No. __-_____

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT DION ABLES,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

APPENDIX

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APPENDIX A

United States District Court

Northern District of Texas
Fort Worth Division

UNITED STATES OF AMERICA	§	
v.	§	Case Number: 4:17-CR-038-A(01)
ROBERT DION ABLES	§	

JUDGMENT IN A CRIMINAL CASE

The government was represented by Assistant United States Attorney Aisha Saleem. The defendant, ROBERT DION ABLES, was represented by Federal Public Defender through Assistant Federal Public Defender Taylor Wills Edwards Brown.

The defendant pleaded guilty on March 24, 2017 to counts 1, 2 and 3 of the information filed on March 14, 2017. Accordingly, the court ORDERS that the defendant be, and is hereby, adjudged guilty of such counts involving the following offenses:

Title & Section / Nature of Offense	Date Offense Concluded	Count
18 U.S.C. § 2252(a)(2) Receipt of Child Pornography	07/5/2014	1
18 U.S.C. § 2251(a) Production of Child Pornography	11/20/2015	2
18 U.S.C. § 2251(a) Production of Child Pornography	12/12/2016	3

As pronounced and imposed on July 7, 2017, the defendant is sentenced as provided in this judgment.

The court ORDERS that the defendant immediately pay to the United States, through the Clerk of this Court, a special assessment of $300.00.

The court further concluded that the defendant is indigent and waived the $5,000 assessment required pursuant to 18 U.S.C. § 3014, as to Counts 2 and 3.

The court further ORDERS that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence address, or mailing address, as set forth below, until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court, through the clerk of this court, and the Attorney General, through the United States Attorney for this district, of any material change in the defendant's economic circumstances.

IMPRISONMENT

The court further ORDERS that the defendant be, and is hereby, committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 240 months as to Count 1, 360 months as to Count 2, and 360 months as to Count 3 to run consecutively for a total sentence of 960 months.

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

SUPERVISED RELEASE

The court further ORDERS that, upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years as to each of counts 1, 2, and 3, to run concurrently and that while on supervised release, the defendant shall comply with the following conditions:

1. The defendant shall not commit another federal, state, or local crime.

2. The defendant shall not unlawfully possess a controlled substance.

3. The defendant shall cooperate in the collection of DNA as directed by the U.S. Probation Officer, as authorized by the Justice for All Act of 2004.

4. The defendant shall have no contact with minors under the age of 18, including by correspondence, telephone, internet, electronic communication, or communication through third parties. The defendant shall not have access to or loiter near school grounds, parks, arcades, playgrounds, amusement parks or other places where children may frequently congregate, except as may be allowed upon advance approval by the probation officer.

5. The defendant shall have no contact with the victim(s), including correspondence, telephone contact, or communication through third parties except under circumstances approved in advance by the probation officer and not enter onto the premises, travel past, or loiter near the victims' residences, places of employment, or other places frequented by the victims.

6. The defendant shall participate and comply with the requirements of the Computer and Internet Monitoring Program, contributing to the cost of the monitoring in an amount not to exceed $40 per month. The defendant shall consent to the probation officer's conducting ongoing monitoring of his computer/computers. The monitoring may include the installation of hardware and/or software systems that allow evaluation of computer use. The defendant shall not remove, tamper with, reverse engineer, or circumvent the software in any way. The defendant shall only use authorized computer systems that are compatible with the software and/or hardware used by the Computer and Internet Monitoring Program. The defendant shall permit the probation officer to conduct a preliminary computer search prior to the installation of software. At the discretion of the probation officer, the monitoring software may be disabled or removed at any time during the term of supervision.

7. The defendant shall register as a sex offender with state and local law enforcement as directed by the probation officer in each jurisdiction where the defendant resides, is employed, and is a student, providing all information required in accordance with state registration guidelines, with initial registration being completed within three business days after release from confinement. The defendant shall provide written verification of registration to the probation officer within three business days following registration and renew registration as required by his probation officer. The defendant shall, no later than three business days after each change of name, residence, employment, or student status, appear in person in at least one jurisdiction and inform that jurisdiction of all changes in the information required in the sex-offender registry.

8. The defendant shall neither possess nor have under his control any pornographic matter or any matter that sexually depicts minors under the age of 18 including, but not limited to, matter obtained through access to any computer and any matter linked to computer access or use.

9. The defendant shall participate in sex-offender treatment services as directed by the probation officer until successfully discharged, which services may include psycho-physiological testing to monitor the defendant's compliance, treatment progress, and risk to the community, contributing to the costs of services rendered at the rate of at least $25 per month.

10. The defendant shall also comply with the Standard Conditions of Supervision as hereinafter set forth.

Standard Conditions of Supervision

1. The defendant shall report in person to the probation office in the district to which the defendant is released within seventy-two (72) hours of release from the custody of the Bureau of Prisons.

2. The defendant shall not possess a firearm, destructive device, or other dangerous weapon.

3. The defendant shall provide to the U.S. Probation Officer any requested financial information.

4. The defendant shall not leave the judicial district where the defendant is being supervised without the permission of the Court or U.S. Probation Officer.

5. The defendant shall report to the U.S. Probation Officer as directed by the court or U.S. Probation Officer and shall submit a truthful and complete written report within the first five (5) days of each month.

6. The defendant shall answer truthfully all inquiries by the U.S. Probation Officer and follow the instructions of the U.S. Probation Officer.

