

09-1698-cr

To Be Argued By:
DEBORAH R. SLATER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 09-1698-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

WESLI CAMARGO, EPAMINONDAS JOSE
SOARES, JOISTER PACHECO ATAIDE,
Defendants,

JEAN DeOLIVEIRA,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The district court (Vanessa L. Bryant, J.) had jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on April 17, 2009. Appendix I (“A-I”) at 6, 50-52. On April 21, 2009, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). A-I at 1, 6. This Court has jurisdiction over this appeal of a criminal sentence pursuant to 18 U.S.C. § 3742(a).

**Statement of Issue
Presented for Review**

Whether the district court plainly erred in imposing a \$10,000 fine, where the amount fell within the undisputed advisory guideline range, and where it was not clearly erroneous for the court to find that the 20-year-old, able-bodied defendant had not satisfied his burden of establishing his present and future ability to pay such a fine.

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-vs-

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Defendants,

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Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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Preliminary Statement

The defendant, Jean DeOliveira, is a young, able-bodied Brazilian citizen, illegally living and working in the United States, who decided to make some quick money

selling counterfeit currency. He quickly pleaded guilty with the hope of attaining a sentence of time served and subsequent deportation. The court imposed a further custodial sentence and a fine, both within the advisory guidelines range stipulated in the plea agreement.

In this appeal, the defendant challenges only his \$10,000 fine, to which he did not object at sentencing. Instead, after the hearing, the defendant filed an objection that cited Fed. R. Crim. P. 35(a), without explaining how his claim fell within the scope of that rule, which permits a court to correct only “arithmetical, technical, or other clear error.” The district court overruled his belated objection, and this appeal followed. This Court should reject this challenge and affirm the defendant’s sentence.

Statement of the Case

On November 25, 2008, a federal criminal complaint issued against the defendant, charging him with passing counterfeit obligations, in violation of 18 U.S.C. § 472. *See* Appendix I (“A-I”) at 4 (docket entry).

On December 10, 2008, a federal grand jury in the District of Connecticut returned a six-count indictment charging DeOliveira and three others with crimes related to the manufacture, uttering, and possession of counterfeit currency. A-I at 4. The defendant was charged in Count Six with uttering counterfeit United States Treasury obligations, in violation of 18 U.S.C. §§ 472 and 2. The matter was assigned to United States District Judge Vanessa L. Bryant, sitting in Hartford.

On March 4, 2009, the defendant elected to plead guilty to Count Six. A-I at 4. At the sentencing hearing on April 14, 2009, the court sentenced the defendant principally to imprisonment for 10 months and a \$10,000 fine. A-I at 5, 50-52. Later that day, the defendant filed a written objection to the fine. A-I at 28-29. The following day, he amended that pleading to include a citation to Fed. R. Crim. P. 35(a). A-I at 30-31.

On April 16, 2009, the court entered an electronic order overruling the defendant's objection and articulating specific findings in support of the ruling. A-I at 5. On April 17, 2009, the district court entered judgment. A-1 at 6, 50-52. On April 21, 2009, the defendant filed a timely notice of appeal. A-I at 1, 6. The defendant has completed his term of imprisonment and on November 10, 2009, was removed from the United States to Brazil.

Statement of Facts and Proceedings Relevant to this Appeal

A. The defendant is arrested after trying to sell \$5,300 in counterfeit U.S. currency

On November 25, 2008, a criminal complaint was lodged against the defendant, charging him with uttering United States currency, in violation of 18 U.S.C. § 472. A-I at 4. He had been arrested by state law enforcement authorities the previous evening when he arrived, as scheduled, at a parking lot in Danbury, Connecticut, to sell fifty-three high-quality bleached counterfeit \$100 bills to a cooperating witness. *See* Sealed Appendix ("A-II") at 6,

Presentence Report (“PSR”) ¶11. Many of the bills bore serial numbers that were identical to those found on \$8,800 in counterfeit currency that two co-defendants had passed in the Hartford, Connecticut, area on October 18, 2008, and approximately \$32,000 in counterfeit currency found in the possession of the same two co-defendants on November 5, 2008, during a traffic stop on the interstate in Roanoke Rapids, North Carolina. A-II at 5-6, PSR ¶ 8-9, A-I at 24-31. The manufacturer of the counterfeit currency was arrested in his home, later the same evening of the defendant’s arrest, and the manufacturer was found in possession of \$22,100 in counterfeit Federal Reserve Notes and implements associated with high-quality counterfeiting. A-II at 7, PSR ¶12.

