

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JONATHAN SCOTT MAY,

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/ Brandon Beck

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Appendix A Opinion of Fifth Circuit, CA No. 21-10308, *United States v. May*, 2022 U.S. App. LEXIS 1131, 2022 WL 152506, at *1 (5th Cir. Jan. 14, 2022)

Appendix B Judgment and Sentence of the United States District Court for the Northern District of Texas.
United States v. May, Dist. Court 5:20-cr-133-1 (N.D. Tex. Nov. 30, 2020)

APPENDIX A

United States v. May

United States Court of Appeals for the Fifth Circuit

January 14, 2022, Filed

No. 21-10308 Summary Calendar

Reporter

2022 U.S. App. LEXIS 1131 *; 2022 WL 152506

UNITED STATES OF AMERICA, Plaintiff—Appellee,
versus JONATHAN SCOTT MAY, Defendant—Appellant.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.*

Prior History: [*1] Appeal from the United States District Court for the Northern District of Texas. USDC No. 5:20-CR-133-1.

[United States v. May, 2020 U.S. Dist. LEXIS 238726 \(N.D. Tex., Nov. 30, 2020\)](#)

Counsel: For United States of America, Plaintiff - Appellee: Emily Baker Falconer, Assistant U.S. Attorney, U.S. Attorney's Office, Northern District of Texas, Dallas, TX; Leigha Amy Simonton, Assistant U.S. Attorney, U.S. Attorney's Office, Northern District of Texas, Dallas, TX.

For Jonathan Scott May, Defendant - Appellant: Christopher Allen Curtis, Assistant Federal Public Defender, Federal Public Defender's Office, Northern District of Texas, Fort Worth, TX; David E. Sloan, Assistant Federal Public Defender, Federal Public Defender's Office, Northern District of Texas, Lubbock, TX.

Judges: Before HIGGINBOTHAM, HIGGINSON, and DUNCAN, Circuit Judges.

Opinion

PER CURIAM:*

Jonathan Scott May pleaded guilty to receipt and distribution of child pornography and was sentenced to the statutory

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

maximum sentence of 240 months of imprisonment. May's sole argument on appeal is that the district court erred by imposing the five-level enhancement under [U.S.S.G. § 2G2.2\(b\)\(5\)](#) for engaging in a pattern of activity involving the sexual abuse or exploitation of a minor.

As May correctly acknowledges, because he did not object at sentencing, we review [*2] the district court's application of the [§ 2G2.2\(b\)\(5\)](#) enhancement for plain error. *See United States v. Oti, 872 F.3d 678, 690 (5th Cir. 2017)*. To prevail on plain error review, May must show that: "(1) there was an error; (2) the error was clear or obvious; (3) the error affected his or her substantial rights; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings such that we should exercise our discretion to reverse." [Id.](#)

We decide this appeal on the third prong of plain error review. To show that an error affected his substantial rights, a defendant "must 'show a reasonable probability that, but for the error,' the outcome of the proceeding would have been different. [Molina-Martinez v. United States, 578 U.S. 189, 194, 136 S. Ct. 1338, 194 L. Ed. 2d 444 \(2016\)](#) (quoting [United States v. Dominguez Benitez, 542 U.S. 74, 76, 124 S. Ct. 2333, 159 L. Ed. 2d 157 \(2004\)](#)). "When a defendant is sentenced under an incorrect Guidelines range . . . the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." [Id. at 198](#). However, "[t]here may be instances when, despite application of an erroneous Guidelines range, a reasonable probability of prejudice does not exist. . . . The record in a case may show, for example, that the district court thought the sentence it chose was appropriate irrespective of the Guidelines range." [Id. at 200](#); *see also* [*3] [United States v. Sanchez-Hernandez, 931 F.3d 408, 411 \(5th Cir. 2019\)](#) (explaining that while [Molina-Martinez](#) "predicted erroneous Guidelines ranges will normally suffice to satisfy the third prong" of plain error review, "the Court recognized that won't always be the case").

Here, the district court gave a detailed explanation of how the [18 U.S.C. § 3553\(a\)](#) factors led it to select the 240-month sentence. The district court then stated that while it believed

the guidelines calculations to be correct, "to the extent they were incorrectly calculated . . . [it] would have imposed the same sentence without regard to that range . . . for the same reasons, in light of the §1 3553(a) factors." Accordingly, May cannot show that any error the district court may have committed in applying the § 2G2.2(b)(5) enhancement affected his substantial rights. *See Molina-Martinez, 578 U.S. at 200; Sanchez-Hernandez, 931 F.3d at 411-12.* For this reason, the judgment of the district court is AFFIRMED.

