NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARCUS DIETER FELDER, Defendant-Appellant.	No. 20-10334 D.C. No. 3:14-cr-00536-MMC-1 MEMORANDUM*
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARCUS DIETER FELDER, Defendant-Appellant.	No. 20-10335 D.C. No. 3:19-cr-00256-MMC-1

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, District Judge, Presiding

Submitted September 20, 2022**
San Francisco, California

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: GRABER, FRIEDLAND, and SUNG, Circuit Judges.

Marcus Dieter Felder appeals the district court's enhancement of his sentence under United States Sentencing Guidelines Section 2B1.1. He challenges the district court's use of Application Note 3(F)(i) to calculate his Guideline range, on the ground that the note is inconsistent with the plain text of the guideline. We agree and vacate Felder's sentence and remand for resentencing.

1. Felder did not waive his challenge under *Stinson v. United States*, 508 U.S. 36 (1993), to Application Note 3(F)(i). "[W]aiver occurs when a defendant 'considered the controlling law, . . . and, in spite of being aware of the applicable law,' relinquished his right." *United States v. Depue*, 912 F.3d 1227, 1233 (9th Cir. 2019) (en banc) (alteration in original) (quoting *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (en banc)). Waiver is different from forfeiture. Forfeiture occurs when a defendant fails "to make the timely assertion of a right." *Id.* at 1232 (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)) (internal quotation marks omitted). Forfeited issues are reviewable for plain error, while waived issues are not reviewable. *Perez*, 116 F.3d at 845.

The record before us contains no evidence that Felder knowingly relinquished his right to raise a *Stinson* challenge to note 3(F)(i). After the government asked the court to apply the $500-per-card multiplier in note 3(F)(i), Felder challenged other collateral issues related to that application note, such as

usability and the evidentiary standard for finding usability. Although Felder failed to raise any challenge to the overall applicability of note 3(F)(i), we cannot conclude on this record that Felder knew of his *Stinson* challenge to note 3(F)(i) but failed to raise it. *See Depue*, 912 F.3d at 1233–34 (finding no waiver when defendant confirmed accuracy of loss calculation in presentencing report but record was "devoid" of evidence that defendant knew of errors).

The government asks us to infer from Felder's citation to case law, legislative history, and legal scholarship on the history of the intended-loss rule that he must have knowingly declined to raise a *Stinson* challenge to note 3(F)(i). But Felder cited those authorities to support his argument that the court should not combine actual loss and imputed loss. Nothing in those citations suggests that Felder knew of and intentionally relinquished his *Stinson* challenge to the $500-per-card multiplier in note 3(F)(i).

2. The government next argues that Felder invited the error. "Under the [invited error] doctrine, an error is 'waived and therefore unreviewable' when 'the defendant has both [1] invited the error, and [2] relinquished a known right.'" *United States v. Myers*, 804 F.3d 1246, 1254 (9th Cir. 2015) (last two alterations in original) (quoting *Perez*, 116 F.3d at 845). As explained above, we cannot conclude from this record that Felder relinquished a known right. Therefore, the government's invited error argument necessarily fails.

3. Because Felder, at most, forfeited his *Stinson* challenge to the $500-per-card multiplier, and because he prevails even under plain error review, we need not address Felder's argument that de novo review applies. *Depue*, 912 F.3d at 1232. Under the plain error standard, we may reverse only if (1) there is error, (2) that was plain, (3) "that affected the defendant's substantial rights," and (4) "the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Hayat*, 710 F.3d 875, 895 (9th Cir. 2013) (citation and internal quotation marks omitted).

Here, each of those conditions is met. The government concedes, and we agree, that the district court erred under *United States v. Kirilyuk*, 29 F.4th 1128 (9th Cir. 2022). The error is plain because the $275,000 in imputed loss has no factual connection to Felder's conduct; rather, it was a product of the arbitrary $500-per-card multiplier in note 3(F)(i).[1] The error resulted in a six-level enhancement for the imputed loss alone, significantly increasing Felder's Sentencing Guidelines range. It therefore "affected the outcome of the district court proceedings," meaning it affected Felder's substantial rights. *Olano*, 507 U.S. at 734. Lastly, the district court's erroneous imposition of a six-level enhancement

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[1] It makes no difference that the *Kirilyuk* rule was not settled when the sentencing took place—"as long as the error [is] plain as of . . . the time of appellate review," the error is "plain" within the meaning of the rule. *Henderson v. United States*, 568 U.S. 266, 269 (2013).

seriously affects the fairness and integrity of Felder's sentence, as "uncorrected Guidelines errors risk depriving defendants of liberty beyond what is necessary to serve the purposes of punishment." *Depue*, 912 F.3d at 1234. We therefore exercise our discretion to correct the error.

We vacate Felder's sentence and remand for resentencing on an open record.

VACATED and REMANDED.