No. 23-7483

IN THE

Supreme Court of the United States

EDGARDO ESTERAS,
TIMOTHY MICHAEL JAIMEZ FKA TIMOTHY M. WATTERS, AND TORIANO A. LEAKS, JR.,

Petitioners,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 15, 2024
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 4:14-cr-425
Youngstown, Ohio
Tuesday, April 18, 2023
3:11 p.m.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EDGARDO ESTERAS,

Defendant.

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

SUPERVISED RELEASE VIOLATION HEARING AND SENTENCING

Appendix A

[3]PROCEEDINGS

THE CLERK: The matter before the Court is Case Number 4:14-cr-425, the United States of America versus Defendant Number 10, Edgardo Esteras.

THE COURT: Good afternoon, everyone. Thank you all for standing. Please feel free to retake your seats.

Counsel for the United States, will you please introduce yourself for the record?

MR. JOYCE: Good afternoon, Your Honor. Chris Joyce appearing on behalf of the United States.

THE COURT: Good afternoon, Mr. Joyce.

Counsel for the defendant, will you kindly introduce both yourself and your client for the record?

MR. GROSTIC: Good afternoon, Your Honor. Christian Grostic on behalf of Mr. Esteras, who is seated next to me at defense table.

THE COURT: Good afternoon to you both.

And I'd like to welcome you as well, Mr. Zakrajsek, as the representative from the Office of Pretrial Services and Probation. Thank you for your assistance in supervising Mr. Esteras, and also -- "Esteras," pardon the mispronunciation -- your willingness to assist Court and counsel throughout today's hearing.

OFFICER ZAKRAJSEK: Thank you, Your Honor.

[4]THE COURT: This hearing has been scheduled to allow me to take up the alleged violations of your term of supervised release, Mr. Esteras. The reports I have reviewed in preparation for today's hearing are several. And I'd like to check with you, Counsel, to make sure that you have the same reports that I have. And I will start from that earlier -- earliest issued this year.

I issued a warrant for Mr. Esteras's arrest pursuant to a January 23rd, 2023 report.

Do you have it, Mr. Joyce?

MR. JOYCE: I do, Your Honor.

THE COURT: Have you had enough time to review it?

MR. JOYCE: Yes, I have. Thank you.

THE COURT: Do you also have it, Defense Counsel?

MR. GROSTIC: Yes, Your Honor.

THE COURT: Thank you.

After the arrest of Mr. Esteras, he was before Magistrate Judge Knapp for a detention hearing. She ordered that he be detained. Mr. Esteras has asked that I review that detention ruling. I did review it, and I ordered that he persist in detention until today's hearing.

Additionally, I have been informed by Mr. Zakrajsek that one of the allegations of violation of Mr. Esteras's term of supervised release has been resolved, I'll use that term, in state court. And to help with this [5]reason for today's hearing, Mr. Joyce, I am drawing your attention to the January 30th report, issued this year, 2023.

Do you have it?

MR. JOYCE: I do, Your Honor.

THE COURT: And you can see there are two alleged violations, correct, new law violation and possession of a firearm?

MR. JOYCE: Yes, I can see that.

THE COURT: Mr. Grostic, do you also have that one?

MR. GROSTIC: Yes, Your Honor.

THE COURT: Great. Thank you.

So then walking us full forward -- to my knowledge, if there is something more, Mr. Zakrajsek will tell us -- to the supplemental information report dated the 14th of March.

This report is the one I referred to when I am informed that the domestic violence charge, criminal damaging and aggravated menacing were dismissed by the Youngstown Municipal Court, and Mr. Zakrajsek's report indicates "at the request of the victim."

Do you have it, Mr. Joyce?

MR. JOYCE: Yes, I do, Your Honor.

THE COURT: And you as well, Mr. Grostic?

[6]MR. GROSTIC: Yes, Your Honor.

THE COURT: So we're here because there have been two allegations of the violation of Mr. Esteras's term of supervised release. If you are looking for the most comprehensive report, I suggest it be the January 30th, 2023 report that not only speaks to both the allegations of violation, it also speaks to the sentencing options.

It does have one piece of good news in it, and that is that despite the suspension of the GED requirement, Mr. Esteras, you earned your GED. I am proud of you for doing that.

And, of course, the guidelines provisions are outlined as part of the sentencing options.

With that, I understand that counsel would like to speak to me. You have my attention.

MR. JOYCE: Thank you, Your Honor. And may I ask, just to inquire for the sake of clarity, is the matter that you are referring to what we approached your staff about, an issue that has arisen prior to the hearing we wanted to make the Court aware of? Is that what the Court is referring to?

THE COURT: That is the only message I have received. If there is something more, you will probably have to tell me about that as well.

MR. JOYCE: Understood. Your Honor, shortly before we entered the courtroom here this afternoon, both [7] Mr. Grostic, counsel for the defendant, and myself were surprised to see that the alleged victim in the Youngstown Police Department report of January 23rd, 2023, that became the subject of the violation report that the Court has referenced, she is present here today. And both Mr. Grostic and I have had an opportunity to speak with her.

It is my understanding that she wishes to make a statement to the Court. And I anticipate, based on what she told me, and in my conference with Mr. Grostic, what she told him, that this is going to be different than the statement she gave to the police.

And so it was my concern, as it was Mr. Grostic's concern, that if she did that, she might implicate herself in some way. And so we wondered if it would be appropriate for her to have counsel appointed to represent her to discuss with her the possible consequences of that action.

THE COURT: Thank you, Mr. Joyce. I have understood you.

Is that the same topic you approached my staff about, Mr. Grostic?

MR. GROSTIC: Yes, Your Honor.

THE COURT: All right. Just to be clear,

Mr. Joyce, I understood you to say that the victim, initials MI, correct?

MR. JOYCE: Correct, Your Honor.

[8]THE COURT: Would like to make a statement. Does that mean that you nor your colleague on the other side intend to call her as a witness so that she can testify under oath?

MR. JOYCE: Thank you. Your Honor, I did not intend to call her, because much of her statement is captured on the body cam that I was going to present to the Court today as evidenced through the officer from the Youngstown Police Department.

It was my understanding, based on the attachment to the motion filed by counsel for the defendant, to reinstate a bond -- or pardon me, to revoke the detention order. Looking at that docket entry he attached, I saw that she had come to the municipal court, and at her request, asked these charges be dismissed. And so because of that, it was my -- I was not intending to call her, because I believed I could establish the violations through the body cam. So I was not intending to call her.

And now having spoken with her, I would tell the Court that I don't intend to call her because I don't know that I could put her on the stand unsure that she is going to say something that is true or untrue. And so if I can't

vouch for her credibility, as an officer of the court, I wouldn't put her up. That's my position.

THE COURT: Thank you.

[9]MR. JOYCE: Thank you.

THE COURT: I agree. Suborning perjury is to be avoided, right?

MR. JOYCE: Absolutely.

THE COURT: Mr. Grostic, do you have a different idea of employing the victim? Did you intend to call her?

MR. GROSTIC: Your Honor, after speaking with her today, I did then intend to call her. I did not until I had spoken with her today.

THE COURT: So you intend to call her still?

MR. GROSTIC: I do.

THE COURT: Then I don't know what the issue is. We all know this is a Rule -- it is a preliminary hearing. It falls under Rule of Evidence 104(a). Rules of Evidence are suspended.

Unless she testifies as a witness called by one side or the other, there will be no statements made to the Court. She is not the victim of this case. The United States is the victim of the allegations that allege Mr. Esteras has violated his term of supervision.

The victim would be the victim of the conspiracy to distribute heroin, and it's everyone within the Northern District of Ohio or abroad. She's a victim of the case that's been dismissed, so she has no standing. I am not obligated by rules that govern allocution to hear from her. [10]And I won't. I don't. I hear from counsel. I hear from victims. I hear from the defendant.

So she won't speak to me unless one of you calls her as a witness, she is placed under oath, and she will testify under penalties of perjury.

So, Mr. Grostic, I leave it to you to assess, if you believe she's going to perjure herself, she will be committing a crime in this very court. And what we do about that will remain to be seen.

I can tell you that I would err on the side of doing what you think is best for your client, but I won't pause and hire counsel for her, because she has no standing in this room other than some member of the public that the defense team might believe suitable to impart evidence. You might do just as well by making a proffer if you have any concerns.

I will leave that to you, along with your client, to decide. Fair enough?

MR. GROSTIC: Understood, Your Honor.

THE COURT: And you'll have some time, because the government will go first.

With that, I have pointed to you -- pointed out to you my belief that the January 30th, 2023 report is the most comprehensive in terms of consequences, if I find that Mr. Esteras has violated his term of supervised release by [11]either committing a new law violation or possession of a weapon.

I would like to add one more thing to the record, and then ask the defense team how you'd like to proceed.

The one other thing I'd like to add to the record, it is really an amplification of something written by Mr. Zakrajsek at the bottom of page 3 of the January 30th, 2023 report. He appropriately references -- it's the paragraph, everyone, that starts "Pursuant to 18 U.S.C. 3583(g)," and he's correct that "revocation of supervision and a sentence of imprisonment is mandatory for a defendant found to be in possession of a controlled substance," and then he goes on, "possession of a firearm."

And the only amplification I would like to make, that is a correct summary of 3583(g), but when you read verbatim the language, it becomes even more palpable what the law requires of the Court under circumstances where a defendant possesses a firearm.

It reads as follows: 3583(g), I am reading from (g)(1), "If the defendant possesses a firearm," and it goes on to say, "as such term is defined in Section 921 of this title, in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm."

I point that out needlessly, because I am sure I [12] have astute counsel before me. I needn't find that Mr. Esteras has committed the new law violation to find that he possessed a firearm.

I have consulted the judgment and commitment order issued on the 11th of September, 2018. The tenth standard condition states, "You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed or was modified for the specific purpose of causing bodily injury or death to another person, such as numbchucks or tasers)."

I make that finding by a preponderance of the evidence. I employ 3583(g).

So, Mr. Joyce, keep in mind, I will accept what presentation of evidence is necessary, but what I do, and both -- as we know from the work sheet Mr. Zakrajsek generously provided, starting at page 1 of the attachment to the January 30th report -- both possession of a firearm and new law violation are Grade C offenses. Neither is more significant in the eyes of the Court to the other.

The last point along those lines that I would like to make is -- one perhaps I'll hold for later. Let me pause there and ask, do you have any questions about the amplification of page 3 of the January 30th, 2023 report, Mr. Joyce?

MR. JOYCE: No, Your Honor. Thank you.

[13]THE COURT: Mr. Grostic?

MR. GROSTIC: No, Your Honor.

THE COURT: Mr. Grostic and Mr. Esteras, the discussion we should have now is how you'd like to proceed. As you know, Mr. Esteras has available to him full due process as outlined in Rule of Criminal Procedure 32.1. That allows for many things, including the full presentation of evidence. Meaning that the government would present what evidence it would choose to persuade the Court that Mr. Esteras has indeed violated his term of supervised release. That often includes, although it need not always, the testimony of his supervising officer, any proffer, video cam evidence as Mr. Joyce has admitted. Mr. Esteras has the right to cross-examine, confront that evidence. And to present his own evidence, including his own testimony, should he choose to do that.

Sometimes, not in every case, but occasionally the defendant waives full Rule of Criminal Procedure 32.1 due process and admits one or both of the violations. I simply want to know how your client would like to proceed today.

MR. GROSTIC: Your Honor, Mr. Esteras would ask for a hearing on both violations.

THE COURT: Denying both violations, sir?

MR. GROSTIC: That's correct.

THE COURT: With that, let me just further [14] outline, I will hear evidence; and then I will allow allocution/argument, which will sort of be your summary of the evidence and allocution at one time; and then I'll, of course, hear allocution from Mr. Esteras; and I'll make my rulings and impose consequences.

Mr. Joyce, are you prepared to begin?

MR. JOYCE: I am prepared, yes. Thank you, Your Honor.

THE COURT: Thank you. How would you like to begin?

MR. JOYCE: Thank you. Your Honor, the government would call Robert DiMaiolo from the Youngstown Police Department as its first witness.

THE COURT: Thank you. Will you retrieve your witness?

MR. JOYCE: Certainly.

THE COURT: Thank you, sir. Please approach to be sworn.

THE CLERK: Please raise your right hand.

ROBERT DiMAIOLO, of lawful age, a witness called by the United States, being first duly sworn, was examined and testified as follows:

THE COURT: Now, if you'd kindly walk around and take the seat next to mine. Thank you, sir. Make yourself comfortable there. The microphone is adjustable.

[15]THE WITNESS: Okay.

THE COURT: When you're ready, you may examine the witness.

MR. JOYCE: Thank you, Your Honor. And forgive me for not making this motion prior to actually calling the witness, but I would move for a separation of witnesses.

THE COURT: Thank you. And what are you asking in that vein? I don't see anyone else in the room who might be a witness other than an officer of the court.

MR. JOYCE: Yes. Nobody else is in the room at present. I understand there are -- based on what we heard from defense counsel, there are witnesses in the hall outside who may at some point wander into the courtroom and overhear testimony. I thought it appropriate if they remain separated while Officer DiMaiolo testifies.

THE COURT: Certainly. No one will be admitted in the room.

Are you concerned also about witnesses who are outside of the room conversing with one another?

MR. JOYCE: No. I am less concerned about that, Your Honor.

THE COURT: Okay. You just don't want anyone to walk in while your witness is under direct or cross-examination?

MR. JOYCE: Yes, exactly right.

[16]THE COURT: Thank you. Will you assist?

No objection, is there, Mr. Grostic?

MR. GROSTIC: No, Your Honor.

(Pause.)

THE COURT: Thank you, sir.

You may begin when you're ready.

MR. JOYCE: Thank you, Your Honor.

DIRECT EXAMINATION OF ROBERT DiMAIOLO

BY MR. JOYCE:

Q. Officer, would you please state your name, spell your last name for the record?

A. Robert C. DiMaiolo, D-i-M-a-i-o-l-o.

Q. Where are you employed, sir?

A. The City of Youngstown Police Department.

Q. And for how long have you worked there?

A. Twenty-five years.

Q. All right. Is that the only position or job you've held with the department, or have you worked in law enforcement in a different capacity?

A. I have worked in prior smaller departments.

Q. Where did you work prior to the Youngstown Police Department?

A. Lake Milton Police Department and Mahoning County Sheriff's Department.

Q. For how long did you hold those positions?

[17]A. Three years.

Q. But for the last 25 years, on a continuous basis, you have worked for the Youngstown Police Department?

A. Yes, sir.

Q. All right. And what positions have you held in the Youngstown Police Department?

A. I am a patrolman and a work for the bomb squad.

Q. Okay. Do you currently work for the bomb squad?

A. Yes.

Q. All right. For how long have you worked in that detail?

A. Twenty years.

Q. All right. What types of training and education have you had to undergo in order to hold your position with the Youngstown Police Department?

A. I went through OPOTA, Ohio Police Officer Training Academy.

Q. All right. And you attended that course prior to working --

A. Yes.

Q. -- as a police officer?

Are you a registered peace officer in the state of Ohio?

A. Yes.

Q. All right. What position do you currently hold? I [18]believe you said patrolman; is that right?

A. Yes.

Q. What are your everyday duties and responsibilities as a patrolman?

A. Answering calls, traffic.

Q. When you say "answering calls," could you elaborate a little bit?

A. Any call for service, emergencies.

Q. Citizen complaints, things like that?

A. Yes.

Q. All right. And when you say "traffic," is it fair to presume you mean traffic enforcement?

A. Yes.

Q. All right. What shift are you currently working?

A. Midnights, 10 p.m. to 6 a.m.

Q. For how long have you been working that shift?

A. Twenty-five years.

Q. You have worked nights the entire time you worked at the Youngstown Police Department?

A. Yes.

Q. All right. Did you work last night?

A. Yes.

Q. All right. When did your shift end?

A. 6 a.m. this morning.

Q. All right. And did you have any work related to your [19]role as a police officer after your shift ended at, you said 8 a.m. this morning?

A. Yes. I'm an SRO for City Schools.

Q. All right. Could you define SRO, please?

A. School resource officer.

Q. All right. So you work at a school as well?

A. Yes.

Q. And you did that today?

A. Yes.

Q. When did your shift from that position end?

A. 10:45.

Q. A.m.?

A. Yes.

Q. All right. I want to direct your attention to January the 23rd of 2023.

Do you recall if you were working that evening?

A. Yes.

Q. All right. And based on what you've already said, I presume that was night shift?

A. Yes, sir.

Q. All right. Did you respond to a call at 1137 Inverness?

A. Yes, sir.

Q. All right. And do you recall the nature of what you learned from your dispatch?

[20]A. It was a call for gunfire.

Q. All right. Were there any other details provided to you?

A. No.

Q. All right. And are you familiar with that address?

A. No.

Q. How about the area of town where that --

A. Yes.

Q. -- home is situated? Okay.

A. I've been on that same beat for 23 years.

Q. And this falls within your beat?

A. Yes.

Q. Okay. All right. So when you received that call for service, what was your first reaction?

A. I arrived on scene and saw an auto -- it was snowing out, and I saw an auto sitting in front of the residence with no snow on it, as it was just like abandoned right in front of the residence, facing the wrong direction of traffic.

