

No. _____

In the
Supreme Court of the United States

Stephon James Whitney,

Petitioner,

v.

United States of America,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Petitioner's Appendix

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Celina Moore

From: ca9_ecfnoticing@ca9.uscourts.gov
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United States Court of Appeals for the Ninth Circuit

Notice of Docket Activity

The following transaction was entered on 05/31/2024 at 10:47:31 AM Pacific Daylight Time and filed on 05/31/2024

Case Name: USA v. Stephon Whitney

Case Number: [22-10326](#)

Docket Text:

Filed text clerk order (Deputy Clerk: MCD): Whitney's Motion to Vacate Order on Rehearing, Dkt. [50], is denied. [12888498] (AF)

Notice will be electronically mailed to:

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAY 23 2024

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STEPHON JAMES WHITNEY, AKA Stef
B, AKA Stef Bizzle, AKA Stephone James
Whitney,

Defendant-Appellant.

No. 22-10326

D.C. No.

2:21-cr-00002-JAD-NJK-1

District of Nevada,

Las Vegas

ORDER

Before: M. SMITH, BENNETT, and COLLINS, Circuit Judges.

The panel has unanimously voted to deny the petition for panel rehearing and rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are DENIED.

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

APR 3 2024

FOR THE NINTH CIRCUIT

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STEPHON JAMES WHITNEY, AKA Stef
B, AKA Stef Bizzle, AKA Stephone James
Whitney,

Defendant-Appellant.

No. 22-10326

D.C. No.

2:21-cr-00002-JAD-NJK-1

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Jennifer A. Dorsey, District Judge, Presiding

Argued and Submitted March 5, 2024
Las Vegas, Nevada

Before: M. SMITH, BENNETT, and COLLINS, Circuit Judges.

Defendant-Appellant Stephon Whitney appeals his conviction, sentence, and certain conditions of supervised release. Because the parties are familiar with the facts, we do not recount them here, except as necessary to provide context to our ruling. We have jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

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

We affirm Whitney's conviction and affirm his sentence in large part except as to the limited issues the parties agree warrant vacatur and remand.

1. The district court did not err in applying a four-level enhancement under U.S.S.G. § 2K2.1(b)(6)(B). The record supports the district court's conclusion that Whitney owned the gun and possessed the marijuana with intent to distribute. Detectives found around a half pound of marijuana in Whitney's apartment, a quantity inconsistent with personal use. In Whitney's bedroom, investigators found a loaded gun with an additional magazine, and several thousand dollars in cash hidden in the headboard of his bed. Outside the bedroom, detectives found a digital scale; small, clear bags; and two boxes of ammunition containing seventy rounds. After initially denying responsibility, Whitney stated "[a]ll that belong to me. Everything." Against this evidence, Whitney offers only a series of strained inferences and his fiancée's inconsistent account that the contraband belonged to her. The district court was well within its discretion in rejecting Whitney's version of events. *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

The record also supports the district court's conclusion that Whitney possessed the gun "in connection" with the drug offense. *See* U.S.S.G. § 2K2.1(b)(6)(B). Contrary to Whitney's contention, the district court did not rely

solely on the proximity of the gun to the drugs and other indicia of drug trafficking in making its determination. Rather, the district court found that “the totality of the facts, when combined with the reasonable logical inferences from those facts,” proved that Whitney possessed the gun in connection with the drug offense, citing “[t]he quantities, how the pot was stored, the baggies, the scale, and the cash stashed with the handgun, *and* the proximity of all of these items to one another in this small apartment” (emphasis added). The district court reasonably inferred that the purpose of the gun was to protect the stash of cash and drugs in the bedroom. That inference was not error.

2. The district court correctly determined Whitney’s criminal history category. The court did not err in counting a prior conviction for cocaine possession towards Whitney’s criminal history score. Although a state court set aside Whitney’s cocaine possession conviction in favor of an amended loitering offense, it was not “expunged” within the meaning of the guidelines. *See* U.S.S.G. § 4A1.2(j) (excluding “expunged” convictions from inclusion in criminal history category calculations). Application note 10 to that section states that convictions that are “set aside” or for which the defendant has been pardoned “for reasons unrelated to innocence or errors of law” nonetheless count towards a defendant’s criminal history score. U.S.S.G. § 4A1.2(j) cmt. n.10. Whitney does not contest that his conviction was amended for reasons other than legal error or actual innocence, and the arrest

documents and criminal complaint are consistent with Whitney's commission of cocaine possession. *Cf. United States v. Yopez*, 704 F.3d 1087, 1091 (9th Cir. 2012) (en banc) ("State courts cannot be given the authority to change a defendant's federal sentence by issuing a ruling that alters history and the underlying facts."). The district court was therefore correct to count the cocaine possession conviction.