A federal grand jury sitting in Hartford, Connecticut, returned a six-count indictment against all four defendants on December 10, 2008. A-I at 4, 24-31. Defendant DeOliveira was presented on December 22, 2008, before United States Magistrate Judge Thomas P. Smith in Hartford, and entered a not guilty plea to Count Six of the Indictment, which charged him with uttering counterfeit United States Treasury obligations, in violation of 18 U.S.C. § 472. An order of detention without prejudice was granted upon Government motion. A-I at 4. Counsel was appointed for the defendant, pursuant to the Criminal Justice Act, based on the defendant’s filing of an financial affidavit, under seal, which supported a finding of indigency. A-I at 4.

B. The defendant pleads guilty to Count Six of the indictment

On March 4, 2009, the defendant changed his plea to guilty before United States District Judge Vanessa L. Bryant. A-I at 4. The parties entered a written plea agreement, which outlined the penalties faced by the defendant. The defendant faced a statutory maximum of 20 years in custody. A-II at 16. The parties agreed that the advisory guidelines range was 4 to 10 months in prison, based on an adjusted offense level of 9 and a criminal history category of I. A-II at 18. The defendant additionally faced a maximum fine of up to \$250,000, and an advisory guidelines range of \$1,000 to \$10,000. A-II at 16, 18.

C. The district court sentences the defendant to 10 months in prison and a \$10,000 fine

Sentencing was scheduled for April 28, 2009, but was advanced to April 14, 2009, at the request of the defendant. A-I at 5. Both parties filed sentencing memoranda. A-I at 15-27,

At the outset of the sentencing hearing, the district court adopted the factual findings of the Presentence Report (“PSR”) absent objection from either party. A-I at 34-35. The court also noted that the parties agreed with the calculation of the advisory sentencing guidelines contained in the PSR, A-I at 35, which corresponded to the parties’ stipulation in the plea agreement.

The PSR addressed the defendant's financial status in several respects. According to the PSR, the defendant reported that when he returned illegally to the United States in 2004, it was "at a cost of \$12,000, which he paid back himself." A-II at 9, PSR ¶ 30. His personal financial statement listed no income or expenses. A-II at 12, PSR ¶ 48. The PSR concluded that "based on what is currently known about the defendant, it appears that he would not be able to pay a fine within the guideline range." *Id.* The Probation Officer's Evaluation stated that, by the defendant's own admission, his "involvement in this matter was motivated by monetary gain without regard to the law." A-II at 14, PSR ¶ 61.

The PSR also provided information about the defendant's earning capacity. The defendant was then twenty years old, and he described his health as "good," reporting no history of significant health issues or surgeries. A-I at 10, PSR ¶ 36. Although the defendant completed only the eighth grade, he had been steadily employed full-time in the painting and construction industries from 2005 until his arrest in November 2008 – that is, from ages 16 to 20. A-I at 11, ¶¶ 40, 43. The PSR reported that, when asked about his potential deportation, the defendant said that it was "his intention to return to Brazil, finish school and join the military police or teach English." A-II at 11, PSR ¶ 39.

In his sentencing memorandum, the defendant's counsel reiterated the defendant's comments in the PSR in significant part, stating, "Once Mr. DeOliveira completes his sentence and returns to Brazil, he intend[s] to further

his education and then find employment where he can utilize the English that he has learned while living in this country.” A-I at 5,18. At sentencing, in seeking a custodial sentence of time served, the defendant’s counsel again stated that the defendant “plans on going back to Brazil, seeking employment back in Brazil, hopefully utilizing his command of the English language that he was able to gain by living here for ten years, and hopefully have a productive life back in Brazil.” A-I at 40.

At sentencing, the Government did not advocate for a specific sentence, but simply argued that a sentence within the advisory guideline range was appropriate. A-I at 36-37.

Before imposing sentence, the district court reviewed all of the general considerations that were relevant to sentencing. It acknowledged the potential penalties and advisory guidelines ranges, as well as the PSR, the parties’ sentencing memoranda, and their statements in court that day. A-I at 43. It also listed the factors enumerated in 18 U.S.C. § 3553(e) that it had to consider. A-I at 41-42.

