APPENDIX

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NOT RECOMMENDED FOR PUBLICATION

No. 23-3422

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE NORTHERN DISTRICT OF
EDGARDO ESTERAS,	)	OHIO
	)	
Defendant-Appellant.	)	

O R D E R

Before: SUTTON, Chief Judge; WHITE and THAPAR, Circuit Judges.

Edgardo Esteras appeals the district court's order revoking his supervised release and sentencing him to 24 months of imprisonment. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). As set forth below, we affirm the district court's revocation order.

In 2018, Esteras pleaded guilty to conspiring to distribute and possess with intent to distribute heroin, in violation of 21 U.S.C. §§ 841(a)(1) and 846. Varying downward from a guidelines range of 15 to 21 months, the district court sentenced Esteras to 12 months of imprisonment, to be served consecutively to a 15-month prison term for violating his probation for a prior federal drug-trafficking conviction, followed by six years of supervised release.

Esteras's six-year term of supervised release began in January 2020. Three years later, in January 2023, the probation office reported to the district court that Esteras had violated the conditions of his supervised release by (1) committing new law violations (domestic violence, aggravated menacing, and criminal damaging) and (2) possessing a firearm. The probation office

subsequently notified the district court that the new criminal charges against Esteras had been dismissed at the victim's request.

Following a hearing on the supervised-release violations, the district court found by a preponderance of the evidence that Esteras had possessed a firearm but declined to find that he had committed a new law violation. The district court revoked Esteras's supervised release and sentenced him to 24 months of imprisonment, varying upward from a policy-statement range of six to 12 months, followed by three years of supervised release. Esteras objected to the district court's consideration of the factors set forth in 18 U.S.C. § 3553(a)(2)(A)—"the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." The district court confirmed that it had considered the need to promote respect for the law along with other § 3553(a) factors, including the need to afford adequate deterrence and protect the public.

In this timely appeal, Esteras argues that his sentence is unreasonable because the district court relied on the factors listed in § 3553(a)(2)(A). The statutory provision addressing revocation of supervised release, 18 U.S.C. § 3583(e), provides that, if a defendant violates a condition of supervised release, the district court may, after considering certain enumerated factors set forth in § 3553(a), revoke the defendant's supervised release and impose an additional prison term. But § 3583(e) does not include the § 3553(a)(2)(A) factors among the list of enumerated factors. Nonetheless, as Esteras concedes, we have held "that it does not constitute reversible error to consider § 3553(a)(2)(A) when imposing a sentence for violation of supervised release, even though this factor is not enumerated in § 3583(e)." *United States v. Lewis*, 498 F.3d 393, 399-400 (6th Cir. 2007). Esteras contends that *Lewis* was wrongly decided. But we "may not overrule the decision of another panel; only the en banc court or the United States Supreme Court may overrule the prior panel." *United States v. Ferguson*, 868 F.3d 514, 515 (6th Cir. 2017).

Because Esteras's only argument is foreclosed by our precedent, we **AFFIRM** the district court's revocation order.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 23a0272p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EDGARDO ESTERAS,

Defendant-Appellant.

No. 23-3422

Appeal from the United States District Court for the Northern District of Ohio at Youngstown.
No. 4:14-cr-00425-10—Benita Y. Pearson, District Judge.

Decided and Filed: December 20, 2023[*]

Before: SUTTON, Chief Judge; WHITE and THAPAR, Circuit Judges.

COUNSEL

ON BRIEF: Christian J. Grostic, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Cleveland, Ohio, for Appellant. Matthew B. Kall, UNITED STATES ATTORNEY'S OFFICE, Cleveland, Ohio, for Appellee.

SUTTON, C.J., delivered the order of the court in which THAPAR, J., joins in full. WHITE, J., joins in the result because she agrees that *United States v. Lewis*, 498 F.3d 393 (6th Cir. 2007) is controlling.

[*]This decision originally issued as a judge order on August 16, 2023. The court has now designated the amended order for publication.

AMENDED ORDER

SUTTON, Chief Judge. Edgardo Esteras appeals the district court's order revoking his supervised release and sentencing him to 24 months in prison. We affirm the district court's revocation order for the reasons that follow.

In 2018, Esteras pleaded guilty to conspiring to distribute and possess with intent to distribute heroin in violation of 21 U.S.C. §§ 841(a)(1) and 846. Varying downward from a guidelines range of 15 to 21 months, the district court sentenced Esteras to 12 months of imprisonment, to be served consecutively with a 15-month prison term for violating his probation for a prior federal drug-trafficking conviction, followed by six years of supervised release.

Esteras's six-year term of supervised release began in January 2020. Three years later, in January 2023, the probation officer reported to the district court that Esteras had violated the conditions of his supervised release (1) by committing domestic violence, aggravated menacing, and criminal damaging, and (2) by possessing a firearm. The probation officer notified the district court that the new criminal charges against Esteras had been dismissed at the victim's request.

Judge Benita Y. Pearson conducted a hearing and found that Esteras possessed a firearm while under supervised release. She "worr[ied]" that her previous sentences for drug crimes and violating an earlier supervised release term failed "to deter [Esteras], to encourage [him] to be respectful of the law." R.439 at 83. Based on his "dangerous" and "disrespectful" behavior, she varied upward from an advisory range of six to twelve months to impose a 24-month jail sentence, "long enough to at least allow [Esteras] to reconsider [his] behavior." *Id.* at 85. She added three years of supervised release to the sentence, including an anger management class and six months of location monitoring. These conditions, Judge Pearson explained, would teach him to "do better" and "think before [he] act[s]." *Id.*

Esteras objected that the court should not have considered the three subfactors identified in 18 U.S.C. § 3553(a)(2)(A) when crafting its sentence: "to reflect the seriousness of the offense, to promote respect for the law, and provide just punishment for the offense." *Id.* at 92. Judge Pearson agreed that "part of [her] contemplation certainly is the need for the sentence imposed, to promote respect for the law." *Id.* But she added that she also considered deterrence and community safety, which appear in other statutory provisions. She also referenced her decision to vary upward "to separate Mr. Esteras from the average, typical, mine run-type defendant." *Id.*

In closing the hearing, Judge Pearson expressed hope that Esteras would take advantage of this opportunity. She acknowledged that some of the conventional features of supervised release could be seen as partly "punitive," such as location monitoring and other measures that "restrict [his] freedom" of movement. *Id.* She then referred to other terms, such as anger management, as "there to bolster [him]" and "help [him] to do better going forward." *Id.* at 95–96.

On appeal, Esteras challenges his sentence on the ground that the district court relied on prohibited factors in sentencing him. We disagree.

Congress has authorized district courts to revoke supervised release. *See* 18 U.S.C. § 3583(e). In some settings, district courts have discretion to revoke, modify, or decrease a term of supervised release. *Id.* In other settings, as when a parolee possesses a weapon as Esteras did here, the district court must revoke the individual's supervised release. *Id.* § 3583(g). Whether at the outset of sentencing an individual, in the context of a modified term of supervised release, or in the context of a required revocation of supervised release, Congress has directed courts to consider certain factors. In the words of Congress under the heading "Factors to be considered in including a term of supervised release": "The court . . . consider[s] the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)." *Id.* § 3583(c); *see also id.* § 3583(e) (similar for "modification of conditions or revocation" of supervised release).

To bring this provision into full view, here is a full recitation of § 3553(a) that italicizes the factors that district courts need not consider in supervised-release determinations:

> The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> (A) *to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense*;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) *the kinds of sentences available*;
>
> (4) the kinds of sentence and the sentencing range established for—
>
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
>
> (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
>
> (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
>
> (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);
>
> (5) any pertinent policy statement—
>
> (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such

> policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
>
> (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.

Invoking the italicized language, Esteras claims that § 3583(c) and (e) create a divide between permitted and forbidden supervised-release considerations. As he sees it, a district court judge who considers the forbidden factors—"the seriousness of the offense," "respect for the law," "just punishment for the offense," or "the kinds of sentences available"—necessarily imposes a procedurally unreasonable sentence. Notably, this argument applies to original supervised-release decisions, which come immediately on the heels of any prison-sentence determination under all of the § 3553(a) factors, *see* 18 U.S.C. § 3583(c), as well as to any revocation, modification, or reduction determinations with respect to supervised release, *see id.* § 3583(e), (g).

United States v. Lewis rejected this argument. 498 F.3d 393, 399–400 (6th Cir. 2007). It provided two explanations: one textual, one contextual. Textually, *Lewis* observes that § 3583 generally gives courts considerable discretion over supervised-release decisions after considering the listed factors. *Id.* at 400. It never says that the court may consider "*only*" those factors. *Id.* Congress, as it happens, knew how to instruct courts not to consider certain sentencing factors, as shown in its express command to disregard the goal of rehabilitation when imposing prison time. 18 U.S.C. § 3582(a) ("recognizing that imprisonment is not an appropriate means of promoting correction or rehabilitation").

In the context of supervised-release decisions, moreover, *Lewis* was concerned that this proposed bright-line rule was unworkable. Whether in the context of an initial or later supervised-release decision, the purportedly forbidden considerations mentioned in § 3553(a)(2)(A) tend to be "essentially redundant" with the permitted ones. *Lewis*, 498 F.3d at 400. Take § 3553(a)(2)(A)'s consideration about the "seriousness of the offense." It aligns with

§ 3553(a)(1) and its emphasis on "the nature and circumstances of the offense." To think about the one requires the judge to think about the other.

Or take § 3553(a)(2)(A)'s consideration of the need "to promote respect for the law." It meshes with the rationale that revoking supervised release will "help" the defendant "learn to obey the conditions of his supervised release." *Id.* (quoting *Johnson v. United States*, 529 U.S. 694, 709 (2000)). Indeed, in this case, Judge Pearson quite understandably could not see how she could ignore respect for the law but consider a defendant's need to respect the terms of supervised release. To neglect the one dishonors the other.

Or take § 3553(a)(2)(A)'s reference to "just punishment for the offense." Under § 3553(a)(5), courts must consider "any pertinent policy statement" of the Sentencing Commission. Among other guidance, the Commission tells judges to "sanction the violator for failing to abide by the conditions of the court-ordered supervision." *Id.* (quoting U.S.S.G. ch. 7 pt. A § 3(b)). The district court, in other words, must craft a remedy that corresponds to how severely the defendant has breached the court's trust as "embodied by the original sentence," which it cannot do without accounting for the conduct that violated supervised release. *United States v. Johnson*, 640 F.3d 195, 204 (6th Cir. 2011). Another enumerated factor tells a court how to carry out that analysis. Under § 3553(a)(4)(B)'s command to consult the Sentencing Commission's supervised-release guidelines, a court first classifies how "serious" these violations are and then uses the categorization to determine the length of any prison sentence. U.S.S.G. §§ 7B1.1, 7B1.3, 7B1.4.

Esteras's bright-line rule is unworkable in another way. Recall that Congress requires courts to consider the same set of factors when first imposing a term of supervised release as when revoking one. 18 U.S.C. § 3583(c), (e). Under Esteras's rule, if Congress forbade district courts from considering anything related to § 3553(a)(2)(A) at a revocation hearing, it would not permit use of anything related to those factors at an initial sentencing either. How would this work? Would the sentencing judge have to adjourn the hearing after imposing a sentence? Then, would she have to start over with a new unblemished inquiry into the right term of supervised release without any consideration, explicitly or implicitly, of considerations related to, say, the "rule of law"? Congress could not have expected courts to wipe their minds of these

concerns when they move from one type of sentence to the other, and nothing in the statute requires such compartmentalization. If anything, the language points the other way. It specifically allows courts to account for the length of a supervised-release term "in imposing a sentence to a term of imprisonment." *Id.* § 3583(a).

Esteras's invocation of *Tapia v. United States* does not change matters. 564 U.S. 319 (2011). It did not, most critically, arise under this statute. The case dealt with a different sentencing law, one with explicit directions, not uncertain implications. The statute in no uncertain terms says "that imprisonment is not an appropriate means of promoting . . . rehabilitation." 18 U.S.C. § 3582(a). Consistent with that directive, *Tapia* ruled that the statute precludes courts from considering "rehabilitation" when imposing prison time. "Our consideration of Tapia's claim," it reasoned, "starts with the text of 18 U.S.C. § 3582(a)—and given the clarity of that provision's language, could end there as well." *Tapia*, 564 U.S. at 326.