Nor did the court err in including Whitney's misdemeanor conviction for failure to register his address as a felon, driving without a license, and driving without proof of insurance towards his criminal history score. Whitney failed to object to this one-point increase at sentencing, so plain error review applies. *See United States v. Alvarez*, 831 F.3d 1115, 1121 (9th Cir. 2016). Under U.S.S.G. § 4A1.2(c)(1), convictions for certain enumerated offenses are not counted unless the defendant received a sentence of more than a year's probation or thirty days' imprisonment. The listed offenses include "driving without a license or with a revoked or suspended license" and "false information to a police officer." *Id.* (cleaned up). The provision applies to the listed offenses, as well as other unenumerated offenses that are "similar to" a listed offense. *Id.* When deciding whether an unenumerated offense is similar to a listed offense, "the court should use a common sense approach" that considers, *inter alia*, "the perceived seriousness of the offense," "the level of culpability involved," and "the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct." *Id.*

cmt. n.12(A). Although driving without a license is specifically excluded, and although Whitney is likely correct that driving without proof of insurance is similar to driving without a license, a felon's failure to provide an updated address to authorities is not a "minor administrative offense" analogous to providing false information to a police officer. Whitney fails to cite any decision of any court for the proposition that these two offenses are similar. He does not establish plain error.

3. Whitney argues that the district court erred by failing to explicitly address his request for a downward variance based on a time-served credit he claims he should have received. He states that his request for parole from state custody was delayed because he was in physical federal custody and that, had there not been a delay, he would have received nineteen months of credit for time served. The argument is unpersuasive. The district court adequately explained the sentence it imposed. In pronouncing a sentence, the district court "should set forth enough to satisfy the appellate court that [it] has considered the parties' arguments and has a reasoned basis for exercising [its] own legal decisionmaking authority." *Rita v. United States*, 551 U.S. 338, 356 (2007) (citing *United States v. Taylor*, 487 U.S. 326, 336–37 (1988)). Because Whitney failed to raise this issue below, we review for plain error. Whitney has offered no proof that his parole was actually delayed by his federal case, and at sentencing, his attorney expressed uncertainty as to the interaction between Whitney's state and federal sentences. Whitney also fails to explain why

the state was unable to process his parole in March 2021, but was nonetheless able to do so in August 2022. In light of Whitney’s inability to make a clear statement regarding the purported effect of his federal case on his state parole proceedings, and the lack of evidence thereto, the district court did not plainly err in declining to explicitly address this request for a downward variance.

4. The felon-in-possession statute, 18 U.S.C. § 922(g)(1), is facially constitutional. Nothing in the Supreme Court’s decision in *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1 (2022), reflects a retreat from the Court’s earlier statement in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that “longstanding prohibitions on the possession of firearms by felons and the mentally ill” are “presumptively lawful.” *Id.* at 626 & n.26; *see also McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (plurality) (noting that the Court “made it clear in *Heller* that [its] holding did not cast doubt on such longstanding regulatory measures as ‘prohibitions on the possession of firearms by felons and the mentally ill’” and that the Court “repeat[s] those assurances here” (citation omitted)). Indeed, *Bruen* repeatedly emphasized that it only addressed the Second Amendment rights of “law-abiding citizens,” a phrase it used some ten times. *See* 597 U.S. at 9, 15, 26, 29–31, 38, 60, 70. And two of the Justices whose concurrences were essential to the judgment in *Bruen* reiterated *Heller*’s and *McDonald*’s statements that “prohibitions on the possession of firearms by felons” are “presumptively lawful.” *See id.* at 81

(Kavanaugh, J., joined by Roberts, C.J., concurring) (citations omitted). Because such a prohibition remains presumptively constitutional, § 922(g)(1) cannot be said to be facially unconstitutional.

5. The gang affiliation condition of Whitney's supervised release is not unconstitutionally vague or overbroad. Whitney failed to object to the condition at sentencing, so plain error review applies. Defendants have a "due process right to conditions of supervised release that are sufficiently clear to inform [them] of what conduct will result in [them] being returned to prison." *United States v. Guagliardo*, 278 F.3d 868, 872 (9th Cir. 2002) (per curiam). A supervised release condition is unconstitutionally vague when it requires the defendant "to guess about the intended meaning of the terms of his supervised release." *United States v. Sales*, 476 F.3d 732, 737 (9th Cir. 2007). A condition is unconstitutionally overbroad if it restricts "more of the defendant's liberty than necessary." *United States v. Wolf Child*, 699 F.3d 1082, 1091 (9th Cir. 2012). Whitney cites no cases where a similar condition has been struck down as impermissibly vague and/or overbroad. Instead, he cites cases from this court upholding similar provisions prohibiting any "association" or "connection" with members of criminal gangs. Given the lack of a meaningful distinction between the conditions upheld in the cases cited by Whitney and the condition complained of here, Whitney cannot establish plain error.

