IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 13-31126

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VERSUS

MARCUS PATTERSON CAREY,
Defendant-Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, No. 2:10-CR-310-1

ORIGINAL BRIEF FOR THE APPELLANT MARCUS PATTERSON CAREY

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ORIGINAL BRIEF FOR THE APPELLANT
MARCUS PATTERSON CAREY

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of these proceedings. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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Lafayette, Louisiana this 27th day of January, 2014.

/s/ Rebecca L. Hudsmith
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STATEMENT REGARDING ORAL ARGUMENT

Undersigned counsel requests oral argument to assist the Court in deciding the multiple complex issues that arose in the sentencing hearing for second degree murder committed by an army veteran suffering from Post-Traumatic Stress Disorder and under the influence of JWH-018, a synthetic marijuana that has since been made illegal because of its psychotic and mind-altering affects.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, No. 1:10-CR-310-1

ORIGINAL BRIEF FOR THE APPELLANT MARCUS PATTERSON CAREY

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the district court committed procedural error during sentencing when the district court refused to consider mitigating evidence under the theory that the government had already considered the mitigating evidence in the plea negotiations?

2. Whether the district court committed procedural error during sentencing when the district court imposed an upward departure under Guideline Section 5K2.8 for extreme conduct in a second degree murder case?

3. Whether a sentence of 30 years for a manslaughter committed by an army veteran, who suffering from Post Traumatic Stress Disorder and was under the influence of legal drugs, is substantively unreasonable when the Sentencing Guidelines provided a Guideline range of only 188 to 235 months?

STATEMENT OF THE CASE

Marcus Patterson Carey is a two-tour combat veteran suffering from Post Traumatic Stress Disorder (PTSD). ROA. 411-12. On June 19, 2010, the 25-year-old Carey was living on Fort Polk military base with two friends and smoked JWH-018, a synthetic marijuana that has since been made illegal due its severe mind-altering and psychotic affect on its users. ROA. 109, 225, 257, 411. While in a dissociative state (not in touch with reality) caused by the JWH-018, Carey awoke in the early morning and attacked his friends with a hammer, killing one and injuring the

other. ROA. 109, 411. Carey then went to a neighbor's house and told him that he had killed his friend and the neighbor contacted military police. While in the custody of military police, Carey gave a video confession riddled with tears, confusion, and complete remorse for his actions. ROA. 399.

I. MARCUS PATTERSON CAREY: MILITARY COMBAT VETERAN WITH PTSD

Marcus Carey joined the United States Army on August 18, 2004 and was stationed at Fort Polk, Louisiana. He was a member of 2/4 infantry, 4th Brigade, 10th Mountain Division during this time. He deployed to Afghanistan in 2006. His first enemy contact was in Chalakor Valley, which is where he received his Combat Infantry Badge. While in Afghanistan, Marcus was involved in heavy combat. One extended mission that Carey was involved in was Operation Medusa, which had a high operational tempo - there was constant bombing, the men slept as little as four hours a night, and it lasted for almost two weeks. ROA. 223.

Similar to many other Afghanistan veterans returning after being exposed to counterinsurgency style warfare, sniper attacks, roadside bombs, Carey used drugs and alcohol to cope with what he had endured during his deployment as a form of self-medication. In September 2007, Carey had a positive urinalysis for marijuana. During this time when every trained serviceman was absolutely necessary, Carey was not discharged for his infraction. Instead, he was sent to Iraq. After being in combat

in Iraq for several months, Carey returned home to Ohio for leave in the summer of 2008 and he did not return for duty on time. Ultimately, Carey returned to Iraq and was disciplined. With his regular work schedule and the added working hours for discipline, Carey was sleeping as little as four hours a night. The chaos and uncertainty of combat in Iraq was harder for Carey than Afghanistan, particularly given that his symptoms of psychiatric illness were fully manifest by the time he served in Iraq. ROA. 224.

Carey returned from Iraq in January 2009, with the warning signs of the serious mental health issues that he was facing. Doctors at that military clinic prescribed Klonopin and Ambien to treat his depression, anxiety and PTSD. ROA. 241. Carey continued to self-medicate despite this preliminary effort to treat his symptoms with psychotropic medications. As a result, he had various military infractions, including missing physical training and being drunk on duty. Nevertheless, his military leaders noted that he had no problem with the daily tasks of being a soldier, which they attributed to the fact that he had so much experience, and his technical knowledge was very sharp - which allowed him to always be the first to answer questions and the first to explain things to his squad mates. Carey's knowledge and experience was needed and useful. Although Carey's motivation was low because he was scheduled to complete his expired time of service (ETS) in

December, 2009, his sergeant noted that it would only be human to act the way Carey did considering the circumstances. ROA. 224, 244.

Carey, however, was suffering the symptoms of trauma, anxiety, and depression: hypervigilance, distressing dreams, sleep problems, agitation, worry, inability to plan, recurrent and intrusive thoughts of trauma, and substance use. He was a two-war combat veteran having difficulty adjusting to his life after war. The need for help was apparent. Instead of help, however, in August, 2009, Carey was discharged from the Army with a general under honorable discharge. ROA. 247. This dismissal was less than four months before his expiration of term of service. Fellow soldiers wrote letters praising Carey's skills as a soldier in combat, and Carey pled for the opportunity to stay in the Army for four more months, so that he could have full benefits of his Army service after discharge, which would help him survive post-discharge. ROA. 225, 249.