In the course of its analysis, it is true, the Court said in dicta that "a court may *not* take account of retribution" when it "impos[es] a term of supervised release." *Id.* But even taken at face value, this reference does not undermine the district court's sentence. The provision confirms two things. First, when the court imposes an initial supervised-release term, retribution should not guide the decision. No one has shown that Judge Pearson did anything of the sort at that point—and Esteras has not argued otherwise. Second, if the defendant violates a term of supervised release or commits a new crime, the government is put to a choice. If it wishes to exact retribution for the new offense, new charges and the resulting process that comes with it are in order. Otherwise, the district court should focus on non-retributive factors in deciding the new sentence and the new term of supervised release. But the district court in this instance did not claim a right to exact retribution for this violation or for that matter use the word. As shown, references to other concepts mentioned in § 3553(a)(2) are hopelessly over-inclusive, and mere references to things like the "rule of law"—or, worse, concepts that overlap with it—do not create a procedurally unreasonable sentence absent evidence that the court was engaged in imposing a purely retributive sentence. No such evidence exists here. In fact, *Tapia* confirms the point. It ruled for the defendant only after observing that the court's "number one thing

[was] the need to provide treatment" and so may have *increased* the sentence to ensure Tapia was "in long enough to get the 500 Hour Drug Program." *Id.* at 334 (quotations omitted).

This understanding of § 3583(e) accords with the analysis of most other circuits and the outcomes of all of them. The general rule is that courts may invoke factors related to the three general considerations in § 3553(a)(2)(A) without creating a procedurally unreasonable sentence. *United States v. Vargas-Davila*, 649 F.3d 129, 132 (1st Cir. 2011) ("Although section 3583(e)(3) incorporates by reference, and thus encourages, consideration of certain enumerated subsections of section 3553(a), it does not forbid consideration of other pertinent section 3553(a) factors."); *United States v. Williams*, 443 F.3d 35, 48 (2d Cir. 2006) ("[Section] 3583(e) cannot reasonably be interpreted to exclude consideration of the seriousness of the releasee's violation, given the other factors that must be considered."); *United States v. Young*, 634 F.3d 233, 240 (3d Cir. 2011) ("[T]he mere omission of § 3553(a)(2)(A) from the mandatory supervised release revocation considerations in § 3583(e) does not preclude a court from taking [the § 3553(a)(2)(A) factors] into account. To hold otherwise would ignore the reality that the violator's conduct simply cannot be disregarded in determining the appropriate sanction."); *United States v. Webb*, 738 F.3d 638, 642 (4th Cir. 2013) ("[A]lthough a district court may not impose a revocation sentence based predominantly on [the § 3553(a)(2)(A) factors], we conclude that mere reference to such considerations does not render a revocation sentence procedurally unreasonable when those factors are relevant to, and considered in conjunction with, the enumerated § 3553(a) factors."); *United States v. Clay*, 752 F.3d 1106, 1108–09 (7th Cir. 2014) ("[T]his subsection may be considered so long as the district court relies primarily on the factors listed in § 3583(e) . . . . [T]here is significant overlap between these factors and § 3553(a)(2)(A)."); *see also United States v. King*, 57 F.4th 1334, 1338 n.1 (11th Cir. 2023) (acknowledging language in prior cases permitting references to factors that also appear in § 3553(a)(2)(A)).

Esteras's argument, notably, does not even work on its own terms—at least the terms of those circuits that support *some of* his reasoning. The circuits that have described the § 3553(a)(2)(A) factors as impermissible when used punitively still recognize that they may play supporting roles in a district court's analysis. *United States v. Sanchez*, 900 F.3d 678, 684 n.5

(5th Cir. 2018) ("[T]his is not to say that any use of words like 'punish,' 'serious,' or 'respect' automatically renders a revocation sentence void. Mere *mention* of impermissible factors is acceptable; to constitute reversible error, our circuit has said, the forbidden factor must be 'dominant.'"); *United States v. Porter*, 974 F.3d 905, 907 (8th Cir. 2020) ("Although we have labeled § 3553(a)(2)(A) an improper, irrelevant, or 'excluded' factor, we have not declared its consideration an error of law *and therefore* an abuse of discretion."); *United States v. Simtob*, 485 F.3d 1058, 1063 (9th Cir. 2007) ("[A] district court may properly look to and consider the conduct underlying the revocation as one of many acts contributing to the severity of the violator's breach of trust so as not to preclude a full review of the violator's history and the violator's likelihood of repeating that history."); *United States v. Booker*, 63 F.4th 1254, 1261–62 (10th Cir. 2023) (rejecting the criminal defendant's appeal in a plain-error setting and noting that it would be problematic to rely on a "direct quotation to [two] factors that may not be considered" and as a result issue a "retributive" sentence). Even under these decisions, Judge Pearson acted properly when she considered the need to promote respect for "the rule of law" alongside the enumerated § 3553(a) factors. This "highly relevant" concern clearly speaks to the need to deter Esteras's misconduct and protect the public from his disregard of the rule of law, to say nothing of fulfilling the Sentencing Guideline's commentary on sanctioning Esteras for breaching the court's trust. *Porter*, 974 F.3d at 908–09. All in all, it is highly doubtful that the outcome in this case would change under any other circuit's decision.

Last of all, Esteras is concerned that Judge Pearson used the word "punishment" during the hearing. But this reference occurred at the beginning of the sentencing phase of the hearing and simply set the stage. In her words, "I find that the new law violation" occurred and that she may "consider" "evidence" of it "in the punishment I will issue today." R.439 at 81. This manner of speaking at the beginning of a sentencing hearing does not remotely convey an intent to impose a retributive sentence in the context of a gun-possession violation that *required* "punishment"—the revocation of supervised release. *See* 18 U.S.C. § 3583(g). Likewise, when the judge later used the word "punitive" in describing the conditions of supervised release, R.439 at 95, it was to ensure that the sentence was not too long—that the "deprivation of [Esteras's] liberty" was "no greater . . . than is reasonably necessary for the purposes set forth" in the enumerated § 3553(a)(2) sections, 18 U.S.C. § 3583(d)(2). Surely, shorthand references to

"punitive" or "punishment" in the context of ensuring a sentence is not too long do not convey a forbidden focus on retribution.

We **AFFIRM** the district court's revocation order.

PEARSON, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	CASE NO. 4:14-CR-425-10
Plaintiff,	)	
	)	
v.	)	JUDGE BENITA Y. PEARSON
	)	
EDGARDO ESTERAS,	)	
	)	**ORDER**
Defendant.	)	

On September 6, 2018, Defendant Edgardo Esteras was sentenced to a 12-month term of incarceration as to Count 1 of the Indictment for conspiracy to distribute heroin, such term to be served consecutively to the 15-month term of incarceration imposed for the probation violation in Case No. 4:11-CR-276-12-DAP, followed by a six-year term of supervised release, with standard and special conditions of supervision imposed. Defendant was further ordered to pay a $100.00 special assessment.

Following Defendant's term of incarceration, supervised release commenced on January 10, 2020.

On or about February 20, 2020, the United States Probation Office ("USPO") submitted a Supervision Report to request a suspension of the GED condition:

> This report serves to request a suspension of the General Education Diploma (GED) condition. Before incarceration, Mr. Esteras was diagnosed with an intellectual development disorder indicating difficulty with reading, writing, and comprehension. The undersigned officer has had multiple conversations with Mr. Esteras regarding the condition. Mr. Esteras has expressed a willingness to work toward obtaining his GED, but disclosed that he has tried and does not think he is capable of comprehending the material.

(4:14-CR-425-10)

On July 20, 2020, the Court ordered suspension of the GED requirement under the circumstances described.

On or about September 19, 2022, the USPO issued a Supervision Report to relay a request from Defendant for early termination of his term of supervised release.

On September 21, 2022, the Court denied Defendant's request for early termination of supervised release, without prejudice to another request being considered at a later time.

On or about January 23, 2023, the USPO issued a Violation Report to notify the Court of Defendant's violation of the terms and conditions of his supervised release:

-New Criminal Charges (filing is pending with Youngstown Municipal Court)

-Violent Conduct

-Whereabouts Unknown (Absconder)

> On January 23, 2023, at 0003 hours, Officers with the Youngstown Police Department were dispatched to 1137 Inverness Avenue in Youngstown in reference to gunfire. Upon arrival, contact was made with the victim, who advised the father of her children, Edgardo Esteras, had physically assaulted her and threatened to kill her. At approximately 2350 hours, Mr. Esteras stormed into the residence, struck the victim in the head, punched a television set, and then stormed outside of the residence. The victim followed Mr. Edgardo out of the residence who was now inside a vehicle. The victim reached inside the vehicle to grab Mr. Esteras car keys, at which time he produced a handgun and pointed it at the victim and stated, "I'm going to kill you". At this time, the victim retreated inside the residence at which time Mr. Esteras fired three rounds into her vehicle, an Infiniti JX35, which was located in the driveway of the residence. Mr. Esteras then fled the scene in a Black Chevy Blazer with an unknown registration.
>
> Officers recovered spent 9mm shell casings and observed three bullet holes in the side of MI's vehicle, as well as a broken television set. The victim refused medical treatment but did advise she wished to file charges of domestic violence against Mr. Esteras. The victim further advised that Mr. Esteras frequently assaults her, and she has had enough. The Youngstown Police Department is currently pursuing charges of Domestic Violence, Illegal Discharge of a Firearm, and Vehicular Vandalism. Formal charges have not been officially filed and Mr. Esteras remains at large as of the time of this report.

On January 23, 2023, the Court ordered the issuance of a Warrant for Defendant's arrest.

(4:14-CR-425-10)

On or about January 30, 2023, the USPO issued a Follow Up Violation Report to provide an update to the Court on Defendant's violations:

1. **New Law Violation:** On January 23, 2023, Mr. Esteras was charged with Domestic Violence (M1), Aggravated Menacing (M1), and Criminal Damaging/Endangering (M2) in the Youngstown Municipal Court under case number 2023CRB00121.

2. **Possession of a Firearm:** On January 23, 2023, Mr. Esteras did have in his possession or under his control a firearm.

Defendant was arrested and appeared before Magistrate Judge Amanda M. Knapp on January 31, 2023 for an initial appearance. On February 6, 2023, Magistrate Judge Knapp conducted preliminary and detention hearings. The Court found that probable cause existed for the violations, and additional proceedings would be conducted by the undersigned. Defendant was remanded to the custody of the U.S. Marshals Service.

On or about March 14, 2023, the USPO issued a Supplemental Information Report to provide an update to the Court regarding the status of Defendant's state charges:

> On January 22, 2023, Mr. Esteras was charged with Domestic Violence (M1), Aggravated Menacing (M1), and Criminal Damaging (M2) in the Youngstown Municipal Court under case number 2023CRB00121Y. On February 22, 2023, all charges were dismissed at request of the victim.

On April 18, 2023, the Court conducted a Supervised Release Violation Hearing and Sentencing, at which time Defendant denied Violation Numbers 1 and 2. Officer Robert DiMaiolo testified on direct examination by the Government, with cross examination by the defense. The Government played a bodycam video (Exhibit 5) of the victim and her family's early morning interactions with law enforcement officers shortly after the above referenced

crimes occurred.[1] During those recorded interactions, no one indicated a perpetrator other than Defendant. The alleged victim testified that, after that early morning interaction with law enforcement, she went to municipal court and reported Defendant as the perpetrator of the crimes. Despite the strong evidence against Defendant, the victim attempted (unpersuasively) to recant, when examined on direct examination by defense counsel. The Government effectively cross examined the victim and submitted Government's Exhibits 1 through 5, which were admitted without objection. The Court found by a preponderance of the evidence that Defendant possessed a firearm, in violation of the terms of his supervised release, sustaining Violation No. 2. The Court proceeded to pronounce sentence after allocution.

Sentencing

Among other things, the Court has considered the evidence presented at the violation hearing, statutory maximum penalties pursuant to 18 U.S.C. § 3583(e)(3); the advisory policy statements set forth in Chapter Seven of the United States Sentencing Guidelines; and the suggested range of incarceration pursuant to U.S.S.G. § 7B1.4(a). Furthermore, the Court has considered the factors and conditions for sentencing listed in 18 U.S.C. § 3553(a) and 3583(d), respectively.

Based upon the Court's review and for the reasons set forth on the record, Defendant's term of supervised release is revoked. The Court varied upwards and imposed a term of incarceration of 24 months, for among other reasons, to protect society and promote respect for

[1] The video revealed a household of individuals of myriad ages joining the victim in recounting Defendant's visit to the home during which he discharged a firearm into the victim's car, forcibly broke the household's television and punched the victim in the neck.

the law. The Court recommends that Defendant be designated to a facility close to his home, such as FCI Elkton, Lisbon, OH, and be permitted to participate in any drug treatment and anger management/behavioral programs. Upon release, Defendant shall serve a three-year term of supervised release, with all uncompleted conditions of supervised release remaining imposed. The first six months of his supervised release shall be on location monitoring with a curfew. Defendant is prohibited from contacting the victim or her children without permission from his supervising officer. The special condition of mental health treatment is reimposed to include an anger management component.