6. The parties suggest that a limited remand is required (1) to correct the special mental health condition under *United States v. Nishida*, 53 F.4th 1144 (9th Cir. 2022), and (2) to correct the district court's imposition of discretionary supervision conditions under *United States v. Montoya*, 82 F.4th 640 (9th Cir. 2023). We agree. We vacate special condition #4 and remand for the district court to modify it in a manner consistent with *Nishida*, and, consistent with the remedy in *Montoya*, we vacate the district court's imposition of the discretionary conditions of supervised release and remand so that the district court may consider whether to impose them, and if so, include them as part of the oral pronouncement of sentence.

AFFIRMED in part; VACATED in part; REMANDED.

UNITED STATES DISTRICT COURT

District of Nevada

UNITED STATES OF AMERICA

v.

STEPHON JAMES WHITNEY
aka; Stephone James Whitney
aka; Stef Bizzle
aka; Stef B

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:21-cr-00002-JAD-NJK

USM Number: 26534-509

Yi Lin Zheng, CJA

Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) 1 of the Indictment [ECF No. 1]

pleaded nolo contendere to count(s) _____
which was accepted by the court.

was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § § 922(g)(1) and 924(a)(2)	Felon in Possession of a Firearm	9/2/2020	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

Count(s) _____ is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

12/5/2022

Date of Imposition of Judgment

Signature of Judge

Jennifer A. Dorsey, U.S. District Judge

Name and Title of Judge

12/13/2022

Date

DEFENDANT: STEPHON JAMES WHITNEY aka; Stephone Jame
CASE NUMBER: 2:21-cr-00002-JAD-NJK

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:
54 MONTHS concurrent to revocation sentence in NV. Case No. C338650.

The court makes the following recommendations to the Bureau of Prisons:
The Court recommends that the defendant be designated to either 1. Phoenix, AZ or 2. Terminal Island, CA based on proximity to family.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____ .

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 12 p.m. on _____ .

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____ , with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: STEPHON JAMES WHITNEY aka; Stephone Jame

CASE NUMBER: 2:21-cr-00002-JAD-NJK

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

3 YEARS

and must comply with the following standard conditions, mandatory conditions, and special conditions:

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. 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 nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the specific risks posed by your criminal record and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the specific risks posed by your criminal record.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

DEFENDANT: STEPHON JAMES WHITNEY aka; Stephone Jame
CASE NUMBER: 2:21-cr-00002-JAD-NJK

Judgment—Page 4 of 7

MANDATORY CONDITIONS OF SUPERVISION

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court, not to exceed 104 tests annually.
 - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must cooperate in the collection of DNA as directed by the probation officer.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's
Signature

Date

DEFENDANT: STEPHON JAMES WHITNEY aka; Stephone Jame

CASE NUMBER: 2:21-cr-00002-JAD-NJK

SPECIAL CONDITIONS OF SUPERVISION

1. Search and Seizure – You must submit your person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition.

The probation officer may conduct a search under this condition only when reasonable suspicion exists that you have violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

2. Substance Abuse Treatment – You must participate in an outpatient substance abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.). You must pay the costs of the program based on ability to pay.

3. Drug Testing – You must submit to substance abuse testing to determine if you have used a prohibited substance. Testing shall not exceed 104 tests per year. You must pay the costs of the testing based on ability to pay. You must not attempt to obstruct or tamper with the testing methods.

4. Mental Health Treatment – You must participate in a mental health treatment program and follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program (provider, location, modality, duration, intensity, etc.). You must pay the costs of the program based on ability to pay.

5. No Gang Affiliation – You must not communicate, or otherwise interact, with any known member of any criminal street gang, without first obtaining the permission of the probation officer.

DEFENDANT: STEPHON JAMES WHITNEY aka; Stephone Jame
 CASE NUMBER: 2:21-cr-00002-JAD-NJK

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

TOTALS	\$ <u>100.00</u>	\$ _____	\$ _____	\$ _____	\$ _____
	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>

The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss***</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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TOTALS	\$ _____	<u>0.00</u>	\$ _____	<u>0.00</u>
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Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the fine restitution.

the interest requirement for the fine restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: STEPHON JAMES WHITNEY aka; Stephone Jame
CASE NUMBER: 2:21-cr-00002-JAD-NJK

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A Lump sum payment of \$ 100.00 due immediately, balance due
 - not later than _____, or
 - in accordance with C, D, E, or F below; or
- B Payment to begin immediately (may be combined with C, D, or F below); or
- C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate
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- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):
- The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.