

No. 23-

IN THE  
**Supreme Court of the United States**

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JUSTIN DEL RIO,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

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**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTION PRESENTED FOR REVIEW**

This appeal concerns a challenge to the enforceability of a \$5,000 fine under 18 U.S.C. § 3014. Petitioner, JUSTIN DEL RIO, submits the Fifth Circuit Court of Appeals' ("the Fifth Circuit" or "the Appellate Court") ruling which affirmed the District Court on the basis that Mr. Del Rio failed to present argument on the fourth prong of plain error—that is, that the error by the District Court "seriously affects the fairness, integrity or public reputation of judicial proceedings—violated the Due Process Clause because: (1) the Fifth Circuit did not consider all the briefing, (2) Government did not make this argument, and (3) Mr. Del Rio's argument in his briefing shows he did argue the fourth prong of plain error. Thus, the Fifth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court and a compelling reason is presented for discretionary review. Mr. Del Rio therefore requests that this Court grant this Petition and allow this case to proceed for a determination of whether the Due Process Clause was violated.

## **PARTIES TO THE PROCEEDING**

The parties to the proceeding are listed in the caption:

Justin Del Rio:	Petitioner (Defendant-Appellant in the lower courts)
United States of America:	Respondent (Plaintiff-Appellee in the lower courts)

## TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW.....	i
PARTIES TO THE PROCEEDING.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	iv
CITATIONS TO OPINIONS AND RELEVANT ORDERS.....	1
GROUNDΣ FOR JURISDICTION.....	2
CONSTITUTIONAL PROVISIONS.....	2
STATEMENT OF THE CASE.....	2-7
ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.....	7-10
CONCLUSION.....	10

## INDEX TO APPENDIX

APPENDIX A	Decision of the United States Court of Appeals for the Fifth Circuit denying relief on direct appeal.
APPENDIX B	Judgment in a Criminal Case issued by the United States District Court for the Northern District of Texas, San Angelo Division.

## TABLE OF AUTHORITIES

### CASES:

<i>Anders v. California</i> , 386 U.S. 738 (1967).....	3
<i>Duncan v. Walker</i> , 533 U.S. 167, 68 (2001).....	9
<i>In re Oliver</i> , 333 U.S. 257, 273 (1948).....	7
<i>United States v. Graves</i> , 908 F.3d 137, 138 (5th Cir. 2018), <i>cert. denied</i> , 139 S. Ct. 1360 (2019).....	8

### CONSTITUTIONAL PROVISIONS:

U.S. CONST. amend V.....	2
U.S. CONST. amend VI.....	2

### STATUTES:

8 U.S.C. § 1324.....	4
18 U.S.C. § 2251(a).....	1-3
18 U.S.C. § 2252(a)(4).....	4
18 U.S.C. § 2252A(a)(5).....	4
18 U.S.C. § 2259A.....	5
18 U.S.C. § 3553(a).....	5
18 U.S.C. § 3572.....	5
28 U.S.C. § 3014.....	i, 2-5

## **PETITION FOR WRIT OF CERTIORARI**

Petitioner, JUSTIN DEL RIO, requests this Court grant this Petition and issue a Writ of Certiorari to review the decision of the Fifth Circuit. Mr. Del Rio submits the Fifth Circuit denied him his due process rights by concluding that he had not argued the fourth prong necessary to show plain error. The Government did not make this argument. The Court of Appeals admits it did not consider all of the briefing, to wit: Mr. Del Rio's reply brief. Finally, a review of the briefing establishes Mr. Del Rio made a sufficient argument for the Fifth Circuit to rule on the issue and grant the requested relief. Thus, Mr. Del Rio submits that this Petition should proceed to further review.

## **REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE**

From the Federal Courts:

The Order of the United States Court of Appeals for the Fifth Circuit, *United States v. Justin Del Rio*, No. 21-11209 (5th Cir. February 9, 2023), appears at Appendix A to this petition and is unreported.

The Judgment in a Criminal Case of the United States District Court for the Northern District of Texas, San Angelo Division, appears at Appendix B to this petition and is unreported.

From the State Courts:

None.

