

United States Court of Appeals
for the Fifth Circuit

No. 19-11039

United States Court of Appeals
Fifth Circuit

FILED

May 10, 2022

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JON ANTHONY TERRY,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:17-CR-647-1

Before WILLETT, ENGELHARDT, and WILSON, *Circuit Judges.*

PER CURIAM:*

Jon Terry pleaded guilty to two counts of production of child pornography in violation of 18 U.S.C. § 2251(a). The district court sentenced Terry to 720 months of imprisonment. The district court also imposed a \$5,000 assessment per count—or \$10,000 total—pursuant to 18 U.S.C. § 3014, which provides that “the court shall assess an amount of

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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\$5,000 on any non-indigent person" convicted of certain crimes relating to sexual abuse.

On appeal, Terry argues that the district court erred in imposing the \$10,000 assessment because he is indigent.¹ Because he did not object to the assessment at sentencing, our review is for plain error. *Puckett v. United States*, 556 U.S. 129, 135 (2009). Terry must therefore show an error which is "clear or obvious" and affected his "substantial rights." *Id.* Such an error must be "so clear or obvious that 'the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it.'" *United States v. Delgado*, 672 F.3d 320, 330 (5th Cir. 2012) (en banc) (quoting *United States v. Hope*, 545 F.3d 293, 296 (5th Cir. 2008)). If Terry clears those hurdles, we have discretion to correct the errors if we find they impugn "the fairness, integrity, or public reputation of judicial proceedings." *Puckett*, 556 U.S. at 135 (quoting *United States v. Olano*, 507 U.S. 725, 736 (1993)).

Terry has not demonstrated a clear or obvious error here. Ample record evidence supports a finding that Terry was not so indigent that he could not pay the assessment. Terry filled out a financial affidavit stating that he was employed for \$2,900 a month at Robert Half Technologies and that he earned \$3,000 a year from online gaming. The PSR catalogs numerous information technology jobs that Terry held, where he earned between \$600 and \$900 a week. Moreover, he retained counsel for proceedings before the district court. To be sure, there is also evidence in the record that could have supported a finding of indigency. But given the evidence discussed above,

¹ In their briefing, the parties dispute whether Terry waived his right to appeal the \$10,000 assessment in his plea agreement. The Government has since abandoned this argument. Accordingly, we do not consider this argument and instead proceed directly to the merits.

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the district court’s conclusion was “plausible in light of the record viewed in its entirety.” *Anderson v. City of Bessemer City*, 470 U.S. 564, 573–74 (1985); *see also United States v. Childers*, 740 F. App’x 417 (5th Cir. 2018) (per curiam) (affirming a district court’s imposition of a § 3014 assessment because “[a]lthough some of the PSR’s information based on [Appellant’s] self-reported status suggested he was indigent, other financial data in the record signaled to the contrary”).

Terry further contends that the district court made an obvious error as it found that Terry was indigent for the purposes of paying a separate, larger fine pursuant to § 5E1.2 of the United States Sentencing Guidelines. But we have rejected that exact argument. *See United States v. Graves*, 908 F.3d 137, 143–44 (5th Cir. 2018). Under the guideline provisions, Terry’s fine range for his offense was \$50,000 to \$500,000. As we held in *Graves*, “[i]t should go without saying that defendant may not have the same ability to pay \$5,000 as he would have to pay five to fifty times that amount.” *Id.*

Finally, relying on out-of-circuit precedent, Terry argues that the district court plainly erred in failing to make an explicit finding that he could pay the assessment before imposing it. But we have never required such an explicit finding. Indeed, in an unpublished opinion, we held that “the statute does not require such a finding” and affirmed a district court’s implicit finding that a defendant was not indigent. *See United States v. Streaty*, 735 F. App’x 140, 141 (5th Cir. 2018) (per curiam). At a minimum, the law remains unsettled in this circuit. Terry therefore cannot demonstrate that the district court committed plain error by failing to make an explicit finding that he could pay the § 3014 assessment. *See United States v. Evans*, 587 F.3d 667, 671 (5th Cir. 2009) (explaining that we ordinarily do not find plain error when we have not addressed an issue or where an argument requires extending existing precedent).

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In sum, the record as a whole supports a finding that Terry was not indigent for the purposes of the § 3014 assessment at issue. His arguments to the contrary are unavailing. He has not shown plain error here.

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

UNITED STATES OF AMERICA

v.

JON ANTHONY TERRY
Defendant.

§ JUDGMENT IN A CRIMINAL CASE

§

§

§ Case Number: 3:17-CR-00647-M(1)

§ USM Number: 56493-177

§ Darlina C Crowder

§ 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 2 and 3 of the Indictment, filed on December 13, 2017.
<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:

<u>Title & Section / Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 USC § 2251(a) Production of Child Pornography	04/30/2017	2
18 USC § 2251(a) Production of Child Pornography	03/11/2013	3

The defendant is sentenced as provided in pages 2 through 8 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)
 Counts 1, 4, and 5 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.

