

No. _____

IN THE
Supreme Court of the United States

JONATHAN KEARN,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

MELODY BRANNON
Federal Public Defender
DANIEL T. HANSMEIER
Appellate Chief
Counsel of Record
KANSAS FEDERAL PUBLIC DEFENDER
500 State Avenue, Suite 201
Kansas City, Kansas 66101
Phone: (913) 551-6712
Email: daniel_hansmeier@fd.org
Counsel for Petitioner

QUESTION PRESENTED

Jonathan Kearn challenged a no-contact condition of supervised release in the district court and on appeal. On appeal, the government agreed with Mr. Kearn that the standard of review was for an abuse of discretion. But the Tenth Circuit sua sponte held the claim forfeited, then further held the claim waived because Mr. Kearn did not argue plain error on appeal. In contrast, eight courts of appeals would not have held the claim forfeited, but instead would have held that the government waived plain error review when it agreed to the abuse of discretion standard. The question presented is:

When the government agrees that a claim was properly preserved below, can a court of appeals sua sponte invoke plain error review on appeal, or has the government waived review for plain error?

TABLE OF CONTENTS

QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
INDEX TO APPENDIX	iii
TABLE OF AUTHORITIES CITED.....	iv
Cases	iv
Statutes.....	vi
Other Authorities	vii
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT.....	7
I. The Circuits Are Divided Over Whether The Government’s Intentional Decision Not To Invoke Plain Error Review Amounts To A Waiver Of That Standard Of Review.....	7
II. The Tenth Circuit’s Decision Is Incorrect.	10
III. The Question Presented Is Critically Important To The Administration Of Federal Appeals.....	15
IV. This Case Is An Ideal Vehicle To Resolve The Conflict.	19
CONCLUSION.....	21

INDEX TO APPENDIX

Appendix A: Decision of the Tenth Circuit	1a
Appendix B: Judgment.....	26a
Appendix C: Excerpt of Transcript of Sentencing Hearing.....	32a
Appendix D: Order Denying Petition for Rehearing	33a

TABLE OF AUTHORITIES CITED

	PAGE
Cases	
<i>Adarand Constructors v. Pena</i> , 515 U.S. 200 (1995)	16
<i>Bain v. United States</i> , 129 S.Ct. 2157 (2009).....	10
<i>Berger v. United States</i> , 295 U.S. 78 (1935)	18
<i>Black v. Romano</i> , 471 U.S. 606 (1985)	18
<i>Cleveland Bd. of Ed. v. Loudermill</i> , 470 U.S. 532 (1985).....	12
<i>Concrete Pipe v. Construction Laborers Pension</i> , 508 U.S. 602 (1993)	16
<i>Gagnon v. Scarpelli</i> , 411 U.S. 778 (1973)	19
<i>Gozlon-Peretz v. United States</i> , 498 U.S. 395 (1991)	18
<i>Greenlaw v. United States</i> , 554 U.S. 237 (2008)	11
<i>Henderson ex rel. Henderson v. Shinseki</i> , 562 U.S. 428 (2011).....	7, 11
<i>Johnson v. California</i> , 543 U.S. 499 (2005)	16
<i>Johnson v. United States</i> , 529 U.S. 694 (2000)	18
<i>McKissick v. Young</i> , 618 F.3d 1177 (10th Cir. 2010).....	12, 13
<i>McLane v. EEOC</i> , 137 S.Ct. 1159 (2017)	16
<i>Morrissey v. Brewer</i> , 408 U.S. 471 (1972)	19
<i>Richison v. Ernest Grp., Inc.</i> , 634 F.3d 1123 (10th Cir. 2011)	6, 9, 12, 13
<i>U.S. Bank Nat’l Ass’n v. Village at Lakeridge</i> , No. 15-1509 (Mar. 27, 2017)	16
<i>United States v. Alexander</i> , 679 F.3d 721 (8th Cir. 2012)	18
<i>United States v. Archambault</i> , 62 F.3d 995 (7th Cir. 1995).....	14
<i>United States v. Ashford</i> , 718 F.3d 377 (4th Cir. 2013).....	8

<i>United States v. Bain</i> , 586 F.3d 634 (8th Cir. 2009).....	9, 10
<i>United States v. Beckham</i> , 968 F.2d 47 (D.C. Cir. 1992).....	14
<i>United States v. Boudreau</i> , 564 F.3d 431 (6th Cir. 2009).....	14
<i>United States v. Carthorne</i> , 726 F.3d 503 (4th Cir. 2013).....	14
<i>United States v. Cyr</i> , 29 Fed. Appx. 1 (D.C. Cir. 2001).....	8
<i>United States v. De Vaughn</i> , 694 F.3d 1141 (10th Cir. 2012)	14
<i>United States v. Encarnacion-Ruiz</i> , 787 F.3d 581 (1st Cir. 2015)	8
<i>United States v. Gallegos</i> , 314 F.3d 456 (10th Cir. 2002).....	16
<i>United States v. Games-Perez</i> , 695 F.3d 1104 (10th Cir. 2012).....	4, 13, 18
<i>United States v. Garcia-Lopez</i> , 309 F.3d 1121 (9th Cir. 2002).....	14
<i>United States v. Gonyer</i> , 761 F.3d 157 (1st Cir. 2014).....	14
<i>United States v. Granderson</i> , 511 U.S. 39 (1994)	18
<i>United States v. Heckenliable</i> , 446 F.3d 1048 (10th Cir. 2006).....	14
<i>United States v. Jeffries</i> , 587 F.3d 690 (5th Cir. 2009).....	8
<i>United States v. Johnson</i> , 529 U.S. 53 (2000).....	18
<i>United States v. Knights</i> , 534 U.S. 112 (2001).....	18
<i>United States v. Lonjose</i> , 663 F.3d 1292 (10th Cir. 2011)	20
<i>United States v. Menesses</i> , 962 F.2d 420 (5th Cir. 1992).....	14
<i>United States v. Murguia-Rodriguez</i> , 815 F.3d 566 (9th Cir. 2016)	8
<i>United States v. Olano</i> , 507 U.S. 725 (1993).....	15
<i>United States v. Poulsen</i> , 655 F.3d 492 (6th Cir. 2011).....	8
<i>United States v. Quiroz</i> , 22 F.3d 489 (2d Cir. 1994)	14

<i>United States v. Ray</i> , 704 F.3d 1307 (10th Cir. 2013)	14
<i>United States v. Reider</i> , 103 F.3d 99 (10th Cir. 1996)	14
<i>United States v. Rodebaugh</i> , 798 F.3d 1281 (10th Cir. 2015)	9, 10
<i>United States v. Salem</i> , 597 F.3d 877 (7th Cir. 2010)	8
<i>United States v. Tremble</i> , 933 F.2d 925 (11th Cir. 1991)	8
<i>United States v. Ventura-Perez</i> , 666 F.3d 670 (10th Cir. 2012)	17
<i>United States v. White</i> , 584 F.3d 935 (10th Cir. 2009)	14
<i>Wood v. Milyard</i> , 566 U.S. 463 (2012)	11, 12

Statutes

18 U.S.C. § 2251(b)	4
18 U.S.C. § 2252(a)(2)	4
18 U.S.C. § 2252(a)(4)(B)	4
18 U.S.C. § 3231	1
18 U.S.C. § 3553(a)	1
18 U.S.C. § 3553(a)(1)	2
18 U.S.C. § 3553(a)(2)(B)	2
18 U.S.C. § 3553(a)(2)(C)	2
18 U.S.C. § 3553(a)(2)(D)	2
18 U.S.C. § 3563(b)	2
18 U.S.C. § 3583(d)	2, 5, 20
18 U.S.C. § 3583(d)(1)	5
18 U.S.C. § 3583(e)(3)	18
28 U.S.C. § 1254(1)	1

28 U.S.C. § 1291	1
28 U.S.C. § 994(a)	2
Other Authorities	
Fed.R.App.P. 28(a)(8)(A)	11
Fed.R.App.P. 28(b)(4)	11
Fiona Doherty, <i>Indeterminate Sentencing Returns: The Invention of Supervised Release</i> , 88 N.Y.U. L. Rev. 958, 1015 (June 2013)	19
U.S. Const. amend. V	1
U.S. Courts of Appeals Federal Judicial Caseload Statistics (March 31, 2017), available at: http://www.uscourts.gov/statistics/table/b-1/federal-judicial-caseload-statistics/2017/03/31	17

PETITION FOR A WRIT OF CERTIORARI

Petitioner Jonathan Kearn respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The panel decision of the United States Court of Appeals for the Tenth Circuit is published at 863 F.3d 1299, and is included as Appendix A. The unpublished order denying panel rehearing and rehearing en banc is included as Appendix D. The judgment imposing the challenged condition of supervised release is included as Appendix B. The district court's oral imposition of the condition is included as Appendix C.

JURISDICTION

The United States District Court for the District of Kansas originally had jurisdiction under 18 U.S.C. § 3231, which provides exclusive jurisdiction for offenses against the United States. Mr. Kearn timely appealed to the United States Court of Appeals for the Tenth Circuit under 28 U.S.C. § 1291. The Tenth Circuit affirmed in a published opinion. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

No person shall . . . be deprived of life, liberty, or property, without due process of law.

18 U.S.C. § 3553(a) provides in relevant part:

Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the

particular sentence to be imposed, shall consider—

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

18 U.S.C. § 3583(d) provides in relevant part:

The court may order, as a further condition of supervised release, to the extent that such condition—

- (1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);
- (2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and
- (3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. § 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b) and any other condition it considers to be appropriate.

