

No. _____
IN THE
UNITED STATES SUPREME COURT OF THE UNITED
STATES

DEREK MUÑOZ-GONZALEZ

Petitioner

Vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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U.S. Solicitor General of the Justice Department in
Washington D.C. 950 Pennsylvania Avenue NW,
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Question presented:

Whether the prosecution breached the plea agreement by vigorously advocating, at sentencing, for the application of two enhancements, that the parties had agreed to exclude from the United States Sentencing Guideline's range recommendation made by the parties to the district court, in the plea agreement, as Petitioner's sole consideration for pleading guilty.

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TO THE HONORABLE COURT:

The Petitioner, Derek Muñoz-Gonzalez ("Muñoz"), represented by court appointed counsel, respectfully prays and requests that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the First Circuit ("AC") entered against him in this case.

OPINION BELOW

The opinion of the First Circuit Court of Appeals was issued on July 17th, 2025. [Appendix ("App."), p. 1.] The First Circuit denied rehearing on October 3rd, 2025. [App., p. 15].

PROCEEDINGS IN FEDERAL COURT

On January 27th, 2021, a grand jury returned an indictment alleging on count one that, from about January 11th, 2021 to on or about January 13th, 2021, Petitioner Muñoz produced child pornography of a female minor, which was his own daughter, in violation of 18 USC sections 2251(a), 2252(2) and 2252(4)(B). Count two charges Muñoz with producing child pornography of his fifteen-year-old

sister-in-law, in violation of 18 USC sections 2251(a), 2252(2) and 2252(4)(B). Muñoz is charged in count three with distributing said images and, on count four, he is charged with the actual possession of the images, in violation of 18 USC sections 2252(2) and 2252(4)(B), correspondingly.

Muñoz and the prosecution entered a plea agreement, in which they agreed to a Guideline calculation with a range of 262-327 months of imprisonment, that was reached by excluding two enhancements. The parties agreed that Muñoz could request a sentence of 262 months of imprisonment, which is the low end of the guideline range, while the prosecution could request a sentence of up to 276 months. The agreed-upon Guideline calculation included enhancements for involving a minor in the offense, 2G2.1(b)(1)(A), distribution of images of the person, 2G2.1(b)(3), and because the parent of the victim was involved in the offense, 2G2.1(b)(5). However, the parties agreed to exclude two enhancements: for involving a sexual act, or sexual contact, 2G2.1(b)(2)(A) and for depicting

images of an infant, 2G2.1(b)(4)(B). On the other hand, as part of the plea agreement, the parties agreed that Petitioner would waive his right to a jury trial.

On October 25th, 2022, he pled guilty pursuant to the plea agreement and admitted the facts alleged in the indictment.

On January 28th, 2022 the presentence investigation report was filed. Particularly, the probation office's Guideline calculation contains, in addition to the same enhancements included in the plea agreement, the two additional enhancements, that the parties agreed to exclude, for involving a sexual act, or sexual contact, 2G2.1(b)(2)(A) and for depicting images of an infant, 2G2.1(b)(4)(B). As a result, the probation office reached a guideline term of 360 months, at a total offense level of 43 and recommended a 360-month sentence. It also stated that Muñoz was a first offender who was a productive and caring human being

suffering an addiction to child pornography since he was 14 years old.

On May 11th, 2022, during the sentencing hearing, the prosecution breached the plea agreement by stating that she wanted to “emphasize” on these two enhancements that the parties had agreed to not include in the stipulated Guideline range recommendation. The prosecution expressly stated that the “gravity” and “seriousness” of the case was precisely the sexual contact and the publishing of the image of the infant and that cases involving infants are “seldom”. The prosecution breached the plea agreement by vigorously advocating to the court at sentencing that the offense involved sexual contact and images of an infant because those two enhancements had not been included in the plea agreement because the parties had agreed on it, and the district court did not require the prosecution to present a position as to those factors. Additionally, Petitioner did not diminish his conduct, nor contested the facts. Therefore, the

prosecution vigorously advocated for enhancements that it had agreed to exclude from the plea agreement recommended Guideline range.

The district court (DC) sentenced Muñoz to 327 months of imprisonment, as to each count to be served concurrently which was significantly higher (65 months) than the prison term requested by Muñoz-Gonzalez of 262 months.

Petitioner appealed, and, on July 17th, 2025, the AC issued an opinion dismissing the appeal. A timely petition for rehearing was filed and denied, on October 3rd, 2025. The present timely Petition for Certiorari followed.

JURISDICTIONAL STATEMENT

The DC's jurisdiction over this criminal case was conferred by 18 U.S.C. section 1331. The First Circuit's jurisdiction over this appeal from the DC's judgment of conviction was conferred by 18 U.S.C. 2251 and 2252.

