

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

JOHN KEVIN WALDRIP,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, **JOHN KEVIN WALDRIP**, pursuant to Rule 39 and 18 U.S.C. § 3006A(d)(6), asks leave to file the accompanying Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of costs and to proceed in forma pauperis. Petitioner was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A (b) and (c), on appeal to the United States Court of Appeals for the Fifth Circuit.

Date:
November 7, 2019.

Respectfully submitted,
/s/ Yolanda Jarmon
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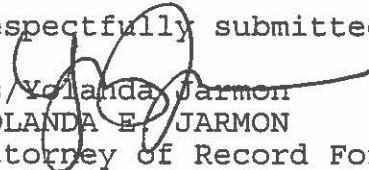
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QUESTIONS PRESENTED

I. In a consolidated Appeal JOHN KEVIN WALDRIP argued that the district court erroneously applied 18 U.S.C. § 3014 when it imposed a total of \$15,000 in special assessments under § 3014 (a)(3); and that the district erred by holding that he committed a Grade A violation as defined by U.S.S.G. § 7B1.1

The Fifth Circuit vacated and remanded the supervised release sentence finding no Grade A violation under 7B1.1. However, the Fifth Circuit affirmed the special assessments imposed under 18 U.S.C. § 3014.

In light of the foregoing, the question presented is as follows:

Whether the Fifth Circuit violated federal law when it refused to vacate the \$15,000 special assessments.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings are named in the caption of the case before the Court.

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(S.D. Tex. December 8, 2017). ²

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PRAYER

The petitioner, JOHN KEVIN WALDRIP, respectfully prays that a writ of certiorari be granted to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit issued on August 9, 2019.

OPINIONS BELOW

The original judgments reflecting Mr. Waldrip's original convictions and sentences can be found at United States v. John Kevin Waldrip Cr. No. 3:13:CR:00016-1-1 (S.D. Tex. December 8, 2017; and United States v. John Kevin Waldrip, Cr. No. 3:16:CR:00016-1-1 (S.D. Tex. December 8, 2017 (Exhibits A and B). However, on August 9, 2019, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming Waldrip's convictions and sentences for distribution receipt, and possession of child pornography and vacating and remanding the revocation sentence for re-sentencing. United States v. Waldrip, Nos. 17-41242, 17-41253, __ Fed. Appx. __ 2019 WL 3770805, 2019 U.S. App. LEXIS 23789, at *3-4 (5th Cir. Aug. 9, 2019) (affirmed in part, remanded in part).³ (Exhibit C).

No petition for rehearing was filed.

JURISDICTION

On August 9, 2019, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming the judgment of conviction and sentence in this case. This petition is filed within ninety days after entry of the judgment. See. Sup. Ct. R. 13.1 and 13.3. Jurisdiction of the Court is invoked under Section 1254(1), Title 28, United States Code.

FEDERAL STATUTES INVOLVED

18 U.S.C.3014

(a)In General.—Beginning on the date of enactment of the Justice for Victims of Trafficking Act of 2015 and ending on September 30, 2021, in addition to the assessment imposed under section 3013, the court shall assess an amount of \$5,000 on any non-indigent person or entity convicted of an offense under—

(1)chapter 77 (relating to peonage, slavery, and trafficking in persons);

(2)chapter 109A (relating to sexual abuse);

(3)chapter 110 (relating to sexual exploitation and other abuse of children);

(4)chapter 117 (relating to transportation for illegal sexual activity and related crimes); or

(5)section 274 of the Immigration and Nationality Act (8 U.S.C.

1324) (relating to human smuggling), unless the person induced, assisted, abetted, or aided only an individual who at the time of such action was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

STATEMENT OF THE CASE

A. Course of Proceedings And Facts

The Copyright Case

On July 24, 2013, a Two-Count Indictment was filed in Cause 3:13-CR-00016-1 (Hereinafter "the copyright case"), charging Waldrip in Count One with trafficking in counterfeited labels for copyrighted works, and in Count Two with copyright infringement. (ROA.17-41253.13-14). Waldrip pled guilty to both Counts in the copyright case. (ROA.17-41253.85-90, 330-341). The Total Offense Level in the was set at 11 with a Criminal History Category of III resulting in a guideline range of imprisonment of 12-18 months and supervised release range of 1-3 years. (ROA.17-41253.342). Waldrip was sentenced to 14 months imprisonment on both Counts to run concurrently, and two years supervised release on both Counts to run concurrently. (ROA.17-41253.85-90, 330-341).

Waldrip's supervised release in the copyright case began on March 5, 2016. (ROA.17-41253.121). About four months later, on July 18, 2016, the probation department filed Probation Form 12 C

requesting a hearing regarding Waldrip's supervised release in alleging that he had committed various crimes related to Child Pornography. (ROA.17-41253.121-123). On November 1, 2016, approximately, eight months after beginning his supervised release, Waldrip was arrested for the alleged violations of supervised release. (ROA.17-41253.126).

The Child Pornography Case

On October 27, 2016, approximately seven months after he began supervised release in the copyright case, a Three-Count indictment in Cause 3:16-CR-00016-1 was filed charging Waldrip in Count One with Distribution of Child Pornography; Count Two, with Receipt of Child Pornography; and Count Three, with Possession of Child Pornography. (ROA.17-41242.10-12). On June 7, 2017, Waldrip entered pleas of guilty to all three Counts of Child Pornography. (ROA.17-41242.95, 106; ROA.17-41253.324). Consequently, on November 16, 2017, the supervised release ordered in case number 3:13-CR-16-01, the copyright case, was revoked and Waldrip was sentenced to an 18-month term of imprisonment for the supervised release violation. (ROA.17-41253.325-326).

