

18-2739 (L)
United States v. Rosario

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**United States Court of Appeals
for the Second Circuit**

August Term, 2019

(Argued: November 5, 2019
Final Submission: August 24, 2020
Decided: July 29, 2021)

Docket Nos. 18-2739, 20-2268

UNITED STATES OF AMERICA,

Appellee,

v.

CARLOS ROSARIO,

Defendant-Appellant.

Before:

SACK and PARK,* *Circuit Judges*, and RAKOFF, *District Judge*.[†]

Carlos Rosario appeals the imposition by the district court (Pauley, J.) of a \$5,000 special assessment, pursuant to 18 U.S.C. § 3014(a), following Rosario's conviction for sexual exploitation of a minor. Rosario contends that the district court improperly considered his future earning potential in finding him "non-indigent" under section 3014(a) and that, in any event, the district court erred in making that finding. We reject both arguments and hold that the district court did

* Judge Peter W. Hall, originally a member of the panel, died on March 11, 2021. Judge Park was designated to replace Judge Hall pursuant to Second Circuit Internal Operating Procedure E(b).

[†] Judge Jed S. Rakoff of the United States District Court for the Southern District of New York, sitting by designation.

1 not err by (1) considering Rosario's future earning potential in determining
2 indigency under section 3014(a), or (2) finding him to be non-indigent within the
3 meaning of the statute. We therefore **AFFIRM** the imposition of the special
4 assessment.

5
6 Judge Rakoff concurs in a separate opinion.

7
8 PHILIP L. WEINSTEIN (Matthew B. Larsen, *on*
9 *the brief*), Federal Defenders of New York,
10 Inc., New York, NY, *for Defendant-Appellant*.

11
12 JUSTIN V. RODRIGUEZ (Anna M. Skotko,
13 Alexandra Rothman, *on the brief*), *for* Audrey
14 Strauss, United States Attorney for the
15 Southern District of New York, New York,
16 NY, *for Appellee*.

17
18 PARK, *Circuit Judge*:

19 Carlos Rosario pled guilty in the United States District Court for the
20 Southern District of New York to three offenses stemming from his sexual
21 exploitation of a minor. As part of Rosario's sentence, the district court (William
22 H. Pauley III, *J.*) ordered Rosario to pay a \$5,000 special assessment under the
23 Justice for Victims of Trafficking Act of 2015 ("JVTA"), which requires courts to
24 impose the assessment on all "non-indigent" persons convicted of specified
25 offenses.

26 On appeal, Rosario argues that the district court erred by considering his
27 future earning capacity in finding him to be "non-indigent." We disagree. The

1 ordinary meaning of “indigent” encompasses not only a lack of present resources,
2 but also includes a forward-looking assessment of the defendant’s “means” or
3 ability to pay. This understanding is reinforced by the statutory scheme, which
4 provides defendants 20 years after their release to make payment. It is also
5 consistent with our precedent and the view of all six of our sister circuits that have
6 addressed the issue.

7 The district court properly considered Rosario’s future earning potential in
8 concluding that he is “non-indigent” under the JVTa and did not otherwise clearly
9 err in reaching that conclusion. We therefore affirm.

10 I. BACKGROUND

11 A. JVTa Assessment

12 The JVTa provides that courts “shall assess an amount of \$5,000 on any non-
13 indigent person or entity convicted of” certain specified offenses, including
14 “offense[s] under . . . chapter 110 (relating to sexual exploitation and other abuse
15 of children).” 18 U.S.C. § 3014(a). The JVTa assessment is “collected in the manner
16 that fines are collected in criminal cases,” *id.* § 3014(f), and the obligation to pay
17 the assessment continues for 20 years after the entry of judgment or defendant’s
18 release from prison, whichever is later, *id.* §§ 3014(g), 3613(b).

1 Funds collected under section 3014(a) are deposited in the “Domestic
2 Trafficking Victims’ Fund.” *Id.* § 3014(c)–(d). The Attorney General must “use
3 amounts available in the Fund to award grants or enhance victims’ programming”
4 under the Trafficking Victims Protection Act, the Trafficking Victims Protection
5 Reauthorization Act, the Victims of Child Abuse Act, or the PROTECT Our
6 Children Act. *Id.* § 3014(e).

