

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JUAN TRUJILLO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX

/s/ Kevin Joel Page

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Appendix A Judgment and Opinion of Fifth Circuit, CA No. 20-10679, *United States v. Trujillo*, 4 F.4th 287 (5th Cir. July 9, 2021)(unpublished).

Appendix B Judgment and Sentence of the United States District Court for the Northern District of Texas, entered June 15, 2020. *United States v. Trujillo*, Dist. Court 3:19-CR-00151-L-1.

APPENDIX A

United States Court of Appeals
for the Fifth Circuit

No. 20-10679

United States Court of Appeals
Fifth Circuit

FILED

July 9, 2021

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JUAN TRUJILLO,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:19-CR-151-1

Before KING, DENNIS, and HO, *Circuit Judges.*

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is reformed to reflect conviction and sentencing under 8 U.S.C. § 1326(b)(1) and affirm the sentence as reformed.

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
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UNITED STATES OF AMERICA,

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versus

JUAN TRUJILLO,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:19-CR-151-1

Before KING, DENNIS, and HO, *Circuit Judges.*

JAMES C. HO, *Circuit Judge:*

If a defendant is convicted of unlawful reentry into the United States after previously being removed from our country, federal law imposes a statutory maximum sentence of twenty years if his prior removal was subsequent to a conviction for an “aggravated felony.” 8 U.S.C. § 1326(b)(2). The term “aggravated felony” includes “a crime of violence” as that term has been defined in 18 U.S.C. § 16. 8 U.S.C. § 1101(a)(43)(F).

We hold that Texas’s intoxication manslaughter statute, TEX. PENAL CODE § 49.08(a), does not constitute a “crime of violence” under

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18 U.S.C. § 16. As a result, the district court here erred when it convicted and sentenced Juan Trujillo under 8 U.S.C. § 1326(b)(2) based on his prior conviction under Texas Penal Code § 49.08(a). But as it turns out, the error did not ultimately affect his sentence. So there is no need to remand for resentencing. Accordingly, we reform the judgment to correct the error under 8 U.S.C. § 1326(b)(2) and affirm the sentence as reformed.

I.

In 1995, Trujillo, a citizen of Mexico, was convicted of intoxication manslaughter under Texas Penal Code § 49.08(a), and sentenced to ten years in prison. He was later deported upon his release, but he subsequently returned to the United States. In 2008, he was arrested for driving while intoxicated (DWI). He was deported a second time, but again later returned to the United States. In 2017, he was arrested for DWI again.

Trujillo pleaded guilty to DWI in state court and was sentenced to two years in prison. After his release, he was transferred to federal custody pursuant to an indictment for illegal reentry under 8 U.S.C. § 1326. The indictment informed Trujillo that he was subject to a statutory maximum of twenty years in prison under 8 U.S.C. § 1326(b)(2).

Trujillo pleaded guilty to illegal reentry. The presentence report (PSR) calculated a range of seventy to eighty-seven months under the U.S. Sentencing Guidelines. Like the indictment, the PSR also stated that he was subject to a statutory maximum sentence of twenty years. The PSR noted his 1995 Texas conviction for intoxication manslaughter.

Trujillo did not file any written objections to the PSR and did not object to it at sentencing. The district court sentenced Trujillo to a within-Guidelines sentence of seventy-two months and two years of supervised release—well short of the twenty-year statutory maximum under 8 U.S.C. § 1326(b)(2). Trujillo did not object to his sentence. He timely appealed.

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Because Trujillo did not object to the PSR’s conclusion that he was subject to judgment under § 1326(b)(2), we review the district court’s decision for plain error. *See United States v. Castaneda-Lozoya*, 812 F.3d 457, 459 (5th Cir. 2016). To prevail on plain error review, Trujillo must identify (1) a forfeited error (2) that is clear or obvious, rather than subject to reasonable dispute, and (3) that affects his substantial rights. *See Puckett v. United States*, 556 U.S. 129, 135 (2009). If he satisfies these three requirements, we may correct the error at our discretion if it “seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.” *Id.* (quotations omitted).

II.

On appeal, Trujillo argues—and the Government concedes—that the district court erred by entering judgment under 8 U.S.C. § 1326(b)(2), because his Texas intoxication manslaughter conviction does not qualify as a “crime of violence” under 18 U.S.C. § 16.

When a defendant is convicted of illegal reentry following his removal from the United States, and his prior removal followed a conviction for an “aggravated felony,” he is subject to a maximum sentence of twenty years. 8 U.S.C. § 1326(b)(2). If his prior removal followed a conviction for a felony that does not qualify as an “aggravated felony,” however, he is subject to a maximum sentence of ten years. 8 U.S.C. § 1326(b)(1).