IT IS SO ORDERED.

May 9, 2023
Date

/s/ Benita Y. Pearson
Benita Y. Pearson
United States District Judge

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 23a0273p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EDGARDO ESTERAS,

Defendant-Appellant.

No. 23-3422

On Petition for Rehearing En Banc

United States District Court for the Northern District of Ohio at Youngstown.
No. 4:14-cr-00425-10—Benita Y. Pearson, District Judge.

Decided and Filed: December 20, 2023

Before: SUTTON, Chief Judge; WHITE and THAPAR, Circuit Judges.

COUNSEL

ON PETITION FOR REHEARING EN BANC: Christian J. Grostic, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Cleveland, Ohio, for Appellant. **ON RESPONSE:** Matthew B. Kall, Jason Manion, UNITED STATES ATTORNEY'S OFFICE, Cleveland, Ohio, for Appellee.

The court issued an order denying the petition for rehearing en banc. MOORE, J. (pp. 3–9), delivered a separate opinion dissenting from the denial of the petition for rehearing en banc. GRIFFIN, J. (pp. 10–11), also delivered a separate opinion, in which BLOOMEKATZ, J., joined, dissenting from the denial of the petition for rehearing en banc.

ORDER

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision. The petition then was circulated to the full court. Less than a majority of the judges voted in favor of rehearing en banc.

Therefore, the petition is denied.

DISSENT

KAREN NELSON MOORE, Circuit Judge, dissenting from denial of rehearing en banc.[1] The top line of any sentence is generally the term of incarceration. What catches the eye is how long the defendant will be in prison, not how long the defendant will remain under court supervision. But in the federal system, supervised release—the often years' long period of court supervision and restrictions following incarceration—comes with the specter of more time in a cell. Judges may "revoke" a defendant's supervised release if a defendant violates court-ordered conditions, sending the defendant back to prison for months or possibly years. After Edgardo Esteras spent twelve months in federal prison on his original term of incarceration, the judge in his case sentenced him to 24 *more* months in prison—double his original sentence—for violating conditions of supervised release. R. 439 (Revocation Tr. at 85:13–21) (Page ID #2887).

Revocation of supervised release is immensely impactful, and sometimes carries consequences even greater than an original term of incarceration. In sentencing Esteras after revoking his supervised release, the district court focused on the retributive purpose of the additional term of incarceration. *See, e.g.*, *id.* at 81:17–22 (Page ID #2883) (explaining what information can be considered "in the *punishment* I will issue today" (emphasis added)); *id.* at 83:9–11 (Page ID #2885) ("[W]hat's been done before isn't sufficient enough to deter you, to encourage you to be *respectful of the law*, to be law-abiding." (emphasis added)). But the supervised-release statute tells district courts not to consider punishment as a purpose when imposing or revoking supervised release. When defense counsel objected to the district court's

[1]The court received a petition for rehearing en banc concerning the original order in this case, which followed binding Sixth Circuit precedent. The petition for rehearing en banc was circulated to the entire court, and less than a majority of the judges voted in favor of rehearing the original order en banc. Following circulation to the full court of the en banc petition, however, the panel revised its prior order and circulated it to the en banc court. En banc rehearing of the prior order was warranted, which is why I dissent from denial of rehearing en banc. And en banc rehearing remains warranted now that the panel is issuing an amended order, because that revised decision likewise relies on the same mistaken precedent. Because both the original and revised orders rely on *United States v. Lewis*, 498 F.3d 393 (6th Cir. 2007), I have addressed both in this dissent from denial of rehearing en banc. Esteras is of course free to petition for en banc rehearing again, now that the panel has filed a revised and published decision.

impermissible consideration of certain statutory factors embodying retributive purposes, the district court confirmed that it relied heavily on "promot[ing] respect for the law" in reaching its sentence, which represented an upward variance. *Id.* at 92:16–18 (Page ID #2894). In effect, there is a real chance that Esteras was essentially punished twice, raising concerns of a constitutional dimension and flagrantly violating Congress's intent in any event. Our precedent that allows district courts to consider unenumerated sentencing factors when revoking supervised release, *United States v. Lewis*, 498 F.3d 393 (6th Cir. 2007), relies on atextual reasoning directly contrary to Congress's purposes. It is an outlier among the circuits. Our failure today to correct *Lewis*'s basic mistakes usurps Congress's role, runs afoul of rudimentary principles of statutory interpretation, and ultimately undermines the purposes of supervised release. Today's decision in this case serves only to prolong our unfortunate adherence to a mistaken precedent.

Today's opinion defends *Lewis* on two grounds: "one textual, [and] one contextual." Amended Order at 5. Neither ground supports *Lewis* or today's decision. The statutory text is clear. It directs district judges to take account of certain sentencing factors, but not others, when revoking supervised release. Under 18 U.S.C. § 3583(e), a court "may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)," terminate, modify, extend, or revoke a defendant's term of supervised release. Notably absent from this list is § 3553(a)(2)(A), which directs district courts to consider "the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." Canons of statutory construction dictate that this omission was intentional and command district courts not to take account of the (a)(2)(A) factors when revoking supervised release. *See, e.g.*, *Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 168 (1993) (declining to extend Rule 9(b)'s pleading requirements to complaints alleging municipal liability because "the Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability"); *id.* ("*Expressio unius est exclusio alterius*."); *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and

purposely in the disparate inclusion or exclusion." (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972))).

Simply put, *Lewis* and today's opinion offer no explanation for why Congress deliberately chose to include some, but not all, of the § 3553(a) factors in § 3583(e). Today's opinion declares that § 3583 "generally gives courts considerable discretion over supervised-release decisions after considering the listed factors." Amended Order at 5 (citing *Lewis*, 498 F.3d at 400). But neither *Lewis* nor the instant opinion can ground this contention in the statutory text. Rather, § 3583(e) explicitly *constrains* the exercise of discretion, directing district courts to focus on only the enumerated factors. Had Congress wished for district courts to consider the § 3553(a)(2)(A) factors, it would have made § 3583(e) coterminous with § 3553(a). Congress did not. *See Azar v. Allina Health Servs.*, 587 U.S. ----, 139 S. Ct. 1804, 1813 (2019) (explaining that courts should not rely on the "doubtful proposition that Congress sought to accomplish in a 'surpassingly strange manner' what it could have accomplished in a much more straightforward way" (quoting *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 647 (2012))).

The context follows from the text. In *Tapia v. United States*, the Supreme Court explained that 18 U.S.C. § 3553(a)(2)(A)–(D) reflects "the four purposes of sentencing generally": "retribution, deterrence, incapacitation, and rehabilitation." 564 U.S. 319, 325 (2011). The statute's "provisions make clear that a particular purpose may apply differently, or even not at all, depending on the kind of sentence under consideration." *Id.* at 326. Following the statute's plain text, "a court may *not* take account of retribution (the first purpose listed in § 3553(a)(2)) when imposing a term of supervised release." *Id.* Section § 3583(e), which pertains to revoking supervised release, is the mirror-image of § 3583(c), which pertains to imposing a term of supervised release. It follows that both subsections direct district courts not to consider retribution when imposing or revoking supervised release.

Faced with this obvious hurdle, today's decision attempts to rewrite *Tapia*. Of course, I need not put much gloss on what Justice Kagan straightforwardly said in that opinion: a district court cannot rely on the § 3553(a)(2)(A) factors when making decisions concerning supervised release. *Tapia*, 564 U.S. at 326. Today's decision attempts to skirt this plain statement through

two paragraphs of explanation of what Justice Kagan supposedly must have meant. I, like Justice Kagan, prefer to rely on the actual text of the statute. In any event, today's attempt to square what the district court did with *Tapia* is futile. For one, today's opinion gets its facts wrong. It says in conclusory words that no one has shown that the district judge let retribution guide the decision. Amended Order at 7. Most obviously, Esteras has. Pet. Rehearing En Banc at 10 ("The district court expressly relied on the section 3553(a)(2)(A) factors—specifically, *the need to punish* and to promote respect for the law—when revoking Esteras' supervised release." (emphasis added)). And this assertion of the panel is belied by the plain words the district court used in the proceeding, which sounded in retribution. Like its take on *Tapia*, today's decision would rather reconceptualize the very words the district court used—"punishment" and "punitive"—and chalk them up to "set[ting] the stage" rather than an error on the part of the district court. Of course, "setting the stage" by thinking of the sentence in terms of punishment is precisely what a district court must not do per the text of the statute. To the extent that *Tapia* explains that taking the § 3553(a)(2)(A) factors into account *necessarily* means taking retribution into account, today's decision's myopic focus on a word here or there entirely misses the point.

Tapia is also instructive on statute-drafting more broadly. But once again, today's decision would rather ignore its clear import. Today's decision suggests that unless Congress enacts a separate statutory provision forbidding district courts to take account of certain factors, as it did in § 3582(a), the purposeful omissions in § 3583(c) and (e) are meaningless. Yet Congress can accomplish its statutory purposes in a variety of ways, as *Tapia* recognizes. Again, the only understanding of § 3583(e) that gives effect to its plain text is that explained by *Tapia*.

That retributive concerns are not to be taken into account reflects Congress's judgment of the purpose of supervised release. The relevant legislative history explicitly states that "the sentencing purposes of incapacitation and punishment would not be served by a term of supervised release—that the primary goal of such a term is to ease the defendant's transition into the community." S. Rep. No. 98-225, at *124 (1983); *see also Johnson v. United States*, 529 U.S. 694, 708–09 (2000) (citing the Senate Report and discussing the purpose of supervised release). By contrast, taking the retributive § 3553(a)(2)(A) factors into account when imposing or revoking supervised release contravenes this congressional purpose and also creates "serious

constitutional questions . . . by construing revocation and reimprisonment as punishment for the violation of the conditions of supervised release." *Johnson*, 529 U.S. at 700. The Sentencing Guidelines confirm this understanding: revocation of supervised release is not meant to "substantially duplicate the sanctioning role of the court with jurisdiction over a defendant's new criminal conduct," but instead to "sanction primarily the defendant's breach of trust." U.S. Sent'g Guidelines Manual Ch. 7A Intro. (U.S. Sent'g Comm'n 2023).

No doubt, there is some level of overlap between the factors district courts must consider when revoking supervised release, and those that a district court cannot consider. *See Lewis*, 498 F. 3d at 400 (explaining that a district court likely takes into account the seriousness of an offense when considering the nature and circumstances of the offense). But today's opinion treats this reality—that there is some degree of overlap—as a virtue, manifestly dishonoring Congress's decision to omit the § 3553(a)(2)(A) factors from consideration. Amended Order at 6 ("To think about the one requires the judge to think about the other."); *id.* ("To neglect the one dishonors the other."). That a district court may consider, to *some* degree, the seriousness of the offense, however, does not justify allowing district courts to disregard Congress's mandate that retributive concerns should not influence the overall sentence. Put differently, the overlap problem first identified by *Lewis* is exaggerated to the extent that a district court can avoid running afoul of the statute by avoiding viewing revocation of supervised release as retribution.

Perhaps recognizing the futility of any text-based argument, today's decision reinvents the overlap argument in the form of a strawman. It suggests that Congress cannot possibly have meant that district courts should not rely on the § 3553(a)(2)(A) factors when revoking supervised release, because "Congress requires courts to consider the same set of factors when first imposing a term of supervised release as when revoking one." Amended Order at 6. Per today's decision, district courts would be forced to "adjourn the hearing after imposing a[n] [initial] sentence" and "start over with a new unblemished inquiry into the right term of supervised release" so as to not mistakenly consider the § 3553(a)(2)(A) factors. *Id.* This argument is disingenuous. What the statute requires is that district courts not view supervised release as an additional punishment, and that district courts adjust their rationale and

considerations accordingly when imposing or revoking supervised release. The district court manifestly failed to do that here.

What is more, some degree of overlap cannot explain away Congress's explicit choice to omit certain sentencing factors from consideration when revoking supervised release. In this way, the analyses of *Lewis* and today's opinion are self-defeating. If Congress believed that courts would inevitably consider the § 3553(a)(2)(A) factors when revoking supervised release, it would not have omitted such factors from § 3583. *Lewis*, 498 F.3d at 400. The same is true if Congress affirmatively wanted district courts to consider such factors. *Id.* at 399–400. Regardless, bare judicial pragmatism cannot overcome the plain text of the statute, which directs district courts not to take retributive sentencing factors into account. *United States v. Tohono O'Odham Nation*, 563 U.S. 307, 317 (2011) ("[C]onsiderations of policy divorced from the statute's text and purpose could not override its meaning.").