STATEMENT OF THE CASE

In federal criminal cases, district courts generally have the authority to impose discretionary conditions of supervised release only if such conditions meet the three statutory requirements enumerated in 18 U.S.C. § 3583(d) (reasonable relationship;

involve no greater deprivation of liberty than is necessary; consistent with any applicable policy statements in the guidelines). In this case, over a timely objection, the district court imposed a special condition of supervised release prohibiting Jonathan Kearn from having any contact with his own children. Pet. App. 3a. Mr. Kearn challenged the condition on appeal, but the Tenth Circuit held that the issue was waived because Mr. Kearn did not argue for plain error review, even though the government admitted that Mr. Kearn preserved the issue below and that the standard of review was abuse of discretion. Pet. App. 24a.

The Tenth Circuit's decision conflicts with decisions from eight other courts of appeals, all of whom have held that the government waives plain error review when it agrees to a different standard of review on appeal. Only one other Circuit (the Eighth) has adopted a rule similar to the Tenth Circuit's rule. This Court should grant this petition to resolve the conflict.

The resolution of this conflict is critically important. The Tenth Circuit's rule applies across the board to all criminal appeals. It is a rule that, because it is invoked sua sponte and without warning to the parties, has the potential to upset the rights of every criminal defendant in the Eighth and Tenth Circuits. But the manner in which claims are reviewed (or not reviewed) should not turn on the location of the reviewing court.

On the merits, the Tenth Circuit's rule is wrong. It conflicts with the well-established principle of party presentation, it arises from a misreading of Tenth Circuit precedent (as then-Judge Gorsuch explained in dissent in *United States v.*

Games-Perez, 695 F.3d 1104, 1122 (10th Cir. 2012)), and it results in arbitrariness and unfairness. Finally, this case is an excellent vehicle to resolve the conflict. The Tenth Circuit held a preserved claim waived, without any briefing on the standard of review from the parties, the result of which precludes appellate review of a condition of supervised release that bars Mr. Kearn from contact with his own children for five years. Review is necessary.

1. In 2013, an individual sent images of Mr. Kearn's daughters via email to an undercover officer. Pet. App. 3a. While the daughters were clothed in most of the images, one image showed the genitals of Mr. Kearn's youngest daughter. *Id.* The individual also sent three sexually explicit videos of other girls. *Id.*

2. Authorities pegged Mr. Kearn as the individual, and a federal grand jury in Kansas returned a three-count indictment, charging Mr. Kearn with: (1) permitting his minor child to engage in sexually explicit conduct, 18 U.S.C. § 2251(b); (2) distributing child pornography, 18 U.S.C. § 2252(a)(2); and (3) possessing child pornography, 18 U.S.C. § 2252(a)(4)(B). Pet. App. 5a. A jury convicted him of all three counts. Pet. App. 6a. The district court imposed a 292-month term of imprisonment, to be followed by a 5-year term of supervised release. Pet. App. 6a.

As a condition of supervised release, the district court prohibited Mr. Kearn from having any "contact with the victim of the offense." Pet. App. 29a. At sentencing, Mr. Kearn objected to the imposition of this condition as applied to his own children. R2.149 at 35. The government made no attempt to defend the condition, but instead noted that Mr. Kearn's youngest daughter would be an adult by the time Mr. Kearn

released to supervision. *Id.* at 36. The district court responded, “I think as it applies to his children, given the sentence that I plan to impose, a concern about contact is obviated.” Pet. App. 32a. In what appeared to be a nod to striking the condition, the district court then commented that, if the children were still minors upon Mr. Kearn’s release, Mr. Kearn “would be in a position to present that issue at the time.” Yet the district court ruled, “So I understand the request. I’m *not* going to modify the condition.” *Id.* (emphasis added).

3. On appeal, Mr. Kearn challenged the imposition of the no-contact condition. Br. 48-49. He explained that, because the condition was challenged below, the court of appeals should review the issue for an abuse of discretion. Br. 48. In arguing that the imposition of the condition was an abuse of discretion, Mr. Kearn tied the argument – that the condition was obviated in light of the victims’ age during supervision – to the applicable statute, 18 U.S.C. § 3583(d), as well as to the Constitution’s right to familial association. Br. 49. Because the condition was aimed at protecting Mr. Kearn’s *minor* daughter, and because Mr. Kearn’s daughter would be an adult during the term of supervision, the condition was not reasonably related to the offenses of conviction. *Id.*; see 18 U.S.C. § 3583(d)(1). Similarly, because Mr. Kearn’s youngest daughter would be an adult during the term of supervision, there was no compelling need to impinge upon Mr. Kearn’s constitutional right of familial association. Br. 49.

The government agreed that Mr. Kearn properly objected to the condition below and that the standard of review was for an abuse of discretion. Gov’t Br. 53. But it

disagreed that the district court abused its discretion on statutory or constitutional grounds. *Id.* 54-56. In reply, Mr. Kearn countered the government's arguments. Reply Br. 19-20. Because the government conceded that the standard of review was for an abuse of discretion, Mr. Kearn said nothing more on the standard of review. *Id.*

The Tenth Circuit, however, in a published decision sua sponte held that Mr. Kearn did not raise either the statutory or constitutional argument at sentencing. Pet. App. 25a. For this reason, the issue was forfeited, and review was for plain error, not an abuse of discretion. *Id.* And because Mr. Kearn did not argue for plain error, he "waived the issue." *Id.* (quoting *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1131 (10th Cir. 2011) (Gorsuch, J.)). In so holding, the court did not acknowledge that the government waived plain error review by conceding that review was for an abuse of discretion. Instead, the court necessarily held that the government did not waive plain error review by invoking a different standard. Pet. App. 25a.

Mr. Kearn filed a petition for rehearing en banc, explaining that, in light of the government's concession that the issue was preserved, he never had a reason (or an opportunity) to argue plain error on appeal (or to explain that plain error review should not apply because the issue was preserved). He noted that eight of the courts of appeals would not have considered the issue waived, but instead would have held that the government waived plain error review by invoking a different standard on appeal. The Tenth Circuit ordered an answer from the government, who took an absolutist position: a court of appeals can always sua sponte find an issue waived. The Tenth Circuit denied the petition in an unpublished order. Pet. App. 33a.

REASONS FOR GRANTING THE WRIT

The federal courts of appeals are split eight to two over whether the government's intentional decision not to argue plain error review amounts to a waiver of that standard of review. This Court should use this case – which turned entirely on waiver principles sua sponte invoked by the Tenth Circuit – to resolve the conflict on this important question. This Court should hold that, when the government agrees that an issue was properly preserved below, and thus waives review for plain error, a court of appeals cannot sua sponte review the issue for plain error. It follows then that, contrary to the Tenth Circuit's holding below, a criminal defendant does not waive an issue by not arguing plain error where the government did not argue plain error on appeal.

I. The Circuits Are Divided Over Whether The Government's Intentional Decision Not To Invoke Plain Error Review Amounts To A Waiver Of That Standard Of Review.

It is well established that, aside from jurisdictional issues, appellate courts “are generally limited to addressing the claims and arguments advanced by the parties.” *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). Particularly in criminal cases, most of the courts of appeals apply this general rule to standards of review; if a party does not invoke a particular standard of review, then the court of appeals will not apply that standard on appeal. But the Eighth and Tenth Circuits have contrary rules, thus splitting the Circuits on this important issue.

1. In published decisions, seven courts of appeals – the First, Fourth, Fifth, Sixth, Seventh, Ninth, Eleventh, and D.C. Circuits – have held that the government

waives plain error review when it agrees that the issue was properly preserved below (and thus not forfeited). *United States v. Encarnacion-Ruiz*, 787 F.3d 581, 586–87 (1st Cir. 2015) (“When the government fails to request plain error review, we, and many of our sister circuits, review the claim under the standard of review that is applied when the issue is properly preserved below.”); *United States v. Ashford*, 718 F.3d 377, 380 (4th Cir. 2013) (“We decline this eleventh-hour request to review Ashford’s claim for plain error, as the government itself failed to raise any such argument in its opening brief.”); *United States v. Jeffries*, 587 F.3d 690, 691 n.1 (5th Cir. 2009) (declining to apply plain error and noting that “[t]he Government does not seek plain error review”); *United States v. Poulsen*, 655 F.3d 492, 502 n.1 (6th Cir. 2011) (“we will not apply the plain error standard unless requested to do so by one of the parties”); *United States v. Salem*, 597 F.3d 877, 884 (7th Cir. 2010) (government “waived its right to rely on plain error review” when it failed to request that standard of review); *United States v. Murguia-Rodriguez*, 815 F.3d 566, 574 (9th Cir. 2016) (because the government asserted clear error instead of plain error, it “waived its right to rely on plain error review”); *United States v. Tremble*, 933 F.2d 925, 928 (11th Cir. 1991) (“nor has the government requested that we apply a more deferential, plain error review as a result. Considering this omission, we exercise our discretion and will reach the merits of defendant’s claims”). An eighth court of appeals – the D.C. Circuit – has similarly held in an unpublished decision. *United States v. Cyr*, 29 Fed. Appx. 1, 4 n.3 (D.C. Cir. 2001) (“because the government does not argue for ‘plain error’ review, we consider only whether the error was ‘clear’”).

2. In contrast, the Eighth Circuit has held that the government does not waive plain error review when it invokes a different standard of review on appeal. *United States v. Bain*, 586 F.3d 634, 639 n.4 (8th Cir. 2009) (reviewing issue for plain error even though the government asserted that the standard of review was an abuse of discretion). But even then, the Eighth Circuit does not hold that the defendant waived review of the underlying issue; instead, it reviews that issue for plain error. *Id.* at 640-641.