II. MARCUS CAREY, WHILE IN A DISSOCIATIVE STATE CAUSED BY HIS PTSD AND JWH-018, SYNTHETIC MARIJUANA, ATTACKS HIS BEST FRIEND AND ROOMMATE, KILLING ONE AND INJURING THE OTHER

Carey stayed at Fort Polk after his discharge because his army buddies had become his family and his comfort. His mother told him not to return to Ohio because the employment outlook was so bad. During the time between being discharged and the homicide, Carey lived with his best friend Howard Wayne Alley.

Carey ran errands for Wayne and helped around the house. Carey and Wayne moved in with Byron Whitcomb for a brief period. Carey began smoking JWH-018, a synthetic marijuana, which has since been made illegal due to the severe psychotic and mind altering effects it has on users, such as Carey, who are prone to psychosis due to preexisting mental illness. ROA. 225, 257.

The night before the homicide, Carey smoked JWH. The next morning, Carey was in an altered state of consciousness and he attacked Byron Whitcomb with a hammer and knife while he was sleeping on a couch. Carey then went to where Howard Alley lay sleeping on a mattress on the floor and attacked him. Byron Whitcomb died from his injuries. Howard Alley survived, but suffered serious head and neck injuries.

The crime scene was chaotic and irrational and Mr. Alley's recount of the events illustrated how bizarre and unplanned the offense was. This evidenced the mental state that Carey was in, according to Dr. Pablo Stewart, a psychiatrist, who, after spending many hours with Carey, concluded that something triggered a dissociative event in Carey on June 19, 2010, which explained why Carey had only fragmented memories of the event, and why the event itself was so irrational. ROA. 225, 411-12. Dr. Stewart further concluded that, "Mr. Carey's significant mental disturbance at the time of the crime made it impossible for him to plan or consider his actions as evidenced by the irrational nature of the offense and crime scene. For

instance, the surviving victim's statement reveals that during the offense he asked Mr. Carey why this was happening, indicating that Mr. Carey's actions were out of context, and the event was not provoked and had no recognizable rational cause. Similarly, Mr. Carey's post-offense behaviors indicate disorganization and lack rational planning: he did not try to benefit himself or flee, but rather walked to a neighbor in shock and stated that he had killed someone. This is an example of his thinking process at the time which indicates that what occurred was outside of any rational, planned or deliberate event between the victims and Mr. Carey. The only logical explanation for Mr. Carey's irrational behavior is that the event was a result of mental break with reality." ROA. 411-12.

III. MARCUS CAREY IS CHARGED WITH FIRST DEGREE MURDER BUT PLEADS GUILTY TO SECOND DEGREE MURDER PURSUANT TO A RULE 11(c)(1)(C) PLEA AGREEMENT

Carey was charged, on October 13, 2010, by grand jury indictment, with one count of first degree murder in violation of 18 U.S.C. § 1111, and one count of attempted first degree murder in violation of 18 U.S.C. § 1113. ROA. 22-24; Record Excerpts ("RE") at Tab 2. Although the indictment listed statutory aggravating factors, which made the case death eligible, the government ultimately decided not to seek the death penalty.

Instead, on June 12, 2013, Carey entered a plea of guilty, pursuant to a plea agreement, to one count of second degree murder and one count of attempted second

degree murder. ROA. 97 (minutes); ROA. 98 (plea agreement). The plea agreement provided that, pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), the maximum term of imprisonment as to both counts plead to was not more than 30 years. ROA. 100. A Presentence Report (PSR) was prepared on August 8, 2013. ROA. 395. Carey was a base offense level 38 under U.S.S.G. § 2A1.2 for second degree murder. ROA. 407. Carey's offense level was increased by one point under the grouping provisions because there was an additional charge of attempted second degree murder. ROA. 408. With acceptance of responsibility, Carey's total offense level was 36. Id. With criminal history category I and a total offense level of 36, Carey's guideline imprisonment range was 188 months to 235 months. ROA. 413. The PSR identified U.S.S.G. § 5K2.8, (extreme conduct) as a factor for the district court to depart from the guidelines range. ROA. 416.

Carey filed a sentencing memorandum setting forth the reasons why a guideline range sentence was appropriate. ROA. 221. The sentencing memorandum set forth the history and circumstances of Carey's life and military service. See supra Part I; ROA. 221. The sentencing memorandum also set forth Carey's history of PTSD and evidence of his mental break from reality that resulted in the death of one friend and the injuring of another friend. See supra Part II; ROA. 225. Carey's sentencing memorandum further explained that this perfect storm of events will not recur and that Carey can be rehabilitated and safely returned to society. ROA. 227.

The government filed a response to Carey's sentencing memorandum, maintaining that an upward departure and a sentence of 30 years was appropriate. ROA. 267. The government maintained that an upward departure based on § 5K2.8 was warranted because Byron Whitcomb died after being attacked and suffering 14 sharp force wounds and two blunt injuries to the head and neck, and because Howard Alley was attacked and his life was changed forever by the crime.

