

No. 23-

IN THE
Supreme Court of the United States

JUSTIN DEL RIO,

Petitioner,
v.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX VOLUME

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APPENDIX A

United States Court of Appeals
for the Fifth Circuit

No. 21-11209

United States Court of Appeals
Fifth Circuit

FILED

August 7, 2023

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JUSTIN DEL RIO,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 6:21-CR-33-1

Before KING, SMITH, and ELROD, *Circuit Judges.*

PER CURIAM:*

Justin Del Rio appeals his sentence in the face of an appeal waiver. Because he failed to brief all the factors to establish reversible plain error, we affirm.

I.

Del Rio pleaded guilty, per a plea agreement, to production of child pornography. *See* 18 U.S.C. § 2251(a). In exchange for his plea, the govern-

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

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ment agreed not to bring additional charges “based upon the conduct underlying and related to [Del Rio’s] plea of guilty.”

The plea agreement included a provision stating, “if the Court finds the defendant is not indigent, an additional mandatory special assessment of \$5,000 must be imposed pursuant” to section 101 of the Justice for Victims of Trafficking Act of 2015 (“JVTA”). In that same plea agreement, Del Rio broadly agreed to waive his right to appeal his “conviction, sentence, fine and order of restitution or forfeiture.” Del Rio negotiated carveouts to this broad appeal waiver, which included preserving his right to challenge a sentence “exceeding the statutory maximum.”¹

At sentencing, Del Rio did not object to the presentence report (“PSR”) or its addendum. The district court sentenced him to 360 months of imprisonment and 25 years of supervised release. The court ordered Del Rio to pay a fee mandated by the JVTA. Del Rio did not object to his sentence but filed a timely notice of appeal.

Del Rio contends that the appeal waiver does not block his challenge to the JVTA special assessment, reasoning that it is a sentence above the statutory maximum. On the merits, he maintains that the district court plainly erred in failing to establish that he was not indigent before imposing the special assessment and that he is, in fact, indigent.

II.

We review the enforceability of an appeal waiver *de novo*. Under our controlling precedent in *United States v. Bond*, 414 F.3d 542, 544 (5th Cir. 2005), we carry out a two-step inquiry: “(1) whether the waiver was knowing

¹ The other negotiated carveouts were to challenge the voluntariness of his guilty plea or appeal waiver, arithmetic errors at sentencing, and to bring a claim of ineffective assistance of counsel. Del Rio does not press any of these claims.

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and voluntary and (2) whether the waiver applies to the circumstances at hand, based on the plain language of the agreement.” Del Rio challenges only step two. Also, per *Bond*, a statutory-maximum provision authorizes an appeal only where the district court exceeds “the upper limit of punishment that Congress has legislatively specified for violations of a statute.” *Id.* at 546 (quotation omitted).

Because Del Rio did not challenge his sentence in district court, our review is for plain error. *See Puckett v. United States*, 556 U.S. 129, 135 (2009). Del Rio “must show that the district court erred, that the error was plain, and that the plain error affected his substantial rights. Even if these conditions are met, we exercise our discretion to correct the error only if it seriously affected the fairness, integrity or public reputation of judicial proceedings.” *United States v. Caravayo*, 809 F.3d 269, 273 (5th Cir. 2015) (per curiam) (cleaned up).

III.

Although this court has not yet ruled on whether a challenge to a finding of non-indigency in a JVTAspecial assessment can result in a sentence in excess of the statutory maximum,² we pretermit discussion of the issue because Del Rio failed adequately to argue that all four prongs of plain error review were met.

A “challenge cannot succeed on plain error review” where the defendant “fails to argue that the alleged error affected the fairness, integrity, or public reputation of judicial proceedings.” *Caravayo*, 809 F.3d at 273. We have consistently “refused to correct plain errors when, as here, the complaining party makes no showing as to the fourth prong.” *Id.* at 273–74 (quot-

² See *United States v. Graves*, 908 F.3d 137, 139–40 (5th Cir. 2018) (avoiding the issue and resolving on the merits).

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ing *United States v. Rivera*, 784 F.3d 1012, 1018 n.3 (5th Cir. 2015)). It was Del Rio’s burden, in his opening brief, to “demonstrate that the error affect[ed] the fairness, integrity, or public reputation of judicial proceedings.” *Id.* at 274 (quoting *United States v. Andaverde-Tinoco*, 741 F.3d 509, 523 (5th Cir. 2013)).