As to the child pornography case, the 2016 Guidelines Manual was used. The Base Offense level was set at 22 pursuant to 18 U.S.C. §§ 2252A(a)(2)(B), 2252A(b)(1) and 2G2.2(a)(2). Two points were added pursuant to U.S.S.G. § 2G2.2(b)(2) because the offense allegedly involved prepubescent minors or minors who had not attained the age of 12 years.. An additional two points were added

pursuant to U.S.S.G. § 2G2.2(b)(3)(F), because the offense allegedly involved the distribution of the material by Peer -to-Peer file sharing network. Another two points were added pursuant to U.S.S.G. § 2G2.2(b)(6), because the offense allegedly involved the use of a computer for the possession, transmission, receipt, or distribution of the material. Five points were added pursuant to U.S.S.G. § 2G2.2(b)(7)(D) because the offense allegedly involved 600 or more images. Three points were deducted for acceptance of responsibility pursuant to U.S.S.G. §§ 3E1.1(a) and (b). The Total Offense Level resulted in a level 30.

The criminal conviction score was calculated at 22 resulting in a Criminal History Category of VI under U.S.S.G. Chapter 5 Part, A. On October 28, 1992, Waldrip pleaded guilty to delivery of a controlled substance, served five years imprisonment and parole was terminated on August 2, 1997. Therefore, three points were added to the score under U.S.S.G. § 4A.1.1(a). On April 20, 1992, Waldrip pleaded guilty to possession of a controlled substance, received 4 years imprisonment with 6 days jail credit and completed parole on August 2, 1997. Therefore, three points were added to the score under U.S.S.G. § 4A.1.1(a). On November 10, 1992, Waldrip pleaded guilty to possession of a controlled substance, was sentenced to five years imprisonment with 102 days jail credit and completed parole on August 2, 1997. Therefore, three points were added to the score under U.S.S.G. § 4A.1.1(a). On August 16, 1996, Waldrip entered a plea of nolo contendere to driving while

intoxicated, received a sentence of 90 days imprisonment, and completed probation on August 16, 1997. Therefore, one point was added to the score under U.S.S.G. § 4A.1.1(c).

On February 9, 2007, Waldrip pleaded guilty to false claim against the United States, was sentenced to 60 months imprisonment, three years supervised release and probation was revoked on March 6, 2014. He was then sentence to 13 months imprisonment. Therefore, three points were added to the score under U.S.S.G. § 4A.1.1(a). On August 26, 2013, Waldrip received a fine of \$350.00 for possession of drug paraphernalia resulting in one point under U.S.S.G. § 4A.1.1(c).

On April 9, 2014, Waldrip pleaded guilty to trafficking in counterfeit labels for copyrighted works/copyright infringement, was sentenced to 14 months imprisonment to run concurrent with the false claim sentence above, two years supervised release and supervised release was revoked on June 7, 2017. Therefore, three points were added to the score under U.S.S.G. § 4A.1.1(a). On February 10, . 2016, Waldrip pleaded guilty to fraudulent use of identifying information, was sentenced to 21 months imprisonment with 610 days jail credit. Therefore, three points were added to the score under U.S.S.G. § 4A.1.1(b). At the time the instant offenses were committed, Waldrip was on federal supervised release in Cause 3:13-CR-00016-01, therefore two points were added pursuant to U.S.S.G. § 4A.1.1(d).

Relevant to the instant request for review, Waldrip objected

to paragraph 86 of the PSI arguing that he was indeed indigent and therefore should not be assessed a \$5,000.00 special assessment on each count of conviction. The objection was denied at sentencing. (ROA.17-41242.118-119,136) .

In a consolidated Appeal Mr. Waldrip argued that the district court erroneously applied 18 U.S.C. § 3014 when it imposed a total of \$15,000 in special assessments under § 3014 (a)(3); and that the district court erred in finding that he committed a Grade A violation as defined by U.S.S.G. § 7B1.1.

The Fifth Circuit vacated and remanded the supervised release sentence holding there was no Grade A violation under 7B1.1. However, the Fifth affirmed the special assessments imposed under 18 U.S.C. § 3014.

This Court should grant certiorari to determine whether the Fifth Circuit violated federal law when it refused to vacate the \$15,000 special assessments; and because the proper application of the sentencing guidelines is of exceptional importance to the administration of justice in federal criminal cases, this Court should decide this question and, and upon review, should reverse the judgment of the Fifth Circuit.

BASIS OF FEDERAL JURISDICTION IN THE
UNITED STATES DISTRICT COURT

This case was brought as a federal criminal prosecution involving copyright crimes in violation of 18 U.S.C. § 2318(a)(1) and 17 U.S.C.(506)(a)(1)(B); and child pornography crimes in violation of 18 U.S.C. §2252A. The district court therefore had jurisdiction pursuant to 18 U.S.C. § 3231.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to determine whether the Fifth Circuit violated federal law when it refused to vacate the \$15,000 special assessments, and because the proper application of the sentencing guidelines is of exceptional importance to the administration of justice in federal criminal cases, this Court should decide this question and, and upon review, should reverse the judgment of the Fifth Circuit.