7. The defendant shall support his dependents and meet other family responsibilities.

8. The defendant shall work regularly at a lawful occupation unless excused by the U.S. Probation Officer for schooling, training, or other acceptable reasons.

9. The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment.

10. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.

11. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

12. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the U.S. Probation Officer.

13. The defendant shall permit a probation officer to visit him at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the U.S. Probation Officer.

14. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer.

15. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

16. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

The court hereby directs the probation officer to provide defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, as contemplated and required by 18 U.S.C. § 3583(f).

FINE

The court did not order a fine because the defendant does not have the financial resource or future earning capacity to pay a fine.

STATEMENT OF REASONS

The "Statement of Reasons" and personal information about the defendant are set forth on the attachment to this judgment.

Signed this the 7th day of July, 2017.

JOHN McBRYDE
UNITED STATES DISTRICT JUDGE

RETURN

I have executed the imprisonment part of this Judgment as follows:

_____

_____

_____

Defendant delivered on _____, 2017 to _____
at _____, with a certified copy of this Judgment.

United States Marshal for the
Northern District of Texas

By _____
Deputy United States Marshal

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-10796
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
June 25, 2018
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

ROBERT DION ABLES,

Defendant - Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:17-CR-38-1

Before BARKSDALE, OWEN, and WILLETT, Circuit Judges.

PER CURIAM:*

Robert Dion Ables pleaded guilty to receiving child pornography (count one) and producing it (counts two and three), in violation of 18 U.S.C. §§ 2252(a)(2) and 2251(a). He challenges his within-Guidelines sentence of 960 months' imprisonment.

Ables claims the district court relied on conduct that was not "relevant conduct" under Guideline § 1B1.3. to support enhancing his offense level under

* Pursuant to 5th Cir. R. 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 Cir. R. 47.5.4.

Guideline § 2G2.1 on count one for sadomasochistic images, the number of images involved, and pecuniary involvement. Because Ables did not preserve these issues in district court, review is only for plain error. *E.g.*, *United States v. Broussard*, 669 F.3d 537, 546 (5th Cir. 2012).

Under that standard, Ables must show a forfeited plain error (clear or obvious error, rather than one subject to reasonable dispute) that affected his substantial rights. *Puckett v. United States*, 556 U.S. 129, 135 (2009). If he makes that showing, we have the discretion to correct such reversible plain error, but generally should do so only if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings". *Id.*

Ables' claim raises fact questions pertaining to the type and number of images involved and whether the money he received from extorting other pedophiles accurately reflected his pecuniary gains. Because "[q]uestions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error", *United States v. Lopez*, 923 F.2d 47, 50 (5th Cir. 1991), Ables fails to demonstrate the requisite plain error.

Additionally, Ables' assertions that *United States v. Olano*, 507 U.S. 725, 732 (1993), and *United States v. Calverley*, 37 F.3d 160 (5th Cir. 1994) (en banc), which addressed legal error, dictate we not follow *Lopez* are unpersuasive. Likewise, his reliance on the Supreme Court's admonition in *Puckett*, 556 U.S. at 142, against the use of *per se* rules on plain-error review is misplaced. That language clarified that the discretionary fourth prong of the plain-error analysis was "meant to be applied on a case-specific and fact-intensive basis". *Id.* Ables effectively asks us to overturn our court's precedent, which we may not do as a panel. *E.g.*, *United States v. Walker*, 302 F.3d 322, 324-25 (5th Cir. 2002).

Accordingly, Ables' assertion that he has raised a legal issue warranting plain-error review based on the court's refusal to make fact findings under Guideline § 1B1.3 is meritless. Because Ables failed to raise this issue in district court, he, therefore, cannot now complain of the court's refusal to make such findings. *United States v. Ruiz*, 43 F.3d 985, 991–92 (5th Cir. 1995).

Ables additionally claims that, because his sentence on count one was enhanced for engaging in a pattern of sexual activity involving sexual abuse or exploitation of a minor, and such conduct was embodied in counts two and three, count one should have been grouped with either count two or count three. As discussed *supra*, because Ables did not raise these issues in district court, review is only for plain error. *E.g.*, *Broussard*, 669 F.3d at 546.

The probation officer misapplied the grouping rules by failing to group count one with one of the other counts. U.S.S.G. §§ 3D1.2(c), 3D1.4. (The Government agrees.) But, without the addition of the one level resulting from that mistake, Ables' maximum offense level of 43 and Guidelines-sentencing range would have remained the same. U.S.S.G. § 3D1.4. Consequently, he cannot show the error affected his substantial rights. *United States v. Garcia-Gonzalez*, 714 F.3d 306, 317 (5th Cir. 2013).

As Ables acknowledges, his claim that the court committed plain error by determining his offense level exceeded 43 before subtracting 3 levels for acceptance of responsibility is foreclosed. *United States v. Wood*, 1995 WL 84100 (5th Cir. 8 Feb. 1995) (unpublished). (He raises the issue to preserve it for possible further review.) Although unpublished, *Wood* is binding precedent because it was issued before 1 January 1996. 5th Cir. R. 47.5.3; *Zenor v. El Paso Healthcare Sys., Ltd.*, 176 F.3d 847, 854 n.4 (5th Cir. 1999).

Likewise, Ables' claim that his sentence was substantively unreasonable because the child-pornography Guidelines are not empirically based is

foreclosed. *United States v. Miller*, 665 F.3d 114, 121 (5th Cir. 2011); *United States v. Duarte*, 569 F.3d 528, 530 (5th Cir. 2009). (He raises the issue to preserve it for possible further review.)