## **GROUND FOR JURISDICTION**

This Petition arises from a direct appeal which granted final and full judgment against Mr. Del Rio for production of child pornography in violation of 18 U.S.C. § 2251(a). Mr. Del Rio pleaded guilty to the above charge. On appeal, the Fifth Circuit ordered counsel

for Mr. Del Rio to argue whether an appeal waiver was enforceable on the issue of a \$5,000 fine under 18 U.S.C. § 3014. The Appellate Court held that Mr. Del Rio did not argue the fourth prong of plain error review and affirmed the District Court on that basis alone. A copy of the Fifth Circuit opinion is attached at Appendix A, and a copy of the District Court's judgment is attached at Appendix B.

### **CONSTITUTIONAL PROVISIONS**

#### **U.S. CONST. Amend. V**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

#### **U.S. CONST. Amend. VI**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in this favor; and to have Assistance of Counsel for his defense.

### **STATEMENT OF THE CASE**

#### **Overview**

This case involves an appeal from a Judgment of conviction for production of child pornography in violation of 18 U.S.C. § 2251(a). The Judgment was the result of a guilty plea wherein Mr. Del Rio waived his right to appeal his conviction and sentence. ROA.98-108.

The undersigned filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). The Fifth Circuit subsequently determined there may be an issue with respect to the additional special assessment of \$5,000 made pursuant to the Justice for Victims of Trafficking Act, 18 U.S.C. § 3014. Thus, the Fifth Circuit ordered counsel to argue the issue. To this end, counsel filed an opening brief, the Government filed a response, and counsel filed a reply brief to the Government's response.

#### Background

On June 9, 2021, the Government filed a one count Indictment against Mr. Del Rio charging him with production of child pornography in violation of 18 U.S.C. § 2251(a). ROA.8-10. The case was subsequently set for trial. ROA.19-23.

#### Guilty Plea

However, on July 19, 2021, Mr. Del Rio entered into a plea agreement with the Government to plead guilty to the single count in the Indictment. ROA.98-108. The agreement included a waiver of appeal. ROA.103-04. The facts of the case were provided in a Factual Resume, to which the Government and Mr. Del Rio agreed. ROA.21-28.

The guilty plea hearing was held on July 29, 2021. ROA.64-79. Mr. Del Rio pleaded guilty to production of child pornography as charged in the Indictment. ROA.77. When he entered his guilty plea, Mr. Del Rio verified that the plea agreement waived his right to appeal his sentence except in limited circumstances. ROA.75. United States District Judge James Wesley Hendrix set the case for sentencing on November 18, 2021. ROA.33-34.

## The Presentence Investigation Report and Addendum Thereto

Prior to the sentencing hearing, a Presentence Investigation Report (“PSR” or “the Report”) was prepared. ROA.110-29. In the PSR, the Probation Officer concluded that, because the maximum statutory sentence was 360, Mr. Del Rio’s Guideline term of imprisonment was 360 months in the custody of the Bureau of Prisons. ROA.124. However, because the maximum statutory sentence was 360 months, Mr. Del Rio’s Guideline term of imprisonment was 360 months. ROA.124.

Relevant to this Petition was an addendum to the PSR, filed on October 26, 2021. ROA.134-35. The “Additional Information” section concludes that Mr. Del Rio should be assessed \$5,000 because he is a non-indigent person convicted of a child pornography offense. ROA.134-35. Specifically, the addendum provides:

At the submission of the Presentence Report, Congress had not renewed the Justice for Victims Trafficking Assessment. It has since been renewed and the Presentence Report shall be amended to include the following information (*changes in italics*):

101. *The defendant is also subject to the provisions of the justice for Victims of Trafficking Act of 2015. In addition to the assessment imposed under section 3013, the Court shall assess an amount of \$5,000, per count, on any non-indigent person or entity convicted of an offense under 18 U.S.C. Chapters 77, 109A, 110, 117; or Section 274 of the Immigration and Nationality Act (8 U.S.C. § 1324). 18 U.S.C. § 3014.* The defendant is also subject to the provisions of the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018. In addition to any other criminal penalty, restitution, or special assessment authorized by law, the court shall assess (1) not more than \$17,000 on any person convicted of an offense under 18 U.S.C. § 2252(a)(4) or § 2252A(a)(5); (2) not more than \$35,000 on any person convicted of any other offense for trafficking in child pornography; and (3) not more than \$50,000 on any person convicted of a child pornography production offense. The court shall consider the factors

in 18 U.S.C. § 3553(a) and 18 U.S.C. § 3572 when ordering this assessment. 18 U.S.C. § 2259A.