Q. Okay. Was anybody in the --

A. No.

Q. When you say "auto," you mean a vehicle, an automobile?

A. Yes.

Q. All right. Nobody was in it?

A. Nobody was in it.

[21]Q. And how heavily was it snowing?

A. It was just a squall. It wasn't much, just flurries.

Q. All right. Was the snow collecting, to your recollection?

A. Yes.

Q. Enough so that it was notable that the vehicle had no snow on it?

A. Yes.

Q. All right. And do you -- can you approximate the time that you arrived?

A. No.

Q. Okay. Sometime within your --

A. Yes.

Q. -- shift?

Do you recall if it was at the beginning or --

A. It was at the beginning.

Q. Okay. All right. When you arrived at the residence, you said you observed a vehicle in the street facing the wrong way. What else did you observe?

A. I observed a white auto backed into the driveway with at least three gunshot holes in the outside of it.

Q. Okay. And based on your experience as a police officer for at least 25 years, you've become familiar with what a gunshot -- a hole?

A. Yes. A bullet hole, yes.

[22]Q. Now, after your arrival, at any point did you speak with anybody on scene?

A. Yes, a female victim came out.

Q. All right. And how did she identify herself?

A. She --

Q. Strike that. Let me rephrase that question, please.

Did she identify herself as a person who lived at that residence?

A. Yes.

Q. All right. And did she also identify herself as the person who had reached out for law enforcement assistance?

A. Yes.

Q. All right. Where is it that you spoke with her?

A. Outside in the front yard of the residence.

Q. Okay. Did you call her out of the home or was she outside when you arrived?

A. She walked out when I arrived.

Q. All right. And where did this interaction take place?

A. Right in front of her residence, right near the car that was left.

Q. Okay. In speaking with her, what did you learn?

A. She stated that the father of her two children came to the residence while she was inside. She was sitting at the kitchen table, and he came in, he punched her in the head, screamed at her a little bit, punched the TV, which he [23] broke, and walked outside. And at that point she followed him outside and saw her car, which was the one that was abandoned in the roadway, and he was getting into it, and she grabbed the keys from him, and she started to walk back and he pulled out a handgun, and she retreated back into the house and then he fired three rounds into her auto.

Q. All right. Can you describe her demeanor when you first spoke with her?

A. She was scared, as well as her kids.

Q. You eventually spoke to her children as well?

A. Yes.

Q. All right. Did that come later?

A. Yes.

Q. All right. So focusing on your first interaction with her, it was just the two of you on the outside of the house; is that right?

A. Yes.

Q. All right. You said she was scared?

A. Yes.

Q. How do you describe somebody who is scared? What about her made you feel that that was how she felt?

A. The fact that she called on her child's father, and then she was -- she was -- she was pretty afraid that he was going to come back and do it again.

Q. All right. Did you observe anything like tears or

[24]anything like that?

A. No, she wasn't crying, no.

Q. Now, after you spoke with her in front of the residence, did she show you the damage to her vehicle?

A. Yes. She showed me the damage, and we walked inside. Since it was cold out, we went inside and did the report, and other officers arrived.

Q. All right. But you were the first one on scene?

A. Yes.

Q. All right. Now, we'll talk about what happened inside as well. But at some point, did the person you identified, did she show you where she believed her -- the father of her children was standing at the time he fired this weapon?

A. Yes.

Q. And can you describe for the Court where that was?

A. It was right outside the vehicle that was left abandoned. And she stated that it was right near the door, right near the door of the auto, the driver's side.

Q. You said that car was in the roadway parked the wrong way, right?

A. Yes.

Q. Was it in front of the driveway?

A. Yes, blocking the driveway.

Q. Blocking the driveway. All right.

Did you have an opportunity to look around in the area [25]where it had been explained to you the person was standing when they fired this weapon, did you look around on the ground at all?

A. Yes. I looked around, and I found a casing.

Q. All right. When you say --

A. A spent casing.

Q. Explain to the Court what a "spent casing" is, please.

A. It's a casing that was ejected from the handgun after it was fired.

Q. All right. So certainly suggestive that a firearm had been discharged there?

A. Yes. And due to the snowfall, it was fresh right on top of the snow.

Q. So by that you mean it was not covered in falling snow?

A. No.

Q. No, you don't mean that?

A. It wasn't covered in falling snow.

Q. Thank you for clarifying.

All right. And in this interaction with the female you have described, did she identify by name the father of her children that had perpetrated these acts?

A. Yes.

Q. What was the name she had given?

A. I cannot pronounce his last name.

Q. All right. Can you make an attempt at it or spell it, [26]an attempt at spelling it?

A. No.

Q. Okay. Is your recollection as to his name -- is there something that I could present you with that would refresh your recollection as to his name?

A. My report.

MR. JOYCE: All right. Your Honor, may I approach the witness and present him his report?

THE COURT: You may, but just show Mr. Grostic what it is you'll show the witness.

MR. JOYCE: Certainly, Your Honor.

THE COURT: Thank you.

BY MR. JOYCE:

Q. (Handing.)

Take a moment and look through that. And once you've had a moment, let me know when you are ready for me to proceed.

A. I'm ready.

Q. All right. Having looked at the document that I have handed you, what was the name that the --

A. Edgardo Esteras.

Q. Edgardo Esteras. All right. Thank you.

Now, what I have handed you, since you are already holding it, has it been marked already?

A. Yes.

[27]Q. As Government's Exhibit 1?

A. Yes.

Q. All right. And you recognize that document?

A. Yes.

Q. All right. And what is it that I have handed you?

A. This is my PD2, my report, incident report.

Q. From the events that took place --

A. Yes.

Q. -- on the night you're talking about?

All right. It appears to be a true and accurate copy of the report as you remember drafting it?

A. Yes.

Q. All right. Now, you said that --

THE COURT: Mr. Joyce, sorry for the interruption. Do you have a copy for me?

THE WITNESS: She can -- I am fine with this now.

THE COURT: I don't want to take it from you. I do have the attachment to Mr. Esteras's motion to revoke detention order. Is it --

OFFICER ZAKRAJSEK: Your Honor, if I may. I have a copy I can provide the Court if you would like.

THE COURT: Would you like me to have that?

MR. JOYCE: Yes. It is the very same report.

THE COURT: Would you retrieve it from Officer Zakrajsek, make sure it is what you would like me to have, [28]and show it to Mr. Grostic? And that way Officer DiMaiolo will be able to keep his own.

MR. JOYCE: Your Honor, I would mention to the Court that this version of the report is just the first I think six pages of what I believe is an eight-page document. And the attachment that you referenced, Your Honor, to the defense counsel's motion I believe is the full eight-page document. That's the very same as what I presented with the witness. And I apologize for not having an extra copy.

THE COURT: I don't mind using what's docketed as ECF 426-1. It is an eight-page document.

Thank you, Officer. I will let you keep yours.

No objection to using what's already on the docket, right, Mr. Grostic?

MR. GROSTIC: No, Your Honor.

THE COURT: All right. Thank you.

MR. JOYCE: May I return it to him?

THE COURT: Please do.

Thank you, Officer. I appreciate it, but I will use this.

THE WITNESS: You're welcome, ma'am.

MR. JOYCE: May I inquire, Your Honor?

THE COURT: Please do.

MR. JOYCE: Thank you.

BY MR. JOYCE:

[29]Q. All right. Officer DiMaiolo --

A. Yes.

Q. -- you said previously that at some point you entered the home of the female. When you entered the home, how many people would you estimate were present?

A. There were approximately eight to ten people inside the residence.

Q. All right. And where in the home were they located based on --

A. Inside the living room, right inside the residence.

Q. All right. And did you have a chance to interview each and every one of them?

A. I interviewed two of them.

Q. Okay. And generally, based on your discussion with the complainant, as well as the two people you just interviewed, who were these people? Did you gain a general sense?

A. I know it was the victim, her two daughters, which are Mr. Esteras's daughters, one of his cousins, a female,

and there were random -- there was one male and a couple other females there that I have no idea who they were.

Q. Okay. But family and friends of the alleged victim?

A. Yes.

Q. All right. When you went into the home, what, if anything, did you observe?

A. I observed, it would be the television to the east side [30]of the living room was destroyed.

Q. Okay. How would you characterize the destruction to it?

A. As it was punched or something. The whole glass was all broken on the front of it.

Q. Was the TV on?

A. Yes.

Q. All right. And while you were speaking with the alleged victim or the complainant, that's where you made your -- filled out your full report?

A. Yes.

Q. Okay. All right. Did she describe to you any injuries that she had sustained?

A. No.

Q. All right. Did she -- did you offer her medical assistance should she need it?

A. Yes.

Q. All right. And she denied that?

A. Yes.

Q. All right. But she did maintain that she was struck by the defendant?

A. Yes. And she filled out a PD6, which is a domestic violence form.

Q. All right. Is that a form that you had provided to her?

[31]A. Yes.

Q. All right. And did you collect that form from her?

A. Yes.

Q. And did you leave a copy with her?

A. Yes.

Q. All right. You said that you had spoken to the children, two children that were present in the home. What did you learn from them?

A. I basically heard most of them saying the same story that happened, and that this isn't the first time that he's assaulted her or done damage to the residence.

Q. Okay. Did you ask her at any point if there was any reason she could identify that this might have happened?

A. Yes, I did ask her if it was over a man maybe being in the house or something, and she just laughed and said, "No, he just does this regularly."

Q. All right. So really she couldn't offer an explanation as to why he entered the home to do this?

A. No.

Q. All right. And was that sentiment echoed by any of the other people you interviewed on scene?

A. No.

Q. No, they said something different than she had said?

A. Nobody said anything different, they all said the same.

Q. They said the same thing?

[32]A. Yes.

Q. All right. Thank you for clarifying what was probably a confusing question.

All right. I am going to back up a little bit. You talked about the vehicle, that it was reported to you that Mr. Esteras had arrived in a vehicle that remained on scene. Did you inquire about where he had gone if the vehicle he came in was still there?

A. Yes. I asked how he left, and there was a female that was sitting on the couch, and she stated that he -- that she is Mr. Edgardo's cousin, and that he took her vehicle, which you could see the tire prints in the driveway, that he went through the neighbor's yard to exit.

Q. Okay. And did you inquire as to how he gained access to her vehicle?

A. She said it was left running, it was a rental.

Q. Okay. So her -- the vehicle that he left in had been on and running in the driveway at the time he went to leave?

A. Yes.

Q. All right. And you said that there were tracks through the neighbor's yard?

A. Yes.

Q. Tire tracks from the vehicle that had recently left?

A. Yes.

Q. All right. And did these appear to you to be fresh [33]tracks?

A. Yes.

Q. All right. And why is it -- based on what you could observe, why is it that that vehicle had to drive through the yard in order to --

A. Because the auto that he drove up in was blocking it in the driveway, so he couldn't back out, he had to back up a little bit and then do a U-turn to get out.

Q. All right. And the tracks you saw were consistent with that?

A. Yes.

Q. All right. You said that at some point you were assisted by other officers; is that right?

A. Yes.

Q. Are you aware if any of the officers who were there assisting you took photographs of the scene?

A. Yes, Detective Sergeant Skowron did.

Q. All right. And have you had an opportunity to look at the photographs that he took?

A. Yes.

Q. All right. And are they true and accurate depictions of the scene as you recall it the night of January the 23rd, 2023?

A. Yes.

MR. JOYCE: Your Honor, may I approach the [34] witness? I would like to present him with Government's Exhibits 2, 3 and 4. These are all photographs. I will, of course, show them to defense counsel first. And I will note with an apology that the officer brought these photographs to me today, and I do not have copies of them because he brought me these physical copies when he arrived here in court today.

THE COURT: Sure. But I'd like to alter your suggestion a bit. Of course, show Mr. Grostic. But then turn on the document camera, and then you can show all of us at one time. All right with you?

MR. JOYCE: Yes, certainly. A great suggestion. Thank you, Your Honor.

THE COURT: But do show your colleague on the other side.

The on/off switch is towards the back. Your hand is near it. Yes, exactly. It should work, and you should be able to manipulate, focus as you need.

MR. JOYCE: All right. Is that visible to the Court, Your Honor.

THE COURT: It is. Thank you.

MR. JOYCE: Certainly.

BY MR. JOYCE:

Q. Officer DiMaiolo, can you see what's on the screen in front of you there, sir?

[35]A. No. I can see it on her screen, though. It's not on this one. I can see it on that one over there.

THE COURT: Oh, forgive me. I should --

THE WITNESS: That's okay. There we go. I can see it now.

THE COURT: Deputy, is your screen on? Do you mind turning it on in the event -- Mr. Zakrajsek, yours should be on now.

OFFICER ZAKRAJSEK: It is, Your Honor. Thank you.

THE COURT: Thank you for saying that.

THE WITNESS: You're welcome, Your Honor.

THE COURT: Yours is working?

THE WITNESS: Yes, ma'am.

THE COURT: Please proceed, Mr. Joyce.

MR. JOYCE: Thank you, Your Honor.

BY MR. JOYCE:

Q. You are able to see the document in front of you, sir?

A. Yes, sir.

Q. It's marked as Government's Exhibit 2 in the bottom corner?

A. Yes, sir.

Q. All right. Do you recognize this?

A. That is a spent casing that Officer Bell found.

Q. All right. Thank you.

And I'm going to gesture with my hand. You tell me if [36]I'm in the correct spot. Is this area where I am circling, is this the spent shell casing that you are referencing?

A. Yes.

Q. And I apologize, it looks, because of the glossy quality of the photo, there's a little bit of a glare on the -- from the light produced by the projector. But you're still able to recognize that?

A. Yes, sir.

Q. And that's the casing you found on scene?

A. Yeah. Officer Bell found it while I was doing the report.

Q. All right. Thank you.

I would like to present Government's Exhibit 3.

Are you able to see that document?

A. Yes.

Q. All right. And it's marked Government's Exhibit 3. What is this?

A. It's a bullet hole in the hood of the auto.

Q. All right. There's a -- the bottom half of the screen -- for purposes of the record, I will make these statements. The bottom half of the screen is mostly white and there's a black mark there towards the top, or middle left part of the screen.

Is that the bullet hole that you observed?

A. Yes.

[37]Q. And while it might not be visible because of the quality of the photograph, did you observe any other bullet holes in this vehicle?

A. Yes. There was one in the windshield. It's hard to tell with the glare. And then there's one in the front grill.

Q. Okay. Thank you very much.

I am going to present you with Government's Exhibit 4.

Do you recognize that?

A. Yes, there's -- yes.

Q. All right. And what is that?

A. There's a bullet hole right underneath the front grill, and you still can't see the one in the windshield, but there is one.

Q. Okay. This is a zoomed-out version, I will say, of Government's Exhibit 3; is that right?

A. Yes.

Q. It's the same vehicle pictured in both Government's Exhibits 3 and 4?

A. Yes.

Q. I can show you Government's Exhibit 3 again if you --

A. It's the same.

Q. It's the same. All right.

And all these pictures are true and accurate depictions of what you observed that night?

[38]A. Yes.

Q. Officer DiMaiolo, are you -- in all your work with the Youngstown Police Department, have you become familiar with the odor of alcohol on a person?

A. Yes.

Q. All right. That's something you've been taught to detect as you interact with citizens?

A. Yes.

Q. On the night in question here, were you able to discern any alcoholic odor from Ms. Infante?

A. No.

Q. Did she indicate in any way or give, I don't know, symptoms of impairment?

A. No.

Q. All right. And that's something you've been trained to identify?

A. Yes.

Q. All right. Did she appear to you to be intoxicated?

A. No.

Q. All right. At the time that you responded to the call for service at 1137 Inverness, were you outfitted with an audio and video recording device?

A. Yeah, with a body-worn camera, yes.

Q. Are you aware if it was operational that evening?

A. Yes.

[39]Q. Are you aware because audio and video was, in fact, captured by that device?

A. Yes.

Q. All right. And are you aware of the receipt and storage procedures at the Youngstown Police Department?

A. Yes.

Q. Do you know if those procedures were followed in this case?

A. Yes.

Q. Have you had an opportunity to take a look at the body cam you recorded that evening?

A. Yes.

MR. JOYCE: Your Honor, with the Court's permission, I would seek to play what will be marked as Government's Exhibit 5. I can represent to you, Your Honor, that this video has been shared with counsel for the defendant prior to the hearing. I confirmed with him also telephonically yesterday and told him I would be playing it, and I made him aware of that as well.

THE COURT: Thank you for doing that.

How will you play it, from a laptop?

MR. JOYCE: Yes. I have set it up already, if the Court would be so kind as to switch it.

THE COURT: Certainly.

(Video played.)

[40]MR. JOYCE: Your Honor, for purposes of the record, I would note that I stopped the video at 23 minutes, 42 seconds. The balance is just the officer getting back into his vehicle and nothing of substance or relevance to the case, is my recollection.