AFFIRMED.

APPENDIX C

17-10796

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

ROBERT DION ABLES,
Defendant-Appellant

On Appeal from the United States District Court
For the Northern District of Texas
Fort Worth Division
District Court No. 4:17-CR-38-A-1

APPELLEE'S BRIEF

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STATEMENT REGARDING ORAL ARGUMENT

Ables raises only one non-foreclosed issue, and it is subject to plain-error review. The record is short, and Ables has failed to demonstrate plain error. Thus, the Court can easily affirm the judgment.

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STATEMENT OF JURISDICTION

This is a direct appeal from a sentence in a criminal case. The district court had jurisdiction under 18 U.S.C. § 3231, and this Court has jurisdiction under 18 U.S.C. § 3742(a). The district court entered judgment on July 7, 2017, and Ables timely filed the notice of appeal on July 19, 2017. Fed. R. App. P. 4(b). (ROA.4-5.)

STATEMENT OF THE ISSUE

Did the district court commit plain error in calculating Ables's total offense level?[1]

STATEMENT OF THE CASE

Ables pled guilty to receiving child pornography (Count 1) and two counts of producing child pornography (Counts 2 and 3). (ROA.34.) He admitted that, on July 5, 2014, he knowingly received on his cell phone an image of a naked minor girl whose legs were spread apart to expose her genitals. (ROA.36-37.) He also admitted that, on November 20, 2015, and December 12, 2016, he knowingly persuaded, induced, enticed, and coerced

[1] Ables raises two additional issues: (1) whether the district court plainly erred in subtracting three levels for acceptance of responsibility from a number in excess of 43, and (2) whether the sentence was substantively unreasonable because the applicable sentencing guidelines allegedly produce sentences that are higher than necessary to achieve the goals in 18 U.S.C. § 3553(a). (Brief at 2.) He admits that both issues are foreclosed. (Brief at 2, 26-30.) Thus, the government will not address them further.

minor girls MV1 and MV2, respectively, to send images of their genitals using a cell phone and the Kik messaging application. (ROA.36-37.)

Ables further acknowledged that, for at least the last two years, he had used social media applications like Kik to initiate contact with minor girls. (ROA.36.) During his conversations with them, he would convince them to send naked photographs of themselves to him. (ROA.37.) He would then coerce them into sending additional sexually explicit images by threatening to expose the girls' previously sent photos on social media tools like Facebook. (ROA.37.)

The PSR explained that this conduct related to Ables's attempt to extort between 300 and 500 adult men by posing as a minor girl and attempting to engage in sexually explicit conversations with them and share images of child pornography with them, including those he had collected from his minor victims. (ROA.130.) Once Ables received an incriminating image or information from the men, he would tell them that he would contact law enforcement unless they sent him money. (ROA.130.) From 2013 to 2016, he received between $40,000 and $50,000 in extortion payments from adult men. (ROA.130.)

Ables said that he found his minor victims on Kik and that he targeted younger girls between the ages of 14 and 17. (ROA.130.) He admitted that he

received images of between 100 to 200 girls and that he received and traded child-pornography images with other men on Kik. (ROA.130.)

Ables's statements to his victims substantiated his collection of thousands of images. (ROA.133-34.) The PSR reported that he told MV1 that he had "hundreds of slaves who send thousands of pictures." (ROA.133.) And he told MV2 that "I am a grown man who loves girls ur age. And I have thousands of pics of thousands of real girls." (ROA.134.) Ables said that he was searching for potential adult-male extortion victims even as the agents arrived at his house to execute the search warrant, and that he had last had contact with a potential minor victim within 48 hours of the search. (ROA.131.)

An examination of Ables' cell phone showed that he possessed 497 images and 254 video files containing child pornography. (ROA.131.) The guidelines consider each video clip to have 75 images, so the PSR found Ables accountable for 19,547 images of child pornography. (ROA.134.) Some of the videos depicted sadistic or masochistic conduct or other depictions of violence upon children. (ROA.131.) For instance, one video depicted sexual intercourse between an adult man and a toddler girl. (ROA.137.)

The PSR calculated a total offense level of 46 for Count 1, 38 on Count 2, and 36 on Count 3. (ROA.137-39.) The total offense level for Count 1

included a six-level enhancement for distributing material for pecuniary gain, a four-level enhancement for possessing sadomasochistic images, and a five-level enhancement because the offense involved 600 or more images. (ROA.137.)

After applying the multiple-count adjustment and grouping rules, the PSR arrived at a new offense level of 47. (ROA.139-40.) It then added five levels for engaging in a pattern of prohibited sexual activity. (ROA.140.) It deducted three levels for acceptance of responsibility, for a subtotal of 49. (ROA.140.) It then capped the total offense level of 43, the highest level on the guidelines sentencing table. (ROA.140.) Combined with a criminal history category of I, this equated to an advisory guideline range of life imprisonment, which the statutory maximums capped at 960 months. (ROA.148.)

Ables did not object to the PSR. (ROA.103, 157.) At sentencing, his counsel argued for a downward variance. (ROA.104-10.) The court rejected it and imposed a 960-month sentence, reasoning:

> Well, there have been times when I thought a sentence below the advisory guideline range would be appropriate in child pornography cases, and I've given a number of sentences below the bottom of the advisory guideline range. I'm not sure the government's ever agreed with it, but I felt that was appropriate.
>
> This is not one of those cases. This is one of the most egregious cases I've ever dealt with. In addition to the offenses the defendant pleaded guilty to, the information in the [PSR] indicates that he just is a very, very bad person generally.