The jurisdiction of this Court is invoked under 28 USC section 1254(1). On July 17th, 2025, a panel of the First Circuit Court of Appeals, composed by Judge Gelpi, Judge Lipez and Judge Rikelman, issued an Opinion dismissing the appeal. [Ap p., p. 1] Petitioner filed a petition for rehearing. On October 3rd, 2025, the AC denied the petition for rehearing en banc. [App., p. 15] This petition is filed within 90 days of the AC's denial of the petition for rehearing en banc pursuant Rule 20.1 of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Sentencing Guidelines, 2022 edition.

STATEMENT OF THE CASE

The facts that are material to the consideration of the questions presented are included in the section describing the proceedings in federal court. The basis for federal jurisdiction in the court of first instance was Title18 USC sections 2251(a), 2252(2) and 2252(4)(B).

ARGUMENT

The prosecution breached the plea agreement by vigorously advocating, at sentencing, for two enhancements that the parties had agreed to exclude from the Guideline range recommendation made to the district court in the plea agreement, as the sole consideration for his guilty plea.

In Santobello v. New York, 404 U.S 257 (1971) this Honorable Court vacated a sentence and remanded for further proceedings because the prosecution breached the plea agreement by making a sentencing request for the maximum penalty of one year, when it had agreed to not make any sentencing request and the district court imposed a sentence of one year.

In the present case, the prosecution agreed not to argue for the application of certain sentencing enhancements, but at the sentencing hearing, the prosecution made emphasis, and vigorously advocated for said enhancements, thereby breaching the plea agreement. The prosecution breached the plea agreement by vigorously advocating, or emphasizing, to the court, at sentencing, that

the offense involved sexual contact and images of an infant because it had agreed to exclude those two enhancements from the Guideline calculation that resulted in the recommended imprisonment range. The district court did not require the prosecution to present a position as to those factors, and there was no controversy between the parties as to Petitioner's conduct. Therefore, the prosecution advocated for enhancements that it had agreed to exclude from the Guideline calculations, on its own initiative.

Those two particular enhancements are the ones that, when applied, result in a guideline range of 360 months as calculated by the probation office which is 33 months closer to the 327-month sentence than the range of 262-276 months that was agreed by the parties. Therefore, the sentence imposed is closer to the sentencing range that results when the two enhancements, that the parties agreed to exclude, are added than to the sentencing range agreed by the parties without those two enhancements.

The record shows that, without any request from the district court, the prosecutor actively and specifically advocated, and emphasized, for those two factors that were excluded from the plea agreement guideline calculation. Therefore, Muñoz requests that his plea agreement, conviction and sentence be vacated because he entered into a plea agreement that did not contain two sentencing enhancements believing that he would receive the support of the prosecution for a lesser sentence, precisely on account of the omission of those enhancements from the sentence calculation, only to find that, at sentencing, the prosecution did not honor the contract and advocated vigorously for those specific enhancements. The process was fundamentally unfair. Muñoz should be allowed to begin the process anew and, therefore, his plea agreement, conviction and sentence should be vacated.

The prosecution's breach is material. Teragram Corp. v. Marketwatch.com, Inc., 444 F.3d 1, 9-12 (1st Cir. 2006) (upholding release of party from further performance after

counter-party committed material breach); U.S. Steel v. M. DeMatteo Constr. Co., 315 F.3d 43, 49-50 (1st Cir. 2002) (rejecting argument for enforcement of contract because arguing party had materially breached). A breach is material if it involves "an essential and inducing feature of the contract." Marketwatch.com, 444 F.3d at 11 (quoting Bucholz v. Green Bros. Co., 172 N.E. 101, 102 (Mass. 1930)). Here, the breach was material, as the only concession made by the government to Muñoz in exchange for his trial waiver and guilty plea was taken back by the prosecution by advocating for those two sentencing enhancements that the parties agreed to exclude from the sentencing recommendation.

There is a material difference between answering questions asked by a sentencing court and affirmatively advocating for an enhancement. United States v. Clark, 55 F.3d 9, 13(1st Cir. 1995). The prosecution's statements here plainly were not made in response to any inquiry by the district court to correct a misstatement of fact. Therefore,

those statements crossed the line into forbidden terrain because supporting an enhancement entails an element of advocacy, and there was such advocacy by the prosecutor here. United States v Saxena, 229 F.3d 1 (1st. Cir. 2000), United States v. Almonte-Nuñez, 771 F.3d 84, 89 (1st Cir. 2014).