BY MR. JOYCE:

Q. Officer, do you recall the balance of the video? Is there anything of substance on there?

A. No. I usually just get in my auto and shut it off right then to do the report.

MR. JOYCE: Your Honor, we're offering the entirety of the exhibit for the purposes of the hearing, but just in the interest of time, I will stop it there, unless there is objection from the Court or counsel for the defendant.

MR. GROSTIC: No objection.

THE COURT: Thank you, Mr. Grostic. I am satisfied with what you've presented, Mr. Joyce.

MR. JOYCE: Thank you. Your Honor, then I'll just wrap up very quickly.

BY MR. JOYCE:

Q. Officer, you were able to see and hear the audio and video that was just presented?

A. Yes.

Q. And was that, in fact, your body camera recording?

[41]A. Yes, that was me.

Q. And that's a true and accurate depiction of the events that occurred that evening?

A. Yes.

Q. This is not adulterated or changed in any way?

A. No.

Q. All right. Thank you.

MR. JOYCE: Your Honor, I have no additional questions for this witness.

THE COURT: Thank you.

Officer DiMaiolo is passed for cross-examination.

CROSS-EXAMINATION OF ROBERT DIMAIOLO
BY MR. GROSTIC:

Q. Good afternoon, Officer.

A. Good afternoon.

Q. I am sorry. I am going to try to speak up because I've got a little frog in my throat, but can you hear me okay?

A. Yes.

Q. All right. Thank you.

I believe in your direct, you said something about you didn't detect any alcohol odor or any inebriation?

A. No.

Q. As we were watching the video, I noticed there's kind of two different timestamps, but the timestamp in the upper right, about 22:50, someone says, "It smells like a good [42]time in here."

Do you recall that?

A. Yes.

Q. Do you know what that was referring to?

A. It had to be marijuana.

Q. Okay. So you did smell marijuana?

A. Yes. But she was vaping, I saw.

Q. Okay. Have you spoken to Ms. Infante since that night?

A. No.

Q. Not at all?

A. No.

Q. Have you seen her at all, until today?

A. I didn't even know that was her at first.

Q. Fair enough. Okay.

So to the best of your knowledge, except for maybe what I just told you, you haven't seen her or talked to her since then?

A. No.

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

THE COURT: You may.

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

MR. GROSTIC: No further questions. Thank you.

THE COURT: Is there any redirect examination of Officer DiMaiolo?

[43]MR. JOYCE: Very, very briefly, Your Honor.

THE COURT: Certainly.

Appendix A

REDIRECT EXAMINATION OF ROBERT DIMAIOLO

BY MR. JOYCE:

Q. Officer, on cross-examination, you indicated that the alleged victim was vaping. For the purposes of the record, what is that? What do you mean by that?

A. It's just -- actually, I really don't know what vaping is. It's just a chemical that they use to smoke. It's not -- it doesn't make you high or anything.

Q. All right. But so based on what you observed, in your interactions with her, she did not appear to be using marijuana in front of you?

A. No. It appeared that the other guys were, because when they asked them, they started giggling and laughing about it.

Q. Okay. But again, the alleged victim there, she didn't exhibit any symptoms of being under the influence of marijuana?

A. No.

Q. And that's something you've been trained to identify?

A. Yes.

MR. JOYCE: Okay. Nothing further, Your Honor.

Thank you very much.

THE COURT: Thank you.

[44]Within the scope of that redirect, Mr. Grostic, is there any recross-examination?

MR. GROSTIC: No, Your Honor.

THE COURT: Is there any reason Officer DiMaiolo is not able to leave the building if he should choose to do so?

MR. JOYCE: No, Your Honor.

THE COURT: Thank you, sir, for appearing. You are free to step down and leave the building.

THE WITNESS: Thank you.

THE COURT: On behalf of the United States, will you call your next witness?

MR. JOYCE: Thank you. Your Honor, pending admission of Government's Exhibits 1 through 4, the government would rest. I have no additional witnesses to call.

THE COURT: If you edit that to 1 through 5, I will ask if there is any objection. Do you mind the edit?

MR. JOYCE: No. Thank you, Your Honor. I appreciate that edit. In fact, it is five exhibits I intend to offer the Court. Thank you.

THE COURT: Mr. Grostic, at trial I would hold a separate exhibits hearing. During this violation hearing, I will do it now. Is there an objection to any one of the exhibits?

[45]MR. GROSTIC: No, Your Honor.

THE COURT: Then I will receive Government's Exhibits 1 through 5.

Subject to this opportunity to wrap up, the case turns to Mr. Esteras. Mr. Grostic, would you like to call a witness?

MR. GROSTIC: Yes, Your Honor. Mr. Esteras would like to call Ms. Melissa Infante.

THE COURT: And certainly I will allow you. I will caution you, Mr. Grostic, as an officer of the court, that if you believe she is going to perjure herself, that you have a duty to avoid that when possible.

Do you understand?

MR. GROSTIC: Yes, I do, Your Honor.

THE COURT: Would you like to speak with her? I will make sure that I tell her that she'll open herself up

to punishment, new law violations, state or federal, for penalties, including perjury, making a false statement. Under some circumstances I even include contempt. I'm not sure that that will be appropriate.

But with that caution made to you, and I'll repeat it to her, you may call your witness.

MR. GROSTIC: Thank you, Your Honor. I will go out into the hallway.

THE COURT: Please do. Thank you.

[46]MR. GROSTIC: Thank you.

THE COURT: Please approach to be sworn. Thank you.

THE CLERK: Please raise your right hand.

MELISSA INFANTE, of lawful age, a witness called by the Defendant, being first duly sworn, was examined and testified as follows:

THE COURT: Thank you. Now take the seat next to mine.

Madam Court Reporter, did you capture exactly what my assistant said as she swore the witness?

THE REPORTER: No, Judge.

THE COURT: No? The record shall reflect, and you tell me if you believe differently, I think you are going to agree your name is Ms. Infante, that you have been ordered to either swear or affirm. Did you hear that?

THE WITNESS: Yes.

THE COURT: Do you know the difference?

THE WITNESS: Yes.

THE COURT: What is the difference?

THE WITNESS: You said swear?

THE COURT: Yes. I will tell you.

THE WITNESS: Okay.

THE COURT: It's either swear to the God of your choosing, or affirm, meaning if you choose not to swear, you [47]affirm. That's still a pledge that you're bound by the oath you've now taken. Clear?

THE WITNESS: Okay.

THE COURT: Ask the witness to please introduce herself for the record, and then I'll caution her.

MR. GROSTIC: Thank you, Your Honor.

Appendix A

DIRECT EXAMINATION OF MELISSA INFANTE

BY MR. GROSTIC:

Q. Ms. Infante, could you state your name for the record and spell your last name?

A. Melissa Infante, last name I-n-f-a-n-t-e.

THE COURT: Thank you, Mr. Grostic.

Ms. Infante, I am Judge Pearson. There has been a concern brought to my attention that you intend to testify and that your testimony might be impeachable, it might be different from other statements you've already made to law enforcement.

And I just want you to know that should it be proven up at some time that while under the oath that you've just taken by swearing and affirming that you will tell the truth, you could expose yourself to new criminal law violations, civil law violations, such as perjury, making a false statement. You might even be charged with something along the lines of wasting the time of the Youngstown police if you say different today while under oath that which we've [48]already seen in a video recording made on the 23rd of January, this year.

I don't say these things to frighten you, but for you to understand that you don't have an obligation to make false statements. You only have an obligation to make truthful statements.

Is that clear?

THE WITNESS: Yes.

THE COURT: All right. If at any time when you're questioned by either Mr. Esteras's attorney, who awaits now to question you, or the government's attorney, you may not answer, and you may also plead the Fifth Amendment if you think that's an appropriate answer, because you believe your answer will cause legal problems for you.

Make sense?

THE WITNESS: Yes.

THE COURT: We'll take it question by question, Mr. Grostic, if you are comfortable with that.

MR. GROSTIC: Thank you, Your Honor.

THE COURT: Certainly.

BY MR. GROSTIC:

Q. Ms. Infante, let me ask first, do you know the person I am pointing at, the defendant sitting at defense table?

A. Yes.

Q. And who is that?

[49]A. The father of my kids, Edgardo Esteras.

Q. Okay.

MR. GROSTIC: Your Honor, could the record reflect that the witness has identified the defendant?

THE COURT: Yes, sir, it shall reflect.

MR. GROSTIC: Thank you.

BY MR. GROSTIC:

Q. Now, Ms. Infante, I want to direct your attention to -- you may not know this date, but January 22nd, the night of, into January 23rd.

Do you remember that night by date?

A. No.

Q. Understood.

Do you remember a time when Youngstown police officers came to your home in late January of this year?

A. No. I didn't call them, so I don't remember what was the time.

Q. Fair enough. I am going to state my question very precisely.

A. Okay.

Q. I'd just ask you to listen carefully.

Do you remember a time when Youngstown police officers came to your house in --

A. No.

Q. -- January of this year?

[50]A. I don't remember the time. It was nighttime. I don't --

Q. I understand.

A. But --

Q. Let me try it completely differently.

A. Do I remember the time?

Q. No. Let me try and rephrase it completely.

A. Oh.

Q. That's my fault.

A. Okay.

Q. Do you remember that in January of this year, Youngstown police officers came to your house?

A. Oh. Yes.

Q. Okay.

A. Uh-huh.

Q. Now we're on the same page.

A. Okay.

Q. And you've already said you don't remember the exact time?

A. No.

Q. But do you remember them coming at nighttime?

A. Yeah. It was dark.

Q. It was dark. Was there snow on the ground?

A. Yes.

Q. Okay. Do you remember that night telling them that [51]something had happened regarding Mr. Esteras?

A. That we were arguing.

Q. And again, I am just going to ask you to listen real carefully.

A. Yes.

Q. Do you remember telling them anything about Mr. Esteras?

A. Yes.

Q. Okay. Now, as the judge has already instructed you, you are under an obligation to tell the truth. And I believe what the judge also told you is that you -- we are aware that you've made other statements to police before tonight -- before this afternoon.

A. Yes.

Q. Are you -- do you recall making statements to police?

A. I don't remember everything I spoke about, but --

Q. Do you remember speaking with police, though, is my question?

A. Yeah. Yes.

Q. Okay. So I am going to ask you a few questions about things you may have told them or what you remember about that night. Okay?

A. Okay.

Q. Okay. So when police arrived, do you remember telling them that Mr. Esteras had come into your home?

[52]A. Did they ask me that? Yeah, I told them he came into the kitchen where I was sitting at.

Q. Okay. Do you remember telling them that he punched your TV?

A. Did he punch it?

Q. Well, my question is actually, do you remember telling police --

A. Telling them?

Q. -- that he punched your TV?

THE COURT: Mr. Grostic, I would rather you do this differently. Your witness. But it might be nice if Ms. Infante knows that we've seen a 23-minute video --

THE WITNESS: Uh-huh.

THE COURT: -- of you speaking with the police.

THE WITNESS: Yes.

THE COURT: So whether she recalls what she said, there is a video that I received into evidence. It's not been objected to. So I really don't mind whether you recall or not.

THE WITNESS: Uh-huh.

THE COURT: And I think that narrows the passageway for Ms. Infante to get herself into a legal complication.

So do you mind taking into consideration the video, what it says? If you'd like some parts of it to be [53]shown to her to see if she wants to respond differently. But we know what's on that video. Right?

MR. GROSTIC: Understood, Your Honor. Thank you.

THE COURT: Keep that in mind, please.

BY MR. GROSTIC:

Q. So, Ms. Infante, let me try a different approach.

A. Okay.

Q. What happened that night with Mr. Esteras?

A. Okay. So I had called him -- we were arguing. I mean, we're always arguing. But I had called him to ask him if he knows anything about what happened to my truck.

He came to the house. We started arguing about it because he said, "Nobody better find out where we live at," being that my son has problems with other people out there.

He got mad at the fact that there was something done to the truck. He helped me buy that truck. So I can understand why he was mad.

So we were arguing inside about other things, including that. And he has a loud mouth, just like I do. He was getting loud with me, so I started hitting him. I punched him in his mouth, and Edgardo started bleeding.

The kids were in the room sleeping, but my daughters came out crying because they heard all the loud noise.

After that, he tries to leave and all -- he tries to leave. About the TV, I can't even remember what happened to [54]it.

He goes outside. I left behind him. I realized that they were in my other car that was actually at the shop supposedly getting fixed. So since I realized that that was my car, I took the keys and I ran right back inside with the keys.

Edgardo got in another car that was there in the driveway and he left. I can't remember which way the car was parked. I think it was facing the house. And then he went through the grass and he left.

But we were arguing inside about what happened to the -- to the car. I'm thinking it's him the whole entire time, because we were arguing. But then I'm thinking like, could he have been capable of doing this, being that he helped me get the car.

Q. Well, let me stop you there, actually. I'm not -- let me back up.

When you said, "I'm thinking this was him," what are you referring to? You just described, if I'm not mistaken, that you were --

A. What was done to the vehicle. What was done to the vehicle, because the vehicle was --

Q. Are you -- I am sorry.

A. The vehicle -- I had pulled up -- I was gone. When I pulled up there, my other two kids were there. And when I [55]seen my vehicle like that, I'm like -- I'm asking them, "Do you guys know what happened to my car?"

Q. And let me pause. When you say "like that," what are you referring to?

A. With the -- with the hole on the windshield.

Q. So you're referring to holes in the windshield?

A. Uh-huh.

Q. Okay.

A. Yes.

So then my kids, they were acting like they didn't know anything. They were acting like it could have been -- they were acting like they didn't know what happened.

But then, a few weeks later, I come to find out that that day my son was arguing with people who he had problems

with before prior, which they did get to shoot up my mom's house, and there was a whole situation with that also. My son till this day still has problems --

THE COURT: Keep to the point. Control your witness. What's the question?

BY MR. GROSTIC:

Q. So let's come all the way back to, you noticed holes in your car?

A. Uh-huh.

Q. Okay. Did Edgardo shoot a gun into your car?

A. I didn't see him do that. When I went outside and [56]noticed that he was in my other car with his friend, I grabbed the keys that were -- I don't know why he left the keys there -- in the cup holder and I ran inside. And that's when he's like, "Melissa, give me the keys. Give me the keys." I'm like, "No."

Q. All right. So let's back up then.

Did you see Mr. Esteras with a gun?

A. No.

Q. Did he threaten to kill you with a gun?

A. Did he -- no.

Q. Did you -- why did you tell Youngstown police that he did shoot at your car?

A. Because I was mad.

Q. Okay. So when the police arrived --

A. Uh-huh.

Q. -- you spoke with them, correct?

A. Yes.

Q. Do you remember everything you said?

A. Not everything.

Q. Okay. But you're aware that there is a video recording of that?

A. Yes.

Q. Have you watched that since then, that video recording?

A. When I was out there, I seen it on there, but that's it.

[57]Q. Okay. Could you hear when you were --

A. No.

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

THE COURT: If you need it.

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

BY MR. GROSTIC:

Q. Now, Ms. Infante, you're aware that the Youngstown -- in the Youngstown Municipal Court, Mr. Esteras was charged with certain crimes, correct?

A. Yes, and that's why I dropped the charges.

Q. Now, if you could just stick to my question. Okay?

A. Yes. Okay.

Q. Did you appear in Youngstown Municipal Court in connection with that case?

A. The courthouse over there?

Q. Yes.

A. Just -- just to --

Q. Again, my question is just, did you appear there?

A. I appeared there, yes.

Q. And did you tell the officials there that you wanted to drop those charges?

A. Yes.

MR. GROSTIC: Nothing further, Your Honor.

THE COURT: Cross-examination of Ms. Infante?

[58]MR. JOYCE: Thank you, Your Honor.

CROSS-EXAMINATION OF MELISSA INFANTE

BY MR. JOYCE:

Q. Good afternoon, Ms. Infante. My name is Chris Joyce. I'm the prosecutor in this case. I am going to ask you a few questions about what you just testified to. All right?

A. Okay.

Q. All right. You said that leading up to the events that you testified to about your house and your argument with Mr. Esteras, you said you had been arguing.

Do you recall making that statement?

A. What was the last thing?

Q. Do you remember saying that, testifying that you had been arguing with Mr. Esteras prior to him showing up at your house?

A. Yes. That's -- yes. That's every day.

Q. Okay. The two of you argue every day?

A. Mainly every day.

Q. Okay.

A. But nothing --

THE COURT: Listen, the question has been answered.

THE WITNESS: Yes.

THE COURT: Next question.

MR. JOYCE: Thank you, Your Honor.

[59]BY MR. JOYCE:

Q. You said that you had called him that night because you wanted to ask him if he knew about what happened to your car, correct?

A. Yes.

Q. And what you were asking about was why there were bullet holes in your car, correct?

A. Yes.

Q. All right. So when you testified here in court today, the way you have characterized that, and correct me if I'm

wrong, you did not see him -- you are saying you didn't see him fire a gun at your vehicle?