ISSUE ONE RESTATED: Did The Fifth Circuit violated federal law when it refused to vacate the \$15,000 special assessments.

A. Standard of Review

The factual findings of the district court are reviewed under the "clearly erroneous" standard. United States v. Salazar, 70 F.3d 351,352 (5th Cir. 1995). Whether a defendant is indigent for purposes of the special assessment under 18 U.S.C. § 3014(a) is an issue of fact that this court reviews for clear error. United States v. Streaty, 2018 U.S. App. LEXIS 23192, *1-2, 735 Fed.Appx.140 2018 WL 4000946 (5th Cir. Tex. August 20, 2018) (citing United States v. Harris, 702 F.3d 226, 229 (5th Cir. 2012)). "A factual finding is not clearly erroneous as long as it is plausible in light of the record as a whole." Id. (citing United States v. Pacheco-Alvarado, 782 F.3d 213, 220 (5th Cir. 2015) (internal quotation marks and citation omitted)).

Whether the district court applied the correct legal standard in assessing Waldrip's non-indigence, however, is a question of law

the Fifth Circuit reviews de novo. United States v. Graves, 908 F.3d 137, 140 (5th Cir. 2018)(citing Pedcor Mgmt. Co. Welfare Benefit Plan v. Nations Pers. of Tex., Inc., 343 F.3d 355, 358 (5th Cir. 2003)).

B. The imposition of the 15,000.00 special assessment constitutes clear error.

In a consolidated Appeal Mr. Waldrip argued that the district court erroneously applied 18 U.S.C. § 3014 when it imposed a total of \$15,000 in special assessments under § 3014 (a)(3); and that the district erred in finding that he committed a Grade A violation as defined by U.S.S.G. § 7B1.1.

The Fifth Circuit vacated and remanded the supervised release sentence holding there was no Grade A violation under 7B1.1. However, the Fifth Circuit affirmed the special assessments imposed under 18 U.S.C. § 3014..

Waldrip's offense occurred after November 1, 1987; the Sentencing Reform Act of 1984 therefore applied to his case. See United States v. Byrd, 837 F.2d 179, 181 (5th Cir. 1988). A defendant may appeal a sentence imposed under the Sentencing Reform Act if it was imposed in violation of law, was imposed as a result of an incorrect application of the sentencing guidelines, or was a departure from the applicable guideline range and was unreasonable. 18 U.S.C. § 3742(b).

The 5,000 Special Assessments

Waldrip objected to paragraph 86 the PSR. He argued that he was indigent and therefore should not be assessed a \$5,000.00 special assessment on each Count of conviction totaling \$15,000. The objection was denied. (ROA.17-41242.118-119,136). As to each Count of Conviction, One, Two, and Three, an additional \$5,000 special assessment is required on any *non-indigent* person, pursuant to the Justice for Victim of Trafficking Act of 2015 at 18 U.S.C. 3014 totaling \$15,000.00. Under 18 U.S.C. 3014(a)(3), the district court shall assess a \$5,000 additional special assessment "on any non-indigent person" who was convicted of a crime relating to the sexual exploitation and other abuse of children, as Waldrip was in this case. See United States v. Perez, 693 F. App'x 364, 365 (5th Cir. 2017)).

Whether Waldrip had the ability to pay the 5,000 special assessments as to each Count of Conviction is a factual finding. The factual findings of the district court are reviewed under the "clearly erroneous" standard. United States v. Salazar, 70 F. 3d 351,352 (5th Cir. 1995). Furthermore, a district court is free to adopt the findings in the PSI so long as there is "a sufficient indicia of reliability" to support the accuracy of those facts. See United States v. Medina, 161 F.3d 867, 876 (5th Cir. 1998).

Here, the sentencing court stated that it imposed this portion of the sentence after "having assessed" Waldrip's ability to pay. The court stated that Waldrip was required to make a lump sum payment of \$300 due immediately, with the balance due in payments of the greater of \$25 per quarter or 50 percent of any wages earned while in prison in accordance with the Bureau of Prisons Inmate Financial Responsibility Program. Any balance remaining after his release from imprisonment shall be paid in monthly installments of \$200 to commence 90 days after the date of release to a term of supervision. (ROA.17-41242.136).

In Waldrip's sentencing objection, he argued that he should not be assessed a \$5,000 special assessment on each count of Conviction because he was Indigent. Waldrip's trial counsel also stated at sentencing that "the likelihood that Waldrip would ever be able to pay a \$15,000 special assessment whether he's incarcerated or eventually gets out on supervised release is probably slim or none." (ROA.17-41242.125).

Whether a defendant is indigent for purposes of the special assessment under 18 U.S.C. § 3014(a) is an issue of fact that the Fifth Circuit reviews for clear error. United States v. Streaty, 2018 U.S. App. LEXIS 23192, *1-2, 735 Fed.Appx.140 (5th Cir. 2018) (citing United States v. Harris, 702 F.3d 226, 229 (5th Cir.

2012)). "A factual finding is not clearly erroneous as long as it is plausible in light of the record as a whole." Id. (citing United States v. Pacheco-Alvarado, 782 F.3d 213, 220 (5th Cir. 2015) (internal quotation marks and citation omitted)).