3. The Tenth Circuit below adopted a similar, but even more punitive, rule than the one adopted by the Eighth Circuit in *Bain*. Although the government conceded that Mr. Kearn raised the issue below, and, thus, that review was for an abuse of discretion, the Tenth Circuit nonetheless held, consistent with the Eighth Circuit's decision in *Bain*, that Mr. Kearn forfeited the issue by not raising it below. Pet. App. 25a. Unlike the Eighth Circuit, however, the Tenth Circuit then refused to consider the issue at all, holding that Mr. Kearn "waived this issue by failing to argue for plain error." Pet. App. 25a (quoting *Richison*, 634 F.3d at 1131). It did so with no recognition that, because the government conceded that the issue was preserved below, Mr. Kearn had no reason (or opportunity) to argue plain error on appeal. *Id.*

In an earlier decision, *United States v. Rodebaugh*, 798 F.3d 1281, 1314 (10th Cir. 2015), a divided panel of the Tenth Circuit reached the same result in another case involving a challenge to a condition of supervised release. There as well, the Tenth Circuit held that the defendant waived the claim because he failed to argue plain error on appeal, even though the government did not argue waiver or forfeiture

on appeal. *Id.* The Tenth Circuit discussed “dueling ‘waivers/forfeitures’” – the defendant “would have forfeited the challenge by failing to speak up in district court, and the government would have waived or forfeited its challenge to [the defendant’s] forfeiture by failing to speak up in the appeal.” *Id.* The Tenth Circuit then exercised its discretion to choose which forfeiture/waiver to invoke, and it chose the defendant’s forfeiture over the government’s waiver. *Id.* at 1315. In dissent, Judge Matheson opined that the government waived plain error review by addressing the claim under an abuse-of-discretion standard. *Id.* at 1306. Judge Matheson could not find “a single case that credits a waiver argument by the Government made only upon prompting *by the court.*” *Id.* (emphasis in original).

4. As far as we can tell, this Court has never been asked to resolve this conflict. The defendant in *Rodebaugh* did not seek certiorari, and the defendant in *Bain* sought certiorari on a different issue, *Bain v. United States*, 129 S.Ct. 2157 (2009). The conflict has existed for some eight years. The Tenth Circuit refused to switch sides in this case, Pet. App. 33a, and even if it were to switch sides, the conflict would still persist. This Court’s intervention is the only hope of uniformity. Review is necessary.

II. The Tenth Circuit’s Decision Is Incorrect.

For at least four reasons, the Tenth Circuit erred when it held that plain error review applied, and that Mr. Kearn waived his claim because he did not argue plain error on appeal.

1. The Tenth Circuit’s decision is inconsistent with this Court’s well-established principle of party presentation. “In our adversary system, in both civil and criminal

cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.” *Greenlaw v. United States*, 554 U.S. 237, 243 (2008). Under this principle, aside from jurisdictional issues (which standards of review are not), “courts are generally limited to addressing the claims and arguments advanced by the parties.” *Henderson ex rel. Henderson*, 562 U.S. at 434. Thus, this Court has often cautioned appellate courts not to address arguments not anticipated by the parties “in developing their arguments on appeal.” *Wood v. Milyard*, 566 U.S. 463, 473 (2012). In *Wood*, this Court reversed a decision from the Tenth Circuit that failed to honor a government’s waiver of a statute of limitations defense. *Id.* at 474. The government’s claim that a waiver “binds only the party, not the court,” Answer to Pet. for Reh’g. 3, is thus incorrect.

As in *Wood*, this Court should reverse the Tenth Circuit’s decision not to honor the government’s waiver of plain error review. Federal Rule of Appellate Procedure 28 requires the appellant to set forth “for each issue, a concise statement of the applicable standard of review.” Fed.R.App.P. 28(a)(8)(A). If the appellee is dissatisfied with the appellant’s standard of review, Rule 28 further requires the appellee to set forth its own concise statement of the applicable standard of review. Fed.R.App.P. 28(b)(4). The government conceded in its brief that Mr. Kearn “objected to the imposition of the no-contact condition of supervised release,” and that review was for an abuse of discretion. Gov’t Br. 53. This is textbook waiver of

any other standard of review. *See Wood*, 566 U.S. at 474; *see* cases cited on p. 9, *supra*. As in *Wood*, the Tenth Circuit erred when it invoked plain error review despite the government’s waiver of that standard of review.

2. The Tenth Circuit’s decision also raises serious due process concerns. An “essential principle of due process” is that a deprivation of liberty be preceded by notice and an opportunity to be heard. *See, e.g., Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985). But under the Tenth Circuit’s rule, a criminal defendant is not given notice before the Tenth Circuit sua sponte finds a claim forfeited. Nor is a criminal defendant given an opportunity to explain why the claim has not been forfeited, or argue that the claim, if forfeited, amounts to plain error. Instead, the Tenth Circuit simply finds the claim forfeited on its own, without notice, then dismisses the claim as “waived” because the defendant has not argued plain error. Pet. App. 24a-25a. Such a procedure, dismissing a criminal defendant’s liberty-based claim on a ground unknown to the defendant, and untested by the parties, hardly aligns with basic principles of due process.

3. The Tenth Circuit’s rule is also premised upon a misreading of its own precedent. In *McKissick v. Young*, 618 F.3d 1177, 1189-1190 (10th Cir. 2010), and *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1131 (10th Cir. 2011) (the latter of which was the only case relied upon by the Tenth Circuit below), the Tenth Circuit established the general principle that a party’s failure to argue for plain error review “marks the end of the road for an argument for reversal not first presented to the district court.” Both decisions were authored by then-Judge Gorsuch. But, as then-

Judge Gorsuch later noted, in “those civil cases the appellees *invoked forfeiture* and the appellants didn’t proceed to identify any plain error.” *Games-Perez*, 695 F.3d at 1122 (Gorsuch, J., dissenting) (emphasis added).

In contrast, in this case, the government did not invoke forfeiture (or plain-error review), but instead conceded that Mr. Kearn preserved the issue below. Gov’t Br. 53. Thus, it is not true that *McKissick* or *Richison* supports the decision to invoke plain error review and to dismiss the claim as waived in this case. As then-Judge Gorsuch explained in *McKissick*, a “party cannot count on us to pick out, argue for, and apply a standard of review for it on our own initiative, without the benefit of the adversarial process, and without any opportunity for the adversely affected party to be heard on the question.” 618 F.3d at 1189. But this is precisely what the Tenth Circuit did in this case. On its own initiative, the Tenth Circuit picked out a standard of review for the government, without the benefit of briefing by either party, and without giving Mr. Kearn an opportunity to be heard on the standard of review, and applied it in this case. Pet. App. 25a. It then further applied what it coined “waiver” principles, even though the government did not invoke those principles either, Mr. Kearn did not in fact affirmatively “waive” plain error review, and again without giving the parties an opportunity to be heard on that question. That is an extraordinary result, and one that conflicts with what virtually every other Circuit would have done in this situation. Review is necessary.

4. Finally, the Tenth Circuit’s decision below conflicts with another generally accepted principle: when the government fails to invoke waiver, it “waives the

waiver.” The Tenth Circuit has consistently embraced this principle. *See, e.g., United States v. Reider*, 103 F.3d 99, 103 n.1 (10th Cir. 1996); *United States v. Heckenliable*, 446 F.3d 1048, 1049 n.3 (10th Cir. 2006); *United States v. White*, 584 F.3d 935, 947 (10th Cir. 2009); *United States v. De Vaughn*, 694 F.3d 1141, 1155 (10th Cir. 2012); *United States v. Ray*, 704 F.3d 1307, 1316 (10th Cir. 2013).

As have other courts of appeals. *See, e.g., United States v. Gonyer*, 761 F.3d 157, 166 n.4 (1st Cir. 2014); *United States v. Carthorne*, 726 F.3d 503, 509 n.5 (4th Cir. 2013) (“The government has urged that we apply plain error review, both in its brief and at oral argument. Therefore, we conclude that the government has defaulted any potential argument that Carthorne entirely waived review of this issue.”); *United States v. Boudreau*, 564 F.3d 431, 435 (6th Cir. 2009) (“[w]e therefore hold that the government has waived its waiver argument”); *United States v. Garcia-Lopez*, 309 F.3d 1121, 1123 (9th Cir. 2002) (“we conclude that the government has ‘waived’ any waiver argument it may have had”); *United States v. Archambault*, 62 F.3d 995, 998 (7th Cir. 1995) (“because the government does not argue that [defendant] waived this challenge, it has waived [defendant’s] waiver”); *United States v. Quiroz*, 22 F.3d 489, 490–91 (2d Cir. 1994) (per curiam) (listing cases in which the government “waived waiver” by failing to raise waiver on appeal); *United States v. Menesses*, 962 F.2d 420, 425-26 (5th Cir. 1992) (government waived its waiver argument when that argument was not made in briefs, but only at oral argument); *United States v. Beckham*, 968 F.2d 47, 54 n.5 (D.C. Cir. 1992) (“Although this refinement of the disproportionality argument was not raised below,

the government failed to object to it, or even to comment upon it, in its brief, thus waiving any waiver argument it may have had.”).