Turning to the facts of the case, the court decided to impose a sentence at the upper end of the advisory guideline range. It noted that the defendant “had the benefit of a very good upbringing” and “a stable home life,” and that his illegal entry into the United States had not been prompted by “financial or political extremes.” A-I at 43. He had been gainfully employed in the United States despite his illegal status, and “had the benefit of tax-

free income all of the years that he was here working.”¹ *Id.* The court noted that the defendant “states with pride, the fact that he paid back the \$12,000 that he paid to come here illegally, indicating to this court that Mr. DeOliveira certainly has the ability to raise funds when it suits his interest.” *Id.* The court expressed skepticism of the defendant’s claim – first raised at the sentencing hearing – that he committed the counterfeiting offense to help his family out of financial straits. A-I at 43-44. The court observed that the defendant “acted out of pure greed and selfishness,” and that he would likely return to the United States illegally if deported. A-I at 44. Moreover, the court questioned the defendant’s character, “in light of the fact that he fathered, and has neither supported nor has he seen his own child.” *Id.*

The court then sentenced the defendant to 10 months in custody with no supervised release to follow and a fine of \$10,000. With regard to the fine, the court stated that it “will not delay your deportation, but will serve as a civil judgment. Should you reenter the country, you will be held to account for the payment of that \$10,000, which the Court orders to be paid immediately.” A-I at 45. The court also suggested that restitution might be appropriate, and invited the parties to submit briefs on the issue. *Id.*

¹ The PSR indicates that the Probation Office had requested, but not yet received, any tax records regarding the defendant. A-II at 12, PSR ¶ 46. Accordingly, there does not appear to be anything in the record indicating whether the defendant did, or did not, pay income taxes while present illegally in the United States.

The defendant voiced no objection to the fine at the sentencing hearing, even though the court invited counsel three times to raise any objections after sentence was imposed. Immediately after listing all the components of the sentence, the court asked, “Does anyone have any objection to the Court’s sentence?” *Id.* Defense counsel objected only to the restitution issue. A-I at 45-46. A second time, the court asked, “Anything further?” A-I at 46. Defense counsel replied, “No, Your Honor.” *Id.* Finally, after advising the defendant of his appellate rights, the court inquired yet again, “Are there any other matters to address before the Court adjourns?” A-I at 48. Defense counsel answered, “Not that I’m aware of, Your Honor.” *Id.*

Later that same day, defense counsel filed a pleading captioned “Defendant’s Objection to Court’s Imposition of a Fine.” A-I at 5, 28-29. This pleading cited no jurisdictional basis for revisiting an already-imposed fine. Instead, in his pleadings, the defendant simply requested that the \$10,000 fine be vacated, citing the PSR’s conclusion that “‘it appears that [the defendant] would not be able to pay a fine within the guideline range.’” A-I at 28 (quoting A-II at 12, PSR ¶ 48). The defendant asserted that the court abused its discretion “by imposing a fine which exceeded his ability to pay.” *Id.* The next day, the defendant filed an amended version of that pleading, adding only a reference to Fed. R. Crim. P. 35(a). A-I at 5, 30-31. The pleading was otherwise unchanged.

On April 16, 2009, the court entered an electronic order overruling the defendant's objection to the fine, stating:

At sentencing, the Court found that the defendant paid \$12,000 to reenter this country illegally and that he was gainfully employed here. Furthermore, the defendant asserted that he would seek work as an English teacher when he returns to Brazil. On the basis of those facts, the Court found that the defendant now has and will in the future have the ability to pay the \$10,000 fine imposed, which is less than the amount he paid to reenter this country illegally.

A-I at 5-6.

On April 17, 2009, the district court entered judgment. A-I at 6, 50-52. Following briefing by the parties, the court concurred with the parties and ruled that restitution was not applicable. A-I at 6, 44, 50-52.

The defendant completed his prison term and was subsequently deported from the United States to Brazil on November 10, 2009.

Summary of Argument

The defendant did not raise a timely objection to his fine, and so his claim is reviewable only for plain error under Fed. R. Crim. P. 52(b). During the sentencing hearing, the defendant did not object to the imposition of a \$10,000 fine, even though the court invited the parties to lodge objections on three separate occasions after announcing its sentence. Instead, the defendant waited until after the hearing was concluded to file a pleading that invoked Rule 35(a). The defendant's claim was essentially a challenge to the merits of the sentence, and did not fall within the narrow scope of Rule 35(a), which permits post-sentencing correction only of "arithmetical, technical, or other clear error."