"[A] prosecutorial failure to fulfill a promise or to make a proper promise is not rendered harmless because of judicial refusal to follow the recommendation or judicial awareness of the impropriety." Correale v. United States, 479 F.2d 944, at 949 (1973). Thus, even if the prosecutor's breach had no effect Muñoz's sentence, he would still be entitled to a remedy. Santobello v. New York, 404 U.S. 257 (1971) (remanding for remedy even though sentencing judge "stated that the prosecutor's recommendation did not influence him and we have no reason to doubt that").

The complete argument of the prosecutor, in our case, at sentencing, was the following:

“MS. HERNÁNDEZ-VEGA: Yes, Your Honor. In this case, the United States stands by the plea agreement that was ascribed by the parties. Pursuant to that plea agreement, the United States is requesting a sentence of 276 months of imprisonment which is within the guideline that was calculated in the plea agreement.

Now, in the allocution of defense counsel and of the defendant they have focused mainly on -- under the 3553 factors, on the history and characteristics of the defendant. But as this Court is well aware we also have to consider the seriousness of the offense, that we need to afford adequate deterrence for his criminal conduct to protect the public from further crimes of this defendant.

And in this particular case, there are two victims in this case and one of them is not the defendant. Particularly it was his own biological daughter which was just ten months old -- and he chose to be a parent -- and a 15-year-old female. And in the stipulation of facts which we will not read all to the Court because it is part of the record, but we do want to emphasize that the videos

that he sent of his daughter to other persons with like tastes in images relating to children include the image of the infant lying on her back wearing a blue shirt. The child is nude from the waist down and her legs are spread exposing her bare vagina. A video depicting him pressing his bare, erect penis on the infant's bare vagina, and an image of him licking the same infant's bare vagina with his tongue.

So, this is the gravity and the seriousness of this particular offense. And we have had many of these cases but seldom do we have a case that includes a ten-month-old baby. And in this case, we understand that the guideline calculations that we made did take into consideration all the 3553 factors and we stand by our recommendation of 276 months of imprisonment.”

The record reflects that the prosecutor made a very brief two-sentence request to support the plea agreement. The record also reflects that, on the other hand, the substance of the prosecution’s argument was to emphasize, or highlight, on the matters that were left out of the plea

agreement guideline calculation, as the sole consideration for defendant's guilty plea, but which were included, by the Probation Office, in the presentence investigation report to reach a substantially higher Guideline sentencing range, than the one stipulated by the parties. Therefore, instead of standing by the plea agreement, the prosecution advocated for the Guideline range found by the Probation Office which was substantially higher than the one that the prosecution agreed with the Petitioner.

The prosecutor also failed to put the United States reputational weight behind the sentencing recommendation, as no explanation was provided to support the plea agreement recommendation of a Guideline range of 39 with a range of 262-327 months versus the Guideline range found by the probation office of 43 with a 360-month sentence.¹ The difference of 98 months between the lower end of the parties' calculations and the calculation of the Probation Office

¹Therefore, the parties stipulated guideline range was a recommendation for a downward variance.

required that the prosecution explained to the judge the reasons for the lower sentence, or downward variance, but instead the prosecution did the opposite and argued vigorously in favor of those enhancements which omission from the guideline analysis, it negotiated with the petitioner, as the sole consideration for his guilty plea.

The prosecutor should have provided some minimal explanation to the district court about why the government agreed to the specific recommendation, at least when, as here, the recommended sentence is so drastically below the Guideline range that the Probation Office calculated. Cortes-Lopez, Id, at p. 22.

The record reflects that, the prosecutor, not in response to Petitioner's advocacy, emphasized on two factors that it had agreed to not include in the plea agreement guideline calculation, as the only consideration for the guilty plea. The prosecution went even further, and stated that those particular facts reflected the "gravity and the

seriousness of this particular offense”, and that there are “many of these cases but seldom do we have a case that includes a ten-month-old baby”. This argument implied that the prosecution believed that Petitioner should receive a higher sentence, as it is not a common crime. If it is not a common crime, then the prosecution was implying that it is an extraordinary crime that would not be a candidate for a downward variance, but rather for an upward variance.

CONCLUSION

The prosecutor breached the plea agreement by emphasizing on the matters it had agreed to leave out of the sentencing recommendation.

WHEREFORE, Petitioner respectfully requests that the Honorable Court grant this petition.

Respectfully Submitted, in San Juan, Puerto Rico, this
22nd day of October 2025.

A handwritten signature in black ink, appearing to read "José R. Olmo Rodríguez", written over a horizontal line.

José R. Olmo Rodríguez

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CERTIFICATE OF SERVICE

I, José R. Olmo-Rodríguez, court appointed counsel for the petitioner Derek Muñoz-Gonzalez, hereby CERTIFY that I deposited copies of the foregoing Petition for a Writ of Certiorari, Motion for Leave to Proceed in Forma Pauperis, and the correspondent Appendix into the United States Mail, with the proper Priority Mail postage affixed, addressed to: Supreme Court of the United States, Clerk's Office, 1 First Street, NE, Washington, DC 20543; and to the U.S. Solicitor General of the Justice Department in Washington D.C. to 950 Pennsylvania Avenue NW, Washington D.C. 20530, United States.