IV. AT SENTENCING, THE DISTRICT COURT UPWARD DEPARTS FROM THE GUIDELINE RANGE OF 188 TO 235 MONTHS TO IMPOSE A SENTENCE OF 360 MONTHS

A sentencing hearing was held on October 8, 2013. ROA. 126. At the hearing, Carey's counsel argued that an appropriate sentence was a guideline range sentence of 188 to 235 months. Counsel pointed out that Carey's remorse, mental health issues as established by his absolute confusion over the circumstances and events of June 19, 2010, along with his military service, supported a guideline range sentence and mitigate the possible heinousness of the actions. Carey made a statement, not asking for leniency from the district court but begging for forgiveness from the victims. ROA. 135. Carey's family and friends also testified at the hearing. ROA. 137. Carey's military friend, Wesley Johnson, testified that the things soldiers see in war are unimaginable, and that this crime was completely out of character for Carey, and that Carey has expressed his sincere remorse. ROA. 137. Carey's mother and sister testified that Carey has their utmost support. Carey's sister explained that they are

very close and that the crime was shocking and not like him, and that he is sorry for what he did. ROA. 138-39.

The government urged the district court to impose a sentence of 30 years and the victim's mother testified. ROA. 140. Counsel for the government urged the district court to impose a sentence of 30 years based on the fact that the crime was unprovoked and it entailed the murder of a soldier and almost the murder of a second soldier. Byron Whitcomb's mother testified that the loss of her son has been unbearable and she asked the district court to impose the maximum sentence allowed.

The district court sentenced Carey to 360 months on Count 1 and 240 months on Count 2, to run concurrently. ROA. 159. The basis of the upward departure was under United States Sentencing Guideline § 5K2.8 for "extreme conduct." ROA. 161. Counsel objected to the upward departure because there was no evidence of torture of the victims, gratuitous infliction of injury or prolonging of pain or humiliation. ROA. 162. Counsel also objected to the sentence as substantially unreasonable for the reasons set forth in the sentencing memorandum and the arguments at the sentencing hearing. In response, the district court stated that one reason for the sentence was that when the surviving victim was almost dying on the floor, Carey offered to choke him to get it over with, and the district court found that to be heinous and cruel. ROA. 162.

The judgment of conviction and sentence was entered on October 24, 2013. ROA. 118; RE at Tab 3. In the sealed amended statement of reasons, Section IV, the district court checked the box C titled "The court departs from the advisory guideline range for reasons authorized by the sentencing guideline manual." ROA. 429. In Section V, the district court checked the box titled "The sentence imposed departs above the advisory guideline range." Id. Under Section VIII, the district court gave additional reasons for the sentence:

> It is apparent from the facts of this case, that the conduct of the defendant was especially cruel, heinous and brutal. The advisory guideline range does not adequately address the severity of the crimes and the violent manner in which the conduct occurred. The defendant brutally murdered Brian Whitcomb without provocation. There were 14 stab wounds, 2 blunt force injuries to the head and neck, as well as additional wounds. He also attempted to murder Hoard [sic] Wayne Alley. The defendant's service and mitigation circumstances were considered by the Government when they chose not to pursue the death penalty and agreed to a cap of 30 years.

ROA. 431. On October 28, 2013, Carey filed a timely notice of appeal. ROA. 84; RE at Tab 4. Carey now appeals from the district court's judgment of 360 months as an unreasonable sentence under the facts of this case.

SUMMARY OF ARGUMENT

Marcus Carey is a young man with no criminal history. He grew up in a single parent home and decided to serve his country and better himself and his employment opportunities, so he joined the United States Army at the age of 19 years old. He

served this country in two wars and he was diagnosed with PTSD. He was only four months from discharging from the Army with full benefits, including mental health treatment, when he was abandoned by the Army and forced to survive without proper mental health treatment. He self-medicated with JWH-018, which is known to induce psychosis. On the morning of the homicide, something triggered an altered state of consciousness, and he acted without ration, and without a clear understanding of his actions. As soon as Carey began to realize what was happening, he went to a neighbor's house and confessed. Throughout this case, Carey repeatedly expressed his sincere and genuine remorse and asked for forgiveness. His friend and family testified that this crime was completely out of character for Carey.

During the sentencing hearing, the district court found that Carey's actions were irrational, that he requires mental health treatment that should be paid for by the military, that he is a two-tour combat veteran, that the military did not properly handle his mental health problems, and that he was sincerely remorseful. However, the district court refused to consider this mitigating evidence because the judge assumed that the evidence was considered by the government in plea negotiations and so Carey had already been "rewarded". The judge, however, was not privy to plea negotiations, and therefore did not, and could not, know or consider why this particular plea was entered into by both sides. Moreover, by refusing to consider the mitigation that was clearly evident and imposing the maximum sentence allowed

under the plea, the district court abrogated her sentencing duties and instead effectively allowed the sole decisions of the government to determine the sentence imposed. This amounted to procedural error and Carey's upward departure sentence should be reversed because it was imposed without proper consideration of the mitigation evidence.