At sentencing, the district court imposed a special assessment pursuant to the Justice for Victims of Trafficking Act of 2015, 18 U.S.C. § 3014. The statute requires that "the court shall assess an amount of \$5,000 on any non-indigent person" convicted of specified offenses relating to human trafficking and sexual exploitation. Id. § 3014(a). Money from the assessment is to be sent to the Domestic Trafficking Victims' Fund. Id. § 3014(c)-(d).

The statute uses the phrase "shall assess," which mirrors the "shall assess" language of 18 U.S.C. § 3013--a statute that requires a non-discretionary special assessment for the Crime Victims Fund. See United States v. Dobbins, 807 F.2d 130, 131-32 (8th Cir. 1986). Both statutes mandate that the district court assess money against defendants for the benefit of victims, and funds are to be collected "in the manner that fines are collected in criminal cases." 18 U.S.C. §§ 3013(b) & 3014(f). Unlike § 3013, in which the court cannot consider the defendant's ability to pay, § 3014 expressly limits its special assessment to "non-indigent" persons. See id. § 3014(a).

Section 3014 is silent on how courts should determine a defendant's indigent status. The Fifth Circuit has yet to articulate a test for determining whether a defendant is indigent for purposes of 18 U.S.C. § 3014. However, the Fourth, Fifth and Eighth Circuits have said the defendant's burden of proof in the criminal fine context applies to the special assessment in 18 U.S.C. § 3014(a). See, e.g., United States v. Streaty, 735 Fed.Appx. 140, 140 (5th Cir. 2018) (per curiam); United States v. Lail, 736 Fed.Appx. 381, 382 (4th Cir. 2018) (per curiam); and United States v. Kelley, 861 F.3d 790, 802 (8th Cir. 2017). Under that standard, "[t]he defendant bears the burden of proving his inability to pay a fine, and may rely upon the [presentence report] to establish his inability to pay." Id. (citing United States v. Magnuson, 307 F.3d 333, 335 (5th Cir. 2002)).

In this case the PSR contained a Section designated: "Financial: Condition: Ability to Pay." In that section, the PSI stated the following:

The defendant is presently in custody and has no source of income. He submitted a Personal Financial Statement reporting assets in an inoperable vehicle, a 2004 Chrysler Concord and liabilities in unpaid loans totaling approximately 1,050 and vehicle repossession due to failing to pay a title loan of 1,2000. A credit check revealed no additional information. (ROA.17-41242.311).

In the instant case, Waldrip was ordered to pay a total special assessment of 15,000 pursuant to the Justice for Victims of Trafficking Act of 2015. Additionally, Waldrip was ordered to pay \$100.00 under U.S.C. 18 U.S.C. § 3013 as to each Count of Conviction for a total of \$300.00.

In assessing the special assessments, the district court stated:

After considering the arguments with respect to the objections, the Court is going to overrule Objection No. 20 and the Court will assess a \$15,000 assessment pursuant to the Justice for Victims of Trafficking Act of 2015 as part of this sentence. Having assessed the defendant's ability to pay, payment of the total criminal penalties shall be due as follows:

The defendant shall make a lump sum payment of \$300 due immediately, balance due in payments of the greater of \$25 per quarter or 50 percent of any wages earned while in prison in accordance with the Bureau of Prisons Inmate Financial Responsibility Program. Any balance remaining after the release from imprisonment shall be paid in monthly installments of \$200 to commence 90 days after the date of release to a term of supervision. Payments are to be made through the United States District Clerk's Office, Southern District of Texas. (ROA.17-41242.136).

In this case the PSR contained a Section designated: "Employment Record." In that section, the PSI stated the

following:

The defendant has been employed by Chacho's Restaurant in Houston, Texas, from 2010 to 2016, and earned \$16 per hour as a computer administrator. Prior to that, the defendant worked for HydroChem Industrial Services in Freeport, Texas, from 2000 to 2005, and earned 9.80 per hour as a vacuum technician. (ROA.17-41242.161).

The PSR also indicated that in May of 1997, Waldrip earned an Associate of Science degree from Brazosport College in Lake Jackson, Texas and had completed 38 additional credit hours toward a second degree. At sentencing, Waldrip's trial counsel stated the following:

Mr. Waldrip has maybe a dollar to his name, and the likelihood of him ever being able to pay a \$15,000 Special Assessment, whether he's incarcerated or eventually gets out on supervised release is probably slim or none. And it seems appropriate, given his financial considerations. That the Court not assess the \$5,000 per count Special Assessment, and I would ask the Court not to do that. (ROA.17-41242.125).

In this case, the PSI mentioned the possibility of the \$5,000 assessment as to each count of conviction. (ROA.17-41242.162). The PSI stated that, as to each of Counts 1, 2 and 3, an additional \$5,000 special assessment was required on any *non-indigent* person, pursuant to the Justice for Victims of Trafficking Act of 2015 at

18 U.S.C. § 3014, totaling \$15,000. (ROA.17-41242.163). However, the PSI made no specific recommendation as to Waldrip's ability to pay.