As a matter of logic, if the government waives any reliance on waiver principles by conceding that an issue was not waived below, then *a fortiori* the government waives plain error review on an issue by arguing for a standard different than plain error on appeal (*i.e.*, by conceding that the issue was preserved below). After all, waiver is done intentionally, whereas forfeiture is done through neglect. *United States v. Olano*, 507 U.S. 725, 733 (1993). If a defendant who intentionally waives an issue can still litigate the issue on appeal because of a government waiver, then surely a defendant who forfeits a standard of review (or “negligently waives” it, as the Tenth Circuit apparently found below) can do the same when the government does not invoke that standard of review on appeal. The Tenth Circuit’s determination that a party “waives” a claim because it has not argued for plain error review, where the government has never invoked that standard, is without merit and must be corrected.

III. The Question Presented Is Critically Important To The Administration Of Federal Appeals.

The question presented merits this Court’s attention. Standards of review are important to the administration of justice. Not only do they frame the issues for appeal, and, as this case illustrates, often determine the result of the appeal, but they also provide context for practitioners litigating issues in the district and appellate courts (as well as inform the district courts how their rulings will be reviewed). Standards of review should not differ depending on the geographic

location of the court of appeals. The government should not have a better opportunity at an affirmance in one court over another. *See, e.g., Concrete Pipe v. Construction Laborers Pension*, 508 U.S. 602, 625-626 (1993) (explaining that the case turned on the proper standard of review); *United States v. Gallegos*, 314 F.3d 456, 463 (10th Cir. 2002) (explaining that the standard of review can have a “substantial impact on the resolution of a particular case”).

This Court has often granted certiorari to resolve conflicts in the Circuits on standard-of-review issues. *See, e.g., Johnson v. California*, 543 U.S. 499, 502 (2005) (“We consider whether strict scrutiny is the proper standard of review for an equal protection challenge to that policy.”); *Adarand Constructors v. Peña*, 515 U.S. 200, 204 (1995) (holding that “courts should analyze cases of this kind under a different standard of review than the one the Court of Appeals applied”). This Court recently heard argument to resolve a standard-of-review conflict, *U.S. Bank Nat’l Ass’n v. Village at Lakeridge*, No. 15-1509 (argued October 31, 2017), and also recently issued a decision resolving another such conflict, *McLane v. EEOC*, 137 S.Ct. 1159 (2017) (resolving “whether a court of appeals should review a district court’s decision to enforce or quash an EEOC subpoena de novo or for abuse of discretion”).

The same need for this Court’s guidance exists here. This Court agrees to resolve so many standard-of-review issues because those issues affect virtually every aspect of any given case. Standards of review are the equivalent of rules to a game. If those standards differ in the appellate courts, then those courts will necessarily resolve legal issues under different rules. Because the courts of appeals are currently

operating under different rules in this context, the conflict presented in this petition is in need of prompt resolution. Moreover, in light of the differing lower court rulings, the length of the conflict, and the Tenth Circuit's denial of en banc rehearing here, there is no reason to think that the lower courts could resolve the conflict on their own. As it stands now, only this Court can resolve this entrenched conflict.

The conflict here is particularly important because it involves all criminal appeals. On March 31, 2017, there were 879 pending criminal appeals in the Eighth and Tenth Circuits.¹ In each appeal, the court of appeals could decide, sua sponte and without notice, to hold a claim forfeited (and in the Tenth Circuit, ultimately waived), thus precluding what otherwise might be relief for the criminal defendant.

Moreover, the Tenth Circuit's rule is unworkable. In order to avoid a surprise waiver, every criminal defendant in the Tenth Circuit must raise each of his claims under the correct standard of review, as well as plain error review. This, as a matter of course, is not only implausible, but impossible, particularly in light of word counts and sound appellate strategy. As a practical matter, criminal defendants are at the whim of the Tenth Circuit and must hope that it does not find otherwise preserved claims forfeited and subject to "waiver" for failure to argue plain error. *See, e.g., United States v. Ventura-Perez*, 666 F.3d 670, 676 (10th Cir. 2012) ("Courts could not function properly if concessions by counsel cannot be relied upon.").

Resolution of this issue is also important because, as it stands now, the Tenth Circuit forgives the government's *waiver* of a standard of review and punishes a

¹ U.S. Courts of Appeals Federal Judicial Caseload Statistics (March 31, 2017), available at: <http://www.uscourts.gov/statistics/table/b-1/federal-judicial-caseload-statistics/2017/03/31>.

criminal defendant's (possible) *forfeiture* of the merits of a claim. But an intentional waiver should never "outduel" an unintentional forfeiture, particularly when the waiver deals only with the standard of review (not the merits), and it is the government who has waived the standard of review. *See, e.g., Berger v. United States*, 295 U.S. 78, 88 (1935) (noting that the government's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done"); *Games-Perez*, 695 F.3d at 1122 (Gorsuch, J., dissenting) ("Neither in any event is it clear why we would want to tie ourselves to the mast and press a waivable objection for the government when doing so yields the injustice of denying an individual the day in court promised to him by Congress."); *United States v. Alexander*, 679 F.3d 721, 728 (8th Cir. 2012) ("our role is not to remedy deficiencies in the government's case").

Finally, this Court has also repeatedly granted certiorari to define and refine the rules associated with postconviction supervision. *United States v. Johnson*, 529 U.S. 53, 59 (2000) (whether excess prison time should be credited to a supervised release term); *United States v. Knights*, 534 U.S. 112 (2001) (whether probationary search condition was constitutional); *Johnson v. United States*, 529 U.S. 694 (2000) (whether a prior version of § 3583(e)(3) allowed the imposition of supervised release following revocation); *United States v. Granderson*, 511 U.S. 39 (1994) (involving the meaning of a phrase in the federal probation statute); *Gozlon-Peretz v. United States*, 498 U.S. 395 (1991) (whether supervised release requirements applied to offenses committed prior to the provisions' effective date); *Black v. Romano*, 471 U.S. 606 (1985) (whether due process required sentencing court to explain its reasons for

rejecting alternatives to incarceration in probation revocation proceedings); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (due process rights related to parole revocation); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (same).

Despite the fact that a term of supervised release is required in less than half of all cases, district courts impose terms of supervised release in virtually all cases. Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. Rev. 958, 1015 (June 2013) (between 2005 and 2009, supervised release was imposed in 99.1% of cases in which it was not statutorily required). Thus, the underlying type of claim at issue in this case is both a common and prevalent one throughout the Circuits. The rules associated with the imposition of conditions of supervised release should be uniform. Because they currently are not, review is necessary.

IV. This Case Is An Ideal Vehicle To Resolve The Conflict.

For two reasons, this case is an ideal vehicle to resolve the conflict.

1. The question presented arises on direct review from a published decision of a federal court of appeals. After the Tenth Circuit sua sponte held the claim forfeited, then sua sponte held the claim “waived” because Mr. Kearns did not invoke plain error on appeal, Mr. Kearns sought rehearing en banc, expressly asking the Tenth Circuit to reconsider its sua sponte standard-of-review decision. The Tenth Circuit denied the petition without comment. Pet. App. 33a. The conflict is thus ripe for review. There are no procedural hurdles to overcome for this Court to address the merits of this important question.

2. If this Court grants certiorari and holds that an appellate court should not

sua sponte invoke plain error review in cases where the government agrees with the defendant that the claim was properly preserved below, Mr. Kearn would be entitled to relief on remand. The district court's apparent reason for the no-contact condition was to protect Mr. Kearn's daughter. Pet. App. 32a. But the district court also imposed a 292-month term of imprisonment, meaning that Mr. Kearn's daughter will be an adult when he is released from prison. As the district court itself recognized, this fact obviates the need for a no-contact provision. Pet. App. 32a. There is no indication that Mr. Kearn has harmed an adult, and he has no other criminal history. The no-contact condition is thus not reasonably related to the offense of conviction. 18 U.S.C. § 3583(d).

Moreover, the Tenth Circuit recognizes that "a defendant has a fundamental right of familial association." *United States v. Lonjose*, 663 F.3d 1292, 1303 (10th Cir. 2011). A district court needs a "compelling" reason to interfere with this right. *Id.* Because Mr. Kearn's daughter will be an adult when he is released from prison, no compelling reason exists here. Upon his release, Mr. Kearn's daughter will be in a position to determine, on her own, whether she wants to contact her father. A condition of Mr. Kearn's supervised release should not prohibit her from doing so.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MELODY BRANNON
Federal Public Defender



DANIEL T. HANSMEIER
Appellate Chief
Counsel of Record
KANSAS FEDERAL PUBLIC DEFENDER
500 State Avenue, Suite 201
Kansas City, Kansas 66101
Phone: (913) 551-6712
Email: daniel_hansmeier@fd.org
Counsel for Petitioner

July 21, 2017

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JONATHAN KEARN,

Defendant - Appellant.

No. 15-3121

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(D.C. NO. 5:13-CR-40057-DDC-1)**

Daniel T. Hansmeier, Appellate Chief (Melody Brannon, Federal Public Defender, with him on the briefs), Office of the Federal Public Defender, Kansas City, Kansas, for Appellant.

Christine E. Kenney, Assistant United States Attorney (Thomas E. Beall, United States Attorney, with her on the brief), Office of the United States Attorney, Topeka, Kansas, for Appellee.

Before **TYMKOVICH**, Chief Judge, **MATHESON** and **MORITZ**, Circuit Judges.

TYMKOVICH, Chief Judge.

A jury convicted Jonathan Kearns of federal child pornography charges arising from pictures he took of his four-and-a-half year old daughter and shared

Appendix A

on the internet. He was sentenced to a lengthy prison term followed by five years of supervised release.