7 B. Procedural History

8 In 2017, Rosario pled guilty to sexual exploitation of a minor and possession
9 and distribution of child pornography. The district court sentenced him to 240
10 months’ imprisonment, followed by a lifetime term of supervised release. The
11 court did not impose a fine, but it ordered Rosario to pay \$12,000 in restitution, a
12 \$300 mandatory assessment, and the \$5,000 special assessment under the JVT A.

13 Rosario appealed to this Court, challenging only the imposition of the JVT A
14 assessment. His sole argument on appeal was that the district court plainly erred
15 in finding him “non-indigent” under section 3014(a). He did not raise any
16 challenge to the district court’s consideration of his future earning ability.

17 In accordance with the procedure outlined in *United States v. Jacobson*, 15
18 F.3d 19 (2d Cir. 1994), we remanded this matter to the district court for further

1 proceedings because we found the record “unclear as to why and how the district
2 court determined that Rosario was not indigent.” *United States v. Rosario*, 785 F.
3 App’x 22, 23 (2d Cir. 2019). We noted that “[w]hile the district court explicitly
4 adopted the Presentence Investigation Report (PSR)” prepared by the Probation
5 Department, “which had recommended the JVTa assessment, the PSR contained
6 no specific finding with respect to Rosario’s indigency.” *Id.* We further observed
7 that “the non-imposition of fines may not be determinative in establishing
8 indigency under Section 3014(a),” and we advised the district court, if it saw fit, to
9 “further develop the record with regard to Rosario’s present financial condition
10 and his predicted earnings capacity.” *Id.*

11 On remand, the district court received new sentencing submissions from the
12 parties and held a resentencing hearing. Rosario again did not argue that
13 consideration of his future earning potential was improper under section 3014(a).
14 The court ultimately reimposed its original sentence, including the \$5,000 JVTa
15 assessment. Tr. at 15–17.¹

16 As to the JVTa assessment, the district court, citing decisions of our sister
17 circuits, stated that a sentencing court “may consider both a defendant’s financial

¹ Citations to “Tr.” refer to the transcript of Rosario’s resentencing hearing, attached as Exhibit A to Rosario’s supplemental letter brief dated August 4, 2020.

1 situation and future earnings potential when making [the] indigency
2 determination.” *Id.* at 6. The court then found Rosario to be “non-indigent” under
3 section 3014(a). It considered Rosario’s health, outstanding debts and current
4 assets, employment while incarcerated, “extensive prior work history,” and
5 “transferable skills” in “basic plumbing, painting, flooring and tile work.” *Id.* at
6 7–12. The court also noted it was “mindful that [Rosario’s] felony convictions and
7 sex-offender status will likely have an adverse effect on his employability,” but
8 stated that Rosario could not “use that fact as a shield against paying the special
9 assessment.” *Id.* at 12.

10 II. DISCUSSION

11 On appeal, Rosario again challenges the district court’s imposition of the
12 JVTa assessment. This time, he argues that the district court (1) improperly
13 considered his future earning capacity in finding him to be “non-indigent,” and
14 (2) erred in imposing the assessment even if consideration of future earning
15 capacity were proper. We reject both arguments.

16 A. The district court appropriately considered Rosario’s future earning 17 potential

18 First, Rosario argues that a district court may consider only the defendant’s
19 resources at the time of sentencing, and not his future earning potential, when

determining whether he is “non-indigent” under section 3014(a). We review the district court’s interpretation of section 3014(a) for plain error because Rosario failed to raise this statutory challenge below. *Puckett v. United States*, 556 U.S. 129, 138 (2009); *United States v. Harris*, 838 F.3d 98, 103–04 (2d Cir. 2016).

The government contends that Rosario waived this argument by choosing not to argue to the district court “that Section 3014(a) prohibits consideration of future ability to pay.” Gov’t Suppl. Br. at 4. We disagree. Waiver is the “intentional relinquishment or abandonment of a known right,” and Rosario’s submissions do not reflect a “strategic, calculated decision” to abandon his statutory challenge. *United States v. Dantzler*, 771 F.3d 137, 146 n.5 (2d Cir. 2014).