The PSR is evidence that Waldrip is Indigent. The PSI revealed that Waldrip had no source of income. He had an inoperable 2004 Chrysler Concord. Finally, he had unpaid loans totaling approximately 1,050 and vehicle repossession due to failing to pay a title loan of \$1,200. In written objections and at sentencing, Waldrip objected to the imposition of the \$15,000 special assessments as to Counts One, Two and Three of the Indictment delineated as a sentencing option in the PSR. (ROA.17-41242.125,142). Nevertheless, the sentencing court erroneously denied the objection. (ROA. 17-41242.136). Therefore, the district court clearly erred in finding that Waldrip was non-indigent. (ROA.17-41242.311).

Here, the district court found that Waldrip could not afford to pay a fine and therefore the fine was waived. (ROA. 17-41242.135). Here, under U.S.S.G. 5E1.2 (c)(3), the fine range is 30,000 to 300,000. A district court is free to adopt the findings in the PSI so long as there is "a sufficient indicia of reliability" to support the accuracy of those facts. See United States v. Medina, 161 F.3d 867, 876 (5th Cir. 1998). The district

court found Waldrip non-indigent even though, the PSR also stated that Waldrip had no source of income.

Citing United States v. Graves, 908 F.3d 137,141-143 (5th Cir. 2018), the Fifth Circuit stated that "Given the record evidence of Waldrip's education, his past record of employment, his identified monthly expenses, and his prospects for future employment as set forth in a letter written by his most recent employer, Waldrip fails to leave us "with the definite and firm conviction that a mistake has been made.'" United States v. Waldrip, Nos. 17-41242, 17-41253, __ Fed. Appx. __ 2019 WL 3770805, 2019 U.S. App. LEXIS 23789, at *2 (5th Cir. Aug. 9, 2019) (affirmed in part, remanded in part).

The Fifth Circuit erred. Here, Waldrip had an inoperable vehicle, a 2004 Chrysler Concord and no other assets before entering prison. There is no evidence that the 175 months in jail, and sex offender designation will enhance his ability to pay down the special assessments. It was clear error to assume that a person in Waldrip's position had future earning capacity.

Furthermore, Waldrip had unpaid loans totaling approximately 1,050 and vehicle repossession due to failing to pay a title loan of \$1,200.can "handle" a \$ 15,000. Why add another \$ 15,000 onto a ledger that will likely never be satisfied?

Moreover, predicting a defendant's financial prospects after prison is inherently guesswork. A long prison sentence will diminish Waldrip's employability. Furthermore, prison, rather than rehabilitating, will stigmatize him and lower his earning capacity upon release.

When comparing other cases where defendants were found non-indigent under this statute, it was because those defendants had assets. For example, in United States v. Kelley, 861 F.3d 790, 802 (8th Cir. 2017), the defendant was an Eagle Scout with a college degree. In another case, United States v. Lail, 736 F. App'x 381, 382 (4th Cir. 2018) (per curiam), the defendant was expected to have a total net worth of \$74, 500 after selling his residence. Id. at 382. And in United States v. Graves, 908 F.3d 137, 143 (5th Cir. 2018), the defendant possessed a GED, some college education, had a wide range of vocational skills, a long history of employment, and had previously earned \$40, 000 per year.

See also United States v. Dedual, No. 18-60216, 2019 U.S. App. LEXIS 3055, at *4 (5th Cir. Jan. 30, 2019) (affirming the district court's finding of non-indigency where defendant's education and work history, which reflected, inter alia, that prior to his involvement in the instant offense, Defendant made over \$5,000 per month as a sales manager and was capable of obtaining and

maintaining employment.)).

Here, Mr. Waldrip worked at Chacho's Restaurant in Houston, Texas, from 2010 to 2016, and earned \$16 per hour as a computer administrator. Prior to that, Waldrip worked for HydroChem Industrial Services in Freeport, Texas, from 2000 to 2005, and earned 9.80 per hour as a vacuum technician. (ROA.17-41242.161). Who would trust a sex offender convicted of sex offense crimes via a computer to be a computer administrator or vacuum technician after serving a 179 month prison sentence for child pornography crimes? Comparing these defendants and examining the Presentence Report's recitation of the Waldrip's assets (or lack thereof), compels a conclusion that he is Indigent.

Based upon the foregoing law and analysis, Fifth Circuit erred in affirming the \$15,000 in special assessments. The United States Supreme Court has opined that although post-Booker, the Sentencing Guidelines are advisory only, the district court must avoid significant procedural error, such as improperly calculating the Guidelines sentencing range. Gall v. United States, 552 U.S. 38, 48-51 (2007).

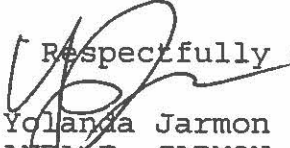
Because the proper application of the sentencing guidelines is of exceptional importance to the administration of justice in federal criminal cases, this Court should grant certiorari in

this case to decide this question and, and upon review, should reverse the judgment of the Fifth Circuit.

CONCLUSION

For the foregoing reasons, petitioner JOHN KEVIN WALDRIP respectfully prays that this Court grant certiorari, to review the judgment of the Fifth Circuit in this case.

Date: November 7, 2019.

