

No. _____

IN THE
Supreme Court of the United States

MELVIN RAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX

Pro se
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Date: _____

**APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT, FILED MARCH 30, 2022**

United States Court of Appeals for the Fifth Circuit

No. 20-20367

Summary Calendar

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:*

Jonathan 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 brandishing 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 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

* Pursuant to 5TH CIRCUIT RULE 47.5, the court had determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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.

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 the 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).

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 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

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.

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 and 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.

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.

³ This argument was preserved.

**APPENDIX B – A COPY OF THE ORDER DENYING REHEARING,
DENIED MAY 31, 2022**

United States Court of Appeals for the Fifth Circuit

No. 20-20367

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-380-2

ON PETITION FOR REHEARING

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

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

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 cost, rehearings, and mandates. **5th Cir. R. 35 and 40 require you to attach 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 non meritorious 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.

Enclosure (s)

Mr. John Richad Berry

Ms. Carmen Castillo Mitchell

Mr. Thomas Donald Moran

Mr. David Allen Nachtigall

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

March 30, 2022

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

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

Enclosed is an order entered in this case.

See FRAP and Local Rules 41 for stay of the mandate.

Mr. John Richad Berry

Ms. Carmen Castillo Mitchell

Mr. Thomas Donald Moran

Mr. David Allen Nachtigall

APPENDIX C – RELEVANT STATUTORY AND REGULATORY PROVISIONS

18 U.S.C § 3742 Review of a Sentence:

(a) A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence- (1) was imposed in violation of the law; (2) was imposed as a result of an incorrect application of the sentencing guidelines; or is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater of fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under Section 18 U.S.C. 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or (4) was imposed for an offense for which there is no sentencing guideline and it's plainly unreasonable.

U.S.S.G. § 1B1.7 Significance of Commentary:

The commentary that accompanies the guideline sections may serve a number of purposes. First, it may interpret the guideline or explain how it is to be applied. Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal. See 18 U.S.C. 3742. Second, the commentary may suggest circumstances which, in the view of the Commission, may warrant departure from the guidelines. Such commentary is to be treated as the legal equivalent

Appendix C

of a policy statement. Finally, the commentary may provide background information, including factors considered in promulgating the guideline or reasons underlying promulgating of the guideline. As with a policy statement, such commentary may provide guidance and assessing the reasonableness of any departure from the guidelines.

U.S.S.G § 2B3.1(b)(4)(A): Four-level abduction enhancement:

"If any person was abducted to facilitate commission of the offense or to facilitate escape."

U.S.S.G. § 1B1.1 Comment.n.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.