The district court did not plainly err in imposing a \$10,000 fine. The court did not clearly err in deciding, as a factual matter, that the defendant had failed to meet his burden of establishing both a present and future inability to pay a fine of that amount – particularly given his history of being able to raise \$12,000 to illegally enter the United States, his steady employment record, his youth and good health, and his expressed intent to seek employment in Brazil. Nor was the amount of \$10,000 substantively unreasonable. This amount fell within the advisory guidelines range stipulated by the parties, and is less than the defendant paid to enter the United States. In light of this Court's limited role in reviewing the broad reasonableness of sentences, it cannot be said that the district court abused its discretion or shocked the conscience by imposing a modest \$10,000 fine.

Argument

I. The district court did not commit plain error in concluding that imposition of a fine within the correctly calculated sentencing guideline range was appropriate for an able-bodied defendant with present and future earning capacity, despite his claim of present indigency.

A. Governing law and standard of review

1. Statutory and guideline provisions governing fines

When imposing a fine, courts must look for guidance from the general sentencing provisions found in 18 U.S.C. § 3553(a), which includes consideration of what sentence entails “just punishment.” A sentencing court must also consult more specific guidance with respect to fines found in 18 U.S.C. § 3572. Among other things, § 3572(a)(1) instructs a court to consider “the defendant’s income, earning capacity, and financial resources.”

The Sentencing Guidelines provide additional guidance on fines. Section 5E1.2(a) (2009) states that “[t]he court shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine.” The Guidelines advise that “[t]he amount of the fine should always be sufficient to ensure that the fine, taken together with other sanctions imposed, is punitive.” U.S.S.G. § 5E1.2(d). With respect to indigent defendants, § 5E1.2(e) states:

If the defendant establishes that (1) he is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay all or part of the fine required by the preceding provisions, or (2) imposition of a fine would unduly burden the defendant's dependents, the court *may* impose a lesser fine or waive the fine.

(Emphasis added).

In case law predating *United States v. Booker*, 534 U.S. 220 (2005), this Court offered extensive guidance about the proper interpretation of U.S.S.G. § 5E1.2, which “authorizes, but does not mandate, the imposition of a lesser fine or waiver of any fine in the case of an indigent defendant.” *United States v. Wong*, 40 F.3d 1347, 1383 (2d Cir. 1994). “[T]he discretion vested in sentencing courts by § 5E1.2[(e)] to waive a fine where indigence is shown should generally be executed in favor of such a waiver.” *Id.*

It is the defendant who “bears the burden” of showing that he is unable to pay the fine. *United States v. Corace*, 146 F.3d 51, 56 (2d Cir. 1998); *see also United States v. Rivera*, 22 F.3d 430, 440 (2d Cir. 1994) (upholding \$100,000 fine imposed on defendant sentenced to life imprisonment); *United States v. Rivera*, 971 F.2d 876, 895 (2d Cir. 1992) (“A defendant seeking to avoid a Guidelines fine on the basis of inability to pay must come forward with evidence of that financial inability.”). Defendants can satisfy their burden with regard to indigency “either by independent evidence or by reference

to the Presentence Report.” *United States v. Thompson*, 227 F.3d 43, 45 (2d Cir. 2000). A sentencing judge, of course, “is not bound by the recommendations of the PSR.” *United States v. Miller*, 116 F.3d 641, 685 (2d Cir. 1997).

This Court has understood “indigence” to mean “present and future inability to pay.” *Rivera*, 22 F.3d at 440. A sentencing court may not impose a fine upon “its mere suspicion that the defendant has funds,” *id.*, or “based upon some remote fortuity like the possibility that a defendant will win a lottery,” *Wong*, 40 F.3d at 1383 (vacating \$250,000 fine imposed on indigent defendant sentenced to life because “I would not want anyone to buy a lottery ticket, get lucky and then not have to pay the fine”). This Court has also stated that “[i]n attempting to predict future ability to pay, district courts must be realistic and must avoid imposing a fine when the possibility of a future ability to pay is based merely on chance.” *Wong*, 40 F.3d at 1383 (quoting *United States v. Seale*, 20 F.3d 1279, 1286 (3d Cir. 1994)).