Beyond these fundamental errors, en banc reconsideration is warranted because the Sixth Circuit's approach is an outlier among the circuit courts. *Lewis* and today's opinion are entirely untethered from the statutory text, and it would appear that they allow a district court to rely *exclusively* on the § 3553(a)(2)(A) factors when revoking supervised release. *Lewis*, 498 F.3d at 399–400 (holding "that it does not constitute reversible error to consider § 3553(a)(2)(A) when imposing a sentence for violation of supervised release, even though this factor is not enumerated in § 3583(e)"). In other words, our cases contain no limits and allow district courts to disregard § 3583(e) *in toto*. Though there is a circuit split on this issue, most circuits would find that a revocation of supervised release principally based on the § 3553(a)(2)(A) factors is procedurally unreasonable. *See, e.g.*, *United States v. Booker*, 63 F.4th 1254, 1260 (10th Cir. 2023) ("[I]t is procedural error to consider an unenumerated [§ 3553(a)(2)(A)] factor."); *United States v. Miqbel*, 444 F.3d 1173, 1182–83 (9th Cir. 2006) (holding that "mere reference" to unenumerated § 3553(a)(2)(A) factors would not be reversible error, but that further consideration of such factors when revoking supervised release is procedurally unreasonable); *United States v. Rivera*, 784 F.3d 1012, 1017 (5th Cir. 2015) ("[A] sentencing error occurs when an impermissible consideration is a dominant factor in the court's revocation sentence."); *United States v. Young*, 634 F.3d 233, 241 (3rd Cir. 2011) (recognizing that consideration of

unenumerated § 3553(a)(2)(A) factors would not be reversible per se error, but that "there may be a case where a court places undue weight on the" § 3553(a)(2)(A) factors); *United States v. Webb*, 738 F.3d 638, 642 (4th Cir. 2013) ("[A]lthough a district court may not impose a revocation sentence based predominately on the [§ 3553(a)(2)(A) factors], we conclude that mere reference to such considerations does not render a revocation sentence procedurally unreasonable."); *United States v. Clay*, 752 F.3d 1106, 1108 (7th Cir. 2014) ("[W]e now join the majority of circuits that have faced this issue and rule that this subsection [§ 3553(a)(2)(A)] may be considered so long as the district court relies *primarily* on [enumerated] factors." (emphasis added)). *Lewis* appears expressly to adopt punishment as a valid rationale for revoking supervised release, directly contrary to the statute and Congress's intent. 498 F.3d at 400 ("[A]lthough violations of supervised release generally do not entail conduct as serious as crimes punishable under the § 3553(a) regime, revocation sentences are similarly intended to 'sanction,' or, analogously, to 'provide just punishment for the offense' of violating supervised release.").

Lewis and today's decision bulldoze over each and every indication of congressional intent available in favor of an explicitly policy-driven outcome. That includes plain text, legislative history, and information from the Sentencing Commission. "[D]eference to the supremacy of the Legislature, as well as recognition that Congress[members] typically vote on the language of a bill, generally requires us to assume that 'the legislative purpose is expressed by the ordinary meaning of the words used.'" *United States v. Locke*, 471 U.S. 84, 95 (1985) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)). Here, this deference requires that district courts honor Congress's explicit choice that supervised release not be an additional punishment, and that district courts adjust their rationale and considerations accordingly. The district court failed to do that here. It plainly viewed revocation of supervised release as punishment, and sentenced Esteras to 24 months' imprisonment based on impermissible sentencing factors. R. 439 (Revocation Tr. at 81:17–22, 83:9–11, 85:13–21) (Page ID #2883, 2885, 2887). Because our precedent mistakenly allows a district court to do so, I respectfully dissent from the denial of rehearing en banc in this case.

DISSENT

GRIFFIN, Circuit Judge, dissenting.

I respectfully dissent from the denial of the Petition for Rehearing En Banc. I would grant the petition because the question raised is of exceptional importance warranting consideration and decision by our En Banc Court after full briefing and argument. Fed. R. App. P. 35(a)(2).

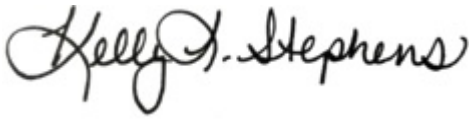
Under *United States v. Lewis*, district courts may revoke supervised release—and impose more prison time—for the purpose of punishment, a consideration ostensibly prohibited by the statutory text. 498 F.3d 393, 399–400 (6th Cir. 2007); *see also* 18 U.S.C. § 3583(e) ("The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)," revoke a term of supervised release); *Tapia v. United States*, 564 U.S. 319, 326–27 (2011) (explaining that 18 U.S.C. § 3553(a)(2)(A–D) reflects "the four purposes of sentencing generally" and that § 3553(a)(2)(A) reflects the purpose of punishment).

Lewis's holding has enormous consequences for the liberty of hundreds of defendants within our circuit who are sentenced every year for violating supervised-release conditions. *See* U.S. Sent'g Comm'n, *Federal Probation and Supervised Release Violations*, 51–52 (July 2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200728_Violations.pdf (reflecting an average of 1,685 probation and supervised-release violations each year in district courts within the Sixth Circuit between 2013 and 2017). Under *Lewis*, our district courts, when sentencing supervised-release violators, are more likely to revoke supervised release and impose longer prison terms because they are permitted to punish the violators.

Under the Federal Rules of Appellate Procedure, cases in which the dispositive issues "have been authoritatively decided" are not usually set for oral argument. Fed. R. App. P. 34(a)(2)(B). Because of *Lewis*, this case was a "Rule 34" case and decided summarily. In my view, given the widespread impact of *Lewis* and the vigorous debate concerning its viability, as

articulated by Judge Moore's dissent and the varying circuit decisions on this issue, this is an exceptionally important issue warranting full briefing and argument before our En Banc Court.

ENTERED BY ORDER OF THE COURT



Kelly L. Stephens, Clerk

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 24a0048p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EDGARDO ESTERAS,

Defendant-Appellant.

No. 23-3422

On Petition for Rehearing En Banc.
United States District Court for the Northern District of Ohio at Youngstown.
No. 4:14-cr-00425-10—Benita Y. Pearson, District Judge.

Decided and Filed: March 7, 2024

Before: SUTTON, Chief Judge; WHITE and THAPAR, Circuit Judges.

COUNSEL

ON PETITION FOR REHEARING EN BANC: Christian J. Grostic, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Cleveland, Ohio, for Appellant. **ON RESPONSE:** Matthew B. Kall, Jason Manion, UNITED STATES ATTORNEY'S OFFICE, Cleveland, Ohio, for Appellee.

The court issued an order denying the petition for rehearing en banc. MOORE, J. (pg. 3), delivered a separate opinion, in which STRANCH, J., joined, dissenting from the denial of the petition for rehearing en banc. GRIFFIN, J. (pp. 4–5), also delivered a separate opinion, in which STRANCH and BLOOMEKATZ, JJ., joined, dissenting from the denial of the petition for rehearing en banc.

ORDER

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision. The petition then was circulated to the full court. Less than a majority of the judges voted in favor of rehearing en banc.

Therefore, the petition is denied.

DISSENT

KAREN NELSON MOORE, Circuit Judge, dissenting from denial of rehearing en banc. I adhere to my dissent from the denial of Esteras's first petition for en banc rehearing, and again respectfully dissent today. *United States v. Esteras*, 88 F.4th 1170, 1171–76 (6th Cir. 2023) (Moore, J., dissenting). I would grant the current petition for rehearing because *United States v. Lewis*, 498 F.3d 393 (6th Cir. 2007), and the amended panel order in this case contravene the statutory text, disregard Supreme Court precedent, and place the Sixth Circuit at the extreme of a circuit split, allowing our district courts expressly to punish defendants for violations of supervised release. *Esteras*, 88 F.4th at 1171–75 (Moore, J., dissenting). Judge Griffin rightly flags the severe consequences that our precedents create for the hundreds of individuals who face revocations of supervised release each year, and correctly points out that these consequences and the shaky foundation of our precedents mean that Esteras's petition raises questions of exceptional importance. En banc rehearing remains warranted for all of these reasons.

DISSENT

GRIFFIN, Circuit Judge, dissenting.

As I did after the first en banc poll, *United States v. Esteras*, 88 F.4th 1170, 1176 (6th Cir. 2023) (Griffin, J., dissenting from denial of rehearing en banc), I respectfully dissent from the denial of Esteras's Second Petition for Rehearing En Banc. I would grant the petition because the question raised is of exceptional importance warranting consideration and decision by our En Banc Court after full briefing and argument. Fed. R. App. P. 35(a)(2).

Under *United States v. Lewis*, district courts may revoke supervised release—and impose more prison time—for the purpose of punishment, a consideration ostensibly prohibited by the statutory text. 498 F.3d 393, 399–400 (6th Cir. 2007); *see also* 18 U.S.C. § 3583(e) ("The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)[,] . . . revoke a term of supervised release . . . ."); *Concepcion v. United States*, 597 U.S. 481, 494 (2022) (interpreting § 3583(c)—which, like § 3583(e), excludes § 3553(a)(2)(A) from its list of "only certain factors"—and noting that exclusion "expressly preclude[s] district courts from considering the need for retribution"); *Tapia v. United States*, 564 U.S. 319, 325–26 (2011) (explaining that 18 U.S.C. § 3553(a)(2)(A–D) reflects "the four purposes of sentencing generally" and that § 3553(a)(2)(A) reflects the purpose of punishment).

Lewis's holding has enormous consequences for the liberty of hundreds of defendants within our circuit who are sentenced every year for violating supervised-release conditions. *See* U.S. Sent'g Comm'n, *Federal Probation and Supervised Release Violations* 51–52 (July 2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200728_Violations.pdf (reflecting an average of 1,685 probation and supervised-release violations each year in district courts within the Sixth Circuit between 2013 and 2017). Under *Lewis*, our district courts, when sentencing supervised-release violators, are more likely to revoke supervised release and impose longer prison terms because they are permitted to punish the violators.

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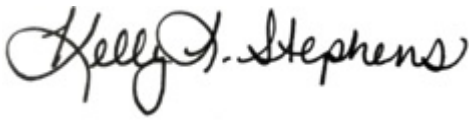
ENTERED BY ORDER OF THE COURT



Kelly L. Stephens, Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	**Case No. 4:14-cr-425**
Plaintiff,	)	**Youngstown, Ohio**
	)	**Tuesday, April 18, 2023**
vs.	)	**3:11 p.m.**
	)	
EDGARDO ESTERAS,	)	
	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE BENITA Y. PEARSON1
UNITED STATES DISTRICT JUDGE

SUPERVISED RELEASE VIOLATION HEARING
AND SENTENCING

APPEARANCES:

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Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

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Office of Pretrial Services and Probation:
Michael Zakrajsek

- - -

change her story. But only enough to make her appear confused. Nothing she said that was of significance while under oath persuades me to believe that you did not possess the weapon, that you did not point it at that household, that you did not discharge it at least three times.

17:08:20

Now, regarding the new law violation, I wish I were better versed in the ordinances, regulations, the actual law of Youngstown, knowing its elements. I suspect that your behavior at targeting the house with a weapon and actually assaulting the car with at least three bullets, the casing of one which was found in the driveway, match the elements. But I just don't know. And it really doesn't matter. Because as I told counsel at the beginning of the hearing, both are Grade C violations. You are subject to the same penalties regardless of whether I find that you violated your term of supervised release in one or two ways.

17:08:38

17:08:54

So I find that the new law violation and Ms. Infante's corroboration of it by presenting herself at Youngstown Municipal Court the next day is evidence that I can consider in the punishment I will issue today. But I find explicitly that you violated your term of supervision by possessing a weapon.

17:09:11

I will allow you to allocute now, and then I will respond by imposing consequences. You have the opportunity to speak if you would like to be heard.

17:09:28

(Discussion held off the record between the defendant and Mr. Grostic.)

THE DEFENDANT: I really ain't got -- I ain't got that much to say. If -- it's -- I don't.

17:09:53 THE COURT: You choose not to allocute?

THE DEFENDANT: What can I say if you -- I just don't.

MR. GROSTIC: Okay. If I could have one moment, Your Honor.

17:10:06 THE COURT: Certainly.

(Discussion held off the record between the defendant and Mr. Grostic.)

MR. GROSTIC: Your Honor, after discussion, which I appreciate the Court's indulging me, Mr. Esteras has

17:10:33 confirmed with me that he does not want to say anything further.

THE COURT: Certainly.

That's fine, Mr. Esteras. You've been before a federal judge at least three times facing a sentencing. The

17:10:47 first time was my colleague, Judge Polster. The last time was me. This time is also me meting out a sentence.