 Respectfully submitted,

/s/Yolanda Jarmon
YOLANDA E. JARMON
Attorney of Record for Petitioner
2429 Bissonnet # E416
Houston, Texas 77005
Telephone: (713) 635-8338
Fax: (713) 635-8498

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

JOHN KEVIN WALDRIP

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

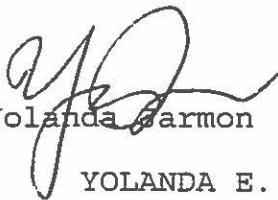
On Petition for Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

CERTIFICATE OF SERVICE

YOLANDA E. JARMON, is not a member of the Bar of this Court but was appointed under the Criminal Justice Act 18 U.S.C. § 3006 A(b) and (c), on appeal to the United States Court of Appeals for the Fifth Circuit, certifies that, pursuant to Rule 29.5, On November 7, 2019, she served the preceding Petition for Writ of Certiorari and the accompanying Motion for Leave to Proceed in Forma Pauperis on counsel for the Respondent by enclosing a copy of these documents in an envelope, first-class postage prepaid, Certified Mail No. 7015 1730 0001 9949 4224, return receipt requested, and depositing the envelope in the United States Postal Service located at 4206 Little York Rd. Houston, TX 77016-9998 and further certifies that all parties required to be served have been served and copies addressed to:

The Honorable Noel J. Francisco

Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001


/s/Yolanda Jarmon
YOLANDA E. JARMON

UNITED STATES DISTRICT COURT
 Southern District of Texas
 Holding Session in Galveston

ENTERED

December 08, 2017

David J. Bradley, Clerk

UNITED STATES OF AMERICA
 V.
 JOHN KEVIN WALDRIP

JUDGMENT IN A CRIMINAL CASE

(For Revocation of Probation or Supervised Release)

(For Offenses Committed On or After November 1, 1987)

CASE NUMBER: 3:13CR00016-001

USM NUMBER: 56221-179

☐ See Additional Alleges.

Gus A. Saper

Defendant's Attorney

THE DEFENDANT:

- ☒
- admitted guilt to violation of condition(s)
- 1, 2, 3, and 4
- of the term of supervision.
-
- ☐
- was found in violation of condition(s) _____ after denial of guilt.

The defendant is adjudicated guilty of these violations:

Violation Number	Nature of Violation	Violation Ended
1	Law Violation-Possession or Promotion of Child Pornography	06/28/2016
2	Law Violation-Possession or Promotion of Child Pornography	06/28/2016
3	Law Violation-Possession or Promotion of Child Pornography	06/28/2016
4	Law Violation-Possession or Promotion of Child Pornography	06/28/2016

☐ See Additional Violations.

The defendant is sentenced as provided in pages 2 through 2 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has not violated condition(s) _____ and is discharged as to such violation(s) condition.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Defendant's Soc. Sec. No.: XXX-XX-1680

November 16, 2017

Defendant's Date of Birth: XX/XX/1973

Date of Imposition of Judgment

Defendant's Residence Address:
Angleton, TexasGeorge C. Hanks, Jr.
 Signature of JudgeGEORGE C. HANKS, JR.
 UNITED STATES DISTRICT JUDGE
 Name and Title of JudgeDefendant's Mailing Address:
Angleton, Texas

December 8, 2017

Date

Exhibit/
 Appendix A

DEFENDANT: JOHN KEVIN WALDRIP
CASE NUMBER: 3:13CR00016-001

Judgment -- Page 2 of 2

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 18 months.

This term consists of EIGHTEEN (18) MONTHS. This sentence is ordered to run consecutively to the term imposed in the Southern District of Texas docket number 3:16CR00016-001.

- ☐ See Additional Imprisonment Terms.
- ☐ The court makes the following recommendations to the Bureau of Prisons:
- ☒ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district:
- ☐ by _____ ☐ a.m. ☐ p.m. on _____
- ☐ as notified by the United States Marshal.
- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before 2 p.m. on _____
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

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

UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

UNITED STATES DISTRICT COURT
Southern District of Texas
Holding Session in Galveston

ENTERED

December 08, 2017

David J. Bradley, Clerk

UNITED STATES OF AMERICA
V.
JOHN KEVIN WALDRIP

JUDGMENT IN A CRIMINAL CASE

CASE NUMBER: 3:16CR00016-001

USM NUMBER: 56221-179

Gus A. Saper

Defendant's Attorney

☐ See Additional Aliases.**THE DEFENDANT:**☒ pleaded guilty to count(s) 1, 2 and 3 on June 7, 2017.☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 2252A(a)(2)(B), 2252A(b)(1)	Distribution of child pornography	06/06/2016	1

☒ See Additional Counts of Conviction.The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.☐ The defendant has been found not guilty on count(s) _____☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the .

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

November 16, 2017

Date of Imposition of Judgment

George C. Hanks, Jr.

Signature of Judge

GEORGE C. HANKS, JR.**UNITED STATES DISTRICT JUDGE**

Name and Title of Judge

December 8, 2017

Date

Exhibit /
Appendix B

DEFENDANT: JOHN KEVIN WALDRIP
CASE NUMBER: 3:16CR00016-001

ADDITIONAL COUNTS OF CONVICTION

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 2252A(a)(2)(B), 2252A(b)(1)	Receipt of child pornography	06/26/2016	2
18 U.S.C. § 2252A(a)(5)(B), 2252A(b)(2), 2256(8)(A)	Possession of child pornography	06/30/2016	3

DEFENDANT: JOHN KEVIN WALDRIP
CASE NUMBER: 3:16CR00016-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 175 months.