Even so, “[c]urrent indigence is not an absolute barrier to imposition of a fine. Even an incarcerated defendant can earn money in his prison account to pay the fine by working within the prison.” *United States v. Workman*, 110 F.3d 915, 918 (2d Cir. 1997) (citation omitted) (finding no plain error in \$1,000 fine imposed on defendant sentenced to 95 months in prison); *see also United States v. Thompson*, 227 F.3d 43, 45 (2d Cir. 2000) (affirming \$5,000 fine on prisoner sentenced to 120 months followed by deportation, in part because defendant

could pay part of the fine out of prison earnings); *United States v. Hernandez*, 85 F.3d 1023, 1031 (2d Cir. 1996) (affirming \$10,000 fine to be paid out of prison earnings over 25-year sentence); *United States v. Fermin*, 32 F.3d 674, 682 n.4 (2d Cir. 1994) (affirming \$2,500 fine imposed with 30-year prison sentence). This Court has found that a fine may be imposed on a currently indigent defendant if there is “evidence in the record that he will have the earning capacity to pay the fine after release from prison.” *Wong*, 40 F.3d at 1382-83 (quoting *Rivera*, 971 F.2d at 895).

2. Standard of Review

a. Denial of motion pursuant to Rule 35(a)

Rule 35(a) states that “[w]ithin 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.” This Court has noted that “[a] district court’s decision to correct a sentence pursuant to Rule 35(a) is subject to review for abuse of discretion.” *United States v. Donoso*, 521 F.3d 144, 146 (2d Cir. 2008).

b. Imposition of a fine

Sentencing claims that were not raised in a timely fashion are subject to plain error review under Fed. R. Crim. P. 52(b). *See United States v. Hernandez*, 85 F.3d 1023, 1031 (2d Cir. 1996). A district court’s factual finding that a defendant is capable of paying a fine is reviewed for clear error. *Thompson*, 227 F.3d at 44.

The Supreme Court has ruled that Courts of Appeals should review sentences for reasonableness. *See Booker*, 543 U.S. at 261. This Court has explained that “[b]ecause *Booker* rendered the whole of the Guidelines advisory, it stands to reason that the Guidelines’ fine requirements were likewise rendered advisory.” *United States v. Rattoballi*, 452 F.3d 127, 139 (2d Cir. 2006).

[A] district court must engage in the same type of analysis it applies in determining the appropriate term of imprisonment: After consulting the Guidelines recommendation, the district court should consider the § 3553(a) factors, including any pertinent policy statement issued by the Commission; it should then consult the standards outlined in 18 U.S.C. §§ 3571 and 3572 to determine whether the imposition of a fine is appropriate.

Id.

As this Court has held, “‘reasonableness’ is inherently a concept of flexible meaning, generally lacking precise boundaries.” *United States v. Crosby*, 397 F.3d 103, 115 (2d Cir. 2005).

Reasonableness review does not entail the substitution of our judgment for that of the sentencing judge. Rather, the standard is akin to review for abuse of discretion. Thus, when we determine whether a sentence is reasonable, we ought to consider whether the sentencing judge

“exceeded the bounds of allowable discretion[,] . . . committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact.”

United States v. Fernandez, 443 F.3d 19, 27 (2d Cir. 2006) (quoting *Crosby*, 397 F. 3d at 114).

In assessing the reasonableness of a particular sentence imposed, “[a] reviewing court should exhibit restraint, not micromanagement.” *United States v. Fairclough*, 439 F.3d 76, 79-80 (2d Cir. 2006) (per curiam) (quoting *United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005) (alteration omitted)).

B. Discussion

1. Because the defendant failed to object to imposition of a fine until after sentencing, his claim is reviewable only for plain error.

Section 3582(c) of Title 18 limits a district court’s authority to modify a sentence to a handful of circumstances. First, a sentence may be reduced upon motion of the Bureau of Prisons in certain situations. 18 U.S.C. § 3582(c)(1)(A). Second, a court may modify a sentence pursuant to authority granted by statute or Fed. R. Crim. P. 35. 18 U.S.C § 3582(c)(1)(B). Under Rule 35(a), a court may correct a sentence within seven days based on clear error. Under Rule 35(b), a court may reduce a defendant’s sentence based on post-sentence substantial assistance on motion by the government. Third, a court

may reduce a defendant's sentence if the applicable sentencing guideline range "has subsequently been lowered by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). *See generally McClure v. Ashcroft*, 335 F.3d 404, 413 (5th Cir. 2003). A court may reconsider and change a sentence after an appellate court remands and directs the sentencing court to reconsider or recalculate the sentence pursuant to 18 U.S.C. § 3742. A district court is also authorized by 28 U.S.C. § 2255 to amend a sentence to correct an error that is cognizable on collateral review. Because federal courts are courts of limited jurisdiction and may not act beyond the authority granted by Article III of the Constitution or statutes enacted by Congress, a district court lacks the authority to alter a sentence outside of those circumstances, which are delineated by § 3582.