> Apparently he engaged in an extortion scheme, looks like about two or three years, and according to the [PSR], he's attempted to extort money from 300 to 500 adult males, and he would negotiate with the adult males. I gather that what he was doing was developing information that those males had viewed child pornography or inappropriate things over their computers, and then once he had developed the information that they had, then he would threaten to expose them if they didn't give him some money. Apparently he received between $40,000 and $50,000 in those extortion payments.
>
> And then not only that, he . . . had photographic images that he received from between 100 and 200 females between the ages of 14 and 18, and part of that was related to another extortion scheme of his, and he would pretend . . . over the internet, that he was a teenage girl sometimes. Sometimes he took other roles.
>
> And he would encourage the girls he was talking to, to give him images over the computer that would be very embarrassing to them if they were exposed, and then he would tell them that he was going to expose them unless they did something else for him, and that would be to give him further images that were pornographic in nature, that he would encourage them to make pornographic images of themselves, and threaten that if they didn't, he would expose the images he already had.
>
> So I think this is a case that when I consider all the factors the Court should consider in sentencing under 18 [U.S.C. §] 3553(a), as well as the guidelines, that the defendant should be sentenced at his guideline range of 960 months, and that is the sentence I plan to impose.

(ROA.111-13.)

Ables did not object to the sentence on any basis. (ROA.117-18.)

SUMMARY OF THE ARGUMENT

The district court did not commit reversible error in its calculation of Ables's total offense level. He argues that the court erred in two ways. First,

he claims that the district court erred in finding that certain acts that took place between 2014 and 2016, including his collection of 19,000 child-pornography images and his distribution of some of those images for money in the extortion scheme, were relevant conduct with regard to Count 1, his receipt of a child-pornography image in July 2014. In this claim, Ables attempts to raise a new fact issue—whether those acts qualify as relevant conduct—that the district court was capable of resolving on proper objection at sentencing, and therefore it cannot constitute plain error on appeal. Even if this Court were to apply ordinary plain-error analysis, Ables has shown no error because his those acts were clearly relevant conduct to Count 1 as they were part of a common scheme or plan or, at the very least, part of the same course of conduct.

Second, Ables argues that the district court incorrectly applied the grouping rules, which resulted in an additional point to his offense level. Applying ordinary plain-error review, this Court should find that it is irrelevant whether the district court erred in this respect because the single point that Ables claims the court incorrectly added to his total offense level did not affect his substantial rights.

Finally, with regard to both alleged errors, Ables has failed to show why this Court should exercise its discretion to remand the case for resentencing. The district court made clear that it believed the 960-month sentence was

necessary based on the sentencing factors in 18 U.S.C. § 3553(a). The court emphasized that this was "one of the most egregious cases [it had] ever dealt with" involving child pornography and extortion, and Ables's conduct amply demonstrated to the court that he was a "very, very bad person." The court's conclusions are unassailable considering Ables's chronic—and related—exploitation of two groups: first and foremost, the hundreds of children who were the victims of child pornography, including those he manipulated into furthering his extortion scheme; and second, scores of adults whom Ables cultivated into targets for extortion based on their connection to the same child-pornography material that Ables himself coveted. This Court can easily affirm.

ARGUMENT AND AUTHORITIES

The district court did not plainly err in calculating Ables's total offense level.

Standard of Review

Ables admits that he did not object to the guideline calculations in the district court. (Brief at 9.) With regard to his claim that the district court erred in considering the number of images, sadomasochistic images, and exchange of images for pecuniary gain as relevant conduct to the receipt of the child-pornography image in Count 1, the Court has repeatedly applied the rule that "[q]uestions of fact capable of resolution by the district court on proper

objection at sentencing can never constitute plain error." *United States v. Lopez*, 923 F.2d 47, 50 (5th Cir. 1991). Indeed, this Court has applied this rule over a hundred times[2]—most recently, in *United States v. Maxey*, 699 F. App'x 435 (5th Cir. Nov. 1, 2017), when the defendant attempted to attack the drug-quantity amount in the PSR. *Id*. at 435.

Ables argues that this Court should nonetheless decline to apply this rule and analyze his relevant-conduct claim under the ordinary plain-error standard. As support, he cites *United States v. Buchanan*, 485 F.3d 274 (5th Cir. 2007), which he claims reviewed the particular issue presented here under the normal plain-error standard. (Brief at 10.) But he fails to mention that the *Buchanan* panel took up the factual question solely because it had "vacated the sentences on" four of the defendant's counts of conviction and "remanded for re-sentencing," and the panel determined that the sentencing issue was "likely"