1. *Statutory Text and Precedent*

We start, as always, with the statutory text. Section 3014(a) does not define “indigent,” so we look to its “ordinary meaning.” *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995). In determining ordinary meaning, “[t]ext may not be divorced from context,” *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 356 (2013), and “the same words, placed in different contexts, sometimes mean different things,” *Yates v. United States*, 574 U.S. 528, 537 (2015) (plurality op.).

1 The word “indigent” encompasses not only a person’s present lack of
 2 resources, but also indicates that a person “lacks the means of subsistence.”
 3 *Indigency*, Black’s Law Dictionary (11th ed. 2019); *see also Indigence*, Oxford English
 4 Dictionary (3d ed. 2020) (defining the term as the “[w]ant of the means of
 5 subsistence”). As several other circuits have concluded, this “forward-looking”
 6 sense of the word “refers to a person’s capabilities—whether a person has or lacks
 7 the *capacity* to earn subsistence.” *United States v. Graves*, 908 F.3d 137, 141 (5th Cir.
 8 2018) (emphasis in original); *see also United States v. Shepherd*, 922 F.3d 753, 758 (6th
 9 Cir. 2019) (noting that “an indigent person not only lives in poverty but also lacks
 10 the means—*e.g.*, skills or education—to exit poverty”). Thus, “the district court
 11 must resolve two basic questions in assessing the defendant’s indigency: (1) Is the
 12 defendant impoverished *now*; and (2) if so, does the defendant have the means to
 13 provide for himself so that he will *not always* be impoverished?” *Shepherd*, 922 F.3d
 14 at 758 (emphases in original).

15 The Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits—all of our sister
 16 circuits to have considered the issue—have held that courts may consider a
 17 defendant’s future earning potential when determining indigency for purposes of
 18 imposing the JVT A assessment. *See United States v. McMiller*, 954 F.3d 670, 675 (4th

1 Cir. 2020); *Shepherd*, 922 F.3d at 758–59; *Graves*, 908 F.3d at 141; *United States v.*
 2 *Kelley*, 861 F.3d 790, 802 (8th Cir. 2017); *see also United States v. Janatsch*, 722 F. App’x
 3 806, 810–11 (10th Cir. 2018); *United States v. Strange*, 692 F. App’x 346, 348–49 (9th
 4 Cir. 2017). We agree with our sister circuits, concluding that when determining
 5 whether a defendant is indigent pursuant to section 3014(a), a court may consider
 6 both the resources available to the defendant at the time of sentencing and the
 7 defendant’s future earning potential. *See United States v. Clarke*, 979 F.3d 82, 101
 8 (2d Cir. 2020) (“When making an indigency determination, a district court ‘may
 9 consider both [the] defendant’s present financial resources and those that may
 10 become available in the future.’” (quoting *United States v. Salameh*, 261 F.3d 271,
 11 276 (2d Cir. 2001))). We decline Rosario’s invitation to hold otherwise.

12 2. *Statutory Structure and Context*

13 The statutory structure of section 3014(a) supports this interpretation. First,
 14 the defendant’s obligation to pay the JVT A assessment continues for 20 years after
 15 entry of judgment or release from prison, whichever is later. 18 U.S.C. §§ 3014(g),
 16 3613(b). This long payment period “underscores that a district court must impose
 17 the assessment unless it finds the defendant could not pay it today—or at any
 18 point for the next twenty years.” *Graves*, 908 F.3d at 141. “[I]t would make little

1 sense for the district court to consider *only* the defendant's financial condition at
2 the time of sentencing" because "[t]hat snapshot in time may not accurately
3 represent the defendant's condition five, ten, or twenty years after sentencing."
4 *Shepherd*, 922 F.3d at 758 (emphasis in original). Even Rosario acknowledged this
5 commonsense reading, explaining in his sentencing submission that the relevant
6 "question" for the district court on remand was "whether between 2034 and 2054,
7 [he] will rise above his current station to become non-indigent such that he must
8 pay this assessment." Def.'s Sentencing Ltr. at 2, *United States v. Rosario*, No. 17-
9 cr-306 (S.D.N.Y. Mar. 6, 2020), ECF No. 42.