So I understand that you understand the right you have and the right you give up. You have been under a term of supervised release at least twice. When I imposed

17:11:06 sentence upon you the last time, I sentenced you for the

commission of the crime that was on my docket, conspiracy to distribute heroin, and I also sentenced you for the violation of the earlier term of supervision imposed that you were under when you were indicted in the new case then on my docket, and that was possession with intent -- conspiracy to possess with intent cocaine and cocaine base.

17:11:25

So you are no stranger to law violations and no stranger to federal court. My worry for you, sir, is that what's been done before isn't sufficient enough to deter you, to encourage you to be respectful of the law, to be law-abiding.

17:11:45

Even things I heard in the video that were repeated today, it appears that you assault that household regularly. That you argue in a violent way with Ms. Infante regularly. I am not really sure what it will require for you to learn that enough is enough. You were given probation by Judge Polster. I imposed two rather lenient sentences, 15 months on that term of supervision violation for Judge Polster; for my own case, 12 months. I ran them consecutively. I thought 27 months might encourage you to do better.

17:11:59

17:12:20

It was with some reluctance, a great deal actually, that I even suspended the GED qualification, thinking that perhaps if you were to become better educated, prove to yourself and others that you can read and write at

17:12:34

at least a high school level, you might begin to see yourself as something other than a law violator, someone who hits women, someone who disturbs children in the middle of the night.

17:12:49 My reading of the police report is that Officer DiMaiolo was at that household at about 3:28 a.m. on a school night. Late January. Vacation is over. There were school-aged persons in that video, and yet they were awake -- not all of them were school-aged, of course -- 17:13:10 because you had assaulted the car and the household with your intentions and broken the TV.

One of the youngsters said, "I was scared. Now I can't watch TV." That might seem insignificant to you, but children shouldn't grow up afraid of what their father or 17:13:26 their mother's boyfriend might do to them at night.

When I consider the guidance given to us by Officer Zakrajsek that I've confirmed with you, is not objected to, and in my opinion is correct, you are subject, pursuant to the advisory guidelines, to 6 to 12 months. We 17:13:45 know that your offense that's brought you here on my docket carries a lifetime of supervision.

Having found that you are in violation of that term of supervised release by the preponderance of the evidence, I must escalate the consequences imposed. And I 17:14:00 do here impose escalated consequences by exercising my

discretion to vary upwards, above even the high end of the advisory guidelines, because your behavior is not average, it's not typical, it's not mine run, it's exceptional. It's disrespectful. It's dangerous. And it must stop.

17:14:21 And if you cannot stop yourself, I will separate you from society for long enough to at least allow you to reconsider your behavior. And hopefully when you return under the new term of supervision that I will impose, you will do better. You will think before you act. And you

17:14:38 will understand that never possessing a weapon or dangerous device or a single bullet is meant for you for the rest of your natural life.

Please listen as I formally impose consequences.

I revoke your term of supervised release. I

17:14:54 hereby impose a term of incarceration of 24 months. A new term of supervised release of three years. Every term of supervised release that I imposed earlier, the last time I sentenced you in September of 2018, is reimposed unless it's been met. For instance, I don't require you to obtain a GED

17:15:15 again. If you've paid your special assessment, that's satisfied.

But every other term, including substance abuse treatment and testing, a search and seizure provision, mental health treatment are the ones I am listing simply

17:15:31 because I believe they have likely not been met. And if --

I mean, likely are those that are capable of being repeated and shall be repeated.

And I am adding a new one. I am adding, for the first six months of your release -- keep in mind, I can incarcerate you for up to three years. I have stopped at 24 months. But once you're released to start this new three-year term of supervised release, for the first six months, you are going to be on location monitoring with a curfew.

17:16:01 Mr. Zakrajsek, Mr. Esteras goes nowhere without the explicit permission of his supervising probation officer. He shall only live at a place approved by the probation office. Make sure there are no weapons there. If he's unable to find such a place, then he'll start his term 17:16:17 of release by living in a residential reentry center until he has enough money to pay his own rent and live in a place that is suitable.

I order that this curfew allow him to work, to attend to medical appointments as necessary, and to only be 17:16:34 in the presence of the victim and the minor children who live with him with the permission of the supervising probation officer.

Is all of that clear, Mr. Esteras?

THE DEFENDANT: Yes, Your Honor.

17:16:44 THE COURT: Sir, I have revoked your term of

supervised release. You have a new term -- a new ability to appeal the sentence that I have imposed. There is still the limit. You've heard this before. It remains 14 days from the date on which I reduce to writing the sentence I've imposed. If you allow that 14-day period to go by without filing a notice of appeal, you may have forever waived your appellate rights.

Mr. Grostic, will you speak with your client about his appellate rights?

17:17:13 MR. GROSTIC: Yes, Your Honor.

THE COURT: Should he ask you to do so, will you timely file a notice of appeal for him?

MR. GROSTIC: Yes, Your Honor.

THE COURT: You should know, Mr. Esteras, as you likely do, if you cannot afford counsel, just like you do not pay Mr. Grostic or his office, counsel will be appointed to represent you free of charge. So that should not be the reason you don't timely file a notice of appeal.

Do you understand that?

17:17:39 THE DEFENDANT: (Nodding head up and down.)

Yes, Your Honor.

THE COURT: Mr. Zakrajsek, you have heard me reimpose conditions that are obviously not completed and are capable of being repeated, and I believe will be of

17:17:54 assistance to Mr. Esteras when he returns to the community.

And I have added six months of location monitoring with a curfew.

Is there anything else you'd like me to consider at this time?

17:18:05 OFFICER ZAKRAJSEK: Your Honor, I would like to petition the Court to consider possibly an anger management program as well due to his anger issues.

THE COURT: Thank you. I think that's an excellent suggestion.

17:18:19 So in the past, Mr. Esteras, I have ordered that you be subjected to mental health treatment. I am ordering that again. It will start with an evaluation. Part of the treatment you'll undergo after that evaluation will be anger management.

17:18:35 If you do behave in the way that the violation that's brought you to court seems to indicate is a regular occurrence, you must learn to control yourself or you are likely going to do something that is going to separate you from society for a much longer period than just 24 months.

17:18:55 So I do impose, as a component of mental health, anger management.

What else, Mr. Zakrajsek?

OFFICER ZAKRAJSEK: Nothing further, Your Honor. Thank you.

17:19:04 THE COURT: Thank you for your work in this case.

Mr. Joyce, what do you believe I can do to improve the terms of Mr. Esteras's three years of supervised release?

MR. JOYCE: Your Honor, I believe the conditions that you have outlined here, with the addition from -- the additional recommend by Mr. Zakrajsek are appropriate, and I would offer nothing additional. Thank you.

THE COURT: Your objection to the sentence imposed, Government's Counsel.

MR. JOYCE: I have no objection, Your Honor.

THE COURT: Mr. Grostic, why don't I start by asking you what you think I can do to improve the conditions of supervised release. Of course, all of the mandatory, standard, and the conditions I've just outlined are those that fall under special conditions.

MR. GROSTIC: (Nodding head up and down.)

THE COURT: Thank you for nodding that you understood that. If there are any others that you believe I should impose that will assist your client or impose in a different way, like Mr. Zakrajsek suggested regarding refining mental health, it's not limited to anger management, but that's now a specific component, is there anything else you'd suggest?

MR. GROSTIC: I don't believe so, Your Honor, as far as conditions of supervised release.

We would ask, as part of the custodial sentence, for a recommendation close to home.

THE COURT: And close to home, meaning here in the Northern District of Ohio?

17:20:32 MR. GROSTIC: Yes.

THE COURT: I will make that recommendation.

Where were you housed during your last term of incarceration, Mr. Esteras?

THE DEFENDANT: Hazelton.

17:20:43 THE COURT: Hazelton. I don't know what the policy of the Bureau of Prisons is regarding sending you back to a place where you've been. If there is no prohibition, if they were to send you back to Hazelton, is that something you'd like me to ask for, or would you rather

17:21:01 something even closer to home, such as Elkton?

THE DEFENDANT: Yeah, closer to home.

THE COURT: More like Elkton than Hazelton?

THE DEFENDANT: Yes, ma'am.

THE COURT: All right. I will make that

17:21:14 recommendation.

What else? What other recommendations, if there are any, Mr. Grostic?

MR. GROSTIC: May I have one moment, Your Honor?

THE COURT: Certainly.

17:21:20 (Discussion held off the record between the defendant

and Mr. Grostic.)

MR. GROSTIC: Your Honor, Mr. Esteras would also request that the Court recommend that he be evaluated for placement in any applicable drug treatment program, as well as any applicable behavioral management or mental health treatment program for which he might qualify.

17:21:41

THE COURT: Thank you. I will make both of those recommendations as well.

My belief, Mr. Esteras, is that a 24-month term, while longer than one you would like, I'm sure, is not long enough for the most intensive drug treatment program, but I am sure there are others that may be helpful to you. And I hope that along with my recommendation, you will sign up and apply yourself to any programs that you're admitted. And I will recommend those for behavioral management and drug treatment.

17:21:57

17:22:17

What else, if anything else? I am open to adopting whatever you recommend if it will help Mr. Esteras.

MR. GROSTIC: No, nothing further, Your Honor. Thank you.

17:22:31

THE COURT: Your objection to the sentence imposed on behalf of your client, Mr. Grostic.

MR. GROSTIC: Your Honor, I believe the Court indicated that it considered factors -- the factor in Section 3553(a)(2)(A) as part of its sentence. I have

17:22:44

objected to that in the past. I am aware that actually the Sixth Circuit has held that that is something the Court can consider, but I would simply like to lodge that objection for the record.

17:23:12 THE COURT: Mr. Grostic, when you specify Section 3553(a)(2)(A), are you referring to underneath -- (2) is the need for the sentence to be imposed, correct? You are specifically objecting to, "to reflect the seriousness of the offense, to promote respect for the law, and provide

17:23:31 just punishment for the offense," that's what you're directing your objection to?

MR. GROSTIC: That's correct, Your Honor.

THE COURT: To any one of those three subfactors or all of them?

17:23:44 MR. GROSTIC: All of them, yes.

THE COURT: Well, I would agree with you, part of my contemplation certainly is the need for the sentence imposed, to promote respect for the law. I mentioned deterring Mr. Esteras as well. I also meant, and I think

17:24:05 it's fair for you to infer, concern about the safety of the community, which is later beyond (a)(2). And I specifically referenced the ability even to depart or, pardon me, vary upwards to separate Mr. Esteras from the average, typical, mine run-type defendant.

17:24:27 So I think I have sufficiently addressed what your

objection is, and you are entitled to it.

I will add just one other point. If it enlarges your objection, you will be able to tell me.

When I told counsel earlier that this is a 104(a) hearing, under the rules of evidence, that they're suspended, I still, being a student of the rules of evidence, it is hard to put them out of your mind. And even though I am not obligated to explicitly make calls on matters, objections, sustain, overrule them, I still try to hew closely to considering evidence in a way that makes sense when the rules of evidence are considered.

And I want the record to reflect that when I did that, and I suspect Mr. Grostic might have been doing this as well, I kept in mind Rule of Evidence 803. Rule of Evidence 803 is one of those rules that outlines exceptions to the rules against hearsay, and it explicitly says, "Regardless of whether a declarant is available as a witness, Judge, you can consider certain things."

And these are things that are well established to be truthful, or more likely than not, I should say, to be truthful, credible. And they include present sense impressions, statements made while explaining an event or condition, those statements made immediately after the declarant perceived it.

So like those statements, Mr. Esteras, that

Ms. Infante made as soon as Officer DiMaiolo showed up, I considered, because I believe, as Mr. Joyce said, she was her most credible at those moments.

"Excited utterance, a statement relating to a 17:26:18 startling event or condition made while the declarant was under the stress of the excitement that it caused."

Those folks in that house, the youngster, the woman with the box braids, the two young women who were standing on either side of Ms. Infante, one of whom was the 17:26:36 one who said, "I was scared. I can't watch TV." The other said, "Why he point a gun at us?" I considered those excited utterances and found them to be credible.

"Then existing mental, emotional, or physical condition" is another one of those categories that has sort 17:26:54 of a threshold, a built-in credibility. I don't have to accept them, but I use that as a way to cabin what I was hearing on the witness stand compared to what I had heard in that video.

So I used those things, Mr. Grostic. And I think 17:27:11 that was part of the argument made by Mr. Joyce to corroborate what I heard on the video and to discredit what I heard from Ms. Infante during most of her testimony. There were nuggets of truth, very few of them. Most of the time she made up answers purposefully to distinguish today's 17:27:33 testimony from what we saw in the video.

If you'd like to enlarge your objection, you have every right to and I'll allow it, please.

MR. GROSTIC: No, nothing further, Your Honor. Thank you.

17:27:42 THE COURT: Thank you.

Thank you for the work you've done, Counselors, in making a full record.