A. No.

Q. Okay. How did you find that your vehicle had been shot?

A. My kids told me.

Q. When did they tell you?

A. When I arrived at the house.

Q. Okay. So you had been out for the evening, you came home and your kids told you --

A. Yes.

Q. -- your car had been shot?

A. Yes.

Q. Where were you?

A. I was at the store.

[60]Q. Okay. Presumably not in that vehicle?

A. No. I was with a friend.

Q. Okay. And so you had called Mr. Esteras so he could come and explain if he knew why your vehicle was shot?

A. Yes.

Q. All right. And you said that he then came into your home after you called him; is that right?

A. Yes, he came.

Q. He came over. All right.

A. Uh-huh.

Q. And that's when the two of you continued arguing?

A. Yes.

Q. All right. And you said that he -- you were arguing, and that you punched him in his mouth; is that right?

A. Yes.

Q. With enough force to draw blood, I think is what you said?

A. Yes.

Q. All right. And had he struck you prior to that?

A. No. All Edgardo did was push my head back. That's why my neck was hurting a little. He just pushed my head back.

Q. All right. Where did that take place?

A. That was near the kitchen.

Q. Okay. You struck him first, and his reaction was then to push you in your neck?

[61]A. Just try to push me away from him, because he knows that I can -- I won't stop hitting him unless somebody --

THE COURT: Stop. Next question.

BY MR. JOYCE:

Q. When this happened, who was with you?

A. I really don't remember everybody that was there.

Q. All right. You said that your children were home?

A. They were sleeping.

Q. How many children live in the home with you?

A. I have -- I have four. The two oldest; and the two little ones that are his kids, they were sleeping.

Q. All right. And the older children?

A. They were in their rooms.

Q. So when Mr. Esteras came into your home and began arguing with you, you were alone; is that right?

A. I was with the girl that had the box braids in the video. We were sitting in the kitchen.

Q. All right. And who is that?

A. She is -- she is my daughter's friend.

Q. She is your daughter's friend?

A. Uh-huh.

Q. Okay. And why was she over?

A. She -- well, currently she's homeless, so I was letting her stay there.

Q. All right. And she was sitting with you at the kitchen [62]table?

A. Yes.

Q. All right. She's not in any way related to Mr. Esteras?

A. She says that they're somewhat related. I don't really know.

Q. All right. And she was staying there for the evening?

A. She was staying there. Even when he was incarcerated, she was still staying there with me.

Q. All right. But the night that we're talking about --

A. That night, yeah.

Q. -- she was sleeping at your house?

A. Uh-huh.

Q. And where was her car?

A. That car was in the driveway.

Q. All right.

A. That's the car that he left in.

Q. Okay. "He" being the defendant?

A. Edgardo.

Q. Yes. All right.

And was her car running?

A. I don't know.

Q. Okay. How did -- were you present when Mr. Edgardo gained possession of her keys?

A. No. I grabbed my keys from the car and I ran inside.

[63]Q. All right. You grabbed your keys from which car?

A. The black car that was in the street.

Q. The one that Mr. Esteras arrived in?

A. Yes.

Q. All right. You said he was with somebody; is that right?

A. Yes.

Q. Who was he with, do you recall?

A. I don't know that guy.

Q. All right. And during this whole interaction with Mr. Esteras, did that person remain in the vehicle?

A. That person was in the vehicle the whole entire time. When I ran outside to -- I ran behind him, and then I realized that that was my car, the guy got out the car.

Q. The person that was in the car got out of the car?

A. Yeah, he got out of the car.

Q. And what did he do?

A. He got out the car, he went around the car, and I ran inside. I don't know.

Q. All right. You said that your children were all asleep at the time Mr. Esteras came into the home; is that right?

A. The two little ones, yes.

Q. At some point did they wake up?

A. When they heard all the screaming, or arguing.

Q. And were they present then during the physical [64]altercation you described?

A. Not that I could remember.

Q. All right. What happened to your television?

A. That -- I was -- okay. I was standing right there, right next to it, and we were arguing, and he was mad, so -- I don't know if he like did like this to it or what it was. (Indicating.) I can't remember.

Q. But based on the gesture you just made, he struck the TV with his hand?

A. Yeah.

Q. With enough force to break it?

A. Could have been. I don't know.

Q. You don't remember if it broke when he hit it?

A. Huh-uh.

THE COURT: Mr. Joyce --

THE WITNESS: It was turned off. I don't know.

THE COURT: Mr. Joyce --

MR. JOYCE: Yes, Your Honor.

THE COURT: -- you can't leave that there.

Was the TV broken before he touched it, yes or no?

THE WITNESS: I hope not.

THE COURT: Don't give me an "I hope not." I said yes or no. Which is it, one or the other? Was the TV broken before he touched it using that gesture you just made, yes or no?

[65]THE WITNESS: No.

THE COURT: After he touched it, after the gesture, was the TV broken?

THE WITNESS: When we turned it on, it was broken.

THE COURT: Was the TV broken? On or off, was the screen broken, yes or no, after he touched it?

THE WITNESS: It was broken.

THE COURT: I infer that when Mr. Esteras touched the TV using the gesture made by the witness, he broke it. Next question.

MR. JOYCE: Thank you, Your Honor.

THE COURT: Listen, I'm not sure what game you're playing at. This is a court of law. We are here at this hour not to game with you. Answer as directly as you can every question regardless of who puts it to you. You won't make any final decisions in this room, Ms. Infante.

THE WITNESS: Okay.

THE COURT: I will. And the only thing you'll delay is the making of that decision. And I strongly suggest you not do it. Because the one authority I do have over you is contempt of court, and I will employ it if you force me to do so. Listen, cogitate, answer.

Back to you.

MR. JOYCE: Thank you, Your Honor.

BY MR. JOYCE:

[66]Q. Ms. Infante, on the night that we are discussing, you told the police you wanted to press charges; is that correct?

A. Yes.

Q. All right. And you filled out a statement indicating as much; is that correct?

A. Yes.

Q. All right. And in that statement, you told the police that Mr. Esteras came to your house unannounced; isn't that correct?

A. I don't recall that.

Q. All right. In that statement, you said he came in and you were sitting at the kitchen table and he struck you. Do you recall that?

A. No.

Q. All right. You said that in his anger, he also struck the TV and broke it. Do you recall that?

A. Yes.

Q. All right. You also said that you followed him out of the house as he went to a vehicle.

Do you recall that?

A. Yes.

Q. All right. You said that you recognized it was your vehicle that he drove to your home, and so you took the keys from him.

[67]Do you recall that?

A. Yes.

Q. And you told the police that when that happened, Mr. Esteras took a gun out and aimed it at you.

Do you recall that?

A. No.

Q. No, you don't recall that?

A. No.

Q. Is it your testimony here today that that did not happen?

A. That he pointed a gun at me?

Q. Yes.

A. No, he didn't.

Q. Okay. You said that he threatened with the gun that he would kill you.

Do you recall that?

A. No.

Q. All right. You said that you watched as he fired several rounds into your vehicle that was parked in the driveway.

Do you recall that?

A. No.

Q. Ms. Infante, as you testified on direct examination, charges were filed in municipal court. And you know that, correct?

[68]A. Yes.

Q. And in order to have those charges filed, you had to appear physically at the municipal court, I believe the next day after this happened; isn't that right?

A. Yes.

Q. And you did go down to that court, and you did ask that charges be filed, correct?

A. Yes.

Q. And those charges were based on the information that you gave the police on January 22nd or 23rd of 2023, correct?

A. Yes.

Q. All right. And then sometime later you went and asked they be dismissed --

A. Yes.

Q. -- is that fair?

A. Uh-huh.

Q. What is your -- strike that.

I understand that you have children in common with Mr. Esteras. Is that correct?

A. Yes.

Q. While he has been in custody since the time of this event, have you had the ability to communicate with him?

A. With him?

Q. Yes.

[69]A. He calls to speak to my daughters.

Q. Okay. Do you speak with him as well?

A. Not as much.

Q. Is that a yes?

A. A little, not as much.

Q. Yes, sometimes you speak with him?

A. Sometimes.

Q. Okay. What is the status of your personal relationship with him at this point in time?

A. I have nothing against him.

Q. Okay.

MR. JOYCE: Thank you. Your Honor, I have no additional questions for this witness.

THE COURT: Thank you, Mr. Joyce.

Is there any redirect examination, Mr. Grostic, within the scope of the cross-examination?

MR. GROSTIC: No, Your Honor. Thank you.

THE COURT: Thank you.

Is there any reason the witness isn't free to step down and leave the building?

MR. GROSTIC: No, Your Honor.

THE COURT: You may step down and leave the building.

THE WITNESS: Okay.

THE COURT: Mr. Grostic, do you have another [70] witness?

MR. GROSTIC: No, Your Honor. With that, defense would rest.

THE COURT: All right.

(Witness exited the courtroom.)

THE COURT: Mr. Grostic, I didn't notice that you used any exhibits. Have I missed any?

MR. GROSTIC: You have not missed anything, Your Honor.

THE COURT: No worries.

Then, as I outlined for you earlier, we are through the submission of evidence. I would like to give you, Officer Zakrajsek, an opportunity, but not obligate you, to say anything more you'd like to share on the record about the experience of supervising Mr. Esteras. Keep in mind that we've all received the reports that you've drafted. We have the evidence that's been submitted, documentary as well as testimonial evidence.

Is there anything more that you'd like to inform the Court and counsel about that you think we might have missed or wouldn't otherwise be aware of?

OFFICER ZAKRAJSEK: I have nothing further, Your Honor. Thank you.

THE COURT: Thank you.

I don't have any questions for you at this time, [71]but do you have any questions for Mr. Zakrajsek?

MR. JOYCE: No, Your Honor. Thank you.

THE COURT: Do you, Defense Counsel?

MR. GROSTIC: No, Your Honor.

THE COURT: Counselors, with that then, I will allow your allocution/argument. And the allocution is an obvious concept to you. The argument is just to summarize the evidence you've heard, folded into the suggestions you'd like to make to the Court regarding whether Mr. Esteras has violated his term of supervised release in the two ways suggested. And if you care to suggest what consequence, if any, be imposed should I find he has violated.

Do you mind going first, Government's Counsel?

MR. JOYCE: Not at all. Thank you, Your Honor. Your Honor, would the Court prefer I speak from the lectern or from my seat?

THE COURT: Wherever you are most comfortable. I think Madam Court Reporter and I can hear you from there as well as from the podium. So you are welcome to stay at your seat or walk to the podium, whichever you'd like.

MR. JOYCE: Thank you, Your Honor. I will elect to speak from the podium.

Your Honor, I submit to the Court that the evidence presented here today does establish by a preponderance of the evidence that Mr. Esteras has, in fact, [72]violated a number of his conditions, two of which, of course, are outlined in the report dated January 30th of 2023, Your Honor.

The first violation, titled as a new law violation, includes a number of different misdemeanor charges that had been filed in the Youngstown Municipal Court, those being domestic violence, aggravated menacing, criminal damaging/endangering.

And, Your Honor, the evidence presented here clearly demonstrates that Mr. Esteras did, in fact, violate his conditions in those ways.

We watched body cam footage that was captured by the officer who responded shortly after the events in question took place. And from that footage, which was very clear in nature, we were benefited with a statement by Ms. Infante that she offered to him while she was still really under the stress of what had happened.

While the officer testified that in his recollection he didn't recall her to be crying when I asked that on direct examination, I would submit that rewatching that video, you can see that when she first interacts with the officer, she, I believe, is crying.

And the significance of that is just that she was still under the stress of what happened. Her memory at that moment in time, I submit, wouldn't -- will never be better. [73]Right? She had just experienced it. She was still shaken up by it.

And it was clear, and she repeated it a number of times throughout that video, and then submitted it -- committed it, pardon me, to writing as well.

And the order of what she described was consistent each time. That Mr. Esteras arrived. He entered her home unannounced. He struck her, as she said -- she was at the table when he entered. At some point he struck her. She did explain on the video that she hit him or scratched him back or something to that effect. But he initiated that contact.

And then at some point, out of his anger, he punched the TV. He broke it. And then she followed him outside. And she approached him at his vehicle. When she saw it was her vehicle, she was upset. It was supposed to be at his shop, and here he was driving it, so she took the keys from him.

And his reaction to that was to pull out a firearm. She didn't hesitate in her description to the officer that it was a firearm. She described where he was standing. She said how he aimed it. She gestured even in the video, if you watch, with her hands of how he stood and where he aimed, fresh in her mind at the time she gave that statement as to what happened.

[74]And then he fired a number of times. That statement, again, she made it then, it certainly appeared truthful and genuine as I watched it. But it's supported and buttressed by the fact that the officers who arrived, pointed to the area where he stood and fired this gun allegedly, they found a shell casing. That is a piece of evidence that supports her story that she explained to the officers that night.

They found bullet holes in the vehicle in the exact way that she described, where he was standing, how he aimed, how he fired it. They went and looked at the car and, sure enough, bullet holes in the windshield and the hood of the vehicle.

They then went in the home. Of course, they saw, you can see in the body cam footage, the TV is broken. You can hear her as she discusses what happens with a number of the people in the room, people who were, based on their own statements, not her statement that she told the police, based on their own statements captured by the body cam, present when this happened.

They described the manner with which Mr. Esteras entered the home, how he angrily was stomping and walked up and how this happens all the time. They explained -- you can hear some of the children who were in the home at the time this gun was fired. You can hear them talking about [75]how they were shocked that he had pointed the gun at him. They had seen this firearm.

All of that, Your Honor, supports the statement that was given by Ms. Infante on the day in question that is

captured by the body cam, that, again, she committed to writing, and then she filed in court the following day in an effort to have charges filed.

I submit to you that all the evidence that was presented, the photographs, the testimony and the body cam footage, all taken together, looking at those, and any reasonable inferences that can be drawn from all those evidence viewed in its totality, support the fact that Mr. Esteras did exactly what she described that evening. That he did violate his conditions of supervision in the ways that are described in the violation report of January 30th, 2023.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Joyce.

Mr. Grostic, I would like to hear your allocution/argument before I hear Mr. Esteras's allocution. You have the same opportunity, from where you are or the podium, your choice.

MR. GROSTIC: Thank you, Your Honor.

My colleague obviously emphasized the body cam video that we saw. Ms. Infante obviously also was in this [76]courtroom after being instructed that she was under penalty of perjury with all the consequences that could follow. And after that instruction, Ms. Infante corrected some of the things that she said that night.

My colleague emphasized that that was while she was under the stress of what happened. As she said here today,

she was angry. The order was not consistent, though, in that body cam. The first statement she made to police is that he came and he shot at her vehicle and then came inside. Later it changed to he shot at the vehicle after she went outside. It was not consistent between the statements that were made.

There was no point at which she said that -- or that a gun was inside the home. I don't know about this point about pointing the gun at children. She didn't say that on the body cam and she did not say that here.

THE COURT: But the video, you didn't hear anything about that during the video? One of the younger women said, "Why he point that gun at us?"

MR. GROSTIC: I did -- I did hear that said. And it's -- I don't know what to make of that, because it's inconsistent with the story we've heard.

THE COURT: Not really. Not really. If you imagine -- and you saw the video. You saw the car in the driveway facing the street. You saw the photos that were [77] separate from the video. You saw that there was a photo of what's believed to be -- well, a bullet shot through the windshield that's facing the house, through the front grill that's facing the house, and then also the hood.

So anyone who is able to connect a bullet with that vehicle in that way is shooting towards the house. I understand precisely why anyone inside of the house, Mr. Grostic, might say, "Why he point that gun at us," because that gun was pointed at every individual inside of that

house. The only way that could happen, when the bullets were made -- bullet holes were made while the gun was -- while the car was in the driveway, and I haven't heard that even from the on-the-stand testimony, that the bullet shots were otherwise put there.

Make sense?

MR. GROSTIC: Yes, I understand now, Your Honor. And I guess the only point that I would make is that it's not clear, at least to me, that the people inside were saying that based on what they themselves saw, or whether that they were hearing something else. I mean, Ms. Infante testified today that the bullet holes were there before that he came over.

THE COURT: Well, I won't disagree with you on that. Thank you for engaging me. You are free to go on.

MR. GROSTIC: As far as my argument, I would leave [78]the Court simply with that, that present here in court, under penalty of perjury and subject to cross-examination, Ms. Infante said that he did not commit these violations.

I would turn then -- I am, of course, in a difficult position where I am first trying to persuade the Court not to impose any penalty. But should the Court decide that Mr. Esteras has violated the terms of his supervised release, I do want to emphasize just certain information that is contained in the violation report. And I know the Court's reviewed that, simply because the Court pointed one of the things out at the beginning.

But that he has been employed full time. He did have both substance abuse and mental health assessments complete. He had, as the Court noted already, completed his GED, even after the Court suspended that requirement. He had over three years of supervised release where he was, you know, according to these conditions, doing the things that the Court wanted him to. And then we're here now on something that happened in January.

So I do just want to bring those things up for the Court's attention, should the Court decide that there is a penalty to be imposed here.

THE COURT: Thank you, Mr. Grostic.

Will you have Mr. Esteras join you?

(Discussion held off the record between the defendant [79]and Mr. Grostic.)

