

United States Court of Appeals
for the Fifth Circuit

No. 24-40631

United States Court of Appeals
Fifth Circuit

FILED

March 10, 2026

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

HERIBERTO MENDEZ-LOZANO,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:22-CR-1706-2

Before STEWART, GRAVES, and OLDHAM, *Circuit Judges*.

PER CURIAM:

While executing an arrest warrant at a mobile home, police discovered Heriberto Mendez-Lozano inside the trailer with five illegal aliens. The aliens told the officers that Mendez-Lozano, along with Heriberto Aguirre, Lorenzo Guy Campbell, and several others, had taken them hostage, terrorizing them at gunpoint and extorting their families for money. After arresting Mendez-Lozano, officers recovered a firearm and two magazines in the trailer.

Mendez-Lozano, Aguirre, and Campbell were indicted as co-defendants. Mendez-Lozano was indicted for thirteen counts: conspiracy to

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harbor aliens, five counts of concealing or harboring aliens, conspiracy to take hostages, five counts of hostage taking, and one count under the felon-in-possession statute, 18 U.S.C. § 922(g)(1). Aguirre and Campbell pled guilty, but Mendez-Lozano went to trial. After a three-day trial, the jury found Mendez-Lozano guilty on all thirteen counts. The district court sentenced Mendez-Lozano to 460 months in prison, three years of supervised release, a \$1,300 special assessment, and \$6,545 in restitution.

Mendez-Lozano brings two challenges on appeal. First, he contends the district court erred by denying his motion to sever the felon-in-possession charge from the remaining counts and bifurcate his trial. He also argues that the district court failed to include a limiting instruction in the jury charge that would have restricted the jury's use of the evidence of his felony conviction. Second, Mendez-Lozano claims the district court erred by applying a four-level sentencing enhancement for his role as an "organizer or leader" of a criminal activity. U.S.S.G. § 3B1.1(a).

I

We begin with Mendez-Lozano's arguments challenging his conviction. Mendez-Lozano's notice of appeal states that his appeal "is limited to the sentence imposed and does not challenge the underlying conviction." ECF 1. But now, he argues that the district court's failure to sever the felon-in-possession count, bifurcate his trial, and include a limiting instruction prejudiced him and affected his substantial rights.

Federal Rule of Appellate Procedure 3(c)(6) allows parties to "designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited." This court asked the parties for supplemental briefing on whether this rule is jurisdictional or merely a claim-processing rule. After reviewing the parties' submissions, we need not answer this question. Either way, Mendez-Lozano's appeal of his conviction

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is subject to waiver. *See United States v. Olano*, 507 U.S. 725, 733 (1993) (“[W]aiver is the intentional relinquishment or abandonment of a known right.” (quotation omitted)). Although we liberally interpret notices of appeal, Mendez-Lozano expressly limited the scope of his appeal to his sentence. Mendez-Lozano has therefore waived any challenge to his conviction. *See Macias v. Perry*, No. 25-40028, 2025 U.S. App. LEXIS 33500, at *6 n.9 (5th Cir. 2025); *Short v. Billings County*, 138 F.4th 1072, 1076 n.4 (8th Cir. 2025).

II

Next, we turn to Mendez-Lozano’s sentence-enhancement challenge. The Sentencing Guidelines provide for a four-level increase to a defendant’s base offense level “[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive.” U.S.S.G. § 3B1.1(a). Mendez-Lozano claims that the “Government did not prove this level of participation by a preponderance of the evidence.” Blue Br. at 13. The district court’s determination that a defendant organized or led criminal activity is a finding of fact that we review for clear error. *See United States v. Rodriguez*, 630 F.3d 377, 380 (5th Cir. 2011) (“We review for clear error the factual findings a district court makes in support of its decision to apply” a “sentencing enhancement.”); *cf. United States v. Ochoa-Gomez*, 777 F.3d 278, 281–82 (5th Cir. 2015) (applying clear-error review to order applying an enhancement under § 3B1.1).

After reviewing the record as a whole, we hold the district court did not clearly err in its application of § 3B1.1. *See United States v. Zuniga*, 720 F.3d 587, 590 (5th Cir. 2013) (factual findings are not clearly erroneous if plausible based on the record as a whole); *United States v. Trujillo*, 502 F.3d 353, 356 (5th Cir. 2007) (similar).