[2] In the interest of brevity, the government will not cite all of the cases that have applied this rule. Rather, it warrants to the Court that its Westlaw search turned up well over 100 cases in which the Court has resolved factual issues by applying the rule. In fact, the Court has applied the rule at least twelve times in the last two years. *See Maxey*, 699 F. App'x at 435; *United States v. Glaze*, 699 F. App'x 311, 311 (5th Cir. Oct. 16, 2017); *United States v. Oti*, 872 F.3d 678, 694 (5th Cir. Oct. 3, 2017); *United States v. Reynolds*, __ F. App'x __, 2017 WL 3328154, at *3 n.6 (5th Cir. Aug. 3, 2017); *United States v. Sphabmisai*, __ F. App'x __, 2017 WL 3271060, at *1 (5th Cir. Aug. 1, 2017); *United States v. Bookout*, 693 F. App'x 332, 333 (5th Cir. July 13, 2017); *United States v. McCain-Sims*, 695 F. App'x 762, 766 (5th Cir. Jun. 12, 2017); *United States v. Ramirez-Castro*, 687 F. App'x 400, 400 (5th Cir. Apr. 25, 2017); *United States v. Cooper*, 669 F. App'x 243, 244 (5th Cir. Oct. 4, 2016); *United States v. Rios*, 669 F. App'x 193, 194 (5th Cir. Sept. 20, 2016); *United States v. Ayala*, 667 F. App'x 840, 840 (5th Cir. Aug. 1, 2016); *United States v. Chavira*, 647 F. App'x 503, 503 (5th Cir. May 10, 2016).

to "recur" at the resentencing so it wanted to give guidance to the district court. *Id.* at 286. No such exceptional situation presents itself here.

Additionally, Ables contends that this Court should stop applying the rule because it purportedly has unsound legal support. (Brief at 11-13.) But this ignores (1) the regularity and consistency with which this Court has applied the rule in contexts such as this for the past 26 years, and (2) the logic in having such a rule with regard to unpreserved factual questions. As to logic, the rule is simply a shorthand way of acknowledging that, in reality, an appellant could not succeed in raising a new factual question on plain-error review because it would be impossible to show that the district court's failure to resolve the unobjected-to factual question was plainly erroneous. The rule is also logical in that it recognizes that the appellate court is not a fact-finding body and should not be in the business of receiving new evidence or new arguments related to evidence in the record and making factual findings on an issue for the first time.

Judge Jones's concurrence in *United States v. Claiborne*, 676 F.3d 434 (5th Cir. 2012), explicitly endorses the logic of this rule. In *Claiborne*, the Court, writing per curiam, applied the rule to find that the defendant's appeal of the two-level obstruction-of-justice enhancement was not plainly erroneous. *Id.* at 438. Judge Prado concurred but expressed skepticism about the rule. *Id.* at

440-44. Judge Jones also concurred to address Judge Prado's concerns. *Id.* at 438.

Judge Jones's concurrence first noted that the per curiam opinion "faithfully follows our twenty year old precedent establishing that findings of fact by a district court are not subject to reversal for 'plain error.'" *Id.* at 438. It then discussed several justifications for the rule. For example, "so many sentencing findings amount to judgment calls, based in part on the trial court's intimate knowledge of local probation and law enforcement practices." *Id.* at 439. Thus, it "seems nearly inconceivable that we could deem their factual findings 'plainly erroneous' under the *Olano* definition." *Id.* Relatedly, the concurrence reasoned that "appellate courts are singularly ill-suited to reviewing unobjected-to facts pertinent to sentencing," and "to allow appellate second-guessing when no factual error was pointed out below erodes the distinction between plain error and clear error." *Id.*

The concurrence also emphasized that applying the rule "is hardly unfair to defendants" because "each defendant and his attorney have ample advance access to the PSR" and "[it] seems highly unlikely that a competent counsel will fail to timely raise a factual objection to an enhancement in the district court." *Id.* And it noted that potential unfairness to the defendant is not the only factor worth considering:

> It is also important that the public, represented by the government, be apprised of potential sentencing defects at the trial level, in order to save resources and utilize law enforcement capabilities efficiently. Every resentencing compelled following plain error review imposes costs and dangers when a defendant is remitted from prison back (perhaps hundreds of miles) to the sentencing court. Arguably, district courts spend more time trying to foresee and prevent reversal based on the errors not pointed out to them. In any event, they are blindsided and their schedules adversely affected by the disorderliness of allowing criminal defendants to prevail on issues raised for the first time on appeal. The balance of hardships is shared among the defendant, the public and the courts . . . when the proper sentencing objections are not raised in the trial court.

Id. at 439-40.

The concurrence further explained that the Court should continue to apply the rule in the interest of consistency and regularity. *Id.* It reasoned that "[t]his [C]ourt has, far more often than not, followed *Lopez*. That a few opinions of this [C]ourt fail to follow *Lopez* in the past twenty years says less about our established court precedent than it does about the potential for error in the increasingly complex law of federal sentencing." *Id.* at 439.

This Court has continued to "faithfully follow" its precedent and apply the rule in the years since *Claiborne*. It should do the same here and hold that Ables cannot demonstrate plain error with regard to the relevant-conduct determination because he asks this Court to address previously unraised factual issues.

If the Court declines to apply the rule, it should apply the ordinary plain-error standard to the relevant-conduct claim. It must also apply the plain-error standard to Ables's claim that the district court misapplied the grouping rules. To prevail, Ables must have shown a forfeited error that is clear or obvious and affects his substantial rights. *Puckett v. United States*, 556 U.S. 129, 135 (2009). "A sentencing error affects a defendant's substantial rights if he can show a reasonable probability that, but for the district court's misapplication of the Guidelines, [he] would have received a lesser sentence." *United States v. John*, 597 F.3d 263, 284-85 (5th Cir. 2010) (internal quotation marks omitted). Even if Ables were to make such a showing, this Court has the discretion to correct the error only if it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Puckett*, 556 U.S. at 135 (internal quotation marks and citation omitted). "Meeting all four prongs is difficult, as it should be." *Id*. (internal quotation marks omitted).