Mr. Esteras, I meant it when I said earlier that I am proud of you for earning your GED. That told me, even

17:27:58 after you knew you were not obligated to do it, you persisted and you did it.

My hope is you'll give some thoughts to your condition, your own circumstances, your role in these conditions and circumstances, and you will continue despite

17:28:12 what you think anyone thinks about you, go forward, improve yourself and have a better life. I still believe you can do that.

I could have given you the three years. I have not. I have given you what I have given you. You have

17:28:24 earned what I have given you. But my hope is you'll go forward. The three years of supervised release won't only be punitive. Meaning the location monitoring with the curfew is meant to restrict your freedom, make sure you're not doing things that you and I will regret. But the terms,

17:28:42 the anger management, the other terms that are there are

there to bolster you, help you to do better going forward. You are still a young man. I hope you will choose a different lifestyle.

The hearing is adjourned.

17:29:05 THE CLERK: All rise.

(Proceedings concluded at 5:28 p.m.)

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Mary L. Uphold June 22, 2023
Mary L. Uphold, RDR, CRR Date

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 24a0052p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

TIMOTHY MICHAEL JAIMEZ fka Timothy M. Watters,
Defendant-Appellant.

No. 23-3189

Appeal from the United States District Court for the Northern District of Ohio at Toledo.
No. 3:10-cr-00004-2—James G. Carr, District Judge.

Decided and Filed: March 12, 2024

Before: GRIFFIN, THAPAR, and NALBANDIAN, Circuit Judges.

COUNSEL

ON BRIEF: Andrew R. Schuman, Bowling Green, Ohio, Kevin M. Schad, FEDERAL PUBLIC DEFENDER'S OFFICE, Cincinnati, Ohio, for Appellant. Ava R. Dustin, Dexter Phillips, UNITED STATES ATTORNEY'S OFFICE, Toledo, Ohio, for Appellee.

OPINION

THAPAR, Circuit Judge. Timothy Jaimez pled guilty to federal drug charges. After his second supervised-release violation, the district court sentenced him to sixty months' imprisonment. Because that sentence is procedurally and substantively reasonable, we affirm.

I.

Timothy Jaimez pled guilty to conspiring to possess narcotics with the intent to distribute them. After serving time in prison, he began a term of supervised release. While on release, Jaimez used drugs, failed to maintain employment, and failed to truthfully disclose financial information to his probation officer. So a court revoked his release.

When Jaimez began a second term of supervised release, his behavior didn't improve. Police found him transporting marijuana in his car with the co-felons from his original conviction. And at Jaimez's properties, police found cocaine base, a shell casing, and a drug press. Based on this conduct, an Ohio court found Jaimez guilty of attempting to traffic marijuana.

The United States then sought to revoke Jaimez's release. It alleged three violations: (1) being charged with a new crime, (2) associating with known felons, and (3) possessing drug paraphernalia. In line with probation's report, the court classified Jaimez's first violation as "Grade A" under the Sentencing Guidelines. *See* U.S.S.G. § 7B1.1(a)(1). That carried a sentencing range of fifty-one to sixty months' incarceration. *See id.* § 7B1.4(a); 18 U.S.C. § 3583(e)(3). Over Jaimez's objection, the district court sentenced him to sixty months' incarceration, followed by six years of supervised release.

II.

Jaimez now appeals, claiming his sentence is procedurally and substantively unreasonable. Applying an abuse-of-discretion standard, we conclude that it's neither. *See United States v. Adams*, 873 F.3d 512, 516–17 (6th Cir. 2017).

A.

Jaimez first challenges his sentence's procedural reasonableness. He argues the court (1) inadequately explained his sentence, (2) improperly considered section 3553(a)(2)(A) factors, and (3) incorrectly classified his release violation as Grade A. Jaimez is wrong on all three counts.

Adequate Explanation. A court need not "engage in a ritualistic incantation" of statutory sentencing factors. *United States v. Chandler*, 419 F.3d 484, 488 (6th Cir. 2005) (citation omitted). Nor must a court explicitly address every factor. *United States v. Collington*, 461 F.3d 805, 809 (6th Cir. 2006). Rather, the record needs to show only that the court considered the applicable factors. *United States v. McBride*, 434 F.3d 470, 474 (6th Cir. 2006).

Jaimez's sentencing passes this very easy test. During sentencing, the court discussed Jaimez's Guidelines range with the parties. *See* 18 U.S.C. §§ 3553(a)(4)(B), 3583(e). The court referenced Jaimez's criminal history and previous release violations. *See id.* §§ 3553(a)(1), 3583(e). The court also sought to deter Jaimez and others from violating release conditions. *See id.* §§ 3553(a)(2)(B), 3583(e). And the court recognized a need to promote respect for the law and protect the public. *See id.* §§ 3553(a)(2)(A), (C), 3583(e); *see also United States v. Lewis*, 498 F.3d 393, 399 (6th Cir. 2007). Given this record, it's clear the court considered the federal sentencing factors.

Section 3553(a)(2)(A) Factors. Jaimez next takes issue with the factors the court did expressly consider: the seriousness of his offense, the promotion of respect for the law, and the provision of just punishment. Jaimez argues the court shouldn't have considered these factors because the statute governing revocation doesn't require it. *See* 18 U.S.C. § 3583(e). But we've made clear that district courts may nonetheless consider these factors when imposing revocation sentences. *See Lewis*, 498 F.3d at 399–400; *United States v. Esteras*, 88 F.4th 1163, 1167–70 (6th Cir. 2023), *reh'g en banc denied*, --- F.4th ----, 2024 WL 981140 (6th Cir. 2024).[1] Thus, it wasn't unreasonable for the court to consider them here.

Violation Grade. A release violation is "Grade A" if it involves drug conduct punishable by more than a year in prison. U.S.S.G. § 7B1.1(a)(1). Here, there was sufficient evidence of such conduct. First, police witnessed Jaimez and his co-felons transport "just under a kilogram" of marijuana in his car. R. 381, Pg. ID 2169. Second, Jaimez's car smelled like marijuana, suggesting Jaimez—a past drug user—knew there were drugs in it. Third, an Ohio court found

[1]Judge Griffin adheres to his dissent from the denial of the petition to rehear *Esteras* en banc. *United States v. Esteras*, --- F.4th ----, 2024 WL 981140, at *1 (6th Cir. 2024) (Griffin, J., dissenting from denial of rehearing en banc).

Jaimez guilty of attempted marijuana trafficking, indicating he knew or had reason to know the marijuana was intended for resale. *See* Ohio Rev. Code Ann. § 2923.02(A) (noting that an "attempt" conviction means the defendant met any "knowledge" or "purpose" elements of the underlying crime); *id*. § 2925.03(A)(2) (defining mens rea for drug trafficking). Based on this evidence, a court could conclude Jaimez knowingly transported just under a kilogram of marijuana, aware it was intended for resale. *See* 18 U.S.C. § 3583(e)(3) (setting a preponderance-of-the-evidence standard for revocation decisions). And under Ohio law, that's punishable by over a year in prison.[2] Ohio Rev. Code Ann. §§ 2925.03(A)(2), (C)(3)(c), 2929.14(A)(4). Thus, the district court correctly graded Jaimez's violation.

B.

Jaimez next alleges his sentence is substantively unreasonable. In particular, he argues the court (1) placed too much weight on the conduct underlying his release violation, (2) inflicted "double punishment" by considering conduct for which Ohio already punished him, and (3) imposed a sentence that was too long in light of mitigating evidence. Again, Jaimez is wrong on all three counts.

Jaimez's Violative Conduct. At sentencing, the district court "keyed in" on the conduct underlying Jaimez's release violation. Appellant Suppl. Br. 2. For good reason: Jaimez was originally convicted for conspiring to distribute drugs, and he had previously violated his supervised release by using drugs. Given this background, the conduct underlying his most recent violation—transporting drugs with the intent to resell them—was particularly relevant. When imposing revocation sentences, courts may consider the need to promote deterrence and respect for the law. 18 U.S.C. §§ 3553(a)(2)(A)–(B), 3583(e); *see Lewis*, 498 F.3d at 399. Jaimez's most recent violation demonstrated a flagrant lack of both. Thus, it was reasonable for the court to give substantial weight to that violation at sentencing. *Cf. United States v. Zobel*, 696 F.3d 558, 571–72 (6th Cir. 2012).

[2]Ohio found Jaimez guilty of only a misdemeanor-level marijuana offense. But when a federal court grades a release violation, it considers the defendant's actual conduct, not just the record of conviction. *United States v. Montgomery*, 893 F.3d 935, 940 (6th Cir. 2018).

Double Punishment. Jaimez next argues he received "double punishment" for his drug-trafficking activity. Appellant Suppl. Br. 3. But this presents no error, either. To be sure, Ohio already punished Jaimez for the drug-related conduct that the district court considered at sentencing. But that's the point: the Sentencing Guidelines explicitly tell courts to consider the criminal nature of a release violation. *See* U.S.S.G. §§ 7B1.1(a), .4(a). And the Supreme Court has long held that federal and state governments may separately punish an individual for the same conduct. *See, e.g.*, *Heath v. Alabama*, 474 U.S. 82, 88 (1985); *Fox v. Ohio*, 46 U.S. (5 How.) 410, 435 (1847).

Jaimez's argument also fails for a simpler reason: revocation sentences are *never* "punishment" for a release violation. Rather, these sentences are "part of the penalty for the initial offense"—in this case, Jaimez's original narcotics-distribution conspiracy. *Johnson v. United States*, 529 U.S. 694, 700–01 (2000). Indeed, even when a court expressly considers the conduct underlying a release violation, we don't interpret the resulting sentence as "punishment" for that conduct. *See, e.g.*, *United States v. Johnson*, 640 F.3d 195, 203 (6th Cir. 2011) (holding that a revocation sentence is a "sanction" for a defendant's "breach of trust," not a "punishment for [his] violation" (citation omitted)); *United States v. Jones*, 81 F.4th 591, 602 n.7 (6th Cir. 2023) (same); *Esteras*, 88 F.4th at 1170 (holding that a court's consideration of violative conduct doesn't make a revocation sentence punitive, even when the court uses the word "punishment"). Thus, the district court's sentence didn't "double punish" Jaimez for his violation.

Sentence Length. At the outset, we presume Jaimez's within-Guidelines sentence is reasonable. *See Jones*, 81 F.4th at 602. Jaimez contends otherwise. He argues the court shouldn't have applied the maximum sentence because his release violations could have been worse. He also asserts that he's been trying to "rebuild[] his life." Reply Br. 3. And he emphasizes that he didn't contest his release violations or his Ohio drug charge. This, he claims, demonstrates his "remorse." *Id.*

But Jaimez's arguments aren't enough to establish unreasonableness. The fact Jaimez could've committed a worse offense doesn't render the statutory maximum unreasonable. Every drug trafficker could have shipped more drugs, just like every murderer could have killed an additional person. That doesn't mean courts should never apply a maximum sentence.

Nor can Jaimez show unreasonableness by arguing he would have given more weight to mitigating evidence. *See United States v. Ely*, 468 F.3d 399, 404 (6th Cir. 2006). And even if he could, his mitigating evidence is paper-thin. While his words suggested remorse, his conduct did not. At Jaimez's last revocation hearing, the court warned him that he'd receive a sixty-month sentence if he didn't straighten out his act. That didn't stop Jaimez from continuing to flout the law. And at some point, protecting the public must trump a defendant's desire to "rebuild his life." This is one such case.

* * *

We affirm.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

United States of America, Case No. 3:10cr4-2

Plaintiff

v. ORDER

Timothy M. Watters
Defendant

This matter was heard on 2/17/2023 before the undersigned for a Combined and Continued Supervised Release Violation Hearing with co-defendant Jose A. Carrizales. The Government counsel was represented by attorneys Ava Dustin and Alissa Sterling. The Defendant appeared and was represented by attorney Andrew R. Schuman. Probation Officer Cornelius Hagins was also present. The Government moves to dismiss violation 3 of the supervised release violation report. Defendant admits to violations 1, 2 and 4 in the supervised release violation report. The court finds that the defendant has violated the conditions of supervision contained in the supervised release violation report.

It is hereby
Ordered that**:**

1. The Defendant to be committed to the custody of the Bureau of Prisons for a term of 60 months with a 6-year term of supervised release.
2. All previous terms and conditions of supervision remain in full force and effect.
3. The court addresses the 3553 (a) factors on record.
4. The Appeal (14 days) noted on record.
5. Defendant Watters [353] combined motion is withdrawn as moot.
6. The no-contact order as to both Defendants also removed.

So ordered.

s/James G. Carr
Sr. U. S. District Court Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES DISTRICT COURT, Case No.:3:10CR4

Plaintiff, Toledo, Ohio

v February 17, 2023

TIMOTHY JAIMEZ & JOSE CARRIZALES,

Defendants.