In the present case, the defendant objected to his fine only in a post-sentencing pleading that invoked Rule 35(a). As this Court has explained, "[a] district court's concededly narrow authority to correct a sentence imposed as a result of 'clear error' is limited to 'cases in which an obvious error or mistake has occurred in the sentence, that is, errors which would almost certainly result in a remand of the case to the trial court'" if determined on appeal to have been imposed in violation of the law. *United States v. Waters*, 84 F.3d 86, 89 (2d Cir. 1996) (per curiam) (quoting *United States v. Abreu-Cabrera*, 64 F.3d 67, 72 (2d Cir. 1996) (quoting, in turn, Fed. R. Crim. P. 35, 1991 advisory committee's note)); *see also United States v. Spallone*, 399 F.2d 415, 421 n.5 (2d Cir. 2005) (noting that "Rule 35(a) permits courts to 'correct a sentence that

resulted from arithmetical, technical, or other clear error’’).

The defendant has never offered any explanation of how the district court’s imposition of a \$10,000 fine constituted “arithmetical, technical or other clear error.” The defendant did not complain about the district court’s math, nor did he claim that the court made a technical error. His only argument is that the district court ignored his current indigency and wrongly assessed his future earning capacity – but this is precisely the sort of factual argument that he could have made to the district court at sentencing. “In the sentencing context, there is simply no such thing as a ‘motion to reconsider’ an otherwise final sentence” *United States v. Dotz*, 455 F.3d 644, 648 (6th Cir. 2006). Rule 35(a) was not designed to allow a defendant to revisit such a merits-based argument after sentencing has been completed. And in any event, for the reasons set forth below, the district court’s conclusion was correct – hardly in clear error. Accordingly, because the defendant failed to challenge his fine in a timely manner, his claim on appeal is reviewable only for plain error.

2. The district court did not clearly err in concluding, as a factual matter, that this able-bodied 20-year-old defendant with a solid work history had a present and future ability to pay a \$10,000 fine.

Plain error is analyzed pursuant to Fed. R. Crim. P. 52(b) and requires (1) an error that has not been affirmatively waived; (2) that is plain in that it is clear or

obvious; and (3) that the error affects substantial rights. *See United States v. Olano*, 507 U.S. 725, 732-35 (1993). Additionally, Rule 52(b) leaves the decision to correct the error within the sound discretion of the court of appeals, and, pursuant to the fourth prong of the *Olano* analysis, the discretion should not be exercised unless the error “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *Id.* at 736 (quoting *United States v. Young*, 470 U.S. 1, 15 (1985)). The defendant bears the burden of persuasion with respect to establishing prejudice. *Olano*, 507 U.S. at 734. Of consequence is that Rule 52(b) is permissive and not mandatory. *Id.* at 735. “[M]eeting all four prongs is difficult, ‘as it should be.’” *Puckett v. United States*, 129 S. Ct. 1423, 1429 (2009) (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 83 n.9 (2004)). This is because it is a fundamental principle that if a litigant believes that an error has occurred during a judicial proceeding which is to his detriment, he must object in order to preserve the issue. *Id.* at 1428.

In the present case, the defendant cannot meet his burden of establishing forfeited but reversible error with regard to any of the four prongs of the Rule 52(b) analysis.

First, the district court did not err at all. The defendant essentially challenges the district court’s determination that he had a present and future ability to pay a \$10,000 fine. Conceding that this falls within the properly calculated advisory guidelines range, the defendant claims only that the judge’s decision “was based solely on erroneous facts.” Def. Br. at 8. Yet the record discloses no

error, much less the sort of clear error that is necessary to overturn a district court's factual finding regarding a defendant's future ability to pay a fine.

Regardless of his present indigence, the defendant made no effort to show that he lacked any earning capacity, and therefore that he lacked a future ability to pay a fine. *Wong*, 40 F.3d, at 1382–83 (quoting *Rivera*, 971 F.2d at 895) (holding that fine may be imposed on a currently indigent defendant if there is “evidence in the record that he will have the earning capacity to pay the fine after release from prison”). Here, the PSR disclosed that the defendant was an able-bodied twenty-year-old man. The defendant described his current health as “good,” reporting no significant health issues during his life, nor having been under the care of a physician. PSR ¶ 36. Moreover, the defendant's work history showed that he had been employed for several years on a full-time basis in the painting and construction industries. PSR ¶ 43. This work history confirmed that he was, as his mother's friend reported, a “hard worker.” PSR ¶ 32. The district court did not clearly err in finding as a fact that the defendant “now has and in the future will have the ability to pay the \$10,000 fine imposed” A-I at 5-6.