Discussion

A. Ables has failed to prove that the district court plainly erred in its relevant-conduct determination.

i. Ables has demonstrated no error, much less clear error.

Ables first argues that the district court erred in its calculation of the total offense level for Count 1—receipt of the image of a minor girl's genitalia on July 5, 2014—because it included (1) a five-level enhancement because the

offense involved 600 or more images, (2) a four-level enhancement for material that portrays sadomasochistic conduct or sexual abuse or exploitation of an infant or toddler, and (3) a six-level enhancement because the offense involved distribution for pecuniary gain—specifically, Ables distributed images to other adult men and then extorted them. (Brief at 14-19; *see* ROA.137-38.) Ables claims that, unlike Counts 2 and 3, which concerned images of MV1 and MV2, the image in Count 1 was not relevant conduct with regard to the extortion scheme in which he received $40,000 to $50,000. He also claims that the Count 1 image was not relevant conduct to the other 19,000 images he collected over the same time frame or to the sadomasochistic child pornography he collected during that period. (Brief at 14-19.) Ables ignores critical facts that show that the image Ables received in Count 1 was part of a common scheme or plan or, at the very least, part of the same course of conduct as these other acts.

Section 1B1.3 of the Sentencing Guidelines governs relevant-conduct determinations. It provides that "all acts and omissions committed . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility

for that offense" constitute relevant conduct. USSG § 1B1.3(a)(1)(A).[3] It further provides that, with respect to receipt-of-child-pornography offenses like that charged in Count 1, relevant conduct also includes "all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction." USSG § 1B1.3(a)(2).[4]

The commentary to Section 1B1.3 provides that acts that are part of a common scheme or plan are "substantially connected to each other by at least one common factor, such as . . . common purpose[] or similar *modus operandi*." USSG § 1B1.3, comment. (n.5(B)(i)). Relatedly, acts that are part of the "same course of conduct" include acts that "are sufficiently connected or related to each other to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses." USSG § 1B1.3, comment. (n.5(B)(ii)). Factors a court should consider in determining whether acts are part of the same course of conduct include "the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses." *Id.*

[3] The PSR applied the 2016 version of the Guidelines Manual, (ROA.136), and therefore all citations to the guidelines in this brief are to the 2016 version.

[4] This provision applies to "offenses of a character for which § 3D1.2(d) would require grouping of multiple counts." USSG § 1B1.3(a)(2). Section 3D1.2(d) requires grouping of multiple counts of offenses that fall under Section 2G2.2, which includes receipt-of-child-pornography offenses. USSG § 3D1.2(d); *see* USSG § 2G2.2.

Given these standards, the district court did not err, let alone clearly err, in finding that Ables's collection of 19,000 child-pornography images, including sadomasochistic or violent images, and his distribution of images for pecuniary gain were part of a common scheme or plan or the same course of conduct as Ables's receipt of the image charged in Count 1 in July 2014. First, the PSR explicitly linked Ables's receipt of the image in Count 1 and this other conduct to the same time frame, which was the period in which he was operating his extortion scheme. It explained that, "[f]rom at least July 5, 2014, [to] December 12, 2016, Ables was involved in the receipt and production of child pornography." (ROA.134.) It continued:

> As to Count 1, the images and videos received, via the computer, by Ables included prepubescent minors as well as minors engaged in sadistic and masochistic conduct. *Ables admitted he received such visual depictions between 2014 and December 12, 2016, while engaged in an extortion scheme wherein he received between $40,000 and $50,000.* Ables received 497 images and 254 video files of child pornography. . . . [E]ach video . . . shall be considered to have 75 images, which total 19,050. Thus, Ables is accountable for a total of 19,547 images of child pornography.

(ROA.134.) Second, the PSR specified that Ables received and distributed all of these images using his cell phone and "categorized the minor females' images under different folders in his phone," which showed that this was all part of an organized plan or scheme or part of an ongoing series of the same offenses. (ROA.131.) And third, in carrying out the offenses in Counts 2 and

3 (getting MV1 and MV2 to send him pornographic photos of themselves), Ables bragged to these victims that "I have hundreds of slaves who send thousands of pictures," and "I have thousands of pics of thousands of real girls." (ROA.133-34.) These words unquestionably linked all of the images Ables possessed together into one sordid scheme or course of conduct.

Applying the factors in Section 1B1.3's commentary to these facts unquestionably shows a common scheme or, at the very least, the same course of conduct. In terms of the time interval between offenses, there was no time interval between Ables's receipt of the images counted for relevant-conduct purposes and the image in Count 1 because Ables received all of them during the course of his extortion scheme from July 2014 to December 2016. In terms of the regularity (repetitions) of the offenses, there were countless repetitions of this conduct (receipt of child pornography from minor girls and adult men and distribution of images to them) during this period—at least some of which was for pecuniary gain. And finally, in terms of the degree of similarity of the offenses, the image in Count 1 was very similar to the other 19,000 images he received during this time frame in terms of content (they were child pornography involving minor females).

In contrast, Ables presented no evidence that the image charged in Count 1 was unrelated to the other images at issue or to his extortion scheme.

Thus, the district court did not err—let alone clearly err—in counting the other 19,000 images, including the sadomasochistic ones, and the fact that he distributed at least some of the images for pecuniary gain, in calculating the offense level for Count 1.