Additionally, the following condition should be added to Paragraph 110 of the Presentence Report:

14. The defendant shall pay the Justice for Victims of Trafficking assessment of \$5,000, payable to the U.S. District Clerk, 33 East Twohig Avenue, Ste 202, San Angelo, Texas 76903-6451. If upon commencement of the term of supervised release any part of the JVTA assessment remains unpaid, the defendant shall make payments in the amount of \$20 per month on such unpaid balance beginning 60 days from the date of this judgment with another payment to be made on the same day of each month thereafter until the restitution is paid in full.

ROA.134-35 (emphasis in original).

### Sentencing Hearing

After a reset, Mr. Del Rio was sentenced on November 29, 2021. ROA.80. The District Court confirmed the above-referenced addendum to the Report. ROA.83. There were no objections to the PSR or the addendum. ROA.83-84. Finally, the Court recited the punishment range and the fine range for the record. ROA.84.

The District Court sentenced Mr. Del Rio to a prison term of 30 year. The Court determined that Mr. Del Rio's federal sentence was to run consecutively to a yet-to-be determined state court sentence. ROA.93. Relevant to this appeal is the following announcement at sentencing by the District Judge:

You are also subject to the Justice for Victims of Trafficking Act. Pursuant to 18 U.S.C. Section 3014, you shall immediately pay an assessment of \$5,000, payable to the U.S. District Clerk in San Angelo, Texas. If, upon the commencement of your term of supervised release, any part of that assessment remains unpaid, you shall make payments on the unpaid balance

beginning 60 days after release from custody at a rate of at least \$50 per month until paid in full.

ROA.95. The Judgment is consistent with this declaration as it provides for Mr. Del Rio to pay a \$5,000 assessment in accordance with the Justice for Victims of Trafficking Act of 2015. ROA.54.

Before the Fifth Circuit

The undersigned counsel for Mr. Del Rio filed an *Anders* brief. The Fifth Circuit denied relief and Ordered counsel to argue whether the \$5,000 special assessment that was imposed by the District Court was a violation of the plea bargain and should not have been ordered because Mr. Del Rio was indigent. Thus, counsel filed an opening brief and argued:

The special assessment set forth in 18 U.S.C. § 1304 *only* permits the imposition of the \$5,000 if the defendant is not indigent. Here, it was never established that Mr. Del Rio was not indigent and, in fact, the evidence is that Mr. Del Rio is an indigent person. Accordingly, this Court must reverse and remand for a sentence without the imposition of the special assessment or remand for a new sentencing proceeding.

Opening Brief at page 15. In other words, counsel argued it was plain error for the District Court to order the special assessment because Mr. Del Rio was indigent. *Id.* at 15-17.

The Government responded and argued that the issue was foreclosed by the appeal waiver. The Government further argued there was no plain error on the issue of imposing the \$5,000 special assessment. Responsive Brief at page 11.

Counsel for Mr. Del Rio filed a reply brief and argued the waiver was not applicable in this case and, more importantly, reurged the argument that plain error had been established. As noted above, the Fifth Circuit affirmed because counsel had not argued the fourth prong of plain error review. Appendix A at pages 3-4.

**ARGUMENT AMPLIFYING REASONS RELIED  
ON FOR ALLOWANCE OF THE WRIT**

**I. The Due Process Violation**

The jurisprudence of this Court establishes that it is a violation of due process to deny Mr. Del Rio a fair opportunity to be heard on matters that he argued were relevant to the issues before the Fifth Circuit. This Court in *In re Oliver* identified the following rights as among the minimum essentials of a fair ruling.

A person’s right to reasonable notice . . . and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.