Federal law defines “aggravated felony” to include “a crime of violence” as defined in 18 U.S.C. § 16. 8 U.S.C. § 1101(a)(43)(F). Section 16(a), in turn, defines “a crime of violence” as “an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another.” 18 U.S.C. § 16(a). (The Supreme Court held in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), that § 16(b) is unconstitutionally vague, so we apply only § 16(a) here.)

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Under Texas law, a person commits intoxication manslaughter if he (1) “operates a motor vehicle in a public place,” (2) “is intoxicated,” and (3) “by reason of that intoxication causes the death of another by accident or mistake.” TEX. PENAL CODE § 49.08(a).

As a matter of Supreme Court precedent, the Texas intoxication manslaughter statute does not qualify as a “crime of violence” under 18 U.S.C. § 16(a). In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the Court observed that “[t]he critical aspect of § 16(a) is that a crime of violence is one involving the ‘use . . . of physical force *against the person or property of another.*’” *Id.* at 9. That “key phrase in § 16(a) . . . most naturally suggests a *higher degree of intent than negligent or merely accidental conduct.*” *Id.* (emphasis added).

That conclusion confirms that the district court erred here. After all, the Texas intoxication manslaughter statute does not require a “higher degree of intent than negligent or merely accidental conduct.” *Id.* To the contrary, the statute specifically requires that the defendant cause the death of another “by accident or mistake.” TEX. PENAL CODE § 49.08(a). Accordingly, the Texas statute does not qualify as a “crime of violence” under 18 U.S.C. § 16(a), as that term was authoritatively construed by the Court in *Leocal*.

So the district court was wrong to enter a judgment of conviction and sentence under 8 U.S.C. § 1326(b)(2). Indeed, the parties agree that the court should have sentenced Trujillo under 8 U.S.C. § 1326(b)(1), because he was convicted of a felony other than an aggravated felony, and therefore subjected him to a statutory maximum sentence of ten years rather than twenty.

Entering conviction based on § 1326(b)(2) rather than § 1326(b)(1) can have collateral consequences for the defendant, such as permanent inadmissibility to the United States. That’s because a conviction for

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unlawful reentry following a prior conviction for an aggravated felony under § 1326(b)(2) is itself an aggravated felony. *See, e.g., United States v. Ovalle-Garcia*, 868 F.3d 313, 314 (5th Cir. 2017). So we have reformed judgments when district courts have incorrectly entered convictions under § 1326(b)(2) rather than under § 1326(b)(1). *See, e.g., United States v. Godoy*, 890 F.3d 531, 541–42 (5th Cir. 2018); *United States v. Mondragon-Santiago*, 564 F.3d 357, 369 (5th Cir. 2009). And we do so here as well.

III.

Trujillo asks us for more. He asks us to vacate his sentence and remand so that the district court can consider whether the misclassification of his conviction influenced its sentencing decision. We decline to do so.

To warrant vacatur, Trujillo must “prove [that] the error affected the outcome in the district court.” *Mondragon-Santiago*, 564 F.3d at 369. He must show that “the record indicate[s] the district court’s sentence was influenced by an incorrect understanding of the statutory maximum sentence.” *Id.*

There is no indication anywhere in the record that the sentence imposed here was influenced in any way by an incorrect understanding of the statutory maximum sentence. To the contrary, Trujillo concedes that the district court entered a sentence within the Guidelines range, and below the statutory maximum of § 1326(b)(1). Moreover, the district court did not even cite § 1326(b)(2) in its sentencing decision. Rather, the court focused instead on Trujillo’s repeated violations to justify his seventy-two month sentence.

We have no difficulty, then, concluding that the district court’s error concerning § 1326(b)(2) did not affect his sentence in any way.

Trujillo nevertheless suggests that we remand so that he can at least ask the district court whether it might have imposed a different sentence. But

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it is Trujillo's burden on appeal to demonstrate a reasonable probability of a different result on remand. *See, e.g., United States v. Lavalais*, 960 F.3d 180, 186 (5th Cir. 2020) (defendant "has the burden to demonstrate that all four prongs of plain error review are met"). He cannot do so here. So remand is not warranted. We will not order remand simply because Trujillo hopes to create a better appellate record.