THE COURT: Mr. Esteras, you have the opportunity to be heard. And I am going to slightly modify the outline of events that I've said. I am going to sum up my findings so that you can speak in response, which I think is the way allocution is meant. You know, the attorneys are comfortable, as you saw your attorney do one thing, argue, and then allocute. You will only allocute. And I think it fairest to you to know what my thoughts are.

As you know, you've been -- it has been alleged that you have violated your term of supervised release in two ways. New law violation, that is, a violation of law here in Youngstown, Ohio, resulting in you being charged with

three misdemeanor offenses. And then separately, the possession of a firearm.

It is important that I discern one from the other, because it's with similar behavior, or overlapping behavior, the same behavior that you've committed both, or it's alleged that you committed both.

I am obligated, as I explained earlier, pursuant to 3583(g), to revoke the supervision of someone who possesses a firearm. And I make that finding, if I can, by a preponderance of the evidence. It is a lesser standard than beyond a reasonable doubt. It is a higher standard than probable cause. And I make that finding today, that [80]you possessed a firearm while under a term of supervised release.

I make that finding based on the evidence that's been presented here, taking into consideration the things that I should.

First of all, that you were under a term of supervision that explicitly prohibited you from possessing a weapon, or having access to a firearm. I believe you did possess and have access, brandished and shot a firearm, three times, as Ms. Infante said in the video that we spent at least 23 minutes viewing here together.

And it's not just that I accept the video cam footage. I appreciate when it exists. I am happy it existed for this case. But it was corroborated, not only by the words of Ms. Infante, but the words of the several others who spoke about the assault you made on that household that evening.

And then, as Mr. Joyce has explained, she didn't just complain to the police that evening, she also corroborated that complaint by leaving her home, going to the Youngstown Municipal Court the next day, and complaining about your behavior. It's only been here in this courtroom this evening, as Mr. Grostic said, after been warned of penalties that could attach if she lied, and she did anyway, but victims of domestic offense often do that, that she'd [81]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.

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.

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.

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.

[82](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.

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.

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 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 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 sentence upon you the last time, I sentenced you for the [83]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.

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.

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.

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 [84]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.

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 -- 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 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 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 do here impose escalated consequences by exercising my [85] 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.

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 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 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 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 because I believe they have likely not been met. And if -- [86]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.

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 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 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.

THE COURT: Sir, I have revoked your term of [87] 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?

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?

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 assistance to Mr. Esteras when he returns to the community. [88]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?

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.

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.

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.

So I do impose, as a component of mental health, anger management.

What else, Mr. Zakrajsek?

OFFICER ZAKRAJSEK: Nothing further, Your Honor.

Thank you.

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

[89]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.

[90]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?

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.

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 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 recommendation.

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

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

THE COURT: Certainly.

(Discussion held off the record between the defendant [91]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.

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.

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.

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 [92]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.

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 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?

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 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.

So I think I have sufficiently addressed what your [93] 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 [94]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 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 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 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 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 testimony from what we saw in the video.

[95]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.

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 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 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 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, the anger management, the other terms that are there are [96]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.

THE CLERK: All rise.

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

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION, FILED MAY 9, 2023

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 4:14-CR-425-10

UNITED STATES OF AMERICA,

Plaintiff,

v.

EDGARDO ESTERAS,

Defendant.

Filed May 9, 2023

ORDER

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.

Appendix B

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.

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.

Appendix B

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.

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.

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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.

Appendix B

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 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

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED AUGUST 16, 2023

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-3422

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EDGARDO ESTERAS,

Defendant-Appellant.

Filed August 16, 2023

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

ORDER

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.

Estera'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." 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

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX D — AMENDED ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED DECEMBER 20, 2023

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-3422

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EDGARDO ESTERAS,

Defendant-Appellant.

Decided and Filed: December 20, 2023*

AMENDED ORDER

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

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.

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

Appendix D

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, 120 S. Ct. 1795, 146 L. Ed. 2d 727 (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, 131 S. Ct. 2382, 180 L. Ed. 2d 357 (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.

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED DECEMBER 20, 2023

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 23-3422

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EDGARDO ESTERAS,

Defendant-Appellant.

Decided and Filed: December 20, 2023

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.

ORDER

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

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

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

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]

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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.

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 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

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED MARCH 7, 2024

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-3422

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EDGARDO ESTERAS,

Defendant-Appellant.

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.

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, 131 S. Ct. 2382, 180 L. Ed. 2d 357 (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 dissents from the denials of rehearing 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

/s/ Kelly L. Stephens
Kelly L. Stephens, Clerk

APPENDIX G — TRANSCRIPT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION, FILED FEBRUARY 17, 2023

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No.:3:10CR4
Toledo, Ohio

UNITED STATES DISTRICT COURT,

Plaintiff,

v

TIMOTHY JAIMEZ & JOSE CARRIZALES,

Defendants.

February 17, 2023

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

[2]THE COURT: Straight forward question, there's a bunch of motions. What's that all about?

COURTROOM DEPUTY: That was Mr. Schuman, Your Honor.

MR. WAGNER: I use a better part of—

MR. SCHUMAN: Motion's withdrawn, stipulating to the violations. That's all.

MS. DUSTIN: I think we—

MR. WAGNER: I'm Pete Wagner. I haven't met you.

MS. DUSTIN: And I think we previously—and I would formally, on the record, dismiss violation number three with respect to the cocaine for Mr. Watters.

THE COURT: Because?

MS. DUSTIN: Because it was in a common area in the house where there was a lot of people in and out, so I don't think we can necessarily prove it.

THE COURT: Even constructive?

MS. DUSTIN: I think it would be best to let that one go.

MR. SCHUMAN: We expressed some reservation about it too in the bond hearing.

MS. DUSTIN: There was construction workers in and out, it was on top of a cabinet, so there were a lot of people in the house.

THE COURT: What was it they were convicted of?

[3]MS. DUSTIN: Both of them, they were indicted for felony position of marijuana. They pled guilty to misdemeanor possession of marijuana. They were sentenced to 180 days.

THE COURT: Time served?

MR. WAGNER: No contest plea.

THE COURT: Good enough.

MS. STERLING: Judge, just to be clear, it's Alissa. Everything you just heard was accurate.

THE COURT: Believe it or not, unlike once before I can tell the difference. I don't know whom I called—I think I called Ava Alissa.

MS. STERLING: No, you called me Ava. I was sitting, to be fair.

MR. WAGNER: You've got to look way up and way down.

MS. STERLING: When Shawna was here, Judge never knew if it was me or Shawna.

MR. WAGNER: I spoke to him one time out of here for about ten or 15 minutes, and he said, Pete, that's you, isn't it, and I had to remember what did I say.

MS. STERLING: So both of the defendants were—of course they were together on the January 14th incident. There are a number of violations for Mr. Carrizales related to that. He also entered a no contest plea to a [4] misdemeanor and was convicted, but he has additional violations that predate that. That includes a felony conviction that he went to jury trial on, and ultimately to prison. So I just want to make sure you're aware his guideline is different, and he has seven violations instead of three.

THE COURT: And the other thing is he's completed the prison time?

PROBATION: Yes.

MS. STERLING: He has.

MR. WAGNER: He was not convicted of the indictment in Wood County. The jury found a lesser included.

MS. STERLING: Still a felony. I'll give you the history, I just wanted you to recall that.

MR. SCHUMAN: Grade C or not?

THE COURT: Pardon, Ava?

MS. DUSTIN: We said that if he pled guilty, the misdemeanor would be grade C. Doesn't mean the conduct won't constitute something higher. It is technically a grade C, and I think probation will verify that. Doesn't stop me

from arguing for higher because technically his conduct would be more, but technically, yeah, it's a grade C.

(A brief recess was taken.)

[5]COURTROOM DEPUTY: The Court is now in session before the Honorable James G. Carr, Judge of the United States District Court. The case before The Court is USA versus Timothy Watters and Jose Carrizales, case number 3:10CR4. The matter is called for a combined continuation of a supervised release violation.

Government's represented by Alissa Sterling and Ava Dustin. Defendant Carrizales is represented by Mr. Wagner, and Mr. Watters is represented by Mr. Schuman. We also have Cornelius Hagins from the Pretrial Probation Office.

Defendants Watters and Carrizales, can you raise your right hand for me? I'll swear you in.

TIMOTHY WATTERS,

JOSE CARRIZALES,

was herein, called as if upon examination, was first duly sworn, as hereinafter certified, and said as follows:

THE COURT: So you can remain seated.

Let me say, where are we in terms of procedure? Have we had probable cause, we're now at adjudication, or do I

begin from square one? Doesn't matter to me, I just want to make sure I get the procedure right.

MS. STERLING: It's my understanding we are ready [6]for adjudication. Mr. Carrizales waived his right to a preliminary hearing over a year ago.

Mr. Watters exercised his right to a hearing, and this Court found probable cause.

We're now ready for adjudication on both cases.

THE COURT: Okay. And it's my understanding that each have been charged in a higher felony level, and each pled to a reduced charge, got 180 days time served, and here we are; is that correct?

MR. WAGNER: That is correct, Your Honor, on behalf of—

THE COURT: I can't quite hear.

MR. WAGNER: I'm sorry. Relative to Mr. Carrizales, we did tender a plea in Lucas County Common Pleas Court to a misdemeanor and got time served, 180 days.

THE COURT: Now, it's my understanding that engaging the guideline range, I'm not bound by whatever The State Court did, but I can look to the actual conduct in terms of determining the guideline range. Ms. Sterling, is that correct?

MS. STERLING: That is correct, Your Honor.

THE COURT: Okay. And I've read the violation reports, and you've gone over the violation reports with your clients, correct, Mr. Wagner and Mr. Schuman?

MR. WAGNER: Yes, Your Honor.

[7]MR. SCHUMAN: Yes, Your Honor.

THE COURT: Mr. Carrizales, are you familiar with the allegations contained in the violation reports?

DEFENDANT CARRIZALES: Yes, sir.

THE COURT: Mr. Watters?

DEFENDANT WATTERS: Yes, Your Honor.

THE COURT: Okay. And are you each fully and completely satisfied that, Mr. Schuman, you, as to Mr. Watters, and you, Mr. Wagner, as to Mr. Carrizales, each of them has given you and your case enough time and attention to prepare you thoroughly for today's procedures?

DEFENDANT WATTERS: Yes, Your Honor.

DEFENDANT CARRIZALES: Yes, Your Honor.

THE COURT: You can remain seated, that's fine. If, for no other reason, you've got to be about this distance

from the microphone for anybody to hear anything, including myself, so I have to keep remembering to lean forward.

And during the course of their work with you relative to these violations, have—Mr. Watters, has Mr. Schuman at any time—have you asked him to do something and he hasn't done it? Do you understand my question?

DEFENDANT WATTERS: Oh, no, no.

MR. SCHUMAN: That I failed to do.

[8]THE COURT: Mr. Carrizales, how about yourself, any time, during the course of the pendency of these proceedings, have you asked Mr. Wagner to do something on your behalf with regard to the pending allegations and he simply refused or failed to do it?

DEFENDANT CARRIZALES: No, sir.

THE COURT: And Mr. Watters, are you satisfied that Mr. Schuman has given you and this whole proceeding enough time and attention to prepare both himself and you thoroughly for today's proceeding?

DEFENDANT WATTERS: Yes, Your Honor.

THE COURT: Mr. Carrizales, likewise, relative to Mr. Wagner, are you thoroughly and completely satisfied that Mr. Wagner has given you and your case enough time and attention to prepare both you and him thoroughly and completely for today's hearing?

DEFENDANT CARRIZALES: Yes, Your Honor.

THE COURT: I gather, counsel, you've had the opportunity to get together with the prosecutor and find out from the prosecutor, or otherwise, the underlying—what contentions, what allegations support the allegations relative to the alleged violations? In other words, have you learned, to the best of your understanding, as much, or just about as much about what the government—what the government has in its hands by way of investigatory reports [9]and so forth relative to these allegations, that you have learned, by examination of the prosecutor, materials, according to your understanding, what the prosecutor knows about the allegations and the incident?

MR. WAGNER: Yes, Your Honor, on behalf of Mr. Carrizales.

MR. SCHUMAN: Yes, Your Honor, on behalf of Mr. Watters.

THE COURT: Okay. Okay, so I think we now proceed—and neither, I gather, is admitting the allegations, and that's fine, that's why we're here. No problem at all.

MS. STERLING: That is actually not correct, Your Honor. I believe we have a resolution as to both cases. I'm happy to put forth the resolution as it relates to Mr. Carrizales, and I believe Ms. Dustin can do the statement for Mr. Watters.

As it relates to Mr. Carrizales, there were actually seven different violations contained in the reports. After

discussing the matter with his counsel Mr. Wagner, the government, at this time, would move The Court to dismiss violation number one and violation number six. And with that, it's my understanding that Mr. Carrizales is going to enter an admission to the remaining violations. He understands that violation number [10]three in particular, which includes a felony conviction, does carry with it a statutory maximum of five-years imprisonment. And admissions to the remaining violations carries with it, I believe, a statutory of three years—maximum of three years.

THE COURT: Why don't we start with this, and I'm going to ask Mr. Carrizales if it is correct that that's being dismissed, according to his understanding at least, the government will move to dismiss it.

And then as to each being admitted, if you'll recite what that is, and I'll ask whether or not that's being admitted.

And before I do that, Mr. Carrizales, did anyone promise you anything for whatever admissions you may be making this afternoon relative to the alleged violations, promise you anything of benefit, promise anybody close to you anything of benefit, anything of benefit at all?

DEFENDANT CARRIZALES: No, sir.

THE COURT: And did anybody threaten you with any kind of harm, or somebody close to you—threaten somebody close to you with harm, personal, physical,

financial, any sort of harm, to cause you to admit, if you do so, whatever you admit to today?

DEFENDANT CARRIZALES: No, sir.

THE COURT: And promises weren't made of any sort [11]whatsoever to you, correct?

DEFENDANT CARRIZALES: No, sir.

THE COURT: Not by the government?

DEFENDANT CARRIZALES: No, sir.

THE COURT: By Mr. Wagner?

DEFENDANT CARRIZALES: No, sir.

THE COURT: By anybody else?

DEFENDANT CARRIZALES: No, sir.

THE COURT: Likewise, with threats, nobody from the government made any threats; is that correct?

DEFENDANT CARRIZALES: No, sir.

THE COURT: Mr. Wagner make any threats?

DEFENDANT CARRIZALES: No, sir.

THE COURT: And nobody else, correct?

DEFENDANT CARRIZALES: No, sir.

THE COURT: Okay. Ms. Sterling, as to the first alleged violation?

MS. STERLING: Thank you, Your Honor. The first violation, again, the government would move to dismiss.

The second violation—

THE COURT: I'm just curious, what is that? I don't have them in front of me. I read them, but my memory's not that good.

MS. STERLING: Certainly, Your Honor. On September 10th, 2018, Mr. Carrizales was arrested by the [12]Perrysburg Police Department and charged with assault, domestic violence, theft, and robbery.

THE COURT: And that's being dismissed; is that correct?

MS. STERLING: It is, Your Honor, because, as alleged in violation number three, he was in—he was arrested on an additional felony charge, and the prosecutor there opted to proceed to trial on that charge. I do not see where the indictment was ever returned on violation number one.

THE COURT: Okay. Was a charge filed?

MS. STERLING: A charge was filed in the Municipal Court. It appears it was bound over. But, again, I don't see where it was ever presented to a grand jury.

THE COURT: Okay. And there's no facts presently available, to wit it's being dismissed, so on motion of the government, that violation will be dismissed.

MS. STERLING: Thank you, Your Honor.

As to violation number two, on October 6th of 2018, Mr. Carrizales was cited for operating a motor vehicle while under the influence, driving under suspension, and reckless driving. He later entered a no contest plea to an amended charge, specifically a physical control of a vehicle while under the influence, a [13]misdemeanor of the first degree in the Toledo Municipal Court, and was given a sentence of time served.

THE COURT: Okay. Mr. Carrizales, is that correct?

DEFENDANT CARRIZALES: Yes, sir.

THE COURT: And at the time you were stopped or found by the police, you, so far as you understood it, were above the legal limit in terms of blood alcohol or whatever?

MR. WAGNER: Your Honor, there were extenuating circumstances, and if The Court would inquire.

THE COURT: Absolutely. I'm just going through—we'll get to disposition when I decide what to do about it. But both defendants and both attorneys will have an opportunity to be heard, by all means. But you do admit those all—those allegations of fact as recited by the prosecutor, is that correct?

DEFENDANT CARRIZALES: Yes, sir.

THE COURT: Okay. There'll be a finding, by a preponderance of the evidence, that is violations found to have occurred.

MS. STERLING: Thank you, Your Honor.

As to violation number three, on November 22nd of 2018, Mr. Carrizales was arrested by the Perrysburg Police Department and charged with domestic violence, felonious [14]assault, grand theft, assault, and aggravated menacing. An indictment was later returned by the grand jury in Wood County for felonious assault. Mr. Carrizales proceeded to jury trial on the matter and was found guilty of an attempted felonious assault, a felony of the third degree. Later sentenced to serve a term of 36 months in the Ohio Department of Rehabilitation and Corrections.