Kearn contends the district court committed various errors at trial and sentencing. First, Kearn raises several evidentiary objections. He argues that the government elicited hearsay testimony when it asked a witness about the contents of an inculpatory report written by an expert who did not testify at trial. Even assuming this testimony was hearsay, however, we find no plain error, since admitting it did not affect the outcome of the trial. Kearn also argues that testimony identifying certain images as “child pornography” was inadmissible, because it was not helpful to the jury. The testimony was helpful, however, since whether the images depicted sexually explicit conduct was a fact in issue. The testimony also helped explain steps in the investigation. Finally, Kearn argues that evidence was improperly admitted under Federal Rule of Evidence 404(b), but he fails to direct us to any evidence actually admitted under that rule.

Second, Kearn argues the jury should have been instructed that they had to agree unanimously on which specific images formed the basis for conviction. In his view, all of the jurors had to agree that at least one specific image violated federal law. But this misstates the case law: unanimity is only required for elements of a crime, not for means of satisfying a given element. Different images satisfying the statutory criteria are merely different means.

Third, Kearn argues that a supervised-release condition that will prohibit him from contacting his victim—his youngest daughter—was improper, because it was not “reasonably related” to the offense of conviction, and because it interfered with his right of familial association. But he has waived these arguments, which he did not make at sentencing, by failing to argue for plain error.

Finally, Kearn argues that the cumulative effect of the errors in this case mandates reversal. But we only identify one possible error here, so cumulative error analysis—which addresses whether *multiple* errors can prejudice a defendant—is unavailing.

We thus conclude that none of the issues Kearn raises requires reversal.

I. Background

Detective Sergeant Stuart Butler, a police investigator in Australia, operated an undercover online persona that purports to trade in child pornography in order to help catch perpetrators. In 2013, “cheyenneandliberty@yahoo.com” began an e-mail exchange with Detective Butler, during which “cheyenneandliberty” sent several images of young girls later identified as Kearn’s daughters. In most of the pictures the girls were clothed, but one of the images showed the genitals of Kearn’s youngest, four-and-a-half year old daughter. “Cheyenneandliberty” also sent Detective Butler a link to three explicit videos of young girls who were not Kearn’s daughters. In these e-mails,

“cheyenneandliberty” described himself as a thirty-eight year old from Kansas, and a single father to four daughters: a four-and-a-half year old, two ten-year-old twins, and a thirteen year old. When Detective Butler asked him for a family photo, “cheyenneandliberty” sent him a photograph of Kearn standing with three of his daughters.

Detective Butler looked at the data embedded in the digital images, which shows when they were taken and the device used to take them. The data showed the explicit images were taken with an iPhone 4s shortly before “cheyenneandliberty” sent the e-mails. This fact indicated to Detective Butler that “cheyenneandliberty” was not merely sending images he found on the internet, but taking the images himself. He therefore referred the exchange to the U.S. Department of Homeland Security.

Investigators found the IP address used to send some of the images was associated with Kearn’s Kansas home address. Kearn’s age, family situation, and location matched the description given by “cheyenneandliberty.” Investigators executed a search warrant at Kearn’s house. Kearn’s daughters were present, and the investigating agent, Special Agent Cassidy Casner, recognized the girls from the images sent to Detective Butler. Investigators seized Kearn’s iPhone 4s—the same model that had taken the photographs—and footage from his home security system.

When Agent Casner reviewed the home security footage, it corroborated the e-mails sent to Detective Butler and the embedded data from the images. That is, the footage confirmed that Kearn was using his phone when the e-mails were sent; Kearn was with his daughters when the pictures were taken; and the daughters were wearing the same clothes shown in the pictures on the dates the pictures were taken.

A grand jury indicted Kearn with (1) permitting his minor child to engage in sexually explicit conduct in violation of 18 U.S.C. § 2251(b); (2) distributing child pornography in violation of 18 U.S.C. § 2252(a)(2); and (3) possessing child pornography in violation of 18 U.S.C. § 2252(a)(4)(B).

At trial, in addition to the home security footage and the e-mail exchange with Detective Butler, the government presented the expert testimony of Special Agent Craig Beebe, who specializes in forensic examinations of electronic evidence. Agent Beebe testified that Kearn's iPhone contained explicit images of young girls, evidence of the "cheyenneandliberty" e-mail address, and two videos of Kearn's youngest daughter naked with Kearn's voice in the background. Agent Beebe also found one of the images e-mailed to Detective Butler on the iPhone. On Kearn's computer, Agent Beebe found further evidence of "cheyenneandliberty," the website through which Detective Butler's undercover persona was contacted, and "ProudPapa," a nom de plume used in the e-mails with Detective Butler.

Kearn testified at trial. He admitted he had taken the explicit photo and videos of his youngest daughter. But in his defense, he said she had reported being molested by her mother's boyfriend and he had taken the photos and videos as evidence of the molestation. A sheriff's report indeed showed that Kearn had reported this alleged molestation to the sheriff a year before the e-mail exchange with Butler. Kearn denied any knowledge of the "cheyenneandliberty" account or the explicit images on his phone other than the ones of his youngest daughter. Kearn operated a heating and air conditioning business from his home, and suggested a former employee with access to his iPhone could have downloaded the images and e-mailed them to Detective Butler.

Kearn also presented evidence from his own computer expert, Andreux Doty. Doty testified he found only an isolated reference to "cheyenneandliberty" in a file created from the iPhone data. He testified he did not find any evidence in government materials he reviewed that the "cheyenneandliberty" e-mails had been sent from Kearn's phone.

The jury found Kearn guilty on all counts. The district court sentenced Kearn to 292 months in prison followed by five years of supervised release, during which he may not contact minors or the victim of the offense (his youngest daughter).

II. Analysis

Kearn raises a number of issues on appeal. He argues various evidence introduced at trial was inadmissible on hearsay or relevancy grounds, and that the admission of the hearsay evidence violated his Confrontation Clause rights. He also contends the court should have instructed the jury to agree unanimously on which specific images were the basis for his conviction. He urges us to find these errors cumulatively mandate relief. And he submits that a supervised-release condition that will prohibit him from contacting his victim—his youngest daughter—was improper.¹

Kearn did not raise these issues at trial, so we review them for plain error. “Under the plain error standard, [the appellant] must demonstrate: (1) an error, (2) that is plain, meaning clear or obvious under current law, (3) that affects

¹ We do not address in detail two other issues Kearn raises. First, Kearn challenges the constitutionality of the Tenth Circuit reasonable-doubt instructions given at his trial, but we have recently upheld the constitutionality of those instructions. *See United States v. Petty*, 856 F.3d 1306, 1311 (10th Cir. 2017) (concluding that the Tenth Circuit Pattern Jury Instruction on reasonable doubt, “taken as a whole, adequately convey[s] the concept of reasonable doubt to the jury”).

Second, Kearn argues that if we do not find plain error, we should remand to the district court for an evidentiary hearing on claims of ineffective assistance of counsel. But our decision in *United States v. Galloway*, 56 F.3d 1239 (10th Cir. 1995) (en banc) forecloses that approach. *See id.* at 1240 (“Ineffective assistance of counsel claims should be brought in collateral proceedings, not on direct appeal. Such claims brought on direct appeal are presumptively dismissible, and virtually all will be dismissed.”).

substantial rights, and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *United States v. Piper*, 839 F.3d 1261, 1265–66 (10th Cir. 2016) (citing *United States v. Rosales-Miranda*, 755 F.3d 1253, 1257–58 (10th Cir. 2014)). Crucially, “[t]o satisfy the third prong of plain-error review, a defendant generally must demonstrate that an error was ‘prejudicial, meaning that there is a reasonable probability that, but for the error claimed, the result of the proceeding would have been different.’” *United States v. Bustamante-Conchas*, 850 F.3d 1130, 1138 (10th Cir. 2017) (en banc) (quoting *United States v. Algarate-Valencia*, 550 F.3d 1238, 1242 (10th Cir. 2008)).

We review each of the issues raised in turn, and find no plain error as to any.

A. Hearsay Testimony

Kearn first contends the district court improperly admitted hearsay evidence through his expert witness. At trial, Kearn presented the testimony of computer expert Andreux Doty, who testified he did not find any evidence the “cheyenneandliberty” e-mails were sent from Kearn’s phone. On cross-examination, the government asked Doty what documents he had reviewed. As part of this line of inquiry, the government asked about a report prepared by a previously retained defense expert, Tammy Loehrs. Loehrs did not testify at trial. After Doty said he had read the Loehrs Report, the prosecutor asked him if “it would help [his] memory if [she] showed [him] a copy” of the report. R., Vol. 2

at 718. When he said yes, she showed him the report, which was marked as a Government Exhibit.

The Loehrs Report, even though solicited by the defense, was substantially more inculpatory than Doty's report. The prosecution asked Doty whether Loehrs "did a key word search for cheyenneandliberty . . . [that] resulted in over 1,000 hits located in numerous folders on . . . both the phone and the hard drive[.]" R., Vol. 2 at 726–27. The prosecution also asked whether the Loehrs Report located "45 hits" for the term ProudPapa—used in the e-mails with Detective Butler—on Kearn's iPhone. R., Vol. 2 at 727. Doty said the Loehrs Report asserted both those points. On redirect, Kearn's lawyer asked Doty more questions about the Loehrs Report, and Doty criticized the Loehrs Report for failing to "validate" the more-than-one-thousand hits for "cheyenneandliberty" in the report, and for indicating that files on the computer had been accessed after the computer had been taken into custody. R., Vol. 2 at 739–41.

Kearn contends that eliciting the contents of the Loehrs Report from Doty violated Federal Rule of Evidence 802, which generally prohibits the admission of hearsay evidence, as well as the Confrontation Clause of the Sixth Amendment.