AFFIRMED.

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JAMES E. GRAVES, JR., *Circuit Judge*, concurring in the judgment:

Mendez-Lozano cannot prevail on any of the merits of his appeal. But because I would not hold that Mendez-Lozano’s notice of appeal constitutes a waiver of the right to appeal his conviction, I concur only in the judgment.

Federal Rule of Appellate Procedure 3(c) details the required contents of a notice of appeal. In 2021, the rule was amended to clarify that “[d]esignation of the final judgment confers appellate jurisdiction over prior interlocutory orders that merge into the final judgment.” FED. R. APP. P. 3(c) advisory committee’s note to 2021 amendment. With this clarification, parties need not designate every district court order they wish to challenge, and courts are not limited to considering only listed orders. *Id.*

Rule 3(c)(6)—a 2021 addition—allows appellants to limit the scope of the appeal. *Id.* This provision serves “[t]o remove the trap for the unwary, while enabling deliberate limitations of the notice of appeal” *Id.*

Mendez-Lozano’s notice of appeal states that the appeal “is limited to the sentence imposed and does not challenge the underlying conviction.” In his briefing, however, he challenges his conviction by arguing that the district court should have: (1) severed his felon-in-possession charge, and (2) provided additional limiting instructions regarding the felon-status stipulation read to the jury.

We asked the parties to provide supplemental briefing in order to determine whether Rule 3(c)(6) was a jurisdictional or a claims-processing rule. Both Mendez-Lozano and the Government believe it to be a claims-processing rule.

What the Government did not argue, either in its response or supplemental brief, was that the limiting statement meant Mendez-Lozano *waived* the ability to appeal his conviction. *See, e.g., Ibarra v. United Parcel*

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Serv., 695 F.3d 354, 358 n.21 (5th Cir. 2012) (“[W]e do not consider arguments not included in a party’s briefs.”). In fact, the Government’s supplemental brief remarked that the court could reasonably conclude that Mendez-Lozano intended to appeal his conviction. “[T]he Government notes that Mendez’s notice also designates the ‘final judgment/sentence’ as the order being appealed, which would include both the conviction and sentence.” Also, the Government “does not claim it has suffered prejudice from Mendez-Lozano’s confusing notice of appeal.” The gravamen of the Government’s argument is not that he waived the appeal of his conviction, but that he cannot prevail on the merits.

The cases cited in the majority opinion in support of its conclusion that the argument is waived are not criminal cases, do not limit courts’ review of a final judgment, and do not refer to the limiting statement as a “waiver.” *See Macias v. Perry*, No. 25-40028, 2025 WL 3709072, at *2 n.9 (5th Cir. Dec. 22, 2025) (per curiam) (declining to consider appellate arguments regarding claims against certain parties when the notice of appeal expressly indicated they appealed their claims as to other named defendants); *Short v. Billings Cnty.*, 138 F.4th 1072, 1076 n.4 (8th Cir. 2025) (declining to address a denial of a motion to dismiss in a stayed federal proceeding when the notice of appeal designated a preliminary injunction for appellate review). There are relatively few circuit court cases that have examined Rule 3(c)(6), and none have held that the limiting statement is a waiver. There are even fewer criminal cases applying the rule. Those that have do not deal with the appeal of a conviction.¹

¹ In one case out of the Eleventh Circuit, the defendant moved for a sentence reduction more than a dozen times. *United States v. Sylvain*, No. 22-13225, 2023 WL 5842006, at *1 (11th Cir. Sept. 11, 2023) (per curiam). In his notice, the defendant specified he was appealing a September 2022 order denying his motion to modify his sentence. *Id.* at *2. However, he did not address any of the applicable standards for this challenge in his

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Concluding that Mendez-Lozano waived the right to appeal his conviction in this instance is imprudent and unnecessary. Despite the limiting instruction in the notice of appeal, it is abundantly clear from the briefing that Mendez-Lozano intended to appeal both his conviction and his sentence. The Government understood this—it argues thoroughly and persuasively that it should prevail on the merits of the challenge to the conviction as well as the sentence. The Government did not mention waiver, either in its original brief or its supplemental brief. And I can find no other case where an appellate court has concluded that a limiting instruction in a notice of appeal constituted waiver of the right to appeal the case’s merits.