Ables argues that *United States v. Fowler*, 216 F.3d 459 (5th Cir. 2000), establishes that the district court's relevant-conduct finding was plainly erroneous, but this is incorrect. Fowler pled guilty to interstate transportation of child pornography. *Id.* at 460. The crime involved Fowler emailing a child-pornography image in October 1998 to someone named Katrina, whom Fowler believed to be a sexually inexperienced minor, in an effort to entice her to meet him and engage in "certain non-violent sexual acts." *Id.* at 461-62. At sentencing—and over Fowler's objection—the district court applied the enhancement for material that portrays sadomasochistic conduct because authorities recovered 76 images of pornographic and sadistic sexual conduct, primarily involving bondage, from his residence. *Id.* at 461, 463. Of the 76 images, the government argued that two portrayed minors. *Id.*

On appeal, the panel majority, over a dissent by Judge Garza, reversed application of the enhancement, reasoning that nothing suggested that Fowler's possession of the bondage photos was related in any way to his attempt to entice Katrina and that, "if anything[,] Fowler refrained from

sending such images because he believed they would only have impaired his efforts to entice Katrina." *Id.* at 462. It also pointed out that the only two sadistic images of minors Fowler possessed were dated 1996 and that Fowler's earliest communication with Katrina occurred in December 1997, which further indicated that "Fowler's receipt of the images depicting sadistic conduct were [not] part of the plan to entice Katrina that led to the offense of conviction or any similar plan." *Id.* at 462. Thus, the panel majority concluded that the district court clearly erred in finding that the sadistic images were "part of the same course of conduct or common scheme or plan as the offense of conviction" and therefore were relevant conduct under USSG § 1B1.3(a). *Id.*

Fowler does not suggest plain error in Ables's case. First, Fowler preserved his claim by objecting at sentencing, and therefore this Court applied clear-error review, rather than the plain-error standard, on appeal. And even on clear-error review, the panel decision was two to one, signifying the difficulty of the issue presented there. Second, Fowler's offense related to a discrete episode of attempting to entice someone he believed to be an underage girl named Katrina to engage in sexual intercourse with him by sending a child-pornography image. No evidence showed that the sadomasochistic images he possessed—only three percent of which involved minors—related at

all to this attempted enticement. Finally, Fowler received the two images of minors engaged in sadomasochistic conduct at least a year before his first communication with Katrina, and thus his offense was temporally distant from his receipt of those images.

Another case like *Fowler* reinforces the differences between *Fowler* and Ables's case. *See United States v. Teuschler*, 689 F.3d 397, 400 (5th Cir. 2012). In *Teuschler*, the defendant used the internet to contact someone named Alexis whom he believed to be a 13-year-old girl and corresponded with her for five days in May 2010, sending her nine images of child pornography during their communications. *Id.* at 398. Authorities located 277 images of child pornography on his computer while executing a search warrant. *Id.* At sentencing, he objected to the district court's application of an enhancement for possession of between 150 and 300 child-pornography images. *Id.*

On appeal, the Court held that the district court clearly erred in applying that enhancement and cited *Fowler* in support. *Id.* at 399-400. It rejected the government's argument that Teuschler possessed the 277 images in the same course of conduct, reasoning that "there is no evidence that Teuschler had an ongoing scheme to entice other girls to engage in sexual activity" and "there is no evidence . . . that Teuschler possessed the additional images at the time of his offense of conviction." *Id.* at 400.

In contrast, the district court had evidence of both of these facts here—that Ables had an ongoing scheme to entice or force minor girls to produce and send him child pornography, and that he received and possessed those images during the same time frame as his offense of conviction. Moreover, unlike in *Fowler* and *Teuschler*, his conduct did not relate simply to engaging with one purported minor—it related to a two-year scheme in which he received images from 100 to 200 teen girls and extorted adult men after distributing such images to them. These differences would establish no clear error if Ables had preserved his objections, as did the appellants in *Fowler* and *Teuschler*, and they certainly establish no plain error here.

This case is, in fact, much closer to *Buchanan*, 485 F.3d 274, which, on plain-error review, rejected the appellant's reliance on *Fowler* and found that the other child-pornography images Buchanan possessed were relevant conduct to his convictions for receipt and possession of child-pornography images. Buchanan saved several child-pornography images on his work computer, and a jury found him guilty on five counts—four relating to images found in his temporary internet files and one related to eleven images found on his hard drive. *Id.* at 277-78. He argued on appeal that the district court improperly enhanced his offense level for possessing sadomasochistic images, claiming that the sadistic image found on his hard drive was not relevant

conduct to the four charged images from his temporary internet files and citing *Fowler* in support. *Id*. at 286.

The Court disagreed, reasoning:

> The defendant in *Fowler* sent images of child pornography to an undercover agent posing as a female minor. When the defendant's home was searched, agents found additional images depicting sadistic conduct saved on discs from previous years. Possession of the images did not constitute relevant conduct because they were not part of the same course of conduct as the offense of the conviction—providing pictures to entice a minor.
>
> By contrast, the pictures in question were found on Buchanan's hard drive only a few days after the temporary internet files were discovered. *Even though count five charges a different crime from the other counts, the crimes are similar, and Buchanan has not shown that his receipt of the sadistic and masochistic image was temporally distant from receipt of the four images on which counts one through four were based*. The district court did not commit plain error by concluding that the sadomasochistic depiction of child pornography found on Buchanan's hard drive was part of the same course of conduct as the conviction for receipt of child pornography.