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APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS LUBBOCK DIVISION

UNITED STATES OF AMERICA

v.

JONATHAN SCOTT MAY

§ **JUDGMENT IN A CRIMINAL CASE**

§

§

§ Case Number: **5:20-CR-00133-H-BQ(1)**

§ USM Number: **09016-509**

§ **David E. Sloan**

§ 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.	1 of the indictment filed October 14, 2020.
<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
18 U.S.C. §§ 2252(a)(2) and (b) RECEIPT AND DISTRIBUTION OF CHILD PORNOGRAPHY	09/17/2020	1

The defendant is sentenced as provided in pages 2 through 9 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 Remaining count(s) 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.

March 25, 2021

Date of Imposition of Judgment

Signature of Judge

James Wesley Hendrix
United States District Judge

Name and Title of Judge

March 25, 2021

Date

DEFENDANT: JONATHAN SCOTT MAY
CASE NUMBER: 5:20-CR-00133-H-BQ(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:
240 months as to count 1.

The court makes the following recommendations to the Bureau of Prisons: Incarceration at FCI Seagoville, Texas.

The Court recommends that, while incarcerated, the defendant receive appropriate substance-abuse and mental health treatment, but the Court did not lengthen the defendant's prison term to promote rehabilitation. *See Tapia v. United States*, 564 U.S. 319 (2011).

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: JONATHAN SCOTT MAY
CASE NUMBER: 5:20-CR-00133-H-BQ(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **Ten (10) 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: JONATHAN SCOTT MAY
CASE NUMBER: 5:20-CR-00133-H-BQ(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: JONATHAN SCOTT MAY
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SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall participate in sex offender treatment services as directed by the probation officer until successfully discharged. These services may include psycho-physiological testing (i.e., clinical polygraph, plethysmograph, and the ABEL screen) to monitor the defendant's compliance, treatment progress, and risk to the community. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least \$25.00 per month.
2. The defendant shall have no unsupervised contact with persons under the age of 18, nor shall the defendant loiter near places where children may frequently congregate. The defendant shall neither seek nor maintain employment or volunteer work at any location and/or activity where persons under the age of 18 congregate and the defendant shall not date or befriend anyone who has children under the age of 18, without prior permission of the probation officer.
3. The defendant shall neither possess nor have under his control any sexually oriented, or sexually stimulating materials of adults or children. The defendant shall not patronize any place where such material is available.
4. The defendant shall not possess, have access to, or utilize a computer or internet connection device without permission of the Court. This condition requires preapproval for categories of computer or Internet access or use; it does not require separate pre-use approval every time the defendant accesses or uses a computer or the Internet.
5. 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 \$40.00 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.
6. The defendant shall submit to periodic, unannounced examinations of his computer/computers, storage media, and/or other electronic or Internet-capable devices, performed by the probation officer at reasonable times and in a reasonable manner based on reasonable suspicion of contraband evidence of a violation of supervision. This may include the retrieval and copying of any prohibited data and/or the removal of such system for the purpose of conducting a more thorough inspection. The defendant shall provide written authorization for release of information from the defendant's Internet service provider.
7. The defendant shall not use any software program or device designed to hide, alter, or delete records and/or logs of the defendant's computer use, Internet activities, or files stored on the defendant's computer.

DEFENDANT: JONATHAN SCOTT MAY
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8. The defendant shall participate in an outpatient program approved by the probation officer for treatment of narcotic, drug, or alcohol dependency that will include testing for the detection of substance use, abstaining from the use of alcohol and all other intoxicants during and after completion of treatment, and contributing to the costs of services rendered (copayment) at the rate of at least \$15.00 per month.
9. The defendant shall participate in outpatient mental health treatment services as directed by the probation officer until successfully discharged. These services may include medications prescribed by a licensed physician. The defendant shall contribute to the costs of services rendered (copayment) at the rate of at least \$15.00 per month.

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CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments page.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	\$100.00	\$0.00	\$0.00	\$0.00	\$0.00

The determination of restitution is deferred until 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.

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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 20 (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.

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FORFEITED PROPERTY

It is further ordered that the defendant's interest in the following property is condemned and forfeited to the United States:

- a. ASUS Chromebook, serial number K6NXCV13B23326A;
- b. Samsung Tablet;
- c. HP Laptop, serial number CNU63735M8;
- d. White and orange Nspire 2GB Thumb Drive;
- e. LG Phone, MN LM-Q730MM, IMEI 354525114421215;
- f. Red digital camera;
- g. Samsung Galaxy S9 cell phone, model SM-G9660U, IMEI 356917091109194;
- h. all collected by law enforcement from May's residence on September 17, 2020.