The district court also committed procedural error when it imposed an upward departure sentence under U.S.S.G. § 5K2.8, extreme conduct. U.S.S.G. § 5K2.8 is not applicable to this case because Carey's actions, although violent as most second degree murders are, were not exceptionally or unusually heinous, cruel, brutal, or degrading to the victim. Carey did not prolong the victims' pain, he did not flee, he did not conceal the victims' whereabouts, and he did not prevent help from arriving. The fact that 5K2.8 is inapplicable becomes even more evident in light of the mitigation that was presented. This crime was totally irrational and impossible to bring ration to it, Carey suffered mental health issues, and was acting in a state of dissociation at the time of the crime. Carey did not act with cruel, brutal, or heinous intentions because he was acting without ration. Accordingly, Carey's sentence should be vacated and remanded with instructions that § 5K2.8 is inapplicable to this case.

The district court also abused its discretion in departing substantially above the guideline range and imposing a sentence of 30 years under the totality of the facts and

circumstances of this case. What occurred in this case is that Carey negotiated a plea with a stipulated maximum possible penalty, but not an agreed-upon sentence, yet was essentially precluded from demonstrating any reason that would justify a sentence below the 30 year maximum allowed by the plea agreement because the district court determined that any mitigation presented had already been considered by the government in plea negotiations. In essence, the district court did not sentence Carey. The government did. This sentence was substantively unreasonable because the district court did not properly consider the mitigation evidence, gave significant weight to the improper factor of the government's consideration of mitigation in plea negotiations, and did not balance the sentence factors.

ARGUMENT

I. THE DISTRICT COURT COMMITTED PROCEDURAL ERROR WHEN THE COURT STATED THAT IT DID NOT CONSIDER MITIGATING EVIDENCE PRESENTED BY MARCUS CAREY BECAUSE THAT EVIDENCE WAS CONSIDERED BY THE GOVERNMENT IN PLEA NEGOTIATIONS

A. The Standard of Review

The appellate court reviews sentences for reasonableness under an abuse-of-discretion standard. United States v. Mondragon-Santiago, 564 F.3d 357, 360 (5th Cir. 2009), cert. denied, 130 S.Ct. 192 (2009). This review occurs in two stages. Id. First, the court must ensure that the district court did not err procedurally by, for example, miscalculating or failing to calculate the sentencing range under the

Guidelines, treating the Guidelines as mandatory, *failing to consider the 18 U.S.C. § 3553(a) factors*, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence – including an explanation for any deviation from the Guidelines range. Id. (emphasis added). Under this step of analyzing for procedural error, this Court reviews the district court's interpretation or application of the sentencing guidelines *de novo*, and its factual findings for clear error." United States v. Gutierrez–Hernandez, 581 F.3d 251, 254 (5th Cir. 2009) (footnote omitted) (quoting United States v. Armstrong, 550 F.3d 382, 404 (5th Cir. 2008)). If the sentence is procedurally proper, the court engages in a substantive review based on the totality of the circumstances. Mondragon-Santiago, 564 F.3d at 360.

At the conclusion of the district court's pronouncement of the sentence, Carey orally objected to the sentence as unreasonable for the reasons set forth in the sentencing memo, the arguments, and the sentencing proceedings. ROA. 162. Carey presented exhaustive mitigation arguments in the sentencing memo and arguments and thus preserved this Court's review of the district court's refusal to consider those arguments.

B. Relevant Legal Authorities

A sentencing court commits procedural error when it "fail[s] to consider the § 3553(a) factors...." Gall v. United States, 552 U.S. 38, 51 (2007). While "a checklist recitation of the section 3553(a) factors is ... [in]sufficient," United States v. Smith,

440 F.3d 704, 707 (5th Cir. 2006), "a district court need not recite each of the § 3553(a) factors and explain its applicability," United States v. Herrera–Garduno, 519 F.3d 526, 531 (5th Cir. 2008) (citing Smith, 440 F.3d at 707).

Section 3553(a) provides that:

> The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--
>
> (1) *the nature and circumstances of the offense and the history and characteristics of the defendant*;
>
> (2) the need for the sentence imposed--
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for--
>
> * * * * *
>
> (5) any pertinent policy statement--
>
> * * * * *
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a). (emphasis added) A statement of reasons is legally sufficient so long as "[t]he sentencing judge ... set[s] forth enough to satisfy the appellate court

that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority." Rita v. United States, 551 U.S. 338, 356 (2007).

C. Legal Analysis

The district court in this case explicitly refused to consider the substantial mitigating evidence under the theory that the government had already considered that evidence in the plea bargain with Marcus Carey. The district court violated the mandatory provisions of 18 U.S.C. § 3553(a) as well as the Supreme Court's mandatory instructions in Gall and Rita that a district court *must* consider all of the § 3553(a) factors. Marcus Carey's drastic upward departure sentence should be reversed because it was imposed without proper consideration of the mitigation evidence in his case.