TRANSCRIPT OF COMBINED AND CONTINUED SUPERVISED RELEASE VIOLATION HEARINGS
BEFORE THE HONORABLE JAMES G. CARR
UNITED STATES DISTRICT JUDGE

APPEARANCES:

On Behalf of the Government:

Alissa Sterling
Ava Rotell Dustin
Office of the U.S. Attorney
Toledo, Ohio 43604

On Behalf of Defendant, Jaimez:

Andrew Schuman, Esq.
Bowling Green, Ohio 43402

On Behalf of Defendant, Carrizales:

Peter J. Wagner, Esq.
Law Offices Of Peter Wagner
Toledo, Ohio 43604

Court Reporter:

Angela Nixon, RMR, CRR
Official Court Reporter
U.S. District Court

way to bring them kids back home to their parents. Unfortunately I was too late. And, yes, it was put in The Blade, but it didn't hurt me at all, Your Honor, because I have no connection to the streets anymore. So, like I said, I put myself in a very bad situation time and time again. It's not your fault, it's not Ms. Dustin's fault, nobody's fault but my own. I'm just sorry that I'm dragging down people that are close to me and people who I do -- I do care about and love, that I affect their lives as well. So as of -- since the beginning of all of this, I've taken my own -- when I'm in the wrong, I take responsibility and I keep on moving. And with that, I agree with whatever you give me, Your Honor. Thank you.

THE COURT: Mr. Schuman, anything further?

MR. SCHUMAN: No, thank you, Your Honor.

THE COURT: Anything further from the government?

MS. DUSTIN: Nothing, Your Honor.

THE COURT: Pursuant to the Sentencing Reform Act of 1984 and 18 U.S. Code Section 3553(a), judgment of this Court that defendant be and hereby committed to the custody of the Bureau of Prisons to serve a term of 60 months.

Upon completion of that term, you should report within 72 hours U.S. Pretrial and Probation Office in this district or U.S. Probation Office in whatever district you are released.

I will, likewise, strongly encourage the Bureau to let you serve your time in Milan. I don't know if you're a threat, or security issue, or anything else. To the extent that their mechanistic computation might put you at a higher security level, I would encourage them to look past that and enable both of you to remain in contact with your people here in Toledo.

I'm going to place you, likewise, on a period of six more years of supervised release. I'll be very candid with you, I'm going to be very candid with both of you, I want this Court to have that string. And if you can't abide by each term and condition of supervised release, you'll be right back in front of me or another Judge. And you'll wind up, yet again -- but you've shown that basically, now twice, the terms and conditions of supervised release are optional. And they are not optional. And I want to make sure, in terms of your own interest, and the interest of the community, and to protect the community, and also anybody who knows what's happening here today gets it that disregarding the terms and conditions of supervised release, particularly in the quantity -- if large quantity of Controlled Substance is involved, you're going to get punished. You're going to pay a severe consequence. I hope you understand that, Mr. Watters. You've went through it, I remember it

vividly, I remember correctly Officer Robinson was just trying to get some financial information, you were providing her with statements about your employment and occupation and so forth. She wanted to know. And if I recall correctly, she had to go knocking on doors of banks. It was an exhaustive time consuming effort on her part that should not -- she should not have had to take the time to get the information she did had you been honest with her. You blew her off, you blew off the conditions of supervised release about responding to the request for financial information. And at least that night when you're out there with your brother and Mr. Carrizales and the garbage bag with a lot of marijuana in it, upward of a kilo, once again, you were paying no attention to the terms and conditions of supervised release. And my lengthy term of continued supervised release is to try to see to it that, at long last, you get it, and also to serve -- not just try to see to it that you do, but that you learn to comply with what The Court and the law tells you you have to do.

Also to make clear to the public generally that someone like yourself doesn't get it, then they're going to get prison time, and a lot of it. That's the purpose of my sentence.

You will report to the pretrial service and probation office. All of the previous terms and conditions

will be reimposed.

And Officer Hagins, is there anything else at this time? There'll be the special condition about undertaking to obtain and maintain lawful gainful employment, and to cooperate with the probation officer and your officer's efforts in that regard.

Once again, you'll be required to provide, promptly and accurately, any requested financial information that the probation officer may ask you to provide.

Officer Hagins, any further special conditions you'd like me to impose or reimpose?

PROBATION: No, Your Honor.

THE COURT: Okay. I believe I expressed my -- the -- my reasons for imposition of this sentence. They are to protect the public. They are to encourage understanding of compliance of the terms and conditions, individual deterrence, and public deterrence. In this Court there's no such thing as an optional condition of supervision, just as there's no optional condition when you're on pretrial release. They're court orders, and this is a consequence of not obeying a court order. I told you before, Mr. Watters, you're not in The State system anymore. We care, we pay attention, and we respond.

I have considered your background, history and

characteristics, your prior criminal record with which I'm obviously quite familiar. And I do think that somebody looking at this with the overall circumstances would find that this is both a just and deserved sanction, and would hope that it would enhance respect for the law.

Ms. Dustin, anything further you want me to say about the 3553(a) factors?

MS. DUSTIN: Perhaps just addressing the deterrence factor.

THE COURT: I can't quite hear you.

MS. DUSTIN: Perhaps address the deterrence factor, Your Honor.

THE COURT: I thought I had, both individual and public deterrence. I hope others hear about this. When you come to Federal Court, you're in the big leagues. We play hard ball. There's no paddle ball here, okay, no shrug of the shoulders. We give you a chance at a break, you don't take that chance, we move things up a notch. And you're really Exhibit A in that regard, Mr. Watters. I'm sorry that you are, but I think it's necessary that you be so that people understand they can't be out abroad in the company of people you shouldn't be with doing things that the law prohibits and expect -- if you get caught, we'll simply reinstate the terms and conditions of supervised release and tell you to behave, tell you to do that,

because that's the bottom line when we get right down to it.

I do believe that the sentence is sufficient but not greater than necessary to get your attention, to see to it, I hope, that once you are out, you will, at long last, learn that lesson. You've got to do, no matter how much you don't want to do it, you may desire to do something else, as long as you're on supervised release for this Court, you've got to do what this Court, myself, and the probation officer says. That's your only option. Because if you don't and you come back, whoever sees you then, whether it's I or somebody else, is going to look at this, and they're going to ask, just as I did, implicitly, how high is up, because going up as high as I can so that I believe it's necessary, particularly in your circumstance, to make clear that you've got to do what the law and The Court requires. If you don't, this is what's going to happen to somebody else who hears about it. They've got a similar situation, I hope they get the lesson that that's what's going to happen to them. Ultimately I'm protecting the community.

Anything further you want me to say, Ms. Dustin, about the 3553(a) factors?

MS. DUSTIN: No, Your Honor. Thank you.

THE COURT: You have a right, as I've indicated

to Mr. Carrizales, to appeal. Talk to Mr. Schuman, your very capable lawyer, as that Mr. Wagner is, and if grounds to appeal appear to exist, by all means within 14 days file a notice of appeal. If you decide to have him and he desires to continue to represent you, he'll do so without cost to yourself. The record will be prepared without cost to yourself. And if either you or he wants you to have another attorney, different attorney, we'll make that request known to either me or to the Court of Appeals. Do you understand all that?

DEFENDANT WATTERS: Yes, Your Honor.

THE COURT: Within 14 days, 14 days. It's a very short timeframe. After that, you will lose -- if you haven't filed a notice of appeal, you will lose any and all right you might otherwise have to challenge what I've done today, either by way of direct appeal, post-conviction relief, or habeas corpus. Do you understand that?

DEFENDANT WATTERS: Yes, Your Honor.

THE COURT: I want to repeat that to you too, Mr. Carrizales; 14 days, otherwise you lose the opportunity to challenge whatever.

Does any party have any objection to any part of these proceedings not previously made?

MR. WAGNER: No, Your Honor.

MR. SCHUMAN: Your Honor, few remarks if I may.

I have a few requests if I may.

THE COURT: Sure.

MR. SCHUMAN: Thank you, Your Honor.

My client wishes to have the no contact order with Mr. Carrizales removed; credit for 13 months in custody on this violation, which I think is appropriate. He requested 14-months credit for the time served on the earlier violation. He notes he had three years of supervised release previously.

I object, for the record, to the sentence imposed for purpose of appeal.

My client also notes that his proper last name now is -- I hope I say it correctly, Jaimez J-A-I-M-E-Z. His name was legally changed in State Court in Ohio some years ago.

THE COURT: I think -- you know, I think that had occurred before, but it wasn't brought to my attention. I will note that. Let me only say I'm going to refrain from making any recommendation as to what the Bureau of Prisons should do in terms of his computation for time served. That's entirely within the province of the Bureau of Prisons.

Correct, Ms. Sterling?

MS. DUSTIN: Your Honor, I believe he would not get credit because he was already serving time on The State

offense. I think he was being held with -- he already got credit for that time. He did not have to serve the 180 days because they gave him credit for the 180 days.

THE COURT: All I'm saying -- I don't know, it's really out of my hands. I can sit and try to do a computation. I will simply say that I expect that, both Mr. Carrizales and he, shall oversee what the Bureau of Prisons will be attentive and accurately calculate the time served credit as to the sentence that I've imposed. Beyond that, I can't -- I have no authority to -- Ms. Sterling, you and I have had a couple of occasions where it was made very clear to me that that computation, whether a defendant believes it's correct or not, cannot come back to me to secure any kind of -- is that right, Ms. Sterling?

MS. STERLING: That is correct, Your Honor. I think there's a distinction here, although it's one without a difference, and that is this; if a defendant is being held solely on this Court's violation order, then he would get credit. However, at least six months for these gentlemen, because they received credit for six months on The State case, they would not get credit for. And the way The Court is supposed to accomplish that is by imposing a higher sentence than what you normally would have, but you can't do that here because you sentenced them at the statutory maximum. So I think for the record that explains

that.

With regard to the protection order issue that Mr. Schuman raised between the two; again, that is a matter that will be addressed by the BOP relative to their security concerns.

THE COURT: Right. I do hope both of you gentlemen are up the road rather than some distant isolated federal facility that, from a practical standpoint, will make it difficult, if not impossible, to bring your family to have a face-to-face visitation or contact. I think, candidly, with just about everybody who comes before me, confining them as close to home as possible is an important component ultimately of reentry and rehabilitation. Family contact is and remains, in my view, important. But, once again, Mr. Schuman, that's all that I can do. I'll take note of that. I'll certainly expect the Bureau of Prisons to accurately and attentively calculate the proper credit for time served.

MR. SCHUMAN: I understand, Your Honor.

My only last comment is my client indicates that The Court previously directed the Marshals to correct his last name to Jaimez. Apparently it didn't happen. I'll leave it at that.

THE COURT: I will so instruct the Marshals. May I suggest that you go on upstairs and get in touch with

Alex and both, formally and informally, make that request. I also suggest that you send a copy of that -- CC that request to Pete Elliot, who's the U.S. Marshal. And I also suggest, follow up on it.

MR. SCHUMAN: Thank you, Your Honor.

THE COURT: In that respect, a phone call from me to anybody needing my help, I'm glad to do that. I really am. I now remember I think that had occurred before the last -- the last supervised release proceedings.

MR. SCHUMAN: I think so, Your Honor.

THE COURT: And I apologize, I had forgotten that. Mr. Watters is still -- Mr. Jaimez.

MR. SCHUMAN: Jaimez.

THE COURT: -- is still being considered to be Mr. Timothy Watters. So that's why --

MR. SCHUMAN: Thank you, Your Honor.

MS. DUSTIN: Your Honor, I think we were having a discussion, and I don't think Mr. Schuman answered the Bostic question.

THE COURT: I'm sorry, I can't hear you.

MS. DUSTIN: I don't think Mr. Schuman answered the Bostic question.

THE COURT: Okay. Any other objections not previously made, Mr. Schuman?

MR. SCHUMAN: No, Your Honor.

MS. STERLING: Mr. Wagner, once again?

MR. WAGNER: No, Your Honor.

THE COURT: Okay. That will conclude this proceeding.

COURTROOM DEPUTY: Your Honor, there's a pending motion to be addressed on the record about Mr. Watters.

THE COURT: You have some motions, Mr. Schuman, previously made that are going to be withdrawn; is that correct?

MR. SCHUMAN: Correct.

THE COURT: Any further pending matters for the government?

MS. DUSTIN: Nothing, Your Honor.

THE COURT: Okay. Mr. Schuman, anything further for defendant?

MR. SCHUMAN: No, thank you, Your Honor.

THE COURT: Mr. Wagner?

MR. WAGNER: No, thank you, Your Honor, very much.

