

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ADRIAN GARCIA,
Defendant-Appellant.

No. 05-30356
D.C. No.
CR-04-00301-016-
MJP

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
IVAN TORRES,
Defendant-Appellant.

No. 05-30391
D.C. No.
CR-04-00301-003-
MJP

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
MIGUEL PLASCENCIA-ALVARADO,
also known as Esteban Garcia-
Morales also known as Angel
Caloca,
Defendant-Appellant.

No. 05-30415
D.C. No.
CR-04-00301-007-
MJP
AMENDED
OPINION

Appeal from the United States District Court
for the Western District of Washington
Marsha J. Pechman, District Judge, Presiding

Argued and Submitted
July 25, 2006
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Seattle, Washington

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Before: J. Clifford Wallace, Kim McLane Wardlaw and
Raymond C. Fisher, Circuit Judges.

Opinion by Judge Fisher

COUNSEL

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OPINION

FISHER, Circuit Judge:

This appeal requires us to consider several allegations of sentencing error. We also must determine whether a district court commits plain error by failing to explicitly set the maximum number of non-treatment related drug tests to which the defendant will be exposed as a condition of supervised release. Finally, we must evaluate whether a district court commits plain error by imposing a financial disclosure condition on a defendant who has been convicted of a drug trafficking offense and has a history of drug use. We affirm the sentences imposed and hold that the district court did not commit plain error by imposing either condition.

I. Background

Because the issues on appeal are exclusively related to sentencing, we need not recount detailed facts of the underlying criminal offenses to which the defendants pled guilty. Rather, we explain only those facts relevant to our resolution of the defendants' allegations of sentencing error.

Adrian Garcia, Ivan Torres and Miguel Plascencia-Alvarado were all involved in a large-scale drug trafficking conspiracy in the Western District of Washington. After being charged with various crimes, all three entered into Rule 11 written plea agreements. *See* Fed. R. Crim. P. 11(c)(1)(C).¹

¹Rule 11(c)(1)(C) provides in part:

Garcia pled guilty to conspiracy to distribute less than 500 grams of cocaine in violation of 21 U.S.C. §§ 846 and 841(b)(1)(C); Plascencia-Alvarado pled guilty to conspiracy to distribute methamphetamine and cocaine in violation of 21 U.S.C. §§ 846 and 841(b)(1)(C); and Torres pled guilty to conspiracy to distribute less than five grams of methamphetamine and less than 50 grams of a mixture containing methamphetamine in violation of 21 U.S.C. §§ 846 and 841(b)(1)(C), as well as witness tampering in violation of 18 U.S.C. § 1513(b)(2). In accordance with their respective plea agreements, Garcia was sentenced to 48 months imprisonment and Plascencia-Alvarado was sentenced to 60 months imprisonment. Torres was sentenced to 66 months imprisonment, also pursuant to his plea agreement, and is subject to various supervised release conditions. Garcia and Plascencia-Alvarado appeal their sentences, and Torres appeals the district court's imposition of certain supervised release conditions.

A. Garcia and Plascencia-Alvarado

Garcia's and Plascencia-Alvarado's plea agreements are nearly identical in all material respects. In both plea agreements, the defendants accepted that the maximum statutory penalty for their offenses is 20 years imprisonment, waived their right to a trial and agreed that the district court "will consider the factors set forth in Title 18, United States Code, Sec-

An attorney for the government and the defendant's attorney . . . may discuss and reach a plea agreement. . . . If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will . . . agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

tion 3553(a), including the sentencing range calculated under the United States Sentencing Guidelines” but “is not bound by any recommendation regarding the sentence to be imposed, or by any calculation or estimation of the Sentencing Guidelines range offered by the parties, or by the United States Probation Department.” Garcia agreed that “the appropriate sentence of imprisonment to be imposed by the Court at the time of sentencing should be within the range of twenty-four (24) to forty-eight (48) months,” and Plascencia-Alvarado agreed that the appropriate sentence in his case was “fifty-four (54) to ninety (90) months.” In light of these stipulated sentencing ranges, the parties acknowledged that “the Court retains *full discretion* to impose a sentence within the range agreed to above.” (Emphasis added.)