Perhaps this serves as a warning for future appellants, particularly in the criminal context: do not include a limiting statement in your notice, lest you unwarily give up the right to appeal.

briefing—instead he mentioned a July 2022 motion for compassionate release. *Id.* The court held that “where an appellant makes an express statement limiting the scope of the appeal, we have jurisdiction to review only the judgments or orders that are specified in the notice,” and it deemed that he had abandoned his challenge to the September 2022 order. *Id.* (citing Rule 3(c)(6)).

However, the court then stated that if it could consider the July 2022 compassionate release order, it would grant summary affirmance for the government under its precedent. *Id.* at *2 n.1. The court also went on to determine that even if the defendant had not abandoned his challenge to the September 2022 order, the challenge would fail on the merits. *Id.* at *3.

The court did not discuss the notice’s language as “waiver,” and in any case, still briefly considered the merits of the defendant’s arguments.

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Plaintiff—Appellee,

UNITED STATES OF AMERICA,

versus

HERIBERTO MENDEZ-LOZANO,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:22-CR-1706-2

JUDGMENT

Before STEWART, GRAVES, and OLDHAM, *Circuit Judges*.

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

The judgment or mandate of this court shall issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion

for stay of mandate, whichever is later. See FED. R. APP. P. 41(B). The court may shorten or extend the time by order. See 5TH CIR. R. 41 I.O.P.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
Holding Session in McAllen

ENTERED

October 02, 2024

Nathan Ochsner, Clerk

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

HERIBERTO MENDEZ-LOZANO

CASE NUMBER: 7:22CR01706-S2-002

USM NUMBER: 41071-510

David Alan Higdon

Defendant's Attorney

THE DEFENDANT:

- ☐ pleaded guilty to count(s) _____
- ☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.
- ☒ was found guilty on count(s) 1 through 13 on November 28, 2023.
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>
8 U.S.C. § 1324(a)(1)(A)(v)(1), 1324(a)(1)(A)(iii), and 1324(a)(1)(B)(i)	Conspiracy to harbor aliens within the U.S.	09/29/2022	1
8 U.S.C. § 1324(a)(1)(A)(iii), and 1324(a)(1)(B)(i)	Harboring an alien within the U.S. for private financial gain.	09/29/2022	2

- ☒ See Additional Counts of Conviction.

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) 1 - 7 of the Superseding Indictment, as to this defendant, are _____ dismissed on the motion of the United States.

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

September 17, 2024

Date of Imposition of Judgment

M. Alvarez

Signature of Judge

MICAELA ALVAREZ

SENIOR U.S. DISTRICT JUDGE

Name and Title of Judge

October 2, 2024

Date

DEFENDANT: **HERIBERTO MENDEZ-LOZANO**
CASE NUMBER: **7:22CR01706-S2-002**

ADDITIONAL COUNTS OF CONVICTION

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
8 U.S.C. § 1324(a)(1)(A)(iii), and 1324(a)(1)(B)(i)	Harboring an alien within the U.S. for private financial gain.	09/29/2022	3
8 U.S.C. § 1324(a)(1)(A)(iii), and 1324(a)(1)(B)(i)	Harboring an alien within the U.S. for private financial gain.	09/29/2022	4
8 U.S.C. § 1324(a)(1)(A)(iii), and 1324(a)(1)(B)(i)	Harboring an alien within the U.S. for private financial gain.	09/29/2022	5
8 U.S.C. § 1324(a)(1)(A)(iii), and 1324(a)(1)(B)(i)	Harboring an alien within the U.S. for private financial gain.	09/29/2022	6
18 U.S.C. § 1203(a)	Conspiracy to hostage taking.	09/29/2022	7
18 U.S.C. § 1203 and 2	Hostage taking.	09/29/2022	8
18 U.S.C. § 1203 and 2	Hostage taking.	09/29/2022	9
18 U.S.C. § 1203 and 2	Hostage taking.	09/29/2022	10
18 U.S.C. § 1203 and 2	Hostage taking.	09/29/2022	11
18 U.S.C. § 1203 and 2	Hostage taking.	09/29/2022	12
18 U.S.C. § 922(g)(1) and 924(a)(8)	Felon in possession of a firearm.	09/29/2022	13