THE COURT: Thank you. That will conclude this proceeding.

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s:/Angela D. Nixon March 27, 2023

Angela D. Nixon, RMR, CRR Date

NOT RECOMMENDED FOR PUBLICATION

No. 23-3547

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE NORTHERN DISTRICT OF
TORIANO A. LEAKS, JR.,	)	OHIO
	)	
Defendant-Appellant.	)	

O R D E R

Before: BOGGS, WHITE, and THAPAR, Circuit Judges.

Toriano A. Leaks, Jr. appeals the sentence imposed after the district court revoked his term of supervised release. The parties do not request oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). Because Leaks's argument is foreclosed by precedent, we affirm.

In 2019, Leaks pleaded guilty to two counts of illegally possessing a machine gun, in violation of 18 U.S.C. §§ 922(o) and 924(a)(2). The district court sentenced him to thirty months of imprisonment. After serving his prison term, Leaks began a three-year term of supervised release.

In February 2023, Leaks's probation officer filed a report charging him with violating his terms of supervision by committing state robbery, tampering, and firearms offenses, failing to report to his probation officer, failing to attend mental-health treatment, and failing to work towards his GED. After Leaks pleaded guilty to two of the state offenses, he admitted that he

violated the terms of his supervised release. The district court imposed a within-guidelines sentence of twelve months of imprisonment, to run consecutively with Leaks's state sentence.

On appeal, Leaks argues that the district court impermissibly relied on the need to reflect the seriousness of the offense, promote respect for the law, and provide just punishment when fashioning his sentence. Although those factors are listed in 18 U.S.C. § 3553(a)(2)(A), he argues, Congress deliberately omitted them from the supervised-release statute under 18 U.S.C. § 3583(e).

Leaks acknowledges that his argument is foreclosed by *United States v. Lewis*. 498 F.3d 393, 399-400 (6th Cir. 2007) ("[I]t does not constitute reversible error to consider § 3553(a)(2)(A) when imposing a sentence for violation of supervised release, even though this factor is not enumerated in § 3583(e)."). He nevertheless argues that the case was wrongly decided. But absent an intervening, inconsistent opinion of the Supreme Court or this court sitting en banc overruling the decision, we are bound by our holding in *Lewis*. *See Freed v. Thomas*, 81 F.4th 655, 659 (6th Cir. 2023) (citing *Salmi v. Sec'y of Health and Hum. Servs.*, 774 F.2d 685, 689 (6th Cir. 1985)); *see also United States v. Esteras*, 88 F.4th 1163, 1167-68 (6th Cir.), *reh'g en banc denied*, 88 F.4th 1170 (2023).

For these reasons, we **AFFIRM**.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	JUDGE PATRICIA A. GAUGHAN
	)	
Plaintiff,	)	CASE NO.: 1:19CR283
	)	
-vs-	)	
	)	ORDER
TORIANO A. LEAKS, JR.,	)	
	)	
Defendant,	)	

A Supervised Release Revocation Hearing was held on June 29, 2023. Assistant U. S. Attorney Scott Zarzycki was present on behalf of the Government. Defendant Toriano A. Leaks, Jr. was present and represented by his counsel Justin Roberts. Probation Officer Rob Capuano was present on behalf of the Probation Department. The defendant waived his right to an evidentiary hearing and admitted to violating the conditions of his supervised release, to wit: new law violations, failure to report, failure to attend mental health treatment, and failure to work towards his GED. The Court finds the most serious violation to be a Grade B.

This Court hereby sentences the defendant, Toriano A. Leaks, Jr., to the custody of the Bureau of Prisons for a period of 12 months to run consecutively to his two state sentences in case numbers CR-21-666036 -A and CR-23-678409-A. The Court does not order further supervision.

IT IS SO ORDERED.

/s/ Patricia A. Gaugha
Patricia A. Gaughan
United States District Court

Date: June 29, 2023

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. TORIANO A. LEAKS, JR., Defendant.	Case No. 1:19-cr-283-PAG Cleveland, Ohio Thursday, June 29, 2023 11:08 a.m., Courtroom 19B VIOLATION HEARING

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE PATRICIA A. GAUGHAN,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:

OFFICE OF THE U.S. ATTORNEY - CLEVELAND
BY: SCOTT C. ZARZYCKI, AUSA
801 West Superior Avenue, Suite 400
Cleveland, OH 44113
(216) 622-3971

(Appearances continued on Page 2)

COURT REPORTER:

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Proceedings reported by machine shorthand; transcript produced by computer-aided transcription.

APPEARANCES CONTINUED:

For the Defendant:

OFFICE OF THE FEDERAL PUBLIC DEFENDER - CLEVELAND
BY: JUSTIN J. ROBERTS, ESQ.
1660 West Second Street
750 Skylight Office Tower
Cleveland, OH 44113
(216) 522-4856

Also present:

ROBERT CAPUANO
U.S. Pretrial Services and Probation Office

* * * * *

CLEVELAND, OHIO; THURSDAY, JUNE 29, 2023; 11:08 A.M.

--oOo--

P R O C E E D I N G S

COURTROOM DEPUTY: All rise.

THE COURT: Please be seated.

Mr. Leaks, you may approach the podium with counsel.

We're here in the matter of United States of America vs. Toriano Leaks, Jr., Case Number 19-cr-283.

Present in court is Mr. Leaks; is that correct, sir?

THE DEFENDANT: Yes, ma'am.

THE COURT: Represented by his attorney, Mr. Justin Roberts; on behalf of the government, Mr. Scott Zarzycki; on behalf of Probation, Mr. Robert Capuano standing in for DeMario Reynolds.

PROBATION OFFICER: Good morning, Your Honor.

THE COURT: Good morning.

Sir, we're here this morning for purposes of a supervised release violation hearing. I have before me a violation report dated February 13th of this year and a supplemental information report dated June 15th, 2023. And I should add also, supplemental information report of June 5th.

Mr. Roberts, I'm going to assume you are in receipt of all three of these reports.

MR. ROBERTS: Yes, Your Honor.

THE COURT: Same question, Mr. Zarzycki.

MR. ZARZYCKI: Yes, Your Honor.

THE COURT: All right. According to these reports, there are six alleged violations.

The first is a new law violation.

On May 11th of this year Mr. Leaks pled guilty to one count of robbery and received a sentence of 4 to 6 years.

The second is a new law violation.

Mr. Capuano, please correct me if I'm wrong, but this matter has not been resolved and there is an outstanding warrant. Am I correct?

PROBATION OFFICER: That is correct, Your Honor.

THE COURT: All right. It is generally my practice not to consider new law violations that have not been resolved, so I am not going to consider alleged Violation Number 2.

Number 3, failure to report.

Mr. Leaks failed to report on May 18th, May 31st, and June 8th of 2022.

The fourth is failure to attend mental health treatment.

He failed to attend group session on May 13th, May 24th, and June 1st of 2022.

Fifth, failure to work towards GED.

He failed to work toward getting the GED -- GED since commencing supervision.

And finally, a new law violation.

On May 11th, 2023, Mr. Leaks pled guilty to having a weapon while under disability with a 3-year sentence to run concurrent with the new law violation that I've already discussed, Violation Number 1.

Mr. Roberts, on behalf of your client, do you wish for this Court to hear testimony regarding these alleged violations, or do you waive the taking of testimony and admit?

MR. ROBERTS: Your Honor, in light of the fact that the Court is not considering Violation Number 2 at this time, we waive the testimony and do admit to the other violations.

THE COURT: Sir, do you understand what your attorney just said to me?

THE DEFENDANT: Yes, ma'am.

THE COURT: And do you, in fact, admit to Violations 1, 3, 4, 5, and 6?

THE DEFENDANT: Yes, ma'am.

THE COURT: Sir, based upon your admission, I do in fact find you to be in violation of supervised release.

I find that the most serious is a Grade B violation,

and with a Criminal History Category of III you are looking at an advisory sentencing guideline range of 8 to 14 months.

On the issue of sentencing, Mr. Roberts, should I turn to you first or your client?

MR. ROBERTS: Your Honor, just briefly, we understand because of the nature of the violation that the Court is required by statute to impose a term of imprisonment. We would ask the Court to run any term of imprisonment concurrent to the now 4 to 6 years that Mr. Leaks received. He obviously accepted responsibility for that case and, actually, when you look at the purposes of sentencing, at least on a supervised release violation, Title 18 United States Code § 3583(a) specifically omits the Court's consideration of Title 18 United States Code 3553(a)(2) which otherwise would be present in a regular sentencing, that being the seriousness of the offense, respect for law and punishment. All of those are omitted from a supervised release sentencing and have been addressed with the 4 to 6-year sentence that he received for the conduct in the new law violation.

We would ask the Court to consider that he's going to be on 18 months' mandatory post-release control also on that case and will continue to be supervised by court officials as he seeks to re-enter the community and rehabilitate himself.

Thank you, Your Honor.

THE COURT: Mr. Leaks, do you have anything to say, sir?

THE DEFENDANT: Um. . . I just would like to say that I learned my lesson and I want to make sure that I influence my younger family members that look up to me and think, what are we doing or whatever I was contributing to was cool, that this ain't the way to go.

THE COURT: Mr. Zarzycki.

MR. ZARZYCKI: Thank you, Your Honor.

It's the government's position that a consecutive guideline sentence is appropriate for Mr. Leaks, under 7B1.3(f), that it was to be served consecutively to a sentence of imprisonment.

Your Honor, this involved a -- as the Court's aware from having his original case, involved the Possession of a Machine Gun and next to this machine gun -- which was functional -- there were three magazines, 15 rounds, 20 rounds and 30 rounds. So his violations -- like, he was sentenced to 4 years for the criminal offenses that he committed. I ask the Court to impose a consecutive sentence because of the violations of this Court's supervision, and that supervision was based on the prior offense of -- or his conviction of having this dangerous machine gun.

Now, one of his offenses to which he's been convicted

in state court involves another firearm as recently as February of this year.

Another offense is a robbery that is an offense of violence as well as his failure to adhere to any of the -- or many of the requirements of his supervision.

I believe that a consecutive sentence would be appropriate for those violations.

THE COURT: Mr. Capuano.

PROBATION OFFICER: Hello, Your Honor.

Your Honor, U.S. Probation Office would just like to add that, unfortunately, this is a very unfortunate circumstance for Mr. Leaks. Mr. Leaks is a very young man. He has a lot of future ahead of him and these are some very serious charges that he has in front of him violations-wise.

In regard to recommendations, Your Honor, we would also recommend that a term of imprisonment is imposed and that it be served consecutive to his state sentence as well.

Originally we were recommending a term of supervised release to follow as well. However, based upon his state sentences, he does have mandatory post-release control with the State of Ohio with the Adult Parole Authority and we would not be opposed to -- if he does not have supervised release through us, Your Honor, following the sentence.

Thank you.

THE COURT: Mr. Roberts, anything else?

MR. ROBERTS: No, Your Honor, other than to -- just to reiterate, I know there's been reference to the seriousness of the offenses, both the original offense and the new offense, and I would just reiterate that he's been sentenced and is serving his time for those.

Thank you, Your Honor.

THE COURT: And yet I agree with all of the statements made by Mr. Zarzycki. To be on supervision and have five violations, two of which are new law violations, both involving firearms, and the original offense here involved a machine gun. Concurrent time does not punish Mr. Leaks for violating supervision and -- and. . . that is not justice.

Therefore, it is the judgment of this Court that you be committed to the custody of the Bureau of Prisons to be imprisoned for a term of 12 months consecutive to the time being served in the two state cases.

There will be no further supervision.

Mr. Leaks, I wish you the best, and I certainly hope you turn your life around because you are a very young man, as Mr. Capuano pointed out.

Boy, this is not the road to go down. You're going to be in and out of prisons the rest of your life. I see it. I see it with one defendant after another.

I don't want that for you. I hope this is your

wake-up call.

Good luck.

THE DEFENDANT: Yes, ma'am.

MR. ROBERTS: Your Honor, just on Mr. Leaks' behalf, if --

THE COURT: One moment, sir.

MR. ROBERTS: We would just object to the consideration of punishment as it relates to the sentence. I understand all of the other factors the Court may have considered, but as it relates to considering punishment from the new offense, we would object in case he wants to perfect any kind of appeal on that issue.

Thank you.

THE COURT: All righty.

Sir, you certainly have the right to appeal, if you so choose.

THE DEFENDANT: Okay.

MR. ZARZYCKI: Are we adjourned, Your Honor?

THE COURT: Oh, we're adjourned. I'm sorry.

(Proceedings adjourned at 11:19 a.m.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter prepared from my stenotype notes.

/s/ Heather K. Newman *8-16-2023*

HEATHER K. NEWMAN, RMR, CRR DATE