* * *

We reform the judgment to reflect conviction and sentencing under 8 U.S.C. § 1326(b)(1) and affirm the sentence as reformed.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

July 09, 2021

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 20-10679 USA v. Trujillo
USDC No. 3:19-CR-151-1

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and 5th Cir. R. 35, 39, and 41 govern costs, rehearings, and mandates. **5th Cir. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and 5th Cir. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5th Cir. R. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk



By: Nancy F. Dolly, Deputy Clerk

Enclosure(s)

Mr. Brian W. McKay
Mr. Kevin Joel Page
Ms. Leigha Amy Simonton

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

JUAN TRUJILLOCase Number: **3:19-CR-00151-L(1)**USM Number: **88637-479****Juan Gabriel Rodriguez**

Defendant's Attorney

THE DEFENDANT:

| | | |
|-------------------------------------|---|---|
| <input type="checkbox"/> | pleaded guilty to count(s) | |
| <input checked="" type="checkbox"/> | pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court. | Count 1 of the Indictment filed March 27, 2019 |
| <input type="checkbox"/> | pleaded nolo contendere to count(s) which was accepted by the court | |
| <input type="checkbox"/> | was found guilty on count(s) after a plea of not guilty | |

The defendant is adjudicated guilty of these offenses:

| Title & Section / Nature of Offense | Offense Ended | Count |
|---|----------------------|--------------|
| 8:1326(a) and (b)(2) Illegal Reentry After Removal From The United States | 10/27/2017 | 1 |

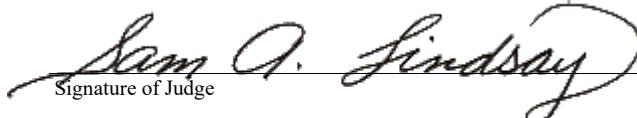
The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s)
 Count(s) is are dismissed on the motion of the United States

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.

June 15, 2020

Date of Imposition of Judgment



Signature of Judge

Sam A. Lindsay, United States District Judge
Name and Title of Judge

June 15, 2020

Date

DEFENDANT: JUAN TRUJILLO
CASE NUMBER: 3:19-CR-00151-L(1)

IMPRISONMENT

Pursuant to the Sentencing Reform Act of 1984, but taking the Guidelines as advisory pursuant to United States v. Booker, and considering the factors set forth in 18 U.S.C. Section 3553(a), the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **Seventy-two (72) months as to Count 1.**

The court makes the following recommendations to the Bureau of Prisons:

The court recommends that Defendant be allowed to serve his sentence at a facility in the Dallas/Fort Worth, Texas area, preferably FCI, Seagoville, if he is eligible.

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: JUAN TRUJILLO
CASE NUMBER: 3:19-CR-00151-L(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : **Two (2) years.**

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 (34 U.S.C. § 20901, 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 additional conditions on the attached page.

DEFENDANT: JUAN TRUJILLO
CASE NUMBER: 3:19-CR-00151-L(1)

STANDARD 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.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at www.txnp.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: JUAN TRUJILLO
CASE NUMBER: 3:19-CR-00151-L(1)

SPECIAL CONDITIONS OF SUPERVISION

As a condition of supervised release, upon the completion of the sentence of imprisonment, the defendant shall be surrendered to a duly-authorized immigration official for deportation in accordance with the established procedures provided by the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq. As a further condition of supervised release, if ordered deported or removed, the defendant shall remain outside the United States.

In the event the defendant is not deported upon release from imprisonment, the defendant shall comply with the standard conditions contained in this Judgment and shall comply with the mandatory and special conditions.

DEFENDANT: JUAN TRUJILLO
 CASE NUMBER: 3:19-CR-00151-L(1)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments page.

| | <u>Assessment</u> | <u>Restitution</u> | <u>Fine</u> | <u>AVAA Assessment*</u> | <u>JVTA Assessment**</u> |
|---------------|-------------------|--------------------|-------------|-------------------------|--------------------------|
| TOTALS | \$100.00 | \$.00 | \$.00 | \$.00 | |

The determination of restitution is deferred until *An Amended Judgment in a Criminal Case (AO245C)* 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. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

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 the Schedule of Payments page 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:

| | | |
|---|-------------------------------|--|
| <input type="checkbox"/> the interest requirement is waived for the | <input type="checkbox"/> fine | <input type="checkbox"/> restitution |
| <input type="checkbox"/> the interest requirement for the | <input type="checkbox"/> fine | <input type="checkbox"/> restitution is modified as follows: |

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22

*** 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: JUAN TRUJILLO
 CASE NUMBER: 3:19-CR-00151-L(1)

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 payments of \$ _____ due immediately, balance due
 - not later than _____, or
 - in accordance 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 _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D** Payment in equal (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E** Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 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:
It is ordered that the Defendant shall pay to the United States a special assessment of \$100.00 for Count 1, which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

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

See above for Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.
- 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:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.