At sentencing, the district court accepted Garcia’s plea agreement and calculated the advisory guidelines range.² In so doing, the court, over Garcia’s objection, attributed to him “the amount of cocaine that the Garcia arm of this organization was responsible for,” which was nearly five kilograms. The district court also granted Garcia a three-point reduction for acceptance of responsibility, and adjusted downward the Presentence Report’s criminal history calculation. After rejecting Garcia’s request for a two-point reduction for his minor role in the offense, the district court arrived at a guidelines recommended range of 97 to 121 months. However, because the district court had accepted the plea agreement, Garcia was ultimately sentenced to 48 months imprisonment.³ Garcia appeals this sentence, arguing that the district court erred in calculating the guidelines range because it applied the

²During sentencing, the district court acknowledged that its guidelines calculation “appear[ed] academic . . . because [the court was] going to accept the 11(c)(1)(C) plea agreement.”

³In justifying its sentence at the high end of the stipulated range, the district court explained that the sentence was lower than the guidelines range, was “consistent with others who were” involved in similar offenses arising out of the conspiracy, reflected the quality of Garcia’s cooperation with the government and served to deter others from criminal conduct.

wrong burden of proof with respect to the drug quantity attributed to Garcia. Had the district court applied the correct evidentiary standard, Garcia argues, it would have arrived at a lower guidelines calculation and he would have received a 24-month sentence.

As with Garcia, the district court accepted Plascencia-Alvarado's plea agreement and calculated his advisory guidelines range to be 108 to 135 months imprisonment. Plascencia-Alvarado argued to the district court that he should receive a 54-month sentence (at the low end of the plea agreement stipulation) because of various equities he believed were in his favor, including his relationship with his young daughter. He further claimed that other similarly situated defendants received comparable sentences. The district court rejected these arguments and sentenced Plascencia-Alvarado to 60 months imprisonment (still at the lower end of his plea agreement's stipulated range).⁴ Plascencia-Alvarado appeals this sentence as unreasonable in light of the 18 U.S.C. § 3553(a) factors.

B. Torres

Torres' plea agreement stipulated to a fixed sentence of 66 months and acknowledged "that the Court retains full discretion with regard to the imposition of a term of supervised release, the conditions of supervised release, fines, forfeiture or restitution." At sentencing, the district court accepted the Rule 11 plea agreement and sentenced Torres to the agreed upon term. The district court also imposed several conditions of supervised release, including that Torres (1) "shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined

⁴The district court judge explained that Plascencia-Alvarado's sentence reflected his role in the conspiracy, was comparable to that imposed upon others charged with similar conduct and accounted for his contrition and lack of prior drug trafficking offenses.

by the court;” (2) “shall submit to mandatory drug testing pursuant to 18 U.S.C. § 3563(a)(5) and 18 U.S.C. § 3583(d)” (drug testing condition); and (3) “shall provide his probation officer with access to any requested financial information, including authorization to conduct credit checks and obtain copies of defendant’s Federal Income Tax Returns” (financial disclosure condition). Although Torres did not object to these conditions at sentencing, he now argues that the district court erred in imposing them.

II. Analysis

A. Garcia and Plascencia-Alvarado⁵

As an initial matter, the government argues that we lack jurisdiction to review these defendants’ sentences because they each received a sentence within the range stipulated to in their plea agreements. We disagree. First, neither Garcia nor Plascencia-Alvarado expressly waived the right to appeal the district court’s sentence. *Cf. United States v. Joyce*, 357 F.3d 921, 922-23 (9th Cir. 2004) (“A defendant’s waiver of his appellate rights is enforceable if the language of the waiver encompasses his right to appeal on the grounds raised, and if the waiver was knowingly and voluntarily made. Plea agreements are contracts between a defendant and the government, and we generally construe ambiguous language in favor of the defendant.”) (internal citations omitted). Second, “a valid guilty plea does not deprive the court of jurisdiction.” *United States v. Castillo*, 496 F.3d 947, 949 (9th Cir. 2007) (en banc).