10 The long-lasting JVTa obligation is unlike other contexts in which courts
11 consider only a defendant's financial resources at the time of sentencing. For
12 example, "[i]n granting court-appointed counsel, the court assesses a defendant's
13 immediate ability to pay because 'any person haled into court, who is too poor to
14 hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.'" *Kelley*, 861 F.3d at 800 (quoting *Martinez v. Ryan*, 566 U.S. 1, 12 (2012)).
15 Appointment of counsel is not dispositive of indigency for purposes of imposing
16 monetary penalties. *Clarke*, 979 F.3d at 101; *see also United States v. Valdez*, 522
17 F. App'x 25, 33 (2d Cir. 2013) (holding that "the fact that [the defendant] had been
18

1 appointed counsel as an indigent defendant” was not “determinative of his ability
2 to pay a fine”). There is no reason to consider a defendant’s future earning
3 potential in assessing his ability to pay for a lawyer now. By contrast, courts *should*
4 consider a defendant’s future earning potential when determining whether he is
5 “indigent” for purposes of paying an obligation over 20 years into the future.

6 Second, section 3014 provides that the JVT A assessment “shall . . . be
7 collected in the manner that fines are collected in criminal cases.” 18 U.S.C.
8 § 3014(f). The Sentencing Guidelines require courts to consider defendants’ future
9 earning capacity in determining whether to impose criminal fines. *See* U.S.S.G.
10 § 5E1.2(a) (providing that courts “shall impose a fine in all cases, except where the
11 defendant establishes that he is unable to pay and *is not likely to become able to pay*
12 any fine”) (emphasis added)). This further supports our reading of section 3014(a).
13 *See, e.g., McMiller*, 954 F.3d at 675; *Graves*, 908 F.3d at 142.

14 Rosario argues that the statutory scheme cuts the other way because section
15 3014(a), unlike other statutes, does not explicitly refer to future earning ability.
16 Rosario points to 18 U.S.C. § 3572(a), which instructs district courts to consider
17 factors including “the defendant’s income, earning capacity, and financial
18 resources” in imposing a fine, and 18 U.S.C. § 3663(a)(1)(B)(i), which requires

1 courts to consider the defendant's "financial resources," "financial needs," and
2 "earning ability" in ordering restitution. In Rosario's view, those provisions show
3 that "Congress knows how to make potential earnings relevant," and the absence
4 of an express reference to potential earnings in section 3014(a) suggests that
5 Congress intended to exclude consideration of that factor. Rosario Suppl. Br. at 1.

6 We are not persuaded. The provisions Rosario identifies have little in
7 common with section 3014(a). Sections 3572(a) and 3663(a)(1)(B)(i) describe factors
8 that courts should consider in deciding whether to impose fines or restitution
9 generally. Unlike the JVTAs' \$5,000 assessment, these provisions do not specify
10 the amount of a fine or assessment for the commission of particular offenses. Nor
11 do they condition a financial penalty on the defendant's "indigence." Most
12 importantly, these provisions are not structured like section 3014(a) because in lieu
13 of a finding of indigence, they provide a list of factors for courts to consider when
14 determining whether to impose a monetary penalty at all. That Congress knew
15 how to legislate differently for other criminal punishment purposes does not
16 support Rosario's argument.²

² In fact, while sections 3572(a) and 3663(a)(1)(B)(i) list "earning capacity" (or "earning ability") as a required consideration, they both also list the defendant's "financial resources." Rosario argues that indigence should be determined *only* with reference to financial resources at

1 Rosario further contends that the 20-year timeframe to pay the \$5,000 special
2 assessment is a reflection of the assessment's subordination to other fines and
3 restitution amounts, not an indication that the assessment should be imposed on
4 a defendant who may be able to pay it in the future. Rosario Suppl. Br. at 4. We
5 disagree. This 20-year time period is consistent with the statute's purpose because
6 it "increase[s] the possibility [that] the assessments would be collected and used
7 to help victims." *Graves*, 908 F.3d at 141.