Id. at 286-87 (emphasis added). The same reasoning applies here, and this Court can easily conclude that the district court did not err, let alone clearly or obviously err, in its relevant-conduct determination.

ii. Assuming clear error, Ables has likely not shown a potential effect on his substantial rights, and he has failed to demonstrate why this Court should exercise its discretion to remand the case.

Ables argues that, excluding all of the above-discussed enhancements, he would have had a total offense level of 42—one point lower than his final offense level of 43. (Brief at 21-22.) But if this Court were to conclude that the district court erred with respect to only one of the three enhancements at issue, Ables would still have a total offense level of 43 or more, which would not affect his guideline range.[5] As explained in Section A.i., the district court did not err in applying any of the enhancements, much less two out of the three, and thus he has shown no effect on his substantial rights.

[5] For instance, if the district court erroneously applied the six-level pecuniary-gain enhancement (the largest enhancement to which Ables objects) but properly applied the other two enhancements, Ables's total offense level solely on Count 1 would be 40 instead of 46. (ROA.137-38.) In applying the grouping rules, the district court would then find two groups—one (Counts 1 and 2) with a total offense level of 40 and the other (Count 3) with a total offense level of 36. (ROA.139; *see infra* p. 24 n.6 (explaining that the proper application of the grouping rules would result in two groups).) This would result in "two units" because Counts 1 and 2, with a highest total offense level of 40, would constitute one unit, and Count 3, with a total offense level of 36, would constitute a second unit. *See* USSG § 3D1.4(a) ("Count as one Unit the Group with the highest offense level. Count one additional Unit for each Group that is equally serious or from 1 to 4 units less serious."). Two units equals two additional offense-level points. *See id*. The court would add these two points to Count 1's total offense level of 40, and it would also add the five-level enhancement for a pattern of activity involving prohibited sexual conduct, (*see* ROA.140), for a subtotal of 47. The court would then deduct three levels for acceptance of responsibility, (*see* ROA.140), for a total offense level of 44. The sentencing table would cap this at 43—the same total offense level the district court originally calculated for Ables. (ROA.140.)

Finally, Ables has failed to establish, under the fourth prong of plain-error review, why this Court should remand his case for resentencing. He admitting to carrying on a two-year double-extortion scheme and receiving pornographic images from 100 to 200 minor girls and $40,000 to $50,000 from adult men in extortion proceeds. In imposing sentence, the district court emphasized the egregious nature of Ables's crime, reasoning:

> [T]here have been times when I thought a sentence below the advisory guideline range would be appropriate in child pornography cases, and I've given a number of sentences below the bottom of the advisory guideline range. I'm not sure the government's ever agreed with it, but I felt that was appropriate.
>
> This is not one of those cases. This is one of the most egregious cases I've ever dealt with. In addition to the offenses the defendant pleaded guilty to, the information in the [PSR] indicates that he is just a very, very bad person generally.

(ROA.111-12.)

These well-supported observations show not only that the district court almost certainly would not impose a lower sentence on remand, but that this case does not present this Court with compelling circumstances warranting exercise of its discretion to remand. As the district court explained, Ables "attempted to extort money from 300 to 500 adult males" and "had pornographic images that he received from between 100 and 200 females between the ages of 14 and 18," which he would threaten to reveal "unless they did something else for him, and that would be to give him further

[pornographic] images." (ROA.111-12.) Given this conduct, the public would certainly not be offended to learn that Ables had received a sentence of 960 months in prison, and remand is unnecessary.

B. Ables has shown no plain error in the court's application of the grouping rules.

Ables also argues that the district court improperly applied the grouping rules. (Brief at 19-20.) The government concurs that this appears to be the case. The PSR enhanced Ables's offense level on Count 1 based on conduct charged in Counts 2 and 3, (*see* ROA.137 ¶ 56), and USSG § 3D1.2(c) provides that "[w]hen one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts," the counts should be grouped. USSG § 3D1.2(c); *see United States v. Runyan*, 290 F.3d 223, 251 (5th Cir. 2002). Thus, it seems that Ables's counts should have been grouped into two groups rather than three.[6]

But this apparent error resulted only in a one-level addition to Ables's total offense level. (ROA.139-40.) Assuming this Court finds no error in the district court's application of the enhancements discussed in Section A (for numerosity, sadomasochistic conduct, and pecuniary gain), the grouping-rule

[6] The government believes two groups would have been appropriate because Section 3D1.2(d) provides that Counts 2 and 3, which fall under USSG § 2G2.1, should not be grouped together. USSG § 3D1.2(d). Thus, although it appears that Count 1 should have been grouped with Count 2, Counts 2 and 3 should not have been grouped together, which results in a total of two groups.

error would not have affected Ables's total offense level. With the one point that resulted from application of the grouping rules, Ables's total offense level was 49 before being capped at 43. (ROA.140.) Without the extra point, the total offense level would have been 48, which still would have been capped at 43. (ROA.140.) Thus, the one level would not have made any difference in terms of Ables's final total offense level or resulting guideline range. Additionally, for the reasons discussed in Section A.ii., Ables has not shown why this Court should remand for resentencing based on this error.

CONCLUSION

This Court should affirm the judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that this document was served on Ables's attorney, Kevin Joel Page, through the Court's ECF system on December 22, 2017, and that: (1) any required privacy redactions have been made; (2) the electronic submission is an exact copy of the paper document; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

/s/Leigha Simonton
Leigha Simonton

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