THE COURT: And that term has been served?

MS. STERLING: Yes, Your Honor. He was released from that term, I believe, November 3rd of 2021.

THE COURT: At the time the incident that brings him here, that violation number three, was he on any form of post release control, parole, whatever?

MS. STERLING: He was on supervised release with this Court. Are you asking me if he was on—

THE COURT: State Court as well?

MS. STERLING: Yes, mandatory post release control, as I understand.

THE COURT: Okay. Do you know whether a detainer's been lodged with regard to that, or a violation notice as to that been filed with the Adult Parole Board or whomever?

MS. STERLING: I do not.

THE COURT: Okay. Mr. Wagner, do you know whether your client is subject to—

[15]MR. WAGNER: No, he was released from custody, Your Honor, and we have no knowledge, nor have we been advised as to any subsequent detention.

THE COURT: Okay. And is there any—are you able to—looking at the date, do you have the police reports of that incident, or can you represent to me, as an officer of The Court, your understanding of the underlying facts, particularly with regard to any assaultive conduct upon the victim? Can you tell me a little bit about what happened, please?

MS. STERLING: I have—I have not personally reviewed the police reports. I can tell you that the violation report filed by this Court's probation department indicates that police reports provided by the Perrysburg Police Department indicates that the police responded to a call of a fight between a male and a female at an address on Oregon Road in Perrysburg Township. The officer spoke with the victim, and she reported that she was punched

and choked by Mr. Carrizales, after which he took her keys and left the residence with her minivan.

THE COURT: And Mr. Wagner, to the best of your understanding, did Ms. Sterling substantially and accurately recite your understanding of what the Perrysburg Police Department report indicates?

MR. WAGNER: We would not quarrel with the police [16]report. However, we have considerable mitigation with respect to certain circumstances.

THE COURT: Sure. I'll hear you out on that in mitigation, okay. But in any event, as to violation number three, is there any objection, Mr. Carrizales, to the recitation of the violation itself, setting aside for now the Perrysburg Police Department reports, that the violation, as stated in the violation report, do you admit those allegations?

DEFENDANT CARRIZALES: Yes.

THE COURT: Pardon me?

DEFENDANT CARRIZALES: Yes, sir.

THE COURT: Okay. There'll be a finding as to that violation.

MS. STERLING: Thank you, Your Honor.

Moving on to violation number four. On January 14th of 2022, Mr. Carrizales was charged with trafficking with

marijuana, a felony of the fourth degree. At that time the case was charged in the Toledo Municipal Court, he was subsequently indicted by the Lucas County grand jury, and, as I believe you're aware, he recently entered a no contest plea and was found guilty to an attempted trafficking in marijuana charge, a misdemeanor of the first degree related to that case.

THE COURT: Okay. And Mr. Carrizales, is that [17] correct with regard to what she's just recited?

DEFENDANT CARRIZALES: Yes, sir.

THE COURT: Okay. Now, if you can, can you please give me the details about the government's understanding of the underlying conduct?

MS. STERLING: Certainly, Your Honor. As if relates to Mr. Carrizales, appears that the Toledo Metro Drug Task Force completed a traffic stop on a vehicle that Mr. Carrizales, Mr. Watters, and I believe Mr. Watters' brother, Tommy Watters, were all three located in the vehicle, the vehicle being registered to Mr. Timothy Watters. Officers noted that the windows were down, and a scent that resembled marijuana was coming from the vehicle. All three individuals were asked to exit the vehicle at that time. Located under the rear seat where Mr. Carrizales was seated was a large white garbage bag that was seen in plain view which contained two large plastic bags filled with suspected marijuana, at which time all three individuals were taken into custody.

That marijuana was later sent to The State Crime Lab, BCI, where it did return, after a chemical analysis, a positive result of marijuana weighing just under a kilogram, Your Honor.

THE COURT: Okay. Mr. Wagner, does your client dispute the accuracy of that recitation?

[18]MR. WAGNER: We do not dispute the accuracy of the police report.

THE COURT: Okay. Is that correct, Mr. Carrizales?

DEFENDANT CARRIZALES: Yes, sir.

THE COURT: Okay. There'll be a finding as to that, and also as to the facts recited about the nature of the substance and its weight.

MS. STERLING: Thank you, Your Honor.

MR. WAGNER: And the disposition, Your Honor?

THE COURT: Pardon?

MR. WAGNER: And the ultimate disposition?

THE COURT: Yeah, of course, and the ultimate disposition, yeah. Yeah.

MS. STERLING: As to violation number five, a random urinalysis drug test was administered by this

Court's probation department on December 9th of 2021 with presumptively positive for marijuana. Test was sent for confirmatory testing and returned a positive result on December 30th of 2021.

THE COURT: Okay. Mr. Carrizales, is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: Do you admit that violation?

THE DEFENDANT: Yes, sir.

[19]THE COURT: Okay. There'll be a finding.

MS. STERLING: Again, Your Honor, as to violation number six, which had to do with failure to notify the probation officer of a change of residence, government's moving to dismiss that violation.

THE COURT: Okay. That will be dismissed.

MS. STERLING: Finally, as to violation number seven, alleges contact with known felons or others engaged in criminal activity. That relates back to the January 14th of 2022 traffic stop where the marijuana was seized, because Mr. Carrizales was in the vehicle with Mr. Watters and his brother, both of whom he knows are convicted felons because they are co-defendants on the underlying case in this matter.

THE COURT: That correct, Mr. Carrizales?

DEFENDANT CARRIZALES: Yes, sir.

THE COURT: And, Mr. Carrizales, at the time did you know that you were prohibited from possessing unlawful possession of Controlled Substances?

DEFENDANT CARRIZALES: Yes, sir.

THE COURT: And did you also know that you were supposed to report any contact with the police?

DEFENDANT CARRIZALES: Yes, Your Honor.

THE COURT: And also did you know you're not supposed to be in the company of anyone known to you or [20]believed by you to be a felon?

DEFENDANT CARRIZALES: Yes, sir.

THE COURT: And you also know that you were prohibited from committing any further violations of law?

DEFENDANT CARRIZALES: Yes, sir.

THE COURT: Did you understand, at the time, that I could find a violation, regardless of whether other judicial proceedings had occurred relative to the underlying conduct?

DEFENDANT CARRIZALES: Yes, sir.

THE COURT: Pardon me?

DEFENDANT CARRIZALES: Yes, sir.

THE COURT: Anything further I should ask with regard to his familiarity with the conditions of release, and, Ms. Sterling, whether or not his conduct—so I can assess whether or not his conduct violated any such condition?

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

THE COURT: There'll be a finding that the referenced conditions—the conduct as to which I found a violation, there will also be a finding that the referenced conditions constitute a violation of the terms and conditions of supervised release. Again, we next will proceed as to Mr. Carrizales with regard to the appropriate sanctions.

[21]Now as to Mr. Watters?

MS. DUSTIN: Your Honor, I'll address Mr. Watters.

THE COURT: Okay.

MS. DUSTIN: Mr. Watters was originally charged in a violation report with four violations.

The first violation was a new law violation that essentially cited that on January 14th, 2022, Mr. Watters was charged with trafficking in drugs marijuana, a felony of the fourth degree, and trafficking in drugs, cocaine, felony of the fourth degree in Toledo Municipal Court.

Ultimately the defendant was only indicted for the trafficking in marijuana. He was not indicted for trafficking cocaine in Lucas County Common Pleas Court. And on February 6th, 2023, Mr. Watters withdrew his plea of not guilty and entered a plea of no contest to the lesser included offense of attempted trafficking in marijuana, a misdemeanor of the first degree. He was found guilty, and he was sentenced to 180 days with credit for all time served, and he agreed to forfeit $740.

THE COURT: Okay. Mr. Watters, do you acknowledge that occurred?

DEFENDANT WATTERS: Yes, Your Honor.

THE COURT: Okay. And do you, likewise, acknowledge that, at the time of that conduct, you knew [22]that you were prohibited from possession of any Controlled Substance?

DEFENDANT WATTERS: Yes, Your Honor.

THE COURT: And that, likewise, you were prohibited, under the supervised release requirements, from committing any further violation of law?

DEFENDANT WATTERS: Yes, Your Honor.

THE COURT: And do you, likewise, agree that the amount of Controlled Substance was as Ms. Sterling has previously indicated?

DEFENDANT WATTERS: Yes, Your Honor.

MS. DUSTIN: Yes, Your Honor. We would rely on the recitation of facts that AUSA Sterling provided with respect to Mr. Carrizales.

THE COURT: Okay. Excuse me, there will be a finding as to that violation.

MS. DUSTIN: Thank you, Your Honor.

With respect to the next violation, he was in association with convicted felons. Mr. Watters' violation states that on January 14th, Mr. Watters was alleged to be found in a vehicle with Tommy Watters and Jose Carrizales, co-defendants from the instant offense, the original offense that he was on supervised release for. It's my recollection it's been, you know, probably a year since this started, that Mr. Watters may have already admitted to [23]this violation. Is that right, Mr. Schuman, at some point? But, if not, we should make the record clear.

THE COURT: Why don't we assume not just for the—

MR. SCHUMAN: I did it in a pleading, Your Honor, but we'll admit today it was a matter of legal strategy.

THE COURT: Okay. Well, in any event, Mr. Watters, you were in the company of Mr. Carrizales; is that correct?

DEFENDANT WATTERS: Yes, Your Honor.

THE COURT: You knew him to be a felon?

DEFENDANT WATTERS: Yes, Your Honor.

THE COURT: And you also were in the company of your brother who you knew to be a felon?

DEFENDANT WATTERS: Yes, Your Honor.

THE COURT: Quite candidly, I never thought about this before, but when one has a sibling, I would assume if they were living together or whatever—I'm not going there, obviously, you were abroad in the night season engaged in other illegal conduct, but there will be a finding as to that violation under the circumstances here. If they were found together living in the same family home or whatever, but that's not what we have here, so there'll be a finding as to that conduct and those violations.

MS. DUSTIN: The next violation, number three, [24]was possession of a Controlled Substance. This, in summary, charged that Mr. Watters—there was some cocaine, multiple baggies of cocaine base located at his residence on Lewis Street in Toledo on January 14th, 2022. At this time we would move to dismiss that violation. I also had indicated the government would do so in document—

THE COURT: I couldn't quite hear you, also indicate—

MS. DUSTIN: We had indicated—the government indicated in document 356, filed on July 1st, 2022, that we would dismiss that violation.

THE COURT: Okay. That relates to the cocaine found at the residence, but I believe it was on the record before we formally began the proceeding, that you indicated that there was simply no way one could properly or lawfully, although arguably, attribute the possession of that contraband to Mr. Watters, and that's fine. So that will be withdrawn and dismissed.

MS. DUSTIN: Next, with respect to violation four, possession of drug paraphernalia. The report charges that a search warrant was executed on Mr. Watters previous address of 5437, 311th Street, Toledo, Ohio on January 14th, 2022. And during the search, officers located a press. Essentially, this would be a press that's [25]often used in drug trafficking. It's considered drug paraphernalia used to press drugs. And Agent Fulmer, who's here today, can testify that that press was swiped with a—it's called a NIK test, and it returned showing the presence of a Controlled Substance, specifically cocaine. We have a—we have photographs of the press with a photograph of the wipe next to it if this Court would like to see it.

THE COURT: Okay. Has that been marked?

MS. DUSTIN: Yes.

THE COURT: First of all, has it been shown to defense counsel?

MS. DUSTIN: They have had complete discovery in this case.

THE COURT: Okay. Mr. Schuman, you know what she's talking about?

MR. SCHUMAN: Yes, I do, Your Honor.

THE COURT: Any objection to having the photograph marked and admitted?

MR. SCHUMAN: No, Your Honor.

THE COURT: Is there—you indicated there was a test or formal test results?

MS. DUSTIN: They're not formal test results, Your Honor. In fact, they're Exhibits 3 and 4 that were E-mailed to Ms. Damoah earlier today or yesterday. I do [26]have a copy if The Court would like to look at it. There is an exhibit—Government's Exhibit 3 depicts the press in the basement of the residence. Government Exhibit 4 depicts the wipe that shows a different color on top of a press. And I can present those to you if you'd like. Agent Fulmer is here if you'd like any explanation.

THE COURT: Okay. Any objection to those being marked as exhibits and being viewed by me?

MR. SCHUMAN: No, Your Honor.

THE COURT: Mr. Schuman?

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

COURTROOM DEPUTY: I'm sorry, Judge, I never received those documents.

THE COURT: I think they're coming right now.

MS. STERLING: They were sent to chambers, ladies, I think last night, like—I sent them to counsel at the same time. I'm not sure—towards the end of the day.

THE COURT: I'm just—I'll see them in a little bit out of the corner of my eye with my glasses.

MS. STERLING: Tina, I'm happy to resend if you can pull it up for Judge.

THE COURT: Mr. Schuman, have you seen these?

MR. SCHUMAN: I have, Your Honor.

MS. DUSTIN: Judge, the NIK test is like a field [27] test. It's not—

THE COURT: Sure. I understand.

MS. DUSTIN: It's not formal.

THE COURT: And indicated the presence of what?

MS. DUSTIN: Cocaine.

THE COURT: Cocaine, okay. Any objection to my consideration of these exhibits?

MR. SCHUMAN: No, Your Honor.

THE COURT: I just want the record to show, as you all know, I've got a pretty severe vision issue. What's right in front of me, these are large exhibits, and I can see them just fine. Thank you.

Just for the record, if you can just tell me, and also, for the record, I just want to make sure—Number 3 I gather is what? The press?

MS. DUSTIN: Yes, and then 4 has the swipe that shows—

THE COURT: Right.

MS. DUSTIN:—the top of the press where it was—where it was—where it returned as positive.

THE COURT: And that's the indicator of the presence of cocaine?

MS. DUSTIN: A field test, yes.

THE COURT: Thanks. They'll be admitted. Okay.

MS. DUSTIN: And that's the only violation left [28] with respect to Mr. Watters.

THE COURT: Okay. And which violation was that again?

MS. DUSTIN: That was number four.

THE COURT: And there will—any objection to my making a finding as to violation four, that's the allegation by the government, in light of those allegations, a finding of violation of the prohibition against the possession of Controlled Substance?

MR. SCHUMAN: No objection.

MS. DUSTIN: I think Mr. Watters has to formally admit to that violation.

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

MS. DUSTIN: Mr. Watters I don't believe has formally admitted to that violation.

THE COURT: Mr. Watters, do you admit to that violation?

DEFENDANT WATTERS: Yes, Your Honor.

THE COURT: Okay. So in light of the evidence, the violations, and the findings of violations of conditions of supervised release, I think we next proceed to consider what I do about it. Correct me—the guideline range as to each defendant is?

MS. STERLING: Your Honor, as to Mr. Carrizales, the guideline range for violation number three, which was [29]the felony, attempted felonious assault, 51 to the

statutory maximum of 60 months. As to the remaining violations for Mr. Carrizales, the guideline range is 33 to 41 months.

THE COURT: Okay. Mr. Carrizales, you understand that I am to look at the Federal Sentencing Guidelines? I'm not bound to them. I cannot go higher than the guideline range as to the possession counts simply because that's the maximum, 60-month maximum. But do you understand that, in considering, I have to look at the—I have to consider whether or not you remain in the range; and as to the other one, go higher, or as to both of them impose a sanction of less than the guideline range? You understand that's my discretion?

DEFENDANT CARRIZALES: Yes, sir.

THE COURT: I'm required by federal law to look at them, consider them, and go from there. Do you understand that?

DEFENDANT CARRIZALES: Yes, sir.

THE COURT: Mr. Watters—as to Mr. Watters, the guideline ranges are—is or are?

MS. DUSTIN: The most serious with respect to the new law violation, it's up to five years, the statutory penalty. And if this Court considers the misdemeanor as a grade C violation, it would be 8 to 14 months. The conduct [30]underlying it would be 51 to 63 months because Mr. Watters—

THE COURT: Excuse me for interrupting, but I have found that—I'm finding the alleged underlying conduct not to whatever the reduced plea was in Common Pleas Court.

MS. DUSTIN: And that would be 51 to 63 months.

THE COURT: If I can make it clear for the record, I believe I am absolutely entitled to look at what really happened rather than a disposition in another court. And if either of you want to make an objection to that, fine, for purposes of preserving that on possible appeal. Mr. Schuman?

MR. SCHUMAN: Object for purposes of preserving for appeal.

THE COURT: Mr. Wagner?

MR. WAGNER: We have no objection, Your Honor.

THE COURT: Okay.

Okay, let's take Mr. Carrizales first as to him. Government's position? And then I will hear from Mr. Wagner and Mr. Carrizales.

MS. STERLING: Thank you, Your Honor. It's my understanding in speaking with the probation officer, specifically Probation Officer Cordova who supervises Mr. Carrizales who's not able to be present here today, [31]that he is recommending revocation and a guideline sentence of 60-months imprisonment. And we concur

with that recommendation, not just for the conduct, but I think it's important that the record reflect the pattern of behavior here.