This term consists of ONE HUNDRED SEVENTY-FIVE (175) MONTHS as to Counts 1 and 2, and ONE HUNDRED TWENTY (120) MONTHS as to Count 3, to run concurrently, for a total of ONE HUNDRED SEVENTY-FIVE (175) MONTHS.

- ☐ See Additional Imprisonment Terms.
- ☒ The court makes the following recommendations to the Bureau of Prisons:
That the defendant be designated to a facility as close to Galveston, Texas, as possible.
- ☒ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district:
☐ at _____ ☐ a.m. ☐ p.m. on _____.
☐ as notified by the United States Marshal.
- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
☐ before 2 p.m. on _____.
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

DEFENDANT: JOHN KEVIN WALDRIP
CASE NUMBER: 3:16CR00016-001

SUPERVISED RELEASE

Upon release from imprisonment you will be on supervised release for a term of: 10 years.

This term consists of TEN (10) YEARS as to each of Counts 1, 2 and 3, to run concurrently, for a total of TEN (10) YEARS.

☐ See Additional Supervised Release Terms.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☒ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

☒ See Special Conditions of Supervision.

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment, you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

DEFENDANT: JOHN KEVIN WALDRIP
CASE NUMBER: 3:16CR00016-001

SPECIAL CONDITIONS OF SUPERVISION

You shall report the address where you will reside and any subsequent change of residence to the probation officer responsible for supervision and you shall register with the sex offender registration agency in any state where you reside, are employed, carry on a vocation, or is a student, as directed by the probation officer. The probation officer will provide the state officials with any and all information required by the state sex offender registration agency and may direct you to report to that agency personally for additional processing, such as photographing and fingerprinting.

You must participate in a sex offense-specific assessment. You must pay the costs of the program, if financially able.

You must participate in a sex offense-specific treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program and you must pay the costs of the program, if financially able.

You must submit to periodic polygraph testing at the discretion of the probation officer as a means to ensure that you are in compliance with the requirements of your supervision or treatment program. You must pay the costs of the program, if financially able.

You must not have direct contact with any child you know or reasonably should know to be under the age of 18, without the permission of the probation officer. If you do have any direct contact with any child you know or reasonably should know to be under the age of 18, without the permission of the probation officer, you must report this contact to the probation officer within 24 hours. Direct contact includes written communication, in-person communication, or physical contact. Direct contact does not include incidental contact during ordinary daily activities in public places.

You must not view or possess any "visual depiction" (as defined in 18 U.S.C. § 2256), including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of "sexually explicit conduct" (as defined in 18 U.S.C. § 2256).

You must not access the Internet except for reasons approved in advance by the probation officer.

You must allow the probation officer to install computer monitoring software on any computer (as defined in 18 U.S.C. § 1030(e)(1)) you use.

To ensure compliance with the computer monitoring condition, you must allow the probation officer to conduct initial and periodic unannounced searches of any computers (as defined in 18 U.S.C. § 1030(e)(1)) subject to computer monitoring. These searches shall be conducted for the purposes of determining whether the computer contains any prohibited data prior to installation of the monitoring software; to determine whether the monitoring software is functioning effectively after its installation; and to determine whether there have been attempts to circumvent the monitoring software after its installation. You must warn any other people who use these computers that the computers may be subject to searches pursuant to this condition.

DEFENDANT: JOHN KEVIN WALDRIP
CASE NUMBER: 3:16CR00016-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$15,300.00		

A \$100 special assessment is ordered as to each of Counts 1, 2 and 3, for a total of \$300. A \$5,000 assessment pursuant to the Justice for Victims of Trafficking Act of 2015 is also ordered as to each of Counts 1, 2 and 3, for a total of \$15,000.

☐ See Additional Terms for Criminal Monetary Penalties.

☒ The determination of restitution is deferred until a later date _____. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal payees must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
----------------------	--------------------	----------------------------	-------------------------------

☐ See Additional Restitution Payees.

TOTALS	<u>\$0.00</u>	<u>\$0.00</u>	
---------------	---------------	---------------	--

☐ Restitution amount ordered pursuant to plea agreement \$ _____

☒ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

☐ Based on the Government's motion, the Court finds that reasonable efforts to collect the special assessment are not likely to be effective. Therefore, the assessment is hereby remitted.

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: JOHN KEVIN WALDRIP
CASE NUMBER: 3:16CR00016-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☒ Lump sum payment of \$300.00 due immediately, balance due
☐ not later than _____, or
☒ in accordance with ☐ C, ☐ D, ☐ E, or ☒ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ installments of _____ over a period of _____, to commence _____ days after the date of this judgment; or
- D ☐ Payment in equal _____ installments of _____ over a period of _____, to commence _____ days after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ days after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:

Payable to: Clerk, U.S. District Court
P.O. Box 2300
Galveston, TX 77553-2300

Balance due in payments of the greater of \$25 per quarter or 50% of any wages earned while in prison in accordance with the Bureau of Prisons' Inmate Financial Responsibility Program. Any balance remaining after release from imprisonment shall be paid in equal monthly installments of \$200 to commence 90 days after the release to a term of supervision.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number

Defendant and Co-Defendant Names
(including defendant number)

Total Amount

Joint and Several
Amount

Corresponding Payee,
if appropriate

- ☐ See Additional Defendants and Co-Defendants Held Joint and Several.
- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:
- ☐ See Additional Forfeited Property.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.