In San Juan, Puerto Rico, this 22nd day of October 2025.

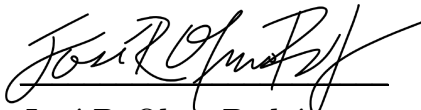
A handwritten signature in black ink, appearing to read "José R. Olmo-Rodríguez", is written over a horizontal line.

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CERTIFICATE OF COMPLIANCE

I, José R. Olmo-Rodríguez, court appointed counsel for the petitioner Derek Muñoz-Gonzalez, hereby CERTIFY that this petition complies with the page limit as it contains less than 40 pages.

In San Juan, Puerto Rico, this 22nd day of October 2025.

A handwritten signature in black ink, appearing to read 'Jose R Olmo Rodriguez', written over a horizontal line.

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APPENDIX

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United States Court of Appeals For the First Circuit

No. 22-1423

UNITED STATES OF AMERICA,

Appellee,

v.

DEREK MUÑOZ-GONZALEZ,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. Silvia L. Carreño-Coll, U.S. District Judge]

Before

Gelpí, Lipez, and Rikelman,
Circuit Judges.

José R. Olmo-Rodríguez, for appellant.

Gregory B. Conner, Assistant United States Attorney, with whom W. Stephen Muldrow, United States Attorney, and Mariana E. Bauzá-Almonte, Assistant United States Attorney, Chief, Appellate Division, were on brief, for appellee.

July 17, 2025

GELPÍ, Circuit Judge. Derek Muñoz-Gonzalez ("Muñoz") was indicted on multiple charges related to child pornography, including two counts of production, one count of possession, and one count of distribution. He agreed to plead guilty to two counts of producing child pornography. The plea agreement contained, among other provisions, a waiver-of-appeal clause setting forth Muñoz's waiver of his right to appeal "any aspect of this case" if the court sentenced him to a term of imprisonment of 327 months or less.

At the sentencing hearing, the district court sentenced Muñoz to 327 months. He appealed, claiming that the prosecutor breached the plea agreement by advocating for two enhancements that were not included in the agreement's sentencing guidelines calculation and asserting that the agreement's waiver-of-appeal clause does not preclude him from raising that breach claim. We disagree. Because the prosecutor did not breach the plea agreement, we affirm.

I. BACKGROUND

A. Facts

We briefly recount the relevant facts and travel of the case. In January 2021, an undercover Federal Bureau of Investigation ("FBI") agent identified a person suspected of being a child molester through Kik Messenger ("Kik"), a mobile messaging application frequently used for exchanging child pornography.

That person was Muñoz, a resident of Puerto Rico. Via Kik, Muñoz said he was sexually exploiting his own then-eight-month-old daughter. Another Kik user asked Muñoz in a Kik group chat, "[D]o you play with your daughter?" "I have," Muñoz responded. After disclosing in the chat that his daughter was under a year old, Muñoz shared a picture of a baby lying on a bed with an adult female standing in front of her.

This prompted the undercover officer to begin communicating with Muñoz privately. In their conversation, Muñoz admitted he had been a pedophile for a long time. He also sent the officer images and videos of child sexual abuse and said he had been sexually active with his eight-month-old daughter. Muñoz also offered to share photos of his girlfriend's fifteen-year-old sister, whom he had photographed while she was in the bathroom.

The next day, on January 12, 2021, Muñoz posted another message in a Kik group chat, stating that he took additional pictures and videos of his daughter earlier that day. He shared a video and two pictures, which collectively depicted Muñoz sexually abusing his infant daughter. As a result, the FBI sent an emergency disclosure request to Kik to obtain Muñoz's demographic information and investigate further. And, after Muñoz's identity was corroborated, he was arrested.

B. Procedural History

Two weeks after Muñoz's arrest, a federal grand jury charged him in a four-count indictment with (1) production of child pornography of an eight-month-old infant, in violation of 18 U.S.C. § 2251(a) and (e) (Count I); (2) production of child pornography of a fifteen-year-old female minor, also in violation of 18 U.S.C. § 2251(a) and (e) (Count II); (3) distribution of child pornography, in violation of 18 U.S.C. § 2252(a)(2) (Count III); and (4) possession of child pornography, in violation of 18 U.S.C. § 2252(4)(B) (Count IV). Muñoz subsequently pleaded guilty only to Counts I and II, each of which carries a term of imprisonment of fifteen to thirty years. In return, the government agreed to dismiss Counts III and IV.