The defendant raises three arguments to undermine this factual finding, but all are meritless.

First, the defendant claims there is no factual basis for the district court's statement that the defendant “would seek work as an English teacher when he returns to Brazil.” A-I at 5; *see* Def. Br. at 8 (“There was absolutely

no mention whatsoever that the defendant would work as an English teacher in Brazil.”). This claim simply overlooks paragraph 39 of the PSR, which reported the defendant’s own statement that “it is his intention to return to Brazil, finish school and join the military police *or teach English.*” A-II at 11 (emphasis added). To the extent that the court relied on the defendant’s own statements, he cannot plausibly claim that her factual findings were clearly erroneous.

In the same vein, the defendant argues that it would be “virtually impossible” for him to obtain a teaching position in Brazil, having dropped out of high school. Def. Br. at 8-9. Again, this argument overlooks the defendant’s own statement that he intended “to return to Brazil, *finish school*” and teach English. PSR ¶ 39 (emphasis added). The defendant cannot have it both ways. He cannot try to avoid a lengthy prison term by painting himself as a man on the path to reform, with plans for a career, but then insist that he cannot pay a fine because he has no prospects for employment. Again, the district court did not clearly err in relying on the defendant’s own statement that he intended to return to school and teach English.

Second, the defendant challenges the district court’s reliance on the fact “that the defendant paid \$12,000 to reenter this country illegally,” A-I at 5, which showed that the defendant “certainly has the ability to raise funds when it suits his interest,” A-I at 43. According to the defendant, the court overlooked “the time frame it took for Mr. DeOliveira to repay his mother.” It is the defendant, however, who has mistaken the time frame. His brief

describes the \$12,000 fee as having been incurred “when he re-entered the United States illegally *in 1999*.” Def. Br. at 9 (emphasis added). Yet as reported in the PSR (which the district court adopted absent objection, A-I at 35), the \$12,000 fee was the cost of the defendant’s illegal return to the United States in 2004 or 2005. PSR ¶ 30. The defendant was arrested for the present offense in November 2008. PSR ¶ 11. It is apparent, then, that he was able to pay back the \$12,000 fee within the span of three or four years. That hardly bespeaks a lack of earning capacity.

Relatedly, the defendant vaguely argues that even though he was able to repay his mother \$12,000 by working in the United States, this does not bespeak a future ability to pay because he will be deported. The defendant then lets drop that “Brazil is not the United States when it comes to finding gainful employment.” Def. Br. at 10. That might be true – or it might not be true. The defendant bears the burden of proving his inability to pay a fine, *Corace*, 146 F.3d at 56; *Rivera*, 971 F.2d at 895, but he introduced absolutely no evidence about the Brazilian economy – much less that he would be unable to find gainful employment in Brazil. Moreover, the district court was able to rely on the fact that the defendant had an ability to *raise* \$12,000 when he wanted to do so – in other words, he was able to borrow \$12,000 when it suited him, and later pay it back. The district court was entitled to conclude that if the defendant was able to borrow \$12,000 only a few years earlier, he would be able to borrow the lesser sum of \$10,000 now.

The defendant's deportation to Brazil does not change the analysis. As this Court has held, no statute "exempts persons who are deported from liability for the payment of fines. Indeed, the purpose of 8 U.S.C. § 1326(a) and (b)(2) is precisely to punish persons who have illegally reentered the country, and therefore these provisions specifically contemplate the imposition of fines upon defendants who will undoubtedly be deported, either immediately or when they complete their prison sentences." *Thompson*, 227 F.3d at 46 (collecting cases in which courts have affirmed fines imposed on defendants who were to be deported immediately upon conviction or release from prison). But the mere suggestion that it may be more difficult for the defendant to repay his fine from earnings in Brazil does not exempt him from liability for a fine. *Id.*

In short, the district court did not base its finding of the defendant's future ability to pay "merely on chance." *Wong*, 40 F.3d at 1383. Instead, the court permissibly inferred from the defendant's past ability to borrow and earn money that he would, in the future, be able to pay the reasonable amount of \$10,000 – which was \$2,000 less than what he borrowed to illegally enter the United States. The district court's finding of the defendant's earning capacity was not clearly erroneous, and the \$10,000 fine falls comfortably within the zone of substantive reasonableness.