Neutral

As of: November 7, 2019 2:02 PM Z

United States v. Waldrip

United States Court of Appeals for the Fifth Circuit

August 9, 2019, Filed

No. 17-41242 c/w No. 17-41253 Summary Calendar

Reporter

2019 U.S. App. LEXIS 23789 *; ___ Fed. Appx. ___; 2019 WL 3770805

UNITED STATES OF AMERICA,
Plaintiff-Appellee v. **JOHN KEVIN**
WALDRIP, Defendant-
Appellant; UNITED STATES OF
AMERICA, Plaintiff-Appellee v. **JOHN**
KEVIN WALDRIP, also known as DVD
Man, Defendant-Appellant

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE* RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [*1] Appeals from the United States District Court. for the Southern District of Texas. USDC No. 3:16-CR-16-1.

United States v. Waldrip, 1 F. Supp. 3d 551, 2014 U.S. Dist. LEXIS 20665 (S.D. Tex., Feb. 19, 2014)

Core Terms

convictions, sentences, district court, violations, revocation, possession of child pornography, substantial rights, correct an error, plain error, contending, purposes, appeals

Counsel: For United States of America, Plaintiff - Appellee(17-41242): Eileen K. Wilson, Assistant U.S. Attorney, Carmen Castillo Mitchell, Assistant U.S. Attorney, U.S. Attorney's Office, Southern District of Texas, Houston, TX.

For **John Kevin Waldrip**, Defendant - Appellant(17-41242): Yolanda Evette Jarmon, Esq., Law Office of Yolanda Jarmon, Houston, TX.

For United States of America, Plaintiff - Appellee(17-41253): Eileen K. Wilson, Assistant U.S. Attorney, Carmen Castillo Mitchell, Assistant U.S. Attorney, U.S. Attorney's Office, Southern District of Texas, Houston, TX.

For **John Kevin Waldrip**, also known as: DVD Man, Defendant - Appellant(17-41253): Yolanda Evette Jarmon, Esq., Law Office of Yolanda Jarmon, Houston, TX.

Judges: Before JOLLY, HIGGINSON, and HO, Circuit Judges.

Opinion

Yolanda Jarmon

Exhibit
Appendix C

PER CURIAM:*

John Kevin Waldrip appeals the within-guidelines, 175-month sentences imposed following his convictions for distribution, receipt, and possession of child pornography. He contends that the district court erred by finding that he is non-indigent for purposes of 18 U.S.C. § 3014 and, consequently, by imposing a total of \$15,000 in special [*2] assessments under § 3014(a)(3). Waldrip also appeals his consecutive, 18-month revocation sentence, contending that the district court erred by holding that he committed a Grade A violation as defined by U.S.S.G. § 7B1.1.

We review for clear error the district court's determination that Waldrip is not indigent for purposes of § 3014. See United States v. Graves, 908 F.3d 137, 140 (5th Cir. 2018), cert. denied, 139 S. Ct. 1360, 203 L. Ed. 2d 595 (2019). In making the determination, the district court could consider Waldrip's future earning capacity and whether he will be capable of paying the assessments over the span of 20 years following his release from prison. See Graves, 908 F.3d at 141-43; § 3014(q); 18 U.S.C. § 3613(b). Given the record evidence of Waldrip's education, his past record of employment and earnings, his identified monthly expenses, and his prospects

for future employment as set forth in a letter written by his most recent employer, Waldrip fails to leave us "with the definite and firm conviction that a mistake has been made." Graves, 908 F.3d at 144 (internal quotation marks and citation omitted).

Because Waldrip failed to object to the classification of his supervised release violations under § 7B1.1, we review for plain error. See Puckett v. United States, 556 U.S. 129, 135, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009). To demonstrate plain error, Waldrip must show a forfeited error that is clear or obvious and that affects his substantial rights. See *id.* If he makes [*3] such a showing, we have the discretion to correct the error, but only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. See *id.* We agree with the parties that Waldrip has made the necessary showing for the reasons below.

Waldrip's violative conduct does not constitute a crime of violence or controlled substance offense and does not involve possession of a firearm or destructive device. See § 7B1.1(a)(1)(A). Further, since Waldrip has no qualifying prior convictions, his violations of Texas Penal Code § 43.26 and 18 U.S.C. §§ 2252A do not constitute Grade A violations because they are not punishable by terms of imprisonment exceeding 20 years. See § 7B1.1(a)(1)(B); § 43.26(d) and (q) (providing that, absent prior § 43.26 convictions, violations of § 43.26

* 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.

constitute second or third degree felonies under Texas law); § 2252A(b)(1) and (2) (prescribing 20-year maximum sentences absent prior, enhancement-qualifying convictions). The district court thus committed clear or obvious error by holding that **Waldrip** had committed a Grade A violation. See Puckett, 556 U.S. at 135.

The error affects **Waldrip**'s substantial rights since it incorrectly increases his guidelines range. See Molina-Martinez v. United States, 136 S. Ct. 1338, 1345, 194 L. Ed. 2d 444 (2016). We exercise our discretion to correct the error. See Rosales-Mireles v. United States, 138 S. Ct. 1897, 1911, 201 L. Ed. 2d 376 (2018); Puckett, 556 U.S. at 135.

Waldrip's convictions and sentences for distribution, [*4] receipt, and possession of child pornography are AFFIRMED. The revocation sentence is VACATED, and the revocation case is REMANDED for resentencing.

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