8 Rosario also argues that Congress could not have permitted consideration
9 of earning ability in determining indigency under section 3014(a) because "it
10 would mean declaring almost everyone 'non-indigent.'" Rosario Suppl. Reply Br.
11 at 4. This concern is overstated. Many defendants have no work history, are
12 physically disabled, or are serving sentences so long that they are unlikely ever to
13 obtain post-release employment. And it is not necessarily the case that every
14 defendant with post-release earning potential is "non-indigent."

the time of sentencing, but he provides no basis for this selective parsing of sections 3572(a) and 3663(a)(1)(B)(i).

1 B. The district court properly found Rosario to be “non-indigent”

2 Finally, Rosario contends that “[e]ven if the district court was right to
3 consider ‘future earnings potential,’ it was still wrong to deem Rosario ‘non-
4 indigent.’” Rosario Suppl. Br. at 6 (citation omitted). Again, we disagree.

5 A court’s determination that a defendant is “non-indigent” under section
6 3014(a) is a factual finding that we review for clear error. *United States v. Jeffers*,
7 329 F.3d 94, 97 (2d Cir. 2003). “We will find clear error only where we as the
8 reviewing court on the entire evidence are left with the definite and firm
9 conviction that a mistake has been committed.” *United States v. Dumitru*, 991 F.3d
10 427, 436 (2d Cir. 2021) (cleaned up). Applying this deferential standard, we affirm
11 the district court’s indigency determination.

12 The district court carefully weighed the record evidence in finding Rosario
13 non-indigent. It noted Rosario’s health, limited financial resources, outstanding
14 debts, and other court-imposed obligations. Against those factors, the district
15 court considered Rosario’s education, “extensive prior work history,” basic
16 vocational skills, language proficiency, and participation in training courses while
17 incarcerated. Tr. at 11–12. The district court’s conclusion was “plausible in light

1 of the record viewed in its entirety” and thus not clearly erroneous. *Anderson v.*
2 *City of Bessemer City*, 470 U.S. 564, 573–74 (1985).

3 Rosario argues that his “sex-offender status” will have a negative effect on
4 his ability to find future employment. Rosario Suppl. Br. at 6. While this may be
5 true, the fact of Rosario’s convictions for sexual offenses against children “does not
6 compel the district court to find him indigent.” *Shepherd*, 922 F.3d at 760. Section
7 3014(a) expressly “contemplates assessing sex offenders” by listing sex crimes
8 against minors among the enumerated predicate offenses. *Id.* As the district court
9 correctly observed, Rosario “cannot use his sex-offender status to shield him from
10 paying the assessment.” *Id.*; see Tr. at 12; cf. *United States v. Thompson*, 227 F.3d 43,
11 46–47 (2d Cir. 2000) (where applicable statutory provisions “specifically
12 contemplate[d] the imposition of fines upon defendants who [would]
13 undoubtedly be deported,” defendant’s post-release deportation was not a basis
14 for vacating imposition of \$5,000 fine).

15 Rosario also points to his \$6,000 debt and \$12,300 in other court-imposed
16 obligations as evidence of indigency. But given Rosario’s vocational skills and
17 pre-incarceration record of employment, we see no clear error in the district court’s
18 determination that Rosario could successfully pay the special assessment by 2054,

1 20 years after his expected release from prison. Indeed, courts have affirmed the
2 imposition of the JVT A assessment even when the defendant had a negative net
3 worth and faced additional financial obligations upon release. *See, e.g., United*
4 *States v. Wandahsega*, 924 F.3d 868, 889 (6th Cir. 2019) (defendant had “no assets
5 other than a checking account containing \$200” and “\$30,000 in outstanding
6 medical bills”); *Shepherd*, 922 F.3d at 760 (defendant would owe \$25,000 in
7 restitution and as much as \$30,000 in child support upon release); *Kelley*, 861 F.3d
8 at 802 (PSR reflected defendant’s “slightly negative net worth at the time of
9 sentencing”).

10 In sum, we hold that the district court did not clearly err in finding, after
11 careful consideration of Rosario’s present financial position and likely future
12 earnings, that Rosario is “non-indigent” under section 3014(a).

13 III. CONCLUSION

14 For the reasons set forth above, we affirm the district court’s imposition of
15 the \$5,000 special assessment pursuant to 18 U.S.C. § 3014(a).