The plea agreement stipulated an advisory guideline range of 262 to 327 months' imprisonment. Said guideline range accounted for the following offense-level enhancements: (1) the victims' ages, (2) the knowing distribution of the images and videos, and (3) the familial relationship between Muñoz and the victims. The guideline calculations also accounted for Muñoz's acceptance of responsibility for his behavior. The parties agreed that Muñoz could request a sentence of 262 months of imprisonment while the government could recommend one of up to 276 months' imprisonment. Any petition by either party for a term of imprisonment below or above that stipulated sentence

recommendation, the agreement stated, would "constitute a material breach of the Plea Agreement."

Notably, the agreement also contained a clause waiving Muñoz's right to appeal:

[Muñoz] knowingly and voluntarily agrees that, if the imprisonment sentence imposed by the Court is 327 months or less, [he] waives the right to appeal any aspect of this case's judgment and sentence, including, but not limited to the term of imprisonment or probation, restitution, fines, forfeiture, and the term and conditions of supervised release.

At the sentencing hearing, Muñoz's counsel asked the district court to impose a sentence of 262 months' imprisonment, arguing that such sentence would be sufficient, but not greater than necessary to punish, deter, and rehabilitate Muñoz. The government countered that 276 months' imprisonment was a more appropriate sentence to deter others, protect the public, and reflect the seriousness of Muñoz's conduct.

In advocating for its position, the government highlighted two facts stipulated in the plea agreement: (1) Muñoz had sexual contact with his infant daughter and (2) the images and videos he sent to others in the Kik chat depicted sexual abuse of an infant. These two facts, although stipulated in the plea agreement's factual summary, were not factored into the parties' proposed guidelines calculation.

At sentencing, the district court considered the stipulated facts spelled out in the plea agreement, which included

the fact that Muñoz "used the application Kik to share videos and images of him[self]" having sexual contact with his eight-month-old daughter. And after considering the stipulated facts along with the sentencing guidelines, the district court ultimately sentenced Muñoz to 327 months of imprisonment -- a longer sentence than either party had recommended at the sentencing hearing, but within the waiver-of-appeal limit.¹ Believing that the government did not hold up its end of the bargain, Muñoz appealed.

II. DISCUSSION

Muñoz advances two arguments on appeal. First, he argues that the waiver-of-appeal provision in the plea agreement does not bar this appeal because that provision only encompasses challenges to the court's imposition of a sentence, not arguments that the government breached the plea agreement. Second, Muñoz contends that the prosecutor breached the plea agreement when she highlighted conduct excluded from the stipulated guidelines calculation: (1) the sexual contact he had with his infant daughter and (2) the sharing of images and videos with others on Kik, depicting him sexually abusing his infant daughter. Because we hold that the prosecutor did not breach the plea agreement, we

¹ The sentence imposed was also within the applicable sentencing guidelines range.

need not address whether the waiver-of-appeal clause bars this appeal.

This court reviews de novo a defendant's claim that the prosecutor breached the plea agreement. See United States v. Almonte-Nuñez, 771 F.3d 84, 89 (1st Cir. 2014); see also United States v. Rivera-Ruiz, 43 F.4th 172, 179 (1st Cir. 2022). But when the "defendant has knowledge of conduct ostensibly amounting to a breach of a plea agreement, yet does not bring that breach to the attention of the sentencing court" during sentencing, this court reviews for plain error. Rivera-Ruiz, 43 F.4th at 179 (quoting United States v. Rivera-Rodríguez, 489 F.3d 48, 57 (1st Cir. 2007)). At the sentencing proceeding, Muñoz failed to assert that the prosecutor breached the plea agreement. Thus, we review Muñoz's submission under plain error.

"The defendant's burden under the plain error standard is a heavy one." United States v. Umeh, 132 F.4th 573, 582 (1st Cir. 2025) (citation omitted). This rigorous standard requires Muñoz to show "(1) that an error occurred (2) which was clear or obvious and which not only (3) affected [his] substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings." United States v. Ruiz-Huertas, 792 F.3d 223, 226 (1st Cir. 2015) (alteration in original) (citation omitted). To make that showing, however, the defendant has only one avenue: the opening brief. It is in the

opening brief where the defendant must address each prong of the plain-error standard. For this court has said time and again "that an argument at best entitled to plain error review [is] waived where the appellant made no attempt to satisfy that standard in his opening brief." United States v. Mulkern, 49 F.4th 623, 636 (1st Cir. 2022) (citation modified). Indeed, "[u]nder the plain error doctrine, if an error is not properly preserved, appellate-court authority to remedy the error is strictly circumscribed." United States v. Pabon, 819 F.3d 26, 33 (1st Cir. 2016) (citation modified).

