution is not ordered because there is no victim other than society at large.

FORFEITURE

Pursuant to 18 U.S.C. § 924(d) and 28 U.S.C. § 2461(c), it is hereby ordered that defendant's interest in the following property is condemned and forfeited to the United States: a Bersa, Model Thunder 380, .380 caliber pistol bearing Serial No. 519425 and any ammunition recovered with this weapon.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

United States marshal

BY _____
deputy marshal