[1] On the merits, we affirm because the sentences imposed by the district court were reasonable. The district court’s sentencing decision was procedurally sound, so we consider the substantive reasonableness of the sentence under a deferential

⁵Because both Garcia’s and Plascencia-Alvarado’s challenges implicate the same dispositive issues, we address their claims jointly.

abuse-of-discretion standard. *Gall v. United States*, 552 U.S. ___, 128 S. Ct. 586, 591 (2007). The district court correctly calculated the guidelines ranges for Garcia and for Plascencia-Alvarado, considered all of the 18 U.S.C. § 3553(a) factors and documented its reasoning. The court imposed sentences that were within the ranges stipulated to in their respective plea agreements and were below the statutory maximums. Garcia’s contention that the district court applied the incorrect burden of proof with respect to the drug quantity attributed to him is without merit. The district court applied the proper burden of proof for factual findings used for sentencing — specifically, the preponderance of the evidence standard. *See United States v. Kilby*, 443 F.3d 1135, 1140 (9th Cir. 2006). Plascencia-Alvarado’s contention that his sentence is unreasonable in light of the § 3553(a) factors is also without merit. The district court considered those factors and the record does not establish that the district court abused its discretion in so doing. *See Gall*, 552 U.S. ___.

B. Torres

Torres challenges the district court’s imposition of both the drug testing and financial disclosure conditions. As to drug testing, Torres argues that the district court erred in failing to specify the maximum number of non-treatment drug tests, thereby impermissibly delegating that authority to Torres’ probation officer. *See United States v. Stephens*, 424 F.3d 876, 881 (9th Cir. 2005) (holding that “a probation officer may not decide the . . . extent of the punishment imposed,” because “[u]nder our constitutional system the right to . . . impose the punishment provided by law is judicial” (alteration in original) (internal quotation marks and punctuation omitted)). Torres also argues that the district court abused its discretion in imposing the financial disclosure condition because it is not “reasonably related to the crime of conviction.”

We generally defer to the district court in imposing supervised release conditions and review them for an abuse of dis-

cretion. *United States v. Johnson*, 998 F.2d 696, 697 (9th Cir. 1993). Because Torres did not object to the conditions of his supervised release before the sentencing court, however, we review for plain error. *See Stephens*, 424 F.3d at 879 n.1. We conclude there was no error, much less plain error, in the district court's sentence.

1. Drug Testing Condition

[2] The district court directed Torres to “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” and to “submit to mandatory drug testing pursuant to 18 U.S.C. § 3563(a)(5) and 18 U.S.C. § 3583(d).”⁶ Although recitation of this boilerplate drug testing language established the minimum number of drug tests to which Torres would be subject, it does not appear to establish a maximum number of such tests. However, as we held in *Stephens*, “the [sentencing] courts [have] the responsibility of stating the maximum number of [drug] tests to be performed or to set a range for the permissible number of tests.” 424 F.3d at 883 (concluding that “while the district court itself determined the *minimum* number of tests to which [the defendant] would be required to submit, the court erred when it failed to state the *maximum* number of non-treatment drug tests the probation officer could impose”). Unlike in *Stephens*, where the district court expressly delegated the authority to set a maximum number of non-treatment drug tests to the probation officer, *id.* at 882, in this case the district court made no such delegation. None-

⁶18 U.S.C. § 3563(a)(5) applies to drug testing conditions of probation, whereas § 3583(d) applies to a condition of supervised release. Both statutory sections provide that courts shall order

as an explicit condition of [probation or supervised release,] that the defendant refrain from any unlawful use of a controlled substance and submit to [a] drug test within 15 days of release on [probation or supervised release] and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance.

theless, because the district court did not set a maximum, Torres reasonably argues that the probation officer could be understood as having this authority, which would clearly violate *Stephens*.

[3] In *United States v. Maciel-Vasquez*, 458 F.3d 994 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 2097 (2007), the defendant challenged a drug testing condition of supervised release that required him to “participate in outpatient substance abuse treatment and submit to drug and alcohol testing as instructed by the probation officer.” *Id.* at 996 (internal quotation marks omitted). We observed that this condition would be permissible if imposed incidental to a drug treatment program, but would be improper under *Stephens* if it were to be understood as granting “the probation officer authority to require testing apart from any treatment program.” *Id.* However, we refused to determine the purpose of the drug testing because the defendant did not object at sentencing and could not establish any plain error. *Id.* Unlike in *Maciel-Vasquez*, the government here concedes that “the Probation Office may conduct only the minimum three tests allowed for in the order.” Indeed, it is clear that district courts that seek to impose more than the statutory minimum of three drug tests must explicitly do so at sentencing. *See United States v. Lewandowski*, 372 F.3d 470, 471 (1st Cir. 2004) (*per curiam*). Given the government’s concession, we construe the district court’s supervised release condition as implicitly limiting the maximum number of drug tests to three. Torres must submit to at least and at most “one drug test within 15 days of release from imprisonment and . . . two periodic drug tests thereafter.” Should the probation office believe more drug tests are necessary, it would have to request a modification from the district court. Any such modification would of course have to comply with *Stephens*. Thus construed, there is no error in the district court’s drug testing condition.