333 U.S. 257, 273 (1948). Although *In re Oliver* addressed the right to cross examine a witness, this Court’s explanation of the law is relevant here because it was grounded in due process. *See id.* at 294-95. Specifically, this Court held that the right to examination is implicit in the Constitutional right of confrontation and helps assure the “accuracy of the truth-determining process.” *Id.* at 295. Indeed, this Court indicated that the denial of the right to develop the argument as required by the Court—and any discussion of the legal issues before the Court—are essential to due process to determine the ultimate “integrity of the fact finding process.” *Id.*

## II. Overview of this Case and Due Process

The ruling by the Fifth Circuit in this case constituted a depravation of Mr. Del Rio's right to be heard on the main issue that the Appellate Court had identified for argument. Review was for plain error and Mr. Del Rio did submit his argument on the doctrine of plain error before the Court. Moreover, the Government never argued that Mr. Del Rio had failed to address the fourth prong of the plain error analysis. Furthermore, as discussed below, Mr. Del Rio did argue that all four prongs of plain error review were met.

## III. The Argument to the Fifth Circuit on Plain Error

The Fifth Circuit found that “[a]lthough his brief dutifully incants the four prongs of plain error review, it presents no argument as to why the fourth prong is satisfied or why the court should use its discretion to correct any error.” Appendix A at page 4. Mr. Del Rio respectfully disagrees.

As Mr. Del Rio observed, the Fifth Circuit “has held that the \$5,000 special assessment can only be made on a non-indigent person after considering the defendant’s ability to pay in light of his present and future earning capacity and financial resources.” Opening Brief at pages 16-17 (citing *United States v. Graves*, 908 F.3d 137, 138 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 1360 (2019)). Yet, Mr. Del Rio did not stop here. The opening brief argues that, because Mr. Del Rio was unable to pay the \$5,000, to allow “the imposition of the special assessment in this case would render the word “non-indigent” in the statute meaningless. Opening Brief at pages 17-18. The opening brief also notes that “the Supreme Court has counseled against interpreting a statute in such a way as to render meaningless

the particular words chosen by Congress. Opening Brief at page 18 (citing *Duncan v. Walker*, 533 U.S. 167, 68 (2001)). Finally, the opening brief points out that the District Court did not make a finding on the indigency issue when it ordered the assessment. Opening Brief at page 19. Thus, Mr. Del Rio asserts that he did argue that the error in this case affected the fairness, integrity or public reputation of judicial proceedings.

And, the Government did not argue that Mr. Del Rio failed to address the elements of plain error review. This observation provides additional authority that the Fifth Circuit was incorrect in finding that all elements of plain error review were not addressed.

In sum, Mr. Del Rio argued:

[T]his Court [referring to the Fifth Circuit] cannot uphold the \$5,000 special assessment because, the appointment of counsel and the inability to pay a fine aside, the evidence shows he is presently indigent and there was never a finding that he would have any future earning capacity, especially in light of his 30-year sentence. Therefore, to allow the imposition of the special assessment in this case would render the word “non-indigent” in the statute meaningless.

Opening Brief at pages 17-18. Mr. Del Rio additionally observed that this Court has “counseled against interpreting a statute in such a way as to render meaningless the particular words chosen by Congress.” Opening Brief at page 18. And, the Government did not argue that this was insufficient briefing on the plain error analysis.

#### IV. The Fourth Prong of the Plain Error Review

It is undisputed that Mr. Del Rio observed the fourth prong of the legal standard of review. Mr. Del Rio noted that there is only plain error if that error “affected the fairness, integrity, or public reputation of judicial proceedings.” Opening Brief at page 12.

In discussing the errors as a result of the granting of the special assessment, Mr. Del Rio asserts that these matters of integrity, fairness and public reputation were addressed. Mr. Del Rio observed the imposition of the special assessment showed that the District Court had rendered the statute meaningless. Opening Brief at pages 17-18. Indeed, Mr. Del Rio further observed how the District Court not only ignored evidence that Mr. Del Rio was indigent, it failed to make a finding on indigence at all. Opening Brief at page 18.

Finally, independent research uncovered no caselaw or authority to suggest that Mr. Del Rio was required to fully re-iterate the exact wording of the statute when arguing that the fourth prong is satisfied and why the Court should use its discretion to correct the error.

### CONCLUSION

For the reasons set forth above, Mr. Del Rio submits his due process rights were violated and therefore a compelling reason is presented in support of discretionary review by this Court on the important issue of constitutional guarantees and concerns.

WHEREFORE, PREMISES CONSIDERED, Petitioner, JUSTIN DEL RIO, respectfully requests that this Court grant this petition and issue a Writ of Certiorari. Mr. Del Rio also requests any further relief to which he may be entitled under the law and in equity.

Respectfully Submitted,

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