Mr. Carrizales was convicted in this court back in 2011 with participating in a drug conspiracy, as well as distributing cocaine. He was sentenced to a ten-year term of imprisonment, which he served and began his eight-year term of supervised release in May of 2018. Within four months, Your Honor, he was arrested on another felony charge, albeit an offense of violence that is involving a felony domestic violence and felonious assault. He ultimately proceeded to trial, was convicted of a lesser offense, although still a felony of the third degree, and was sentenced to three years imprisonment with The State of Ohio. He ended that prison term in November of 2021. A violation report was filed with this Court, and he appeared in front of you on those violations, I believe, on November 8th of 2021. He was advised of the violation and the potential penalties, and the matter was deferred for approximately a month. At that time he tested positive for marijuana, was referred to the Zepf Center for counseling, and, again, the case was continued for approximately—

THE COURT: And he had been released at the time?

[32]MS. STERLING: Correct. At that time, of course, in January, specifically January 14th, of 2022, after all of that, committed the new law violation involving the almost kilogram of marijuana, during which he was arrested with Mr. Watters and his brother Tommy Watters, again, as a reminder, those being co-defendants in his underlying

case. And he subsequently entered a no contest plea and was convicted to trafficking in that amount.

Simply, Your Honor, he has completely and in every way possible ignored and disregarded the orders of this Court and those of the probation department officer who has tried to assist him. We believe at this time he should be revoked and returned to the institution for 60 months.

THE COURT: Okay. Mr. Wagner, on behalf of your client? Of course you may remain seated by all means.

MR. WAGNER: Thank you, Your Honor.

THE COURT: If you'll just pull the microphone about this close to you so everyone can hear you.

MR. WAGNER: Is this fine with The Court? Can The Court hear me now?

THE COURT: Can you get the microphone a little closer?

MR. WAGNER: Testing one, two, three.

THE COURT: That's fine.

[33]MR. WAGNER: Judge, I'm sure doesn't come as any surprise to The Court that we take exception to the intent of the defendant. I will have him speak relative to mitigation, but I think it's important to note that when he was arrested on December 10th of 2018, this was a dispute

with respect to a girlfriend. He did tender a plea of not guilty. It was tried by The Judge—by the jury, excuse me. And the results were a finding of not guilty of the charge, but guilty of the lesser-included offense. He was given—

THE COURT: I apologize, what—so what—of what was he convicted?

MR. WAGNER: Attempted felonious assault—

THE COURT: Okay.

MR. WAGNER:—resulting from a dispute and a—and a—dispute. In that regard, Your Honor—

THE COURT: Would that finding by the jury indicate—I just want to know—I assume that the attempted felonious assault means that the jury could not find beyond a reasonable doubt that there had been contact between him and the victim—

MR. WAGNER: Without—

THE COURT:—if you know?

MR. WAGNER: Without retrying the case or looking—

[34]THE COURT: I just want to know as a matter of law in Ohio, and if you don't know that's fine.

MR. WAGNER: Well, my general sense impression, Your Honor, is an attempted assault is not a completion

of the assault.

THE COURT: Right. And, Ms. Sterling, you're a former state prosecutor, I'll take judicial notice of that, do you know? I mean, it's my understanding that an attempt means that you were unsuccessful in completing whatever attempt was—whatever the intent—the attempt was.

MS. STERLING: I think that's accurate. Although, I want to clarify, I don't know that we could sit here and presume that the jury found that there was no contact with the victim. It could also be that the finding was related to the nature of the harm because a felonious assault in The State of Ohio requires a result of serious physical harm. They could have found, for example, that he intended to cause her serious physical harm, but it only resulted in physical harm, so I wouldn't want us to impose upon the jury's finding.

MR. WAGNER: If I might, Your Honor?

THE COURT: Absolutely.

MR. WAGNER: We're talking about inferring the intent of the defendant. I think that the—not only the finding of the jury, but the imposition of the sentence [35] speaks to the issue of it was not a completed felonious assault.

THE COURT: Okay.

MR. WAGNER: Although we're not certainly here

to try the entire question of fact, and I appreciate that.

THE COURT: Okay. For purposes of this proceeding, however—I will assume, without finding one way or the other, somehow—know that there was no physical contact between your client and the victim.

MR. WAGNER: Was?

THE COURT: That there was not?

MR. WAGNER: Yes, Your Honor.

Relative to the disposition—disposition of The Court, this case was subject to supervised release on November 3rd of 2021, and there have been no further—there's been no further activity with respect to the defendant and that individual. And I would submit that this was an isolated case with respect to two people who were very close at one time. It was not a—

THE COURT: I'm setting that to one side entirely.

MR. WAGNER: Please?

THE COURT: I'm focused much more on the—on the—the possession of the substantial quantity of illegal drugs while in the company of others—

[36]MR. WAGNER: I appreciate, Your Honor—

THE COURT:—with whom he should not have been—

in whose company he should not have been.

MR. WAGNER: If The Court would want to hear anything with respect to the second violation, the driving while intoxicated, that was amended to a physical control. There was an issue as to how it had been administered to the defendant as to whether he was aware at the time that he had consumed any alcohol, and the Municipal Court gave time served, which shows, once again, this is not a continuous course of conduct.

THE COURT: Let me ask the officer because I can't recall, Officer Hagins, was there a no-alcohol condition?

PROBATION: He does not have one, Your Honor.

MR. WAGNER: But to buttress the argument, Your Honor, the lowering of the charge was based on the dispute as to whether or not defendant had been aware of the consumption of alcohol as opposed to having been given a drink without his knowledge of the alcohol content, which was the basis of the lowering of the charge.

I believe the only remaining case in which—and I'm sure The Court is concerned, is the contact with the known felon, i.e., the co-defendant. Albeit that, in that regard, as The Court has been advised, the Common Pleas [37] Court of Lucas County just accepted a plea of no contest to the misdemeanor—amended misdemeanor count and gave the defendant time served. He was in custody as a result of the holder from this Court. So the time served

was—was reflected.

Beyond that, Your Honor, we have no further statements.

THE COURT: Mr. Carrizales, you have the right to speak on your own behalf before I decide what I'm going to do by way of disposition.

DEFENDANT CARRIZALES: Yes, sir.

THE COURT: And please get the microphone real close.

DEFENDANT CARRIZALES: Yes, sir.

THE COURT: Perfect.

THE DEFENDANT: I want to come to The Court and tell you when I got released from federal custody, I came from the RDAP program. When I went to the halfway house, I really wasn't using the tools that they provided for me during that program. At the same time, my mother was in Hospice, and she was passing away, so it really took a toll on me. She—going to her funeral and looking at the memory, pictures, and seeing her grow with my kids, and her grandkids, and my sisters and brothers, I wasn't in none of them because I had missed the majority of their lives.

[38]As a young—as a young child, I was in a gang. I was affiliated with a gang and so forth. It was just my

upbringing. It was not a household. You know, I—I took to the streets of Toledo, Ohio. And my record shows that I'm—I look like a menace, I look terrible. I look horrible. And the day of question, right after that I started drinking, of being released. On my own I went to the Zepf Center, the 30 day in-house patient because I ended up in the hospital for the OVI. I don't know what occurred. I believe somebody slipped me a Mickey or something because I don't recall nothing. I just recall waking up in the hospital bed with an IV in me looking at the side and looking at an OVI picture and police report saying that I totaled the car I was in.

And from there I started, you know, really thinking about myself and my children because they missed so much out of me. I got five children that they don't know me. They don't—they know I'm their dad, but they don't know me because I was always incarcerated. I was always doing the wrong thing. And I got out—I got out of the—I got out of the hospital, went to rehab, and still lost. I was still—I was still lost.

And the assault, felonious assault, at the time—at the time I don't know what occurred. It happened on Thanksgiving. It happened on Thanksgiving. I [39]asked her not to drink, but my fiancee at the time wanted to drink or whatever. I woke up, I did not know what happened. And—and when I went to trial, that was my whole defense is I didn't know what happened. But I know I didn't—I wouldn't beat her. My mom didn't raise me like that. I wouldn't do that. And when I got arrested right now, and when you told me—when I came to the street

and you said you're a woman beater and all that, that hurted me, that really hurted me. You really hurted me. That hurt—that killed me. I wanted to take my life that day, you know, as, like, damn, is this—is this really me, like—and it's sad, it's really sad. But like I told The Judge when I got convicted of the attempted felonious assault, I asked to be sentenced right then and there. I could have fought the appeal, but Covid came and I was already in prison. And going to prison, I know what it was.

So they put me in prison, right. They put me in prison, in state prison where there's more drugs in the prison than out here on the streets. There's more chaos in—in—it's, like, the streets, it's like the streets with no family. It's no help. It's not help. It's hard out here. It's easy in there doing the—doing your days, you know, getting fed, you know, there's no bills, there's no responsibilities. There's nothing—there's nothing [40]that is occurring, you know, and it's hard out here.

And I—and I—I don't want to—I want to say I—I apologize for even coming to this point in my life. I'm tired of the walls, I'm tired of being locked up. I want to be a law abiding citizen, sir, and abide by the—by these papers, by my actions, though, that I never showed that. I never—I showed nothing but ignorance, and it hurts. And my kids look at that, and I got five of them, and they're growing—almost grown adults that I never had no part, a dead beat father. I can change that, sir. I can be the spokesperson that people to be looking through my eyes, look at what it is. It's hard. It's hard. I know it's hard on people going on day-to-day and doing their jobs and stuff

providing for their family. It's easy in jail, but there's no help. In every—in every institution you go to, there's—the ratio of correctional officers is crazy. I know I can be a productive citizen if you allow me to. And I am so sorry, and if I ever—if you give me a chance, and if I ever come before you again, I will let you give me life in prison. I would deserve life in prison if I ever come back to you and you see my face again because I don't deserve it.

And for me coming out in 2021, yes, I was doing drugs in prison. That's why I came out dirty. That's why [41]I came out dirty. But if they looked at my counts, my urine counts because I did nothing wrong, except I did something wrong. My aunt passed away, I was helping my cousin, and there was some substance in the car. And I told you that day in court, like, I did not—I did not know. I wouldn't have put myself in that predicament to lose my kids again, to see the pain in their face of me going again. I never had a life. I don't have a life. I'm not asking you to just let me free. I can do steps. I can—if you put me in a halfway house for a year or so or do something—and I apologize. I just say I apologize from the bottom of my heart. I know on those papers and when people look at me, and when people Google me and all this, it's terrible, Your Honor. It's terrible. It's terrible. I want—I'm asking The Court, and I'm asking you for mercy, mercy, and mercy, Your Honor.

THE COURT: You can be seated, whichever makes you more comfortable. I do have a question because I simply don't know. At the time you were arrested, were

you working?

DEFENDANT CARRIZALES: Yes, Your Honor. I was working at the Huntington Center downtown. The money that they seized, the $388, is a check that I just—just cashed. The check stub's in my wallet that the government's going to get to me once I—

[42]THE COURT: What were you doing at night with two people you knew were felons? You knew you shouldn't have been with them. You've admitted to the misdemeanor, the possession of a substantial quantity of marijuana?

DEFENDANT CARRIZALES: Your Honor, it was just, like, I wanted to say, like, I gave up. I wanted to go to trial. I told my lawyer I did want to go to trial. I did want to go to trial because it took—it took a lot out of—I had—I had to admit to something that—

THE COURT: Well, candidly, you can tell me you didn't know it was in that garbage bag and try to convince me, but I'll tell you right now that would be kind of hard to believe that you wouldn't have gotten in the car and asked Tommy what is that, or, Timmy, what is that stuff in there. And even if you had no other connection with it, you were in possession of it because it's right next to you—

DEFENDANT CARRIZALES: Yes, sir, and that's why—

THE COURT:—and that constitutes possession. I

don't have my glasses in my hand. They're over there a few feet from me. I don't have possession of my coat upstairs. I don't have it on, or my briefcase, but I have possession of it as a matter of law.

DEFENDANT CARRIZALES: Yes, Your Honor.

[43]THE COURT: And I'm sorry, sir, but you knew your circumstances, you knew the conditions. I don't know if you've ever heard about me and violations of supervised release, but I take them very seriously. You previously had a conviction for being in physical control of a vehicle while intoxicated. And I'm just saying, I'm letting you know what is of concern to me.

DEFENDANT CARRIZALES: I understand.

THE COURT: And I'll let you know, I am setting aside whatever the encounter was with the young woman. I'm sure Mr. Wagner has told you, that's the one thing nobody on supervised release wants to do in front of Judge Carr because he asks—establish domestic violence, if any man on supervised release has touched any woman with anything but affection, my question is how high can I go. It's not the Toledo Municipal Court, or Perrysburg, or whatever. I want to assure you, that didn't occur, okay.

DEFENDANT CARRIZALES: Yes, sir.

THE COURT: There's no evidence and reason for me to believe—I'm about to do anything to anybody when it comes time to sentence them with (indicating), I just

want to assure you of that. That's why I run through that discussion I did earlier. So what I'm focused on the possession after your prior conviction, serious convictions. You're in the company of somebody, and I'll [44]get to this shortly, who not only has been convicted, but has previously been revoked by me for noncompliance with the simple requests of the probation officer basically coming in here with a cockamamie story about this, that, and the other thing. You're in his company—I cannot recall, I don't think Mr. Tommy Watters has been before me on a violation, but Mr. Timmy Watters has. I don't know whether you knew that at the time.

DEFENDANT CARRIZALES: No, Your Honor, I haven't.

THE COURT: Okay. But you're in the car, a substantial quantity of marijuana, I'm going to find that you knew, or had reason to know that that was contraband, that you had no business being in possession of it and you were. And that's what I'm focusing on.

DEFENDANT CARRIZALES: Yes, sir.

THE COURT: Particularly in light of your prior federal conviction in this court. I'll be very candid with you, very honest, you know what, you should have been home that night with your kids.

DEFENDANT CARRIZALES: You're absolutely right, sir.

THE COURT: And that's—I can't recall because I did not look, though I usually do, but in this instance I looked the Presentence Reports. That's my custom and practice. So I don't recall how many children you have, or [45]the ages or whatever, but I get it, old guy telling you this, but you want to stay away from me, and Ms. Sterling, and Ms. Dustin, and the police officers, get a job. You had a job. Go to the job, do the job, go home, close the door, and Mr. Timmy Watters, Mr. Tommy Watters, comes knocking at your door, don't open it.

DEFENDANT CARRIZALES: Yes, sir.

THE COURT: Very simple moralistic, simplistic lecture. That's—that's the way you avoid being where you are.

DEFENDANT CARRIZALES: You're absolutely right, sir.

THE COURT: And I assume your kids are all pretty well grown, teenagers or whatever?

DEFENDANT CARRIZALES: Yes, sir.

THE COURT: And you're right, you missed—candidly you missed the majority of your life with them.

DEFENDANT CARRIZALES: Yes, sir.

THE COURT: The older they get, kids grow and go. The older they are, the less chance you have to form that relationship with them.

Enough with the lecture. Mr. Watters (sic), I want you to know that's what I'm concerned about. By all means, you may continue if you desire. I did not mean to cut you off.

[46]MR. WAGNER: No, Your Honor.

THE COURT: Pardon me?

MR. WAGNER: Your Honor, I think his recitation is completed on behalf of Mr. Carrizales.

THE COURT: Mr. Carrizales, I'm sorry.

MR. WAGNER: I think we presented our case.

THE COURT: If you'll move the microphone a little closer.

MR. WAGNER: Your Honor, we've completed our presentation.

THE COURT: Okay. Pursuant to the Sentencing Reform Act of 1984—anything further on behalf of the government?

MS. STERLING: No, Your Honor, but I do want to remind The Court that in the violation report that Mr. Cordova filed, he indicated that he did not know where Mr. Carrizales had been residing, that, to his knowledge, he was unemployed. And although he had connected him with the Zepf Center, when he spoke to the counselor there, she said that when Mr. Carrizales shows up, he's polite and

courteous, however, he misses more appointments than he actually shows up for.

THE COURT: Thank you for reminding me of that. In this instance, Mr. Carrizales, those other circumstances would be, in this instance, ultimately what I am responding [47]to is being in the presence of two convicted felons, themselves, I believe, former drug dealers, and with a substantial quantity of marijuana. I'm sure you—marijuana, wasn't Fentanyl, Judge, that's okay, but, still, when you're subject to conditions of supervised release, there is nothing that's optional because every one of those conditions is a court order. It's not something that the probation officer makes up and wants you to do or would like to see you do, which I do too, but when it comes to me, there are no options. And I believe, quite candidly, in light of the evidence in front of me, you guys were out there broad, in the nighttime, headed somewhere to distribute those drugs. I see nothing in this record to conclude to the contrary. That may not have been what you were about, but, based upon the totality of the evidence, I think, by a preponderance of the evidence, it's fair for me to conclude that. And that is conduct that cannot, should not, and will not be tolerated.