18 U.S.C. § 3553(a)(1) states that the sentencing court "shall consider" the nature and circumstances of the offense and the history and characteristics of the defendant. The mandatory requirement imposed by statute on the district court was ignored in this case. The district court, instead, deferred its obligations to the government attorneys. The district court stated in its oral reasons for imposing the sentence:

> And I appreciate Mr. Carey's service to our country. I really do. I mean, a two war veteran, that means a lot to me. But the Government considered that when they took the death penalty off the table and they

> took life in prison off the table. And I have - - as much as I appreciate that, I have to acknowledge the fact that the Government has already rewarded him, and I say rewarded him, for that service by not seeking - - which they easily could have done because the evidence was so clear in this case, they easily could have done, and gone for the death penalty in this case or gone for a life sentence; and they didn't do that.

ROA. 159. In this statement, the district court stated that Carey was "rewarded" by the government entering into a plea agreement. The court impermissibly came up with her own interpretation of the plea negotiations in this case, negotiations that the judge cannot and should not be privy to. See United States v. Pena, 720 F.3d 561 (5th Cir. 2013) (there is a bright-line prohibition against all judicial participation in plea negotiations).

The district court also mentioned this improper consideration in its written statement of reasons stating that "[t]he defendant's service and mitigation circumstances were considered by the Government when they chose not to pursue the death penalty and agreed to a cap of 30 years." ROA. 431. The judge assumed that the government negotiated a plea to second degree murder as a result of the same mitigation evidence presented by Carey at sentencing. There is no basis in the record to support the district court's assumptions, as there are countless factors, all unknown to the court, that resulted in the plea negotiations.[1]

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[1] As an example, the negotiations could have been determined by the government's glaring weakness in this case: the lack of any sort of intent or motive to commit first degree murder by Marcus Carey, and the potential for a not guilty by reason of insanity verdict.

Even if the district court was correct in its assumption that the government considered mitigation evidence in its plea negotiation, no legal authority authorizes a sentencing judge to abrogate its legal responsibility to consider those factors when determining the sentence. The language in §3553(a) is mandatory: sentencing court "shall consider" the evidence of mitigation concerning the nature and circumstances of the offense and the history and characteristics of the defendant.

The evidence of mitigation in this case was overwhelming. At the young age of 25, Marcus Carey was a two-tour veteran of the wars in Afghanistan and Iraq and was suffering from severe PTSD stemming from his experiences at war. ROA. 223-24. The Army acknowledged Carey's PTSD and praised his abilities as a soldier. ROA. 225, 249. Carey used marijuana and alcohol to cope with his PTSD and as a result was discharged from the Army four months shy of his ETS. ROA. 224, 244. Broke, unemployed, and abandoned by the Army, Carey self-medicated with JSW-018, a synthetic marijuana that was legal at that time. ROA. 225, 257. It has now been well-documents that JWH-018 has mind altering psychotic effects on its users. Id. Carey immediately went to a neighbor to contact the authorities once he realized what he had done and cooperated fully and completely with the authorities. ROA. 399.

Dr. Pablo Stewart, a psychiatrist, who, after spending many hours with Carey, concluded that something triggered a dissociative event in Carey on June 19, 2010,

which explained why Carey had only fragmented memories of the event, and why the event itself was so irrational. ROA. 225, 411-12. Dr. Stewart further concluded that, "Mr. Carey's significant mental disturbance at the time of the crime made it impossible for him to plan or consider his actions as evidenced by the irrational nature of the offense and crime scene. The only logical explanation for Mr. Carey's irrational behavior is that the event was a result of mental break with reality." ROA. 411-12.

Despite the objection by Carey to the sentence imposed, the district court reaffirmed its decision to refuse to consider mitigating evidence in the statement of reasons where it stated, "The defendant's service and mitigating circumstances were considered by the government when they chose not to pursue the death penalty and impose a cap of 30 years." ROA. 431. This statement of reasons runs afoul of the instructions in Rita that a statement of reasons must satisfy "satisfy the appellate court that [s]he has considered the parties' arguments and has a reasoned basis for exercising his own legal decision making authority." 551 U.S. at 356. Here the district court agreed with Carey's presentation of mitigation and found that: (1) the crime was irrational; (2) Carey was genuinely and immediately remorseful; (3) Carey has mental health problems; (4) Carey was not properly treated by the military after combat; and (5) Carey is a two-tour combat veteran. ROA. 151, 153, 158-60. Yet despite finding this mitigation, the district court refused to consider that mitigation

in determining the sentence. Marcus Carey's sentence should be vacated because the district court explicitly refused to consider the overwhelming mitigation evidence presented.

II. THE DISTRICT COURT COMMITTED PROCEDURAL ERROR WHEN IT IMPOSED AN UPWARD DEPARTURE SENTENCE UNDER U.S.S.G. § 5k2.8, EXTREME CONDUCT

A. Standard of Review

The appellate court reviews sentences for reasonableness under an abuse-of-discretion standard. United States v. Mondragon-Santiago, 564 F.3d 357, 360 (5th Cir. 2009), cert. denied, 130 S.Ct. 192 (2009). This review occurs in two stages. Id. First, the court must ensure that the district court did not err procedurally. Id. Under this step of analyzing for procedural error, this Court reviews the district court's interpretation or application of the sentencing guidelines *de novo*, and its factual findings for clear error." United States v. Gutierrez–Hernandez, 581 F.3d 251, 254 (5th Cir. 2009) (footnote omitted) (quoting United States v. Armstrong, 550 F.3d 382, 404 (5th Cir. 2008)). If the sentence is procedurally proper, the court engages in a substantive review based on the totality of the circumstances. Mondragon-Santiago, 564 F.3d at 360.