Here, Muñoz failed to expressly address the plain-error standard in his opening brief. Although he sought to address the standard in his reply brief, our precedent is clear "that issues advanced for the first time in an appellant's reply brief are deemed waived." Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 299 (1st Cir. 2000); see also United States v. Rodriguez-Monserrate, 22 F.4th 35, 40 (1st Cir. 2021); United States v. Rodríguez-Torres, 939 F.3d 16, 40 & n.14 (1st Cir. 2019). For this reason alone, Muñoz waived his breach-of-plea-agreement claim.

But in any event, even setting waiver aside, the government's comments at sentencing did not constitute "a clear or obvious breach of the plea agreement." United States v. Davis, 923 F.3d 228, 239 (1st Cir. 2019). To demonstrate "'clear or

obvious error,' a party must show that the error is contrary to existing law." United States v. Rabb, 5 F.4th 95, 101 (1st Cir. 2021) (citation omitted). That law or principle must also be clearly established in our precedent. See United States v. Espinoza-Roque, 26 F.4th 32, 36 (1st Cir. 2022) ("An appellant cannot establish plain error using 'case law absent clear and binding precedent.'" (quoting United States v. Marciano, 525 F.3d 72, 74 (1st Cir. 2008) (per curiam))). "In other words, the error must be 'indisputable' in light of controlling law." Rabb, 5 F.4th at 101 (quoting United States v. Jones, 748 F.3d 64, 69-70 (1st Cir. 2014)). If our precedent does not clearly establish the error, then the appellant cannot overcome the plain error hurdle. See id.

In the plea agreement context, "[w]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." United States v. Lessard, 35 F.4th 37, 42 (1st Cir. 2022) (citation omitted). "Because plea bargaining requires defendants to waive fundamental constitutional rights, we hold prosecutors engaging in plea bargaining to the most meticulous standards of both promise and performance." Id. (citation modified). These "standards require more than lip service to, or technical compliance with, the terms of a plea agreement." Id. (quoting Almonte-Nuñez, 771 F.3d at

89). Since "[a] defendant is entitled to the benefit of the bargain struck in the plea deal and to the good faith of the prosecutor," id. (citation modified), a prosecutor cannot make "end-runs around" the promises in the plea agreement, United States v. Castillo, 126 F.4th 791, 796 (1st Cir. 2025) (citation omitted).

On the other hand, "we recognize that the government is not obliged to present an agreed-upon recommendation with ruffles and flourishes." Id. (citation modified). "Nor do we require" the prosecution to display "any particular degree of enthusiasm" when making its sentencing recommendation. Id. (citation omitted). While there is no "magic formula" for assessing a prosecutor's performance, we must consider the "totality of the circumstances" in asking whether their conduct was "reasonably consistent" with the recommendation they promised. Lessard, 35 F.4th at 42 (citation omitted); see also United States v. Acevedo-Osorio, 118 F.4th 117, 128 (1st Cir. 2024) (stating that the court "must examine the totality of the circumstances in a case-by-case approach" by considering the "'net effect of the government's behavior' to determine whether, on balance, it has 'undermine[d] the benefit of the bargain.'" (alteration in original) (quoting United States v. Cortés-López, 101 F.4th 120, 128 (1st Cir. 2024))). And so, "[b]ecause context is key, we have declined to find breach where a prosecutor's comments come at the 'court's urging' or 'in direct response to defense counsel's

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attempt to put an innocent gloss' on relevant facts." Castillo, 126 F.4th at 796 (quoting United States v. Saxena, 229 F.3d 1, 7 (1st Cir. 2000)).

During the sentencing hearing, the prosecutor recommended 276 months of imprisonment, as agreed in the plea agreement. At the beginning of her allocution, the prosecutor affirmed that "the United States stands by the plea agreement . . . ascribed by the parties," and that "[p]ursuant to that plea agreement, the United States is requesting a sentence of 276 months of imprisonment." Then, in explaining why 276 months was a more appropriate sentence than a 262-month sentence, the prosecutor stated that one of the victims was an infant and that certain images and videos involved sexual acts or contact with the victim. Those facts were stipulated in the plea agreement. And the context in which the prosecutor offered them suggests that she simply reminded the court of the stipulated record to counter the focus on Muñoz's "history and characteristics" in defense counsel's allocution for a more lenient sentence. In the end, the prosecutor reaffirmed that the United States "stand[s] by [its] recommendation of 276 months of imprisonment."