2. Financial Disclosure Condition

[4] District courts are encouraged to impose a financial disclosure condition when they require a defendant to pay restitution. *See* U.S.S.G. § 5D1.3(d)(3) (instructing that where “the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine,” it should also impose “a condition requiring the defendant to provide the probation officer access to any requested financial information”). However, a district court may impose such a condition even without ordering restitution, so long as the condition satisfies certain criteria.⁷ First, it must be “reasonably related to the factors set forth in 18 U.S.C. § 3553(a).” *United States v. Gallaher*, 275 F.3d 784, 793 (9th Cir. 2001); *see also United States v. Brown*, 402 F.3d 133, 137 (2d Cir. 2005) (“[T]he Guidelines recommend a financial disclosure special condition where the court imposes a fine or restitution. By its own terms, however, this policy statement does not preclude a court from requiring financial disclosure in other ‘appropriate’ situations.”) (internal citation omitted)). Second, it must “involve no greater deprivation of liberty than is reasonably necessary. . . .” *United States v. Fellows*, 157 F.3d 1197, 1204 (9th Cir. 1998). Finally, the condition “must be consistent with pertinent policy statements of the Sentencing Commission.” *Id.*

[5] The financial disclosure requirement imposed on Torres satisfies all three criteria, and the district court did not commit plain error by imposing the condition. Torres was involved in a large scale drug conspiracy as a drug supplier. Torres also has a history of drug abuse. Clearly, if Torres is receiving or spending significant funds in suspicious ways, the probation office would have reason to believe he has reengaged with drug trafficking or use and would so report to the district

⁷Moreover, contrary to Torres’ argument otherwise, the condition need not “be related to the offense of conviction.” *United States v. Wise*, 391 F.3d 1027, 1031 (9th Cir. 2004).

court. Requiring Torres to disclose financial information, at the very least, reflects appreciation of “the nature and circumstances of the offense and [his] history and characteristics” and serves “to protect the public from further crimes.” 18 U.S.C. §§ 3553(a)(1), (a)(2)(C). And the probation office’s monitoring is no greater than necessary to achieve these ends.

[6] We join our sister circuits in concluding that certain defendants who have been convicted of drug trafficking offenses may properly be required to disclose the details of their personal finances as a condition of supervised release. *See Brown*, 402 F.3d at 137 (affirming financial disclosure condition imposed on defendant convicted of drug trafficking in part because “given this particular defendant’s personal characteristics and history, the financial disclosure requirement is an effective monitoring — and hence deterring — device” and because “monitoring [the defendant’s] finances will . . . serve to protect the public from ‘further crimes of the defendant’ ”) (quoting 18 U.S.C. § 3553(a)(2)(C)); *United States v. Melendez-Santana*, 353 F.3d 93, 107 (1st Cir. 2003) (affirming financial disclosure condition imposed on a similarly situated defendant because it is related to the characteristics of the defendant and deters future criminal conduct), *overruled on other grounds by U.S. v. Padilla*, 415 F.3d 211 (1st Cir. 2005) (en banc); *United States v. Behler*, 187 F.3d 772, 780 (8th Cir. 1999) (affirming financial disclosure condition because “the district court understood that money and greed were at the heart of [the defendant’s] drug distribution offenses and believed that monitoring [the defendant’s] financial situation would aid in detecting any return to his former lifestyle of drug distribution”). Therefore the district court did not plainly err in imposing this condition.

III. Conclusion

Garcia’s and Plascencia-Alvarado’s sentences are AFFIRMED. Torres’ sentence (including the conditions of supervised release) is AFFIRMED.