At the conclusion of the court's pronouncement of the sentence, Carey orally objected to "the upward departure based on the guideline of 5K2.8 as not applying in this case." ROA. 162. Carey further explained the objection: "There was no

evidence of torture of victim, gratuitous inflection (sic) of injury or prolonging of pain or humiliation, which makes that guideline applicable." Id.

B. Relevant Legal Authorities

The Sentencing Guideline provision for second degree murder contains an application note that states:

> Upward Departure Provision – If the defendant's conduct was *exceptionally* heinous, cruel, brutal, or degrading to the victim, an upward departure may be warranted.

U.S.S.G. § 2A1.2, app. no. 1 (emphasis added). This application notes cross references to § 5K2.8 which is the general departure provision for "extreme conduct":

> If the defendant's conduct was *unusually* heinous, cruel, brutal, or degrading to the victim, the court may increase the sentence above the guideline range to reflect the nature of the conduct. Examples of extreme conduct include torture of a victim, gratuitous infliction of injury, or prolonging of pain or humiliation.

U.S.S.G. § 5K2.8 (emphasis added). The specific provision under the second degree murder guideline requires that the offense be *exceptionally* heinous, cruel, brutal, or degrading to the victim, whereas the general departure provision only requires the offense be *unusually* heinous, cruel, brutal, or degrading to the victim. Compare U.S.S.G. § 2A1.2, app. no. 1, with U.S.S.G. § 5K2.8.

The Tenth Circuit has provided definitions for terms contained within § 5K2.8. In United States v. Hanson, the Tenth Circuit provided that *heinous* means "[h]ateful, odious; highly criminal or wicked; infamous, atrocious;" *cruel* means "[d]isposed to

inflict suffering; indifferent to or taking pleasure in another's pain or distress;" *brutal* means "[i]nhuman, coarsely cruel, savage, fierce"). 264 F.3d 988, 998 (10th Cir. 2001)(internal citations omitted).

C. Legal Analysis

The district court's application of departure provision § 5K2.8 of the Sentencing Guidelines was an abuse-of-discretion because nothing about the offense conduct was "extreme," nor did the district court make any factual findings that support any "extreme" conduct. In order for § 5K2.8 to apply in Carey's case, his second degree murder must have been committed in an *unusually*[2] or *exceptionally*[3] heinous, cruel, brutal manner, or be degrading to the victim. The district court's stated reasons for a finding of extreme conduct, was the fact that when the surviving victim was on the floor, Carey offered to choke him to get it over with. ROA. 162. Carey submits that this fact does not make his offense *unusually* or *exceptionally* heinous and cruel.

This Court has applied the "extreme conduct" departure provision in one published case involving a murder conviction. In United States v. Gore, 298 F.3d 322 (5th Cir. 2002), the defendant engaged in recurring and brutal abuse of his girlfriend's

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[2] U.S.S.G. § 5K2.8 uses the term *unusually* heinous, cruel, brutal, or degrading to the victim.

[3] Application note 1 to U.S.S.G. § 2A1.2 uses the term *exceptionally* heinous, cruel, brutal, or degrading to the victim.

three-year-old son. One evening, he hit the child so hard that the child defecated on himself and had difficulty breathing and could not stand up. Despite this, the defendant put the child to bed and refused to get help for the child when he found the child unresponsive because he feared getting himself in trouble. The defendant pled guilty to second degree murder. The Court found that the departure for extreme conduct was warranted because the defendant repeatedly beat the three-year-old over the course of days, refused to get the child treatment when he became unresponsive, and fled when the child died. Id. at 324.

In the case at bar, Carey was in an altered state at the time of the crime. The district court noted that the court was "trying to bring ration to something that's totally irrational, and it can't be done." ROA. 158. The district court was also "convinced" that Carey's remorse was immediate, sincere and genuine. ROA. 151. These findings by the district court show that Carey did not act with cruel and heinous intentions, because he was acting without ration. And, unlike the defendant in Gore, Carey did not delay getting help for the victim, nor did he try to hide to protect himself, but rather he was immediately remorseful.

Carey's conduct is also out of line with other Circuits' application of the extreme conduct departure to murder cases. See United States v. Roston, 986 F.2d 1287, 1293 (9th Cir. 1993)(the defendant cruelly killed his wife of nine days, he choked her into unconsciousness and throw her body into the sea over twenty miles

from land in the dark of night off the coast of Mexico knowing, as he must have known, that she was certain to perish); United States v. Iron Cloud, 312 F.3d 379, 382 (8th Cir. 2002)(defendant sexually assaulted the minor victim, then repeatedly dunked her conscious body into a river until she was swept away and drowned, then misled the police as to her whereabouts); See also United States v. Quintero, 21 F.3d 885, 889-90 (9th Cir. 1994)(defendant struck his four-year-old son in the head and refused to bring him to the hospital; when the child died, the defendant burned the child's body and removed the head to be buried in another location.). Here, Carey acted swiftly, without cruel intentions, he did not desecrate the victims, he did not try to hide or destroy evidence of his wrongdoing, but rather immediately turned himself in and confessed.