It is far from obvious that the prosecutor's emphasis on the stipulated facts constituted advocacy for enhancements not contained in the plea agreement. See United States v. Miranda-Martinez, 790 F.3d 270, 274 (1st Cir. 2015) ("[T]he

government's review of the facts of the case cannot constitute a breach of the plea agreement when they are relevant to the court's imposition of sentence." (citation modified)). To the contrary, the record makes plain that the prosecutor explained why her sentencing recommendation was appropriate in response to Muñoz's recommendation for a lesser sentence. See United States v. Cruz-Vázquez, 841 F.3d 546, 549 (1st Cir. 2016) ("Having unequivocally stated that it was recommending a sentence at the higher end of the guideline range, the government was free to offer reasons supporting its recommendation.").

"When the parties agree that a defendant may argue for a particular sentence while the government may argue for a somewhat stiffer sentence," the government is not constrained to pull its punches when arguing for the stiffer sentence. United States v. Montañez-Quiñones, 911 F.3d 59, 65 (1st Cir. 2018). Our precedent has made clear that "when the plea agreement allows the government to advocate for a sentence that is stiffer than the sentence that defense counsel has proposed, the government 'ha[s] a right (indeed, a duty) to explain to the court why the higher sentence that it [i]s urging [i]s more appropriate.'" Lessard, 35 F.4th at 43 (alterations in original) (quoting Montañez-Quiñones, 911 F.3d at 65). We therefore conclude that Muñoz has not clearly shown that the government breached the plea agreement. Because we hold

that no breach of the plea agreement occurred, we see no reason to address Muñoz's remaining contention.

III. CONCLUSION

For the reasons discussed above, we **affirm**.

United States Court of Appeals For the First Circuit

No. 22-1423

UNITED STATES OF AMERICA,

Appellee,

v.

DEREK MUÑOZ-GONZALEZ,

Defendant, Appellant.

JUDGMENT

Entered: July 17, 2025

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: Derek Muñoz-Gonzalez's sentence is affirmed.

By the Court:

Anastasia Dubrovsky, Clerk

cc: José Ramon Olmo-Rodriguez, Jenifer Yois Hernandez-Vega, Mariana E. Bauzá-Almonte, Nicholas Warren Cannon, Gregory Bennett Conner, Derek Muñoz-Gonzalez

United States Court of Appeals For the First Circuit

No. 22-1423

UNITED STATES,

Appellee,

v.

DEREK MUÑOZ-GONZALEZ,

Defendant - Appellant.

Before

Barron, Chief Judge,
Lipez, Gelpí, Montecalvo, Rikelman, and Aframe,
Circuit Judges.

ORDER OF COURT

Entered: October 3, 2025

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

Anastasia Dubrovsky, Clerk

cc:

José R. Olmo-Rodríguez
Derek Muñoz-Gonzalez
Jenifer Yois Hernandez-Vega
Mariana E. Bauza Almonte
Nicholas Warren Cannon
Gregory Bennett Conner

UNITED STATES DISTRICT COURT

District of Puerto Rico

UNITED STATES OF AMERICA

v.

Derek MUNOZ-GONZALEZ

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:21-cr-00020-SCC-1

USM Number: 25529-509

Melanie Carrillo-Jimenez, Esq.

Defendant's Attorney

THE DEFENDANT:☒ pleaded guilty to count(s) One (1) and Two (2) of the Indictment on 10/25/2021.☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 2251(a)(e)	Production of child pornography.	1/13/2021	One (1) and Two (2)

The defendant is sentenced as provided in pages 2 through 7 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) remaining ☐ is ☒ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

5/11/2022

Date of Imposition of Judgment

s/ Silvia L. Carreno-Coll

Signature of Judge

Silvia L. Carreno-Coll, U.S. District Judge

Name and Title of Judge

5/11/2022

Date

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AO 245B (Rev. 09/19) Judgment in Criminal Case
Sheet 2 — ImprisonmentJudgment — Page 2 of 7

DEFENDANT: Derek MUNOZ-GONZALEZ

CASE NUMBER: 3:21-cr-00020-SCC-1

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

Three hundred and twenty-seven (327) months as to each Count to be served concurrently with each other.

☒ The court makes the following recommendations to the Bureau of Prisons:
Defendant to be designated to FCI Seagoville.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____ , with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

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AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 3 — Supervised ReleaseJudgment—Page 3 of 7

DEFENDANT: Derek MUNOZ-GONZALEZ

CASE NUMBER: 3:21-cr-00020-SCC-1

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

Fifteen (15) years.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - ☒ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☒ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☒ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

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AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 3A — Supervised ReleaseJudgment—Page 4 of 7

DEFENDANT: Derek MUNOZ-GONZALEZ

CASE NUMBER: 3:21-cr-00020-SCC-1

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

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DEFENDANT: Derek MUNOZ-GONZALEZ
CASE NUMBER: 3:21-cr-00020-SCC-1