September 11, 2019
Date of Imposition of Judgment

Signature of Judge

BARBARA M. G. LYNN
CHIEF UNITED STATES DISTRICT JUDGE
Name and Title of Judge

September 12, 2019
Date

19-11039.123

DEFENDANT: JON ANTHONY TERRY
CASE NUMBER: 3:17-CR-00647-M(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:

THREE HUNDRED AND SIXTY (360) MONTHS for Count 2 and THREE HUNDRED AND SIXTY (360) MONTHS for Count 3, to run consecutive to each other, for a total aggregate sentence of SEVEN HUNDRED AND TWENTY (720) MONTHS.

- The court makes the following recommendations to the Bureau of Prisons:
The court recommends the defendant be housed in a facility in Arkansas, subject to the facility being able to deal with persons who are sexual offenders.

- 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

19-11039, 124

APP B

DEFENDANT: JON ANTHONY TERRY
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SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

LIFE on each count to run concurrently with each other.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

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

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall 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.

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.

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CASE NUMBER: 3:17-CR-00647-M(1)

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;
2. the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. the defendant shall support his or her dependents and meet other family responsibilities;
5. the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

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SPECIAL CONDITIONS OF SUPERVISION

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 \$10 per month.

The defendant shall participate in 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 a rate of at least \$10 per month.

Without prior permission of the probation officer, the defendant shall have no contact with persons under the age of 18, including by correspondence, telephone, Internet, electronic communication, or through third parties. The defendant shall not have access to or loiter near school grounds, parks, arcades, playgrounds, amusement parks, or other places where children may frequently congregate. 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, without prior permission of the probation officer. Furthermore, the defendant shall not date or befriend anyone who has children under the age of 18, without prior permission of the probation officer.

The defendant shall neither possess nor have under his control any sexually oriented, or sexually stimulating materials of adults or children. This includes visual, auditory, telephonic, electronic media, email, chat communications, instant messaging, or computer programs. The defendant shall not patronize any place where such material or entertainment is available. The defendant shall not use any sex-related telephone numbers.

The defendant shall have no contact with any victim of this offense, including by correspondence, telephone, or communication through third parties, except under circumstances approved in advance by the probation officer. The defendant shall not enter onto the premises, travel past, or loiter near any victim's residence, place of employment, or other places frequented by the victim.

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

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

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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.

The defendant shall not use any computer other than the one the defendant is authorized to use without prior approval from the probation officer.

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.

The defendant shall not use any computer or computer-related equipment owned by his employer except for the strict benefit of his employer in the performance of his job-related duties.

The defendant shall not maintain or create a user account on any social networking site (i.e., MySpace.com, Facebook.com, Adultfriendfinder.com, etc.) that allows access to persons under the age of 18, or allows for the exchange of sexually-explicit material, chat conversations, or instant messaging. The defendant shall neither view nor access any web profile of users under the age of 18.

The defendant shall not use or possess any gaming consoles (including, but not limited to, Xbox, PlayStation, Nintendo), or devices without prior permission from the probation officer.

The defendant shall not use or possess a web cam or any other hardware that allows for the exchange of video or photographs online.

The defendant shall not use or own any device that allows Internet access other than authorized by the probation officer. This includes, but is not limited to, PDA's, electronic games, and cellular/digital telephones.

The defendant shall not access any Internet Service Provider account or other online service using someone else's account, name, designation, or alias.

The defendant shall pay an assessment pursuant to 18 U.S.C. § 3014 to the United States in the amount of \$10,000, payable to the U.S. District Clerk, 1100 Commerce Street, Room 1452, Dallas, Texas 75242. If upon commencement of the term of supervised release any part of the assessment imposed pursuant to 18 U.S.C. § 3014 remains unpaid, the defendant shall make payments on such unpaid balance beginning 60 days after release from custody at the rate of at least \$50 per month until the fine is paid in full.

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CRIMINAL MONETARY PENALTIES

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

	Assessment	Fine	Restitution
TOTALS	\$200.00	\$0.00	\$0.00

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

* 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 The defendant shall pay an assessment pursuant to 18 U.S.C. § 3014 to the United States in the amount of \$10,000, payable to the U.S. District Clerk, 1100 Commerce Street, Room 1452, Dallas, Texas 75242. If upon commencement of the term of supervised release any part of the assessment imposed pursuant to 18 U.S.C. § 3014 remains unpaid, the defendant shall make payments on such unpaid balance beginning 60 days after release from custody at the rate of at least \$50 per month until the fine is paid in full.

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 \$200.00 for Counts 2 and 3, which shall be paid 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.

Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.

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:
One Apple iPhone, bearing IMEI number 355376073074192; one Apple iPad, bearing IMEI number 358849054076946; one Corsair Force GT hard drive, bearing serial number 1147650000011570214; one Seagate Barracuda hard drive, bearing serial number Z560H5BH; and one Western Digital My Passport external hard drive, bearing serial number WXM1AC6NS951.

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.

United States Court of Appeals
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No. 19-11039

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JON ANTHONY TERRY,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:17-CR-647-1

ON PETITION FOR REHEARING EN BANC

Before WILLETT, ENGELHARDT, and WILSON, *Circuit Judges.*

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.