Assuming without deciding that the Loehrs Report was hearsay and violated Kearn's rights under the Confrontation Clause, Kearn cannot demonstrate that the district court plainly erred by admitting it. "To satisfy the third prong of plain-error review, a defendant generally must demonstrate that an error was

‘prejudicial, meaning that there is a reasonable probability that, but for the error claimed, the result of the proceeding would have been different.’”

Bustamante-Conchas, 850 F.3d at 1138 (quoting *United States v. Algarate-Valencia*, 550 F.3d 1238, 1242 (10th Cir. 2008)). Kern cannot do that here.²

The prosecution’s colloquy with Doty regarding the Loehrs Report is relatively short. The facts elicited about the report from Doty were: (1) “there

² Kern argues that under the third prong of plain-error analysis “prejudice for purposes of a Confrontation Clause violation focuses ‘on the particular witness, not on the outcome of the entire trial.’” Aplt. Br. at 27 (quoting *United States v. Holloway*, 826 F.3d 1237, 1249 (10th Cir. 2016)). But this conflates the prejudice requirement in the third prong of plain-error analysis with the showing of prejudice required to state a *violation* of the Confrontation Clause. Although the word “prejudice” appears in both contexts, the cases are not referring to the same inquiry.

It is true that in order to state a violation of the Confrontation Clause, a defendant need only make a showing of prejudice as to a particular witness, not as to the trial as a whole. *See, e.g., Holloway*, 826 F.3d at 1249. But the third prong of plain-error analysis is not where we address whether there has been a violation of the Confrontation Clause. Rather, it is at the first prong of plain-error analysis, when we ask whether there is error, that we look to whether there is a violation of the Confrontation Clause—and therefore, whether there is prejudice as to a particular witness.

Here, then, because we assume error and decide the issue on the third prong, we ask not whether there has been a violation of the Confrontation Clause, but instead make the normal inquiry: whether there is a reasonable probability that, but for the error claimed, the result of the proceeding would have been different. *See, e.g., United States v. Pablo*, 696 F.3d 1280, 1293–94 (10th Cir. 2012) (finding that an assumed Confrontation Clause violation did not affect a defendant’s substantial rights where the defendant would have been convicted even without the erroneous testimony).

was an application on [Kearn's] phone that was for storing a photograph," R., Vol. 2 at 725; (2) "the Loehrs[] examination also determined that the [e]-mail cheyenneandliberty[] was being used on the iPhone with other accounts but [Loehrs] was unable to recover any actual [e]-mails," R., Vol. 2 at 726; (3) "a key word search for cheyenneandliberty . . . resulted in over 1,000 hits . . . [on] both the phone and the [personal computer] hard drive," R., Vol. 2 at 726–27; and (4) Loehrs found 45 hits for "ProudPapa" on the iPhone, R., Vol. 2 at 727.

Most of these points came out in the properly admitted non-hearsay testimony of the prosecution's expert witness, Agent Beebe. See R., Vol. 2 at 565–66 (password-protected application on phone for storing photographs contained possible child pornography); R., Vol. 2 at 564–65 (examination revealed that the "cheyenneandliberty" e-mail address was being used on the phone); R., Vol. 2 at 580–81 (search results for "cheyenneandliberty" and "ProudPapa"). The only distinction is that Special Agent Beebe did not number the hits for "cheyenneandliberty" "over 1,000," but that distinction is immaterial in context.

For instance, Kearn admitted taking the explicit pictures and videos. The pictures were e-mailed using an IP address associated with Kearn's house. The embedded data showed the pictures were taken shortly before they were e-mailed, which was a year *after* Kearn claimed his daughter had been molested. The home security system showed Kearn using his phone around the time the e-mails were

sent. Kearn's phone contained evidence of the e-mail address from which the pictures were sent. Finally, Kearn's phone contained other explicit photographs of children.

Because the information elicited about the Loehrs Report did not affect the outcome of the trial, we find the district court did not commit plain error by admitting it.

B. Helpfulness of Testimony

Kearn next argues several statements by government witnesses violated Federal Rules of Evidence 701 and 702, which provide that opinion testimony must be helpful to the trier of fact to be admissible. *See* Fed. R. Evid. 701(b) ("If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is . . . helpful to clearly understanding the witness's testimony or to determining a fact in issue."); *id.* 702(a) ("A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if . . . the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.").

He contends two prosecution witnesses improperly testified that certain images qualified as child pornography. In Kearn's view, these statements were

inadmissible because they were not helpful to the jury.³ For example, at trial the government asked Agent Beebe whether he prepared a report of his findings from searching Kern's phone. He answered: "Yes. In my preview I reported that I saw images that were child pornographic in nature." R., Vol. 2 at 557. Later the government asked Agent Beebe whether he found "images that [he] believed were child pornography on the iPhone." He responded yes. R., Vol. 2 at 566.

Rule 701 applies to the lay testimony of Detective Butler and Agent Casner, and Rule 702 applies to the expert testimony of Agent Beebe. But "helpfulness" is similar for both lay and expert testimony. Testimony is not helpful if it "simply tell[s] the jury what result it should reach without providing any explanation of the criteria on which that opinion is based or any means by which the jury can exercise independent judgment." *United States v. Dazey*, 403 F.3d 1147, 1171 (10th Cir. 2005). We have excluded this type of testimony because "it usurps the function of the jury in deciding the facts," or because it "interferes with the function of the judge in instructing the jury on the law." *Id.* at 1171 (internal quotation marks omitted).

³ Kern also argues that testimony he distributed the images to Detective Butler and that he owned the iPhone on which the images were recovered violated these rules. But these are facts, not opinions, so these rules do not apply.

In addition, Kern cites Rule 704(b), which prohibits experts from testifying "about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense." But none of the statements Kern cites opine on his mental state or knowledge: that is, whether he possessed, produced, or disseminated the images knowingly.

In support of his argument that the testimony identifying child pornography was not helpful, Kearn points to a Seventh Circuit case, which found inadmissible a federal agent's testimony that photos on the defendant's computer met the federal definition of child pornography. *United States v. Noel*, 581 F.3d 490, 496–99 (7th Cir. 2009). The *Noel* court found that the agent's testimony was “[l]ay testimony offering a legal conclusion” and thus “inadmissible because it [was] not helpful to the jury.” *Id.* at 496.

But the witness comments here are distinguishable from the comments in *Noel*, because these witnesses did not mention the legal definition, or tell the jury what to find. Indeed, the government made clear its questions did *not* concern the legal definition of child pornography. *See R.*, Vol. 2 at 437–38.

We resolved a similar question in *United States v. Stanley*, 896 F.2d 450, 451–52 (10th Cir. 1990). In *Stanley*, a U.S. Postal Inspector testified that he had “specialized in the investigation of prohibited mailings such as child pornography” for decades. *Id.* at 451. The government offered as lay opinion testimony the inspector's opinion that “several of the children depicted in sexually explicit conduct were under the age of eighteen.” *Id.* at 451–52. On appeal, the defendant argued this testimony was not helpful because the pictures “spoke for themselves.” *Id.* at 452. This court disagreed, finding that the inspector's testimony was helpful (1) “in determining the age of the subjects,” which was “a fact in issue;” and (2) “as an explanation of why he ordered a

supervised delivery, obtained a search warrant, and seized the defendant's package." *Id.* at 452.

The same analysis holds here. Testimony about whether particular images were child pornography was helpful to the jury, since whether the images depicted "sexually explicit conduct" was a fact in issue. *See* R., Vol. 1 at 23–25 (the indictment, citing 18 U.S.C. §§ 2251(b), 2252(a)(2), 2252(a)(4)(B)). And testimony about the law-enforcement officers' views on the images was helpful as an explanation of why they took certain steps in their investigation.

We therefore do not find the district court plainly erred by admitting this testimony.

C. Rule 404(b) Evidence—Prior Similar Acts

The government filed a pre-trial motion to introduce evidence "located on the defendant's smart phone and computer, including but not limited to sexually explicit images of any minors, nude video clips of [Kearn's youngest daughter], and search terms indicating an interest in such material." R., Vol. 1 at 74. The government sought to introduce the evidence under Rule 404(b) to show "the defendant's intent, knowledge, absence of mistake and lack of accident." *Id.* Kearn argues this was error, because the government did not "precisely articulate the purpose of the proffered evidence." *Aplt. Br.* at 41 (citing *United States v. Birch*, 39 F.3d 1089, 1093 (10th Cir. 1994)).

Under Rule 404(b), “[e]vidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.” Fed. R. Evid. 404(b). It may, however, “be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” *Id.* The prosecutor must provide notice if he intends to offer such evidence at trial. *Id.*

We have held that “the government must precisely articulate the purpose of the proffered [404(b)] evidence.” *United States v. Birch*, 39 F.3d 1089, 1093 (10th Cir. 1994). Moreover, the trial court must “specifically identify the purpose for which such evidence is offered.” *Id.* (quoting *United States v. Kendall*, 766 F.2d 1426, 1436 (10th Cir. 1985)). “[A] broad statement merely invoking or restating Rule 404(b) will not suffice.” *Id.* (quoting *Kendall*, 766 F.2d at 1436). We have therefore held that a statement providing that the evidence’s purpose was “to prove the defendant’s knowledge, identity and absence of mistake or accident” “failed to articulate with precision the evidentiary purpose of the Rule 404(b) evidence it offered.” *Id.*

The broad statement offered by the government in its pre-trial motion tracks almost exactly the statement we found inadequate in *Birch*. But the government responds that the district court here never ruled on the pre-trial Rule 404(b) motion. In its view, the evidence at trial was intrinsic to the charged

conduct, and was not admitted under Rule 404(b). The government’s brief canvasses the evidence, and explains the purpose for which each piece was admitted—making out the elements of the charged offenses. Because Kearn was on trial for knowingly distributing and possessing child pornography, sexually explicit images on his phone and search terms indicating his mental state did not need to come into trial under 404(b). They were the very point of the trial.