Second, even assuming *arguendo* that the defendant could establish error, it must also be clear or obvious rather than subject to reasonable dispute and it must affect substantial rights, as noted in the second and third prongs

of the *Olano* test. 507 U.S. 732-35. The defendant has not shown that any alleged error was clear. Instead, he simply relies on the PSR's conclusions and the fact of his court-appointed representation to establish his *present* indigency. He does not address his *future* earning capacity except by claiming that he does not have the credentials to teach English in his native Brazil. But it is by no means "clear" that a district court must equate present indigency with a lack of future earning capacity, and is likewise not "clear" that the defendant will be unable to repay a \$10,000 fine by getting a job in Brazil. And by failing to do more than assert present indigency, the defendant has failed to show that the the district court's decision would have been different – or, put differently, that any error affected his substantial rights, as is required to establish plain error. See *United States v. Vonn*, 535 U.S. 55, 73 (2002).

Last, even if the court's imposition of a guidelines fine established plain error that affected substantial rights, this Court should not exercise its discretion as the purported error does not "seriously affect[] the fairness, integrity or public reputation of judicial proceedings," as is required under the forth *Olano* prong. *Olano*, 507 U. S. at 732 (quoting *United States v. Young*, 470 U.S. 1, 15) (1985)). To the contrary, the integrity of judicial proceedings would be undermined if a defendant could petition a court for a lower custodial sentence by playing up his job prospects, but then seek to minimize those prospects when seeking to avoid a fine.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: April 7, 2010

Respectfully submitted,

NORA R. DANNEHY
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A handwritten signature in cursive script, appearing to read "DR Slater".

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ADDENDUM

Fed. R. Crim. P. 35. Correcting or Reducing a Sentence

(a) Correcting Clear Error. Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

(b) Reducing a Sentence for Substantial Assistance.

(1) In General. Upon the government's motion made within one year of sentencing, the court may reduce a sentence if:

(A) the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person; and

(B) reducing the sentence accords with the Sentencing Commission's guidelines and policy statements.

(2) Later Motion. Upon the government's motion made more than one year after sentencing, the court may reduce a sentence if the defendant's substantial assistance involved:

(A) information not known to the defendant until one year or more after sentencing;

(B) information provided by the defendant to the government within one year of sentencing, but which did not become useful to the government until more than one year after sentencing; or

(C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant.

(3) Evaluating Substantial Assistance. In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant's presentence assistance.

(4) Below Statutory Minimum. When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.

(c) "Sentencing" Defined. As used in this rule, "sentencing" means the oral announcement of the sentence.

Fed. R. Crim. P. 52. Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the Court's attention.

Fed. R. App. P. 4(b) Appeal in a Criminal Case.

* * *

(1) Time for Filing a Notice of Appeal.

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days after the later of:

(I) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

(I) the entry of the judgment or order being appealed;
or

(ii) the filing of a notice of appeal by any defendant.

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision, sentence, or order--but before the entry of the judgment or order--is treated as filed on the date of and after the entry.

(3) Effect of a Motion on a Notice of Appeal.

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must

be filed within 10 days after the entry of the order disposing of the last such remaining motion, or within 10 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(I) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 10 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

(B) A notice of appeal filed after the court announces a decision, sentence, or order--but before it disposes of any of the motions referred to in Rule 4(b)(3)(A)--becomes effective upon the later of the following:

(I) the entry of the order disposing of the last such remaining motion; or

(ii) the entry of the judgment of conviction.

(C) A valid notice of appeal is effective--without amendment--to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).

(4) Motion for Extension of Time. Upon a finding of excusable neglect or good cause, the district court may--before or after the time has expired, with or without motion and notice--extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

(5) Jurisdiction. The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.

(6) Entry Defined. A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.

18 U.S.C. § 3553. Imposition of a sentence

* * *

(e) Limited authority to impose a sentence below a statutory minimum.--Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on applicability of statutory minimums in certain cases.-- Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that--

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

* * *

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. DeOliveira

Docket Number: 09-1698-cr

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **criminalcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 4/7/2010) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: April 7, 2010

CERTIFICATE OF SERVICE

09-1698-cr USA v. DeOliveira

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I also certify that the original and five copies were also shipped via Hand delivery to:

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on this 7th day of April 2010.

Notary Public:

Sworn to me this

April 7, 2010

RAMIRO A. HONEYWELL
Notary Public, State of New York
No. 01HO6118731
Qualified in Kings County
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