Carey's conduct in this case does not qualify as extreme conduct under § 5K2.8. Although this case involved a murder and attempted murder, there was nothing outside the heartland of murder cases that occurred in this case. Carey did not torture the victims, he did not conceal their whereabouts, and he did not prevent help from arriving.

The district court's factual findings during the sentencing hearing do not support a departure for extreme conduct. In response to Carey's objection to the district court's application of a § 5K2.8 departure, the district court stated that "when Mr. Alley was almost dying on the floor the defendant offered to choke him to get it

over with; and I find that to be heinous and cruel." ROA. 162. This fact focused on by the judge does not support a finding of extreme conduct. As explained above, district courts have found heinous and cruel conduct where a victim's suffering was prolonged, or the defendant preventing help from arriving. In this case, Carey did not try to prolong the victim's suffering, and in fact when he began to realize what had happened, he went to the neighbor's house and asked for help to be called. Further, the fact the district court found that this crime was irrational belies a finding that his actions - and his statement to the surviving victim - could amount to extreme conduct because he was not in his right mind at the time.

The district court's factual findings in the statement of reasons also do not support a departure for extreme conduct. In the statement of reasons, the district court stated that Carey's conduct was "especially cruel, heinous and brutal." ROA. 431. The district court stated that "there were 14 stab wounds, 2 blunt force injuries to the head and neck, as well as additional wounds." Id. This factual finding by the district court does not promote this homicide outside of the heartland of homicide cases. Extreme trauma is inherent in every death, but 14 stab wounds and 2 blunt force trauma are injuries that could be inflicted swiftly and without prolonged suffering. Under the district court's theory, nearly every murder would be extreme conduct, all but making § 5K2.8 applicable in every single murder case. The Sentencing Commission inclusion of the word *exceptionally* in its second degree

murder cross reference to § 5K2.8 shows that only a limited number of second degree murders should be considered extreme conduct.

If this Court were to agree with the district court that § 5K2.8 applies in this case, the extent of the departure imposed by the district court from Carey's guideline range was an abuse of discretion. Carey's guideline range was 188 to 235 months. The district court departed more than ten years above the top end of the guideline range to impose a thirty year sentence. This more than fifty percent increase in Carey's sentence is not supported by the fact that Carey made a comment to one the victims that he would end his suffering or the fact that there were multiple stab wounds and traumas. Under the facts and circumstances of this case and of Marcus Carey, this offense was not an *exceptionally* or *unusually* heinous, cruel, brutal, or degrading to the victims. The district court abused its discretion in departing upward by more than ten years using § 5K2.8. Marcus Carey's sentence should be vacated and remanded with instructions that § 5K2.8 is inapplicable under the facts of this case.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN DEPARTING SUBSTANTIALLY ABOVE THE GUIDELINE RANGE AND IMPOSING A SENTENCE OF 30 YEARS UNDER THE TOTALITY OF THE FACTS AND CIRCUMSTANCES OF THIS CASE

A. Standard of Review

The appellate court reviews sentences for reasonableness under an abuse-of-discretion standard. United States v. Mondragon-Santiago, 564 F.3d 357, 360 (5th Cir. 2009), cert. denied, 130 S.Ct. 192 (2009). This review occurs in two stages. Id. First, the court must ensure that the district court did not err procedurally by, for example, miscalculating or failing to calculate the sentencing range under the Guidelines, treating the Guidelines as mandatory, failing to consider the 18 U.S.C. § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence – including an explanation for any deviation from the Guidelines range. Id. If the sentence is procedurally proper, the district court engages in a substantive review based on the totality of the circumstances. Id.

B. Relevant Legal Authorities

This court recognizes three types of sentences. United States v. Brantley, 537 F.3d 347, 349 (5th Cir. 2008). A district court may impose (1) a sentence within the defendant's Guidelines range, (2) an upward or downward departure as allowed by the Guidelines, or (3) a non-Guideline sentence or a variance that is outside of the relevant Guidelines range. Id.

"[A]n upward departure and an upward variance are not one and the same." United States v. Jacobs, 635 F.3d 778, 782 (5th Cir. 2011). A "departure" refers only to a sentence imposed under the framework set out in the Guidelines. Id. at 780. "When the district court imposes an upward departure, it must explain its reasons for doing so in Section V of the standard-form Statement of Reasons." Id. In contrast, a "variance" is a sentence imposed outside the Guidelines framework. Id. A district court explains its reasons for imposing a variance in Section VI of the Statement of Reasons. Id.

The district court must make an individualized assessment based on the facts presented and may deviate from the Guidelines based on policy considerations or because the Guidelines fail to reflect the § 3553(a) factors. Mondragon-Santiago, 564 F.3d at 360. The district court should consider the factors in § 3553(a) in light of the parties' arguments, and may not presume the Guidelines range is reasonable. Gall v. United States, 552 U.S. 38, 48-49 (2007). The district court must adequately explain the sentence "to allow for meaningful appellate review and to promote the perception of fair sentencing." Id. at 597. A sentence outside the Guidelines is unreasonable if it "(1) does not account for a factor that should have received significant weight, (2) gives significant weight to an irrelevant or improper factor, or (3) represents a clear error of judgment in balancing the sentencing factors." United States v. Smith, 440 F.3d 704, 708 (5th Cir. 2006).