DEFENDANT: **HERIBERTO MENDEZ-LOZANO**
CASE NUMBER: **7:22CR01706-S2-002**

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: Count 1: 120 months; Count 2: 120 months; Count 3: 120 months; Count 4: 120 months; Count 5: 120 months; Count 6: 120 months; Count 7: 360 months; Count 8: 360 months; Count 9: 360 months; Count 10: 360 months; Count 11: 360 months; Count 12: 360 months; and Count 13: 160 months.

As to each of Counts 1 through 12, said imprisonment terms to run concurrently with each other; and as to Count 13, said imprisonment term to run partially concurrent and partially consecutive to Counts 1 through 12, for a total of 460 months.

- ☐ See Additional Imprisonment Terms.
- ☐ The court makes the following recommendations to the Bureau of Prisons:
- ☒ 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 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

9/1/2024 at in a
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DEFENDANT: **HERIBERTO MENDEZ-LOZANO**
CASE NUMBER: **7:22CR01706-S2-002**

SPECIAL CONDITIONS OF SUPERVISION

Substance Abuse Treatment, Testing, and Abstinence

You must participate in an outpatient alcohol and substance-abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program, including the provider, location, modality, duration, and intensity. You must pay the costs of the program, if financially able.

You may not possess any controlled substances without a valid prescription. If you do have a valid prescription, you must follow the instructions on the prescription.

You must submit to substance-abuse testing to determine if you have used a prohibited substance, and you must pay the costs of the testing if financially able. You may not attempt to obstruct or tamper with the testing methods.

You may not use or possess alcohol.

You may not knowingly purchase, possess, distribute, administer, or otherwise use any psychoactive substances, including synthetic marijuana or bath salts, that impair a person's physical or mental functioning, whether or not intended for human consumption, except as with the prior approval of the probation officer.

Mental Health Treatment

You must participate in a mental-health treatment program and follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program, including the provider, location, modality, duration, and intensity. You must pay the cost of the program, if financially able.

You must take all mental-health medications that are prescribed by your treating physician. You must pay the costs of the medication, if financially able.

Anger Management

You must participate in a mental health program specifically for anger management. You must pay the cost of the program, if financially able.

DEFENDANT:

HERIBERTO MENDEZ-LOZANO

CASE NUMBER:

7:22CR01706-S2-002

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 Assessment¹</u>	<u>JVTA Assessment²</u>
TOTALS	\$1,300.00	\$6,545.00	\$0.00	\$0.00	\$0.00

Based upon a finding of indigency, the Court waives the \$5,000 additional special assessment required under the Justice for Victim of Trafficking Act of 2015, pursuant to 18 U.S.C. § 3014.

- ☐ See Additional Terms for Criminal Monetary Penalties.
- ☐ 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 Loss³</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
Angel David Gramajo Barrio		\$4,545.00	
Audy Disla		\$1,000.00	
Luis Reyes		\$1,000.00	

- ☐ See Additional Restitution Payees.

TOTALS	\$	<u>\$6,545.00</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:
- ☐ Based on the Government's motion, the Court finds that reasonable efforts to collect the special assessment are not likely to be effective. Therefore, the assessment is hereby remitted.

¹ Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

² Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

³ 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:

HERIBERTO MENDEZ-LOZANO

CASE NUMBER:

7:22CR01706-S2-002

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 \$7,845.00 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 _____ installments of \$_____ over a period of _____, to commence _____ after the date of this judgment; or
- D

☒ Payment in equal monthly installments of \$100.00 to commence 60 days after release from imprisonment to a term of supervision; or
- E

☐ Payment during the term of supervised release will commence within _____ 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:

Payable to:

Clerk, U.S. District Court
 Attn: Finance
 P.O. Box 5059
 McAllen, TX 78502

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
☐ See Additional Defendants and Co-Defendants Held Joint and Several.			
☐ The defendant shall pay the cost of prosecution.			
☐ The defendant shall pay the following court cost(s):			
☐ The defendant shall forfeit the defendant’s interest in the following property to the United States:			

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