Kearn does not point us to the district court’s ruling on the proposed evidence, and does not dispute the government’s assertion that the evidence at trial did not come in under Rule 404(b). There are no references to Rule 404(b) in the trial record, other than the government’s motion.

Kearn, moreover, does not point to any evidence actually admitted under Rule 404(b), and does not rebut the government’s argument that none was. Given that, we cannot find that the district court erred here.

D. Instruction on Unanimity of Theory

Kearn next argues the district court erred in failing to instruct the jury that it must agree unanimously on which specific images were the basis for conviction. The district court only gave a general unanimity instruction. R., Vol. 1 at 217 (“Your verdict on each count of the Indictment must be unanimous.”). Kearn argues this instruction was insufficient, and Tenth Circuit Criminal Pattern Jury Instruction § 1.24, at 37 (2011 ed., rev. 2017) (“Unanimity of Theory”) was legally required. The relevant part of that instruction provides that “in order to

return a guilty verdict, all twelve of you must agree upon which of the listed acts, if any, the defendant committed.” Since, argues Kearn, there were multiple images that arguably violated federal law, different jurors could have had in mind different images when finding Kearn guilty.

We disagree that Instruction § 1.24 was required. Its use note explains that Instruction § 1.24 “should be used when the government introduces evidence that the defendant has committed multiple acts which may constitute an *element* of the crime.” *Id.* (emphasis added). Instruction § 1.24 is a response to *Richardson v. United States*, 526 U.S. 813 (1999), which involved different statutory language than the language relevant to Kearn’s conviction.

Richardson involved a conviction under 21 U.S.C. § 848(a), which prohibits persons from “engag[ing] in a continuing criminal enterprise,” defined by the statute as a “‘violat[ion]’ of the drug statutes where ‘such violation is part of a continuing series of violations.’” *Id.* at 815 (quoting 21 U.S.C. § 848(a), (c)). The Supreme Court held that “a jury in a federal criminal case brought under § 848 must unanimously agree not only that the defendant committed some ‘continuing series of violations’ but also that the defendant committed each of the individual ‘violations’ necessary to make up that ‘continuing series.’” *Id.* (quoting 21 U.S.C. § 848(a), (c)).

Richardson based its holding on a distinction between the *elements* of an offense and the *means* by which the government may satisfy an element.

Elements, the Court held, must be found unanimously by the jury. *Id.* at 817. On the other hand, the jury need not agree unanimously on the means by which an element is proven. *Id.* Consequently, “a federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime.” *Id.*

Instruction § 1.24 applies to situations like the one in *Richardson*, where the government produces evidence the defendant has committed multiple acts that might be considered elements of the crime. *See United States v. Sorensen*, 801 F.3d 1217, 1237 (10th Cir. 2015) (describing Instruction § 1.24 as “anchored in *Richardson*’s holding” and finding fault in its use in a charge “far different from *Richardson*”), *cert. denied*, 136 S. Ct. 1163 (2016). It does not apply to situations where multiple acts might be considered different means of satisfying the element requirement. *Id.*

Looking at the statutes under which Kearn was charged and convicted, we find they do not require unanimity as to which images formed the basis for conviction. Different images are merely different means of satisfying the element requirement, not different statutory elements.

Kearn was convicted of three offenses: violations of 18 U.S.C. § 2251(b), 18 U.S.C. § 2252(a)(2), and 18 U.S.C. § 2252(a)(4)(B). Stripped to the relevant language, we have:

- “Any parent . . . who knowingly permits such minor to engage in . . . sexually explicit conduct for the purpose of producing *any visual depiction* of such conduct . . . shall be punished . . . [if the depiction travels in interstate commerce.]” 18 U.S.C. § 2251(b) (emphasis added).
- “Any person who . . . knowingly receives, or distributes, *any visual depiction* [in interstate commerce] . . . if—(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct . . . shall be punished . . .” 18 U.S.C. § 2252(a)(2) (emphasis added).
- “Any person who . . . knowingly possesses . . . 1 or more [media] . . . which contain *any visual depiction* that has [traveled in interstate commerce] . . . if—(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (ii) such visual depiction is of such conduct; shall be punished . . .” 18 U.S.C. § 2252(a)(4)(B).

All three statutes thus refer to “any visual depiction” meeting the statutory criteria. In other words, if the government has shown the jury that the defendant has produced (§ 2251(b)), distributed (§ 2252(a)(2)), or possessed (§ 2252(a)(4)) any visual depictions of minors engaged in sexually explicit conduct, the jury may convict. The government’s evidence thus went to means of satisfying the statutory language, rather than different possible elements. *Richardson* and Instruction § 1.24 therefore have no application here.

An example may clarify this interpretation. Suppose a statute makes the following conduct illegal: “The murdering of another in the room of a house with a blunt household instrument.” This statute thus has three elements: (1) “the murdering of another” (2) “in the room of a house” (3) “with a blunt household instrument.” The evidence at trial is that Peter and Paul were in a house alone

together, all entrances and exits to the house were locked, and Paul died from head trauma from a blunt instrument. Peter's fingerprints and DNA were found on a candlestick, a wrench, and a lead pipe in the house, but it is not clear which was the murder weapon. It is also unclear where in the house the murder occurred. Under Kern's theory of the law, the jury cannot convict unless they unanimously agree on the murder weapon and the room where the murder occurred. But the holding of *Richardson* sets a lower bar than the rules of "Clue." The jury need only unanimously agree that (1) Peter murdered Paul, (2) in the room of a house, (3) with a blunt household instrument. If the evidence at trial persuades them of those elements, they may convict. They need not agree unanimously on which room and weapon; the different weapons and rooms are merely *means* of satisfying the statutory elements. If six jurors are persuaded it happened in the library with a candlestick, and six jurors think it happened in the observatory with a lead pipe, that would not vitiate the conviction. So too here.

Because unanimity as to which images formed the basis for conviction is not required, we do not find the district court erred.

E. Cumulative Error

Kern argues the cumulative effect of the district court's errors rendered his trial fundamentally unfair.

"A cumulative-error analysis aggregates all errors found to be harmless and analyzes whether their cumulative effect on the outcome of the trial is such that

collectively they can no longer be determined to be harmless.” *United States v. Toles*, 297 F.3d 959, 972 (10th Cir. 2002). We have explained above why most of Kearn’s putative errors were not, in fact, errors. Kearn adds two more errors in the cumulative-error section of his brief.

First, he argues that the district court erred by allowing government witnesses to provide expert testimony without satisfying the expert witness disclosure requirement. In his view, once the government established that Agent Casner and Detective Butler were trained to recognize child pornography, their testimony that certain images were child pornography was expert testimony. But we are not persuaded. Rule 701 “does not permit a lay witness to express an opinion as to matters which are beyond the realm of common experience and which require the special skill and knowledge of an expert witness.” *Randolph v. Collectramatic, Inc.*, 590 F.2d 844, 846 (10th Cir. 1979). But “Rule 701 allows lay witnesses to offer ‘observations [that] are common enough and require . . . a limited amount of expertise, if any.’” *James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207, 1214 (10th Cir. 2011). The testimony here—that child pornography involves sexually explicit imagery of children, and that certain explicit images qualified—did not go beyond the realm of common experience. They therefore did not constitute expert testimony.

Second, Kearn argues that Detective Butler’s statement that “cheyenneandliberty” was a “contact child sex offender” was irrelevant and

prejudicial. R., Vol. 2 at 406. To put this statement in context, the prosecutor asked Detective Butler: “What else did you do as part of your investigation?” R., Vol. 2 at 406. He responded: “As soon as I received even the first couple of images I was very alarmed by it and realized this guy was a contact sex offender and immediate action had to be taken, so I contacted Homeland Security Investigations in the USA and I referred the matter straight away.” *Id.*

Evidence is relevant if “(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” Fed. R. Evid. 401. This portion of the testimony, taken as a whole, made it more probable that Kearn produced and distributed sexually explicit images through interstate commerce. That fact is of consequence, since it forms the basis of two of the three charges of the indictment. It is plainly relevant.

Nor was it prejudicial. Under Federal Rule of Evidence 403, “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice.” The supposed unfair prejudice here was in implying that Kearn was a contact sex offender. But the government’s entire theory of the case was that Kearn was a contact sex offender. Any prejudice added by Detective Butler’s statement was therefore minimal.

Because this statement violated neither Rule 401 or 403, there was no error.

Thus, the only possible error we have identified is the admission of the hearsay evidence from the Loehrs Report. But “[t]he purpose of cumulative error analysis is to address whether the cumulative effect of *two or more* individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error.” *United States v. Rogers*, 556 F.3d 1130, 1144 (10th Cir. 2009) (emphasis added) (internal quotation marks omitted). Because we have not found multiple errors, cumulative error analysis is unavailing here. Moreover, as noted, the evidence of Kearn’s guilt was overwhelming, and we doubt, even absent any of Kearn’s alleged errors, the outcome of the trial would have been different.