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall not commit another Federal, state, or local crime, and shall observe the standard conditions of supervised release recommended by the United States Sentencing Commission and adopted by this Court.
2. The defendant shall not unlawfully possess controlled substances.
3. The defendant shall refrain from possessing firearms, destructive devices, and other dangerous weapons.
4. The defendant shall not have unsupervised visits with the victim while she is a minor unless determined to be appropriate by the treatment provider and previously approved by the Probation Officer.
5. The defendant shall consent to the installation of systems that will enable the Probation Officer or designee to monitor and filter any internet accessing and data storage devices, owned and/or controlled by the defendant. The defendant shall consent to and cooperate with unannounced examinations on any equipment owned or controlled by the defendant, which may result in retrieval and copying of all data from the device and any internal or external peripherals, and may involve removal of such equipment for the purpose of conducting a more thorough inspection. You shall immediately notify the Probation Office upon registration for access to any website or service that allows for: communication with other users, uploading/downloading of files, posting of any material, etc. Notification shall include the site address, user name, password, pseudonyms, and logons. This includes, but is not limited to, social networks, cloud storage services, message boards, etc. The defendant shall contribute to the cost of the monitoring service based on his ability to pay.
6. The defendant shall not engage in a specified occupation, business, or profession bearing a reasonable direct relationship to the conduct constituting the offense. Specifically, the defendant shall not work with children under the age of 18, or hold a job that gives him authority over potential victims, gives him access to vulnerable populations or places him in setting near a school or playground. Any employment must be notified in advance; the Probation Officer will make an assessment of the job placement and set employment restrictions based on the Sex Offender Management Procedures Manual. The defendant shall consent to third party disclosure to any employer or potential employer.
7. The defendant shall not participate in any volunteer activity or be involved in any children's or youth organization or any group that would bring him into close contact with a child or children under the age of 18, unless prior approval of the U.S. Probation Officer.
8. The defendant shall not reside, date or socialize with a child or children below the ages of 18, unless previously approved by the U.S. Probation Officer and after a third party risk has been duly signed.
9. The defendant shall cooperate in the collection of a DNA sample as directed by the Probation Officer, pursuant to the Revised DNA Collection Requirements, and Title 18, U.S. Code Section 3563(a)(9).
10. The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. Sec. 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state, U.S. Territory or Indian Tribe, sex offender registration agency in which he or she resides, works, is a student, carry on a vacation, or was convicted of a qualifying offense.
11. Defendant shall submit his person, property, house, vehicle, papers, computers (as defined in 18 U.S.C. Section 1030(e)(1)), other electronic communication or data storage devices, and media, to a search conducted by a 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 of release. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition.
12. The defendant shall undergo a sex-offense-specific evaluation and/or participate in a sex offender treatment/and or mental health treatment program arranged by the Probation Officer. The defendant shall abide by all rules, requirements, and conditions of the sex offender treatment program(s), including submission to testing; such as polygraph, and/or any other testing available at the time of his release. The defendant shall waive his right of confidentiality in any records for mental health assessment and treatment, and sign any necessary release form required to obtain the records, imposed as a consequence of this judgment to allow the U.S. Probation Officer to review the defendant's course of treatment and progress with the treatment provider. The defendant shall be required to submit to an initial polygraph examination and subsequent maintenance testing intervals to be determined by the probation office to assist in treatment planning and case monitoring and as a means to ensure that he is in compliance with the requirements of his/her supervision or treatment program. The defendant will be required to contribute to the costs of services rendered, by means of co-payment, based on his/her ability to pay or availability of third-party payment.

DEFENDANT: Derek MUNOZ-GONZALEZ
CASE NUMBER: 3:21-cr-00020-SCC-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
TOTALS	\$ 200.00	\$ 6,000.00	\$	\$ 5,000.00	\$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, 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>
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TOTALS	\$	<u>0.00</u>	\$	<u>0.00</u>
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☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

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

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Derek MUNOZ-GONZALEZ
CASE NUMBER: 3:21-cr-00020-SCC-1

SCHEDULE OF PAYMENTS

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

- A ☒ Lump sum payment of \$ 11,200.00 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 equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of 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

Case Number
Defendant and Co-Defendant Names
(including defendant number)

Total Amount

Joint and Several
Amount

Corresponding Payee,
if appropriate

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:

any visual depiction described in this Indictment or any book, magazine, periodical, film, videotape, or other matter which contains any such visual depiction, which was produced, transported, mailed, shipped or received in violation of this chapter; (b) any property, real or personal, constituting or traceable to gross profits or other proceeds obtained from such offense; and (c) any property, real or personal, used or intended to be used to commit or to promote the commission of such offense or any property traceable to such property. All pursuant to Title 18, United States Code, Section 2253(a).

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVT A assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.