Del Rio did not make that required showing. Although 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.³

Del Rio has not established plain error under our clear precedent. The judgment is AFFIRMED.

³ “A party forfeits an argument . . . by failing to adequately brief the argument on appeal.” *Mock v. Garland*, No. 23-10319, 2023 WL 4882763, at *12 n.38 (5th Cir. Aug. 1, 2023) (omission in original) (quoting *Rollins v. Home Depot USA*, 8 F.4th 393, 397 (5th Cir. 2021)).

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS SAN ANGELO DIVISION

UNITED STATES OF AMERICA

v.

JUSTIN DEL RIO

§ JUDGMENT IN A CRIMINAL CASE

§

§

§

§ Case Number: **6:21-CR-00033-H-BU(1)**
§ USM Number: **50524-509**
§ **Kevin W. Willhelm**
§ 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 June 9, 2021.
<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

18 U.S.C. § 2251(a) - Production of Child Pornography

Offense Ended
12/04/2020

Count
1

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)
 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.

November 29, 2021

Date of Imposition of Judgment

Signature of Judge

James Wesley Hendrix
United States District Judge
Name and Title of Judge

November 29, 2021

Date

DEFENDANT: JUSTIN DEL RIO
CASE NUMBER: 6:21-CR-00033-H-BU(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:

360 months—the statutory maximum—as to count 1. This sentence shall run consecutively to any sentence imposed in Case No. D-17-0183-SA, pending in the 391st District Court, Tom Green County, Texas.

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

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: JUSTIN DEL RIO
CASE NUMBER: 6:21-CR-00033-H-BU(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **Twenty five (25) 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: JUSTIN DEL RIO
CASE NUMBER: 6:21-CR-00033-H-BU(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: JUSTIN DEL RIO
CASE NUMBER: 6:21-CR-00033-H-BU(1)

SPECIAL CONDITIONS OF SUPERVISION

1. 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 \$20.00 per month.
2. 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 \$20.00 per month.
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 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 \$20.00 per month.
5. The defendant shall have no contact with minors under the age of 18, including by correspondence, telephone, internet, electronic communication, or communication through third parties, with the exception of the defendant's own children. The defendant's contact with his children will be limited to occasions when the probation officer is informed in advance of the defendant's intent to have that contact and the probation officer approves it. 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, except as may be allowed upon advance approval by the probation officer.
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 possess, have access to, or utilize a computer or Internet connection device, including, but not limited to Xbox, PlayStation, Nintendo, or similar device with internet connectivity, without permission of the probation officer. 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. The defendant shall not use any computer other than the one the defendant is authorized to use without prior approval from the probation officer.

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8. 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.
9. Without prior approval of the probation officer, the defendant shall not maintain or create a user account on any social networking site (i.e., Facebook, Twitter, Snapchat, Instagram, Grindr, Tinder, 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.
10. The defendant shall not engage in or utilize any service that allows peer-to-peer file sharing or file transfer protocol activity.
11. The defendant shall not utilize or possess a camera, recording device, camcorder, or other similar device during the term of supervised release, without prior approval by the probation officer.
12. The defendant shall pay the Amy, Vicky, and Andy Child Pornography assessment of \$5,000.00 pursuant to 18 U.S.C. § 2259A(1), payable to the U.S. District Clerk, 33 E Twohig Avenue, Ste. 202, San Angelo, Texas 76903-6451. If upon commencement of the term of supervised release any part of the AVAA assessment remains unpaid, the defendant shall make payments in the amount of \$50.00 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.
13. The defendant shall pay the Justice for Victims of Trafficking assessment of \$5,000.00, 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 \$50.00 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.

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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	\$5,000.00	\$5,000.00

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:

the interest requirement is waived for the fine assessments
 the interest requirement for the fine 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
See special conditions of supervised release regarding payment of assessments, as if set forth in full.
- 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

Pursuant to 18 U.S.C. § 2253 and the Preliminary Order of Forfeiture (Dkt. #30) filed on 11/1/21, the defendant shall forfeit any property, real or personal, used or intended to be used to commit or to promote the commission of the offense alleged in Count One, and any property traceable to such property, including but not limited to: an iPhone 8Plus (A1864).