F. Supervised-Release Condition

The district court sentenced Kearn to five years of supervised release following his term of imprisonment. One of the special conditions of his supervised release is that he may have no contact with the victim of the offense, i.e., his youngest daughter. Kearn has a 292-month (24 1/3 year) sentence, so his youngest daughter will be over 30 years old by the time Kearn is released from prison. Kearn objects to this condition, arguing the district court abused its discretion by imposing it.

Kearn provides two reasons why this condition was improper. First, the condition is not “reasonably related” to the offense of conviction, as the statute requires. *See* 18 U.S.C. § 3583(d)(1). Second, he has a “fundamental right of

familial association,” and the district court did not have the requisite “compelling” reason for interfering with this right. Aplt. Br. at 49 (quoting *United States v. Lonjose*, 663 F.3d 1292, 1303 (10th Cir. 2011)).

But Kern has waived this issue by failing to argue for plain error. Neither of these arguments—reasonable relationship or familial association—was raised at sentencing. *See R.*, Vol. 2 at 885–87 (relevant portion of the sentencing colloquy). Generally, “the failure to argue for plain error and its application on appeal . . . marks the end of the road for an argument for reversal not first presented to the district court.” *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1131 (10th Cir. 2011).

We therefore affirm the no-contact-with-victims condition. Kern’s failure to argue these points under the plain-error standard marks the end of the road.⁴

III. Conclusion

For the reasons above, we AFFIRM the judgment and sentence of the district court and DISMISS without prejudice Kern’s claim of ineffective assistance of counsel.

⁴ It is worth noting that, like any special condition, the defendant can petition the court based on changed circumstances at the time of his release.

United States District Court

District of Kansas

UNITED STATES OF AMERICA

v.

Jonathan Kearn

JUDGMENT IN A CRIMINAL CASE

Case Number: 5:13CR40057 - 001

USM Number: 23150-031

Defendant's Attorney: Michael E. Francis

THE DEFENDANT:

- ☐ pleaded guilty to count(s):
- ☐ pleaded nolo contendere to count(s) ___ which was accepted by the court.
- ☒ was found guilty on Counts 1, 2 and 3 of a 3-count Indictment 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. § 2251(b) and 18 U.S.C. § 2251(e)	Production of Child Pornography by a Parent or Legal Guardian , a Class B Felony	04/28/2013	1
18 U.S.C. § 2252(a)(2) and 18 U.S.C. § 2252(b)(1)	Distribution of Child Pornography , a Class C Felony	04/28/2013	2
18 U.S.C. § 2252(a)(4)(B) and 18 U.S.C. § 2252(b)(2)	Possession of Child Pornography , a Class C Felony	05/07/2013	3

The defendant is sentenced as provided in pages 1 through 6 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 dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall 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 shall notify the Court and United States Attorney of material changes in economic circumstances.

11/16/2015

Date of Imposition of Judgment

s/ Daniel D. Crabtree

Signature of Judge

Honorable Daniel D. Crabtree, U.S. District Judge

Name & Title of Judge

11/20/2015

Date

Appendix B

26a

DEFENDANT: Jonathan Kearn
CASE NUMBER: 5:13CR40057 - 001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 292 months.

Ct. 1: 292 months
Ct. 2: 240 months
Ct. 3: 120 months. All counts to be served concurrently with each other.

☒ The Court makes the following recommendations to the Bureau of Prisons:

The Court recommends designation to FCI Englewood, Colorado to facilitate family visitation.

☒ 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 ___ 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 ___ on ___.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Officer.

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 U.S. Marshal

DEFENDANT: Jonathan Kearn
CASE NUMBER: 5:13CR40057 - 001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years.

Counts 1, 2, and 3: Five (5) years supervised release, each count, to run concurrently

The defendant shall 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.

- ☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check if applicable)*
- ☒ The defendant is prohibited from possessing or purchasing a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check if applicable)*
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check if applicable)*
- ☒ The defendant shall register as a sex offender, and keep the registration current, in each jurisdiction where the defendant resides, where the defendant is an employee, and where the defendant is a student. For initial registration purposes only, the defendant shall also register in the jurisdiction in which convicted, if such jurisdiction is different from the jurisdiction of residence. Registration shall occur not later than 3 business days after being sentenced, if the defendant is not sentenced to a term of imprisonment. The defendant shall, not later than 3 business days after each change in name, residence, employment, or student status, appear in person in at least one jurisdiction in which the defendant is registered and inform that jurisdiction of all changes in the information required. *(Check if applicable)*
- ☐ The defendant shall participate in an approved program for domestic violence. *(Check if applicable)*

If this judgment imposes a fine or restitution, it is to be a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this Court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without 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 the probation officer;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow 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 substances 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;
- 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.

DEFENDANT: Jonathan Kearns
CASE NUMBER: 5:13CR40057 - 001

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall have no contact with any person under the age of 18 except: (1) in the presence of an adult who is aware of the nature of the defendant's background and offense(s), and who has been approved by the U.S. Probation Office; (2) in the course of normal commercial business; or (3) in other cases of unintentional and incidental contact.
2. Submit to a sex offender assessment, and follow the recommendations of such assessment.
3. No contact with the victim of the offense.
4. The defendant shall neither possess nor have under his/her control any material that depicts sexually explicit conduct involving adults or minor[s], child pornography, or visual depictions of minor[s] engaged in sexually explicit conduct, all as defined in 18 U.S.C. 2256.
5. As directed by the U.S. Probation Officer, the defendant shall cooperate with and abide by the policies of the United States Probation Office's Computer and Internet Monitoring Program which includes restrictions related to: computer and Internet usage, possession and use of electronic, cellular, gaming, and Internet appliance devices; possession and use of computer hardware and software, encryption hardware or software, and accessing certain types of web sites to include: social networking, chat rooms, and those depicting sexually explicit conduct or pornographic material. The defendant will also be subject to computer monitoring, and will provide the United States Probation Office with a complete inventory of all electronic and Internet capable devices, user account information as well as password(s).
6. The defendant shall submit his/her person, house, residence, vehicle(s), papers, business or place of employment and any property under the defendant's control to a search, conducted by the United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.
7. The defendant is prohibited from possessing or purchasing a firearm, ammunition, destructive device, or any other dangerous weapon.

DEFENDANT: Jonathan Kearn
CASE NUMBER: 5:13CR40057 - 001

CRIMINAL MONETARY PENALTIES

The defendant shall pay the total criminal monetary penalties under the Schedule of Payments set forth in this Judgment.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
Totals:	\$300	None	None

Counts 1, 2, and 3:

\$100 CVF assessment, each count, for a total of \$300

- ☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.
- ☐ The defendant shall make restitution (including community restitution) to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
----------------------	--------------------	----------------------------	-------------------------------

<u>Totals:</u>	\$	\$	
----------------	----	----	--

- ☐ Restitution amount ordered pursuant to plea agreement \$_____.
- ☐ The defendant shall pay interest on any fine or restitution of more than \$2,500, unless the fine or restitution 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 set forth in this Judgment 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 and/or ☐ restitution.
- ☐ the interest requirement for the ☐ fine and/or ☐ restitution is modified as follows:

DEFENDANT: Jonathan Kearn
CASE NUMBER: 5:13CR40057 - 001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A ☐ Lump sum payment of \$___ due immediately, balance due
☐ not later than ___, or
☐ in accordance with ☐ 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 monthly installments of not less than 5% of the defendant's monthly gross household income over a period of ___ years to commence ___ days after the date of this judgment; or
- D ☐ Payment of not less than 10% of the funds deposited each month into the inmate's trust fund account and monthly installments of not less than 5% of the defendant's monthly gross household income over a period of ___ years, to commence ___ 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:

If restitution is ordered, the Clerk, U.S. District Court, may hold and accumulate restitution payments, without distribution, until the amount accumulated is such that the minimum distribution to any restitution victim will not be less than \$25.

Payments should be made to Clerk, U.S. District Court, U.S. Courthouse - Room 259, 500 State Avenue, Kansas City, Kansas 66101.

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

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

<u>Case Number</u> (Including Defendant Number)	<u>Defendant Name</u>	<u>Joint and Several Amount</u>
--	-----------------------	---------------------------------

- ☐ 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 against any money judgment ordered as part of a forfeiture order should be made payable to the United States of America, c/o United States Attorney, Attn: Asset Forfeiture Unit, 1200 Epic Center, 301 N. Main, Wichita, Kansas 67202.

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.

1 understand that would be a condition of
2 supervised release. I assume that while the
3 defendant is incarcerated that visitation and
4 contact would somewhat be controlled by the
5 Bureau of Prisons and their policies.

6 Frankly, all of his children will be of the
7 age of majority by the time he completes his
8 sentence.

9 THE COURT: Yeah. I think-- doesn't
10 that obviate the concern?

11 Mr. Francis, as I understand it, the
12 Bureau of Prisons decides who Mr. Kearn can
13 visit with during his incarceration. Do you
14 agree with that?

15 MR. FRANCIS: I agree with that.

16 THE COURT: And I think as it
17 applies to his children, given the sentence
18 that I plan to impose, a concern about
19 contact is obviated. If for some
20 circumstance somebody is still of minority
21 age when he is under his term of supervised
22 release, I think he would be in a position to
23 present that issue at the time. So I
24 understand the request. I'm not going to
25 modify the condition.

FILED

**United States Court of Appeals
Tenth Circuit**

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

October 2, 2017

**Elisabeth A. Shumaker
Clerk of Court**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

No. 15-3121

JONATHAN KEARN,

Defendant - Appellant.

ORDER

Before **TYMKOVICH**, Chief Judge, **MATHESON** and **MORITZ**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court



ELISABETH A. SHUMAKER, Clerk