C. Legal Analysis

The sentence imposed in this case was substantively unreasonable because the district court imposed an upward departure sentence of 30 years (1) without accounting for a factor that should have been given significant weight–all mitigation evidence (2) for giving significant weight to an improper factor–the government's consideration of mitigating evidence in plea negotiations (3) and for committing a clear error of judgment in balancing the sentencing factors.

First, the district court refused to address or account for a factor that should have been given significant weight: Carey's plethora of mitigation evidence presented for consideration under 18 U.S.C. § 3553(a). This error is discussed in detail above. See supra, Part I. The district court in this case stated that it believed the government had already considered the mitigating evidence in its plea negotiations, and therefore the district court would not consider them at sentencing. See ROA. 159 (The district court states that the government "already rewarded" Carey for his mitigation through plea negotiations); see also ROA. 431 (In the written statement of reasons that district court stated "[t]he defendant's service and mitigation circumstances were considered by the Government when they chose not to pursue the death penalty and agreed to a cap of 30 years."). The district court violated 18 U.S.C. § 3553 and the Supreme court's instructions in Rita and Gall when it deferred its responsibility to consider mitigation evidence to the government. See Rita, 551 U.S. a 356; Gall, 552 U.S. at

51. The district court comments show that Carey was given a 30 year sentence because the district court refused to consider the mitigating evidence supporting a lower sentence.

Second, the district court gave significant weight to an improper factor: the government's consideration of mitigating evidence in its decision to enter into a plea with Carey. This improper consideration is discussed fully above. See supra, Part I. The record shows that the district court gave significant weight to this improper consideration. The district court mentioned this factor in both oral reasons and in the written statement of reasons for the sentence. See ROA. 159 (The district court states that the government "already rewarded" Carey for his mitigation through plea negotiations); see also ROA. 431 (In the written statement of reasons that district court stated "[t]he defendant's service and mitigation circumstances were considered by the Government when they chose not to pursue the death penalty and agreed to a cap of 30 years."). The district court comments show that Carey was given a 30 year sentence because the district court considered the government's unspoken reasons for entering into a plea agreement as a factor.

Third, the district court committed a clear error in balancing the sentencing factors in this case. The Sentencing Guidelines, which are presumed to be reasonable in this Circuit, hold that a defendant with no criminal history who commits one second degree murder and one attempted second degree murder should be sentenced

to 188 to 235 months imprisonment. With the base in mind, the district court was to consider the following mitigating and aggravating factors.

This case has overwhelming mitigation, as discussed throughout this brief. Marcus Carey has no criminal history. He joined the Army to serve his country, as many of his family members had, and to better his employment opportunities. He served in two wars, enduring and suffering the effects of heavy combat. He was diagnosed with PTSD while in the Army, but he was abandoned by the Army right before his term of service was set to expire, and forced to survive without proper mental health treatment. He self-medicated with JWH-018, a then legal synthetic marijuana, and on the morning of the homicide, something triggered an altered state of consciousness, and he acted without ration and without a clear understanding of his actions. As soon as Carey began to realize what was happening, he went to a neighbor's house and confessed. Help was called. His confession was filled with remorse and confusion, emotions he continued to express through the sentencing hearing. His family and war buddy testified that this crime was completely out of character for him. During the sentencing hearing, the district court agreed that this mitigation was present. As discussed above, the district court found that Carey: (1) did not act rationally on the morning of the crime; (2) was genuinely and immediately remorseful; (3) has mental health problems; (4) was not properly treated by the

military after combat; and (5) is a two-tour combat veteran. ROA. 158, 151, 160, 153, 159.

Despite finding this mitigation, however, the district court refused to balance it against the purported aggravating factors of the amount of stab wounds to the victims and Carey's statement to one victim regarding helping him die quicker. And it is important to note, that Carey was not asking for a downward departure, but rather presenting mitigation evidence to further support the reasonableness of the sentencing guideline range. The district court refused to balance the sentencing factors and instead imposed the maximum sentence allowed, which was more than 10 years above the guideline range. The district court's basis for refusing to consider mitigation and refusing to balance the sentencing factors was that Carey had already been rewarded by the government by allowing him to enter into a plea with a maximum penalty of 30 years. By conducting the sentencing in this case in this fashion, the district court essentially allowed Carey to be sentenced during plea negotiations with the government. The refusal of the district court to balance the mitigation evidence with the aggravating factors in light of the sentencing guideline range of 188 to 235 months, was an abuse of discretion and the sentence should be vacated and the case remanded.

CONCLUSION

For all of the foregoing reasons, appellant Marcus Patterson Carey respectfully prays that this Court vacate his sentence, and remand to the district district court for imposition of a reasonable sentence.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Original Brief for the Appellant Marcus Patterson Carey has been served by the 5th Circuit electronic filing system on Camille Ann Domingue, Assistant United States Attorney, on this 27th day of January, 2014.

/s/ Rebecca L. Hudsmith

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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s/ Rebecca L. Hudsmith
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Dated: January 27, 2014