So pursuant to the Sentencing Reform Act of 1984 and 18 U.S. Code Section 3553(a), judgment of this Court the defendant be and hereby committed to the custody of the Bureau of Prisons to serve a term of 60 months. That will be followed by a six-year term of supervised release. Put you back on supervised release because I want this Court, whether it be I or another Judge, to have the ability and

[48]opportunity to do two things; to see to it that you have the opportunity to succeed, and to show this Court and the community that you can comply with the law. And I expect you to work with the officer and to be honest with the officer.

All of the previous conditions of supervised release will be imposed. And you'll also be prohibited from the use of alcohol.

You'll also be required to diligently seek, and if you obtain, diligently to maintain lawful, gainful employment. You should cooperate with the probation officer with regard to any efforts that the officer makes on your behalf in that regard.

In addition to all the other conditions of supervised release, within 72 hours of your release from your custody of the Bureau of Prisons, you shall report in person to the pretrial service and probation office in this district to begin serving that term of supervised release.

And let me ask the officer, is there anything further that I should include by way of special conditions of supervised release?

PROBATION: Your Honor, I just wanted to make The Court aware that he already had a no alcohol condition.

THE COURT: That's what I thought. It's unclear in my colloquy whether that was so, but I want that.

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[49]Mr. Carrizales, let me give you a bit of advice. I've already said what I've said. When you come out, get a job. Some years ago I tried to meet the folks coming out of federal custody coming home. And I say as emphatically as I can, get a job. There are times when it's very difficult, but—and I hope that this remains, people that have been convicted with the offenses that you've been convicted of with the kind of record that you have can get jobs. Employers are begging for people to go to work that want to go to work. I remember vividly there was a gentleman sitting in the corner there in the jury box, and I was making the same speech to that group. This gentleman raised his hand, he was talking to me, but he was speaking to the people in the jury box. He said, Judge, I just got out of federal prison after 27 years, and I have a job. I seldom recall who he was, he was one of the Walton brothers. I don't know, Pete, if you know who—or the Warner brothers, back in the day when the guidelines were mandatory and I handled all pretrial matters. He can get a job, I hope you can get a job. I hope you listen to this old guy when he tells you get a job. Get up in time to get to the job, do the job, go home. Whether you've got a girlfriend, a spouse, somebody whose record is entirely clean, or hopefully your own adult kids, and maybe even grandchildren. Be with them, to the extent that you can, [50]try to establish a relationship and be the kind of dad, and maybe, God willing, a grandfather that you'd like to be. That way we'll never see each other again.

DEFENDANT CARRIZALES: Yes, sir.

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THE COURT: We'll never see each other. And if drinking's a problem, temptation, talk to the officer. Tell him. Try A.A. People—I've known several in it, they say it works somehow. I don't know.

And finally, be honest with your officer because if the officer can't trust you, ultimately I can't trust you. That's what this is all about.

The 3553(a) factors, I've considered the history and char—personal characteristic of this defendant, principally his prior criminal record. It's quite clearly—that evening intending to distribute marijuana. Sure it was not cocaine, sure it's not Fentanyl, sure it's not heroin, but, nonetheless, is a Controlled Substance that's against the law to distribute.

Ultimately what I'm trying to accomplish is not only your rehabilitation so that you understand that if you want to avoid going to prison forever increasing lengths of time, you've got to stop violating the law. My purpose is to see to it that that happens, your interest, your family's interest, and ultimately the community's interest.

I do think that an objective observer would say [51]that the sentence is just, and it's not greater than necessary to accomplish its purposes, as Mr. Carrizales indicated personal rehabilitation, and protection of the community.

Ms. Dustin, Ms. Sterling, is there anything you want me to stay about the 3553(a) factors?

MS. STERLING: Perhaps. Your Honor, I assume your sentence also includes, although you listed your primary concerns, also includes awareness or concerns for general deterrence, particularly given Mr. Carrizales'—

THE COURT: And individual deterrence, absolutely. Thank you very much. That's kind of always the case, but also want to let others know, Mr. Carrizales, when you're on supervised release in a Federal Court, there's no free pass. Sure, minor violation, we'll work with you. Something major exists, no. If you haven't learned from your prior criminal convictions that you've got to follow the law, and that's what I'm trying to emphasize and make clear to you, you've got to follow the law.

Anything further in that regard, Ms. Sterling? Thank you very much.

MS. STERLING: No, thank you.

MR. WAGNER: Your Honor, I apologize.

THE COURT: Of course.

[52]MR. WAGNER: Could The Court advise as to the immediate incarceration sentence?

THE COURT: Pardon? Place of incarceration?

MR. WAGNER: Yeah—no, no, the amount of time immediately.

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THE COURT: 60. I will recommend, I don't know if you qualify, Mr. Carrizales, but I certainly will recommend that the BOP keep you and place you in a facility as close to Toledo as possible so that whatever bonding connection you may be able to form or formulate with your family, it will be easier for them to do so. I have no control over that. I don't know whether, given your criminal history, you qualify for that. I don't know—that would be emphasized in the judgment entry.

You do have a right to an appeal. Talk that over with Mr. Wagner whether there are grounds for you to appeal what I've done today by the way of finding the violations and also the sentence that I've imposed. If grounds to appeal appear to exist, have Mr. Wagner file a notice of appeal on your behalf within 14 days, or you will lose your right you might otherwise have to challenge your disposition and sanctions that I've imposed today. And that—and then if Mr. Wagner represents you, or if you or he would prefer, you can have another attorney appointed either by me or The Sixth Circuit Court of Appeals. The [53]most important thing is you must file a notice of appeal within 14 days, or you lose forever whatever opportunity you might otherwise have to challenge your adjudication and disposition. Do you understand that?

DEFENDANT CARRIZALES: Yes, sir.

THE COURT: Okay. All of that will be without cost to yourself, including preparation of the record of these proceedings.

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

MS. STERLING: Not on behalf of the government.

MR. WAGNER: No, Your Honor.

THE COURT: That will conclude this proceeding.

Now on behalf of Mr. Watters. Ms. Dustin?

MS. DUSTIN: Yes, Your Honor, I just wanted to touch briefly on how we got here today, to remind The Court Mr. Watters was convicted of drug conspiracy in 2015 and was sentenced to 120 months. He served his sentence, and when he was released on supervised release, in August of 2019, he was ultimately violated. And those terms that he was violated on, he was found to have drug—drug use and failed to truthfully answer questions by his probation officer.

And I wanted to remind The Court of the hearings we had with Probation Officer Dawn Robinson at the time. [54]And—

THE COURT: Excuse me, Ms. Dustin, I remember them vividly. I remember the problem, the extent to which she had to go—because he simply was not forthcoming on his financial situation and circumstances. I think I'm correct about that.

MS. DUSTIN: Yes, you're right. In fact—

THE COURT: She went above and beyond.

MS. DUSTIN: In fact, he also was—he also failed to disclose expenditures over $500, and ultimately you imposed a sanction—you revoked his supervision, imposed 14-month imprisonment.

THE COURT: And reinstated his term of supervised release.

MS. DUSTIN: And you did, Your Honor. And now we are here again on another violation of supervised release, and ultimately the defendant sits before you today on these violations. And if The Court would recall, we had a preliminary hearing in this case to establish probable cause for the violation, and that occurred on February 15th, 2022. I think it's relevant because earlier, during his allocution, Mr. Carrizales referred to being with his cousin, and his cousin was moving and his aunt had died, and he was helping his cousin move. And they were—and kind of insinuating the marijuana was in [55]the car because I believe when he said he was helping his cousin move he was referring to Mr. Timothy Watters. I was looking back at the transcript of the probable cause hearing, and Marjorie Rosales testified, and, on cross-examination, I believe that is Mr. Watters' wife or girlfriend, on cross-examination she was asked if she remembered the day he was arrested, and she said, yes, it was January 14th. And I asked, do you know or recall whether or not he worked that day, and she indicated that he was off because the aunt had died and the whole family needed to be in the hospital. And I asked if he was off on January 14th, and

she said yes. And I said, would you tell us how long had you lived at the address on Lewis. When did you move to Lewis? And she responded the same day when we—when he was pulled over that day moving stuff to the house, and I was supposed to stay that night in the house. And I asked, you were moving to the Lewis address on January 14th, 2022. And she said, yes, ma'am. And I asked where did you move from, and she said the residence at Point Place.

So my point is, he pretty much corroborates that the aunt died, he was helping Mr. Watters move, Mr. Watters was driving the car, and in the car was almost a kilo of marijuana. And back at the previous house, the house they were moving from, as you saw in the photographs today, [56]there was what can be used as a press for cocaine which NIK tested positive. Those are serious violations. And, as this Court noted at the time of the prior hearing, you know, when he was found guilty of the prior violations, that's—that was serious conduct. Apparently Mr. Watters doesn't learn, and he is not deterred by this Court.

I also came across a Toledo Blade article that referenced Mr. Watters. And I thought I would bring this to this Court's attention.

THE COURT: Have you shown that to Mr. Schuman? Why don't you take a moment to do so please. And if you want, you can mark it as an exhibit if you wish to offer it, whatever you and Mr. Schuman have to say.

Mr. Schuman, any objection?

MR. SCHUMAN: Judge, having just seen it, I guess I would object for the record.

THE COURT: Okay.

MS. DUSTIN: This appeared in the Toledo Blade on December 21st, 2022. If you don't need to hear it, I will not reference it.

THE COURT: Apparently Mr. Schuman did not have a chance to see it beforehand. No problem. It's fairly recent, but that's okay. Go ahead.

MS. DUSTIN: Your Honor, this sentence that you impose today should reflect the serious nature of the [57]offense, the fact that the defendant was previously convicted of a drug conspiracy, he was on supervised release, and he—and he was in a car with other felons with a large amount of marijuana and what appears to be a cocaine press at his previous residence. Your sentence should reflect the history and characteristics of this defendant, who seems to not be able to follow the law or this Court's orders. And your sentence should deter him because nothing seems to deter him, and deter others from similar conduct. We ask you to impose a sentence—the last time you imposed a sentence of 14 months, and that did not deter him. And we ask that you impose a sentence closer to the statutory maximum in this case in order to deter him and others.

THE COURT: Mr. Schuman, Mr. Watters, you have the right to speak. Mr. Schuman?

MR. SCHUMAN: Thank you, Your Honor. Your Honor, when I was a state court prosecutor I tried to find something positive to say about defendants at sentencing, at least that's my memory. Naturally, and hopefully, I continue to do that in my role as a defense lawyer. I can say that Mr. Watters has worked, he has a work history, I find him to be very intelligent. He's had 13 months to reflect on his conduct in this case. He's an intelligent person. He has the capability of making a contribution to [58]society. He has finished cognitive behavioral therapy. He was enrolled in counseling at the Zepf Center at the time of his arrest. He was employed at C & J Complete Auto. He resides with his wife, I believe, at 6015 Lewis here in Toledo. She's present here in the courtroom today. We have a slight difference of opinion, I realize, Your Honor. I would encourage The Court to treat this as a class C violation that does not require revocation, impose a 14-month sentence, or 13-month sentence, give my client credit for time served and continue him on supervised release.

A few more comments, if I may, Your Honor.

THE COURT: Sure. Of course.

MR. SCHUMAN: My client took responsibility for the drug charges both here and in State Court. He took responsibility for the press. He took responsibility for the charge of associating with felons. He could have taken it to hearing. As I said, he took responsibility. He realizes he made mistakes. He's been sitting for 13 months in custody on this charge thinking about that. My client

indicates that he filed reports indicating he had contact with felons, namely his brother, Timothy Watters (sic), and Mr. Carrizales, who I understand to be a cousin related by marriage. He said his supervisors never had an issue with this.

[59]I find The Court's point interesting against his brother, maybe they live together, I don't know, Your Honor. I'm not arguing with you, Judge, that there were drugs in the car. That's not a legitimate purpose to be hanging around your brother, but—

THE COURT: Or your cousin.

MR. SCHUMAN: Or your cousin. However, it was conduct on multiple occasions, most of the rest of that time that he had conduct with these people, I don't know that there was criminal behavior.

THE COURT: That doesn't bother me at all. That's something—if the officer was aware of it, fine. Again, the fact that you have family members who are—I don't think—the no-contact requirement is intended to make sure that the kind of contact and conduct that occurred when they were together when they were stopped doesn't occur. So that's why—that's the aspect, or the situation, that I consider to violate that prohibition. What happened was had he paid attention to that prohibition, we wouldn't be here today. But he didn't, and it was a serious violation. Others, no. That's why I tried to allude to earlier, kind of an odd thing you can't have contact with your brother or cousin or whatever. I mean, that's not the kind of contact

we're talking about, and that's not the kind of contact that was going on that [60]night.

MR. SCHUMAN: Understood.

THE COURT: They were abroad with a lot of marijuana, and I believe, and I think that the record provides me with an ample basis for doing so, at least by a preponderance of the evidence, which is the standard here, that they weren't going to find a pipe and smoke it on their own, going to roll it in a cigarette or whatever they do. They were going to distribute it, and they were going to make money distributing. Society increasingly shrugs their shoulders about marijuana, but I can't and don't. It's a violation of the conditions of supervised release, and a serious one. But go ahead, I just want you to understand the context. Go ahead.

MR. SCHUMAN: Thank you, Your Honor. I understand. One moment, Your Honor.

THE COURT: Of course. Absolutely.

MR. SCHUMAN: Your Honor, thank you. I will rest on those comments.

THE COURT: Mr. Watters, you have a right to speak on your own behalf before I decide what I'm going to do.

DEFENDANT WATTERS: Yes, Your Honor. I'll try to make this brief.

THE COURT: You're welcome to speak as long as [61] you want. My time is your time.

DEFENDANT WATTERS: You made it clear I tend to dig myself a bigger hole, so I'll just get to the point. No excuses for anything that's gone on. Maybe an apology is in order, a couple of them, and one to Mr. Carrizales here, an apology to him. And, secondly, an apology to my wife because I failed her as a husband by putting myself in this predicament again. I remember you saying that I was incorrigible. I don't believe that to be true, but in this circumstance it could obviously seem that way.

And to address what Ms. Dustin was trying to bring to light about the article in The Blade, well, I was in a situation there where—

THE COURT: I don't know anything about it, Mr. Watters. You're welcome to tell me about it.

DEFENDANT WATTERS: I'll keep it pretty brief. Sometimes you get in relationships with people when you're in jail more than you do with people on the outside.

THE COURT: Sure, you're with them more.

DEFENDANT WATTERS: Yeah. A guy that I know in there—a guy that I knew in there asked me if I knew a person and said his kids were missing. And I said I will try to see if I can help him. I didn't call no police, I didn't call no—Ms. Dustin. I didn't call nobody. I made a phone call to somebody I knew to see if there was a [62]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.

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[63]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 [64]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 [65]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 [66] 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, [67] 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 [68]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. [69]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 [70]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 [71]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 [72]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.

[73]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.

APPENDIX H — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION, FILED FEBRUARY 24, 2023

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

Case No. 3:10cr4-2

UNITED STATES OF AMERICA,

Plaintiff,

v.

TIMOTHY M. WATTERS,

Defendant.

Filed: February 24, 2023

ORDER

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

APPENDIX I — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED MARCH 12, 2024

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-3189

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TIMOTHY MICHAEL JAIMEZ FKA
TIMOTHY M. WATTERS,

Defendant-Appellant.

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.

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*, 95 F.4th 454, 2024 U.S. App. LEXIS 5523, 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

1. Judge Griffin adheres to his dissent from the denial of the petition to rehear *Esteras* en banc. *United States v. Esteras*, 95 F.4th 454, 2024 U.S. App. LEXIS 5523, 2024 WL 981140, at *1 (6th Cir. 2024) (Griffin, J., dissenting from denial of rehearing en banc).

drug user—knew there were drugs in it. Third, an Ohio court found 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.

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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).

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).

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, 106 S. Ct. 433, 88 L. Ed. 2d 387 (1985); *Fox v. Ohio*, 46 U.S. (5 How.) 410, 435, 12 L. Ed. 213 (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, 120 S. Ct. 1795, 146 L. Ed. 2d 727 (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.

APPENDIX J — TRANSCRIPT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION, FILED JUNE 29, 2023

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:19-cr-283-PAG

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TORIANO A. LEAKS, JR.,

Defendant.

VIOLATION HEARING

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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

* * * * *

[79a]CLEVELAND, OHIO;
THURSDAY, JUNE 29, 2023; 11:08 A.M.

Appendix J

PROCEEDINGS

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 all three of these reports.

MR. ROBERTS: Yes, Your Honor.

[80a]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 the 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, [82a]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.

[83a]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 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 [84a]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?

[85a]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 [86a] 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.

Appendix J

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.)

APPENDIX K — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION, FILED JUNE 29, 2023

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO.: 1:19CR283

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

TORIANO A. LEAKS, JR.,

Defendant,

JUDGE PATRICIA A. GAUGHAN

ORDER

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. Gaugha
United States District Court

Date: June 29, 2023

APPENDIX L — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED MARCH 6, 2024

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-3547

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TORIANO A. LEAKS, JR.,

Defendant-Appellant.

Filed: March 6, 2024

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO

ORDER

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**.