NO.

SUPREME COURT OF THE UNITED STATES

BRYAN WOLFE	)
Petitioner	)
	)
- VS. -	)
	)
UNITED STATES OF AMERICA	)
Respondent.	)

On Petition For Writ Of Certiorari To
The United States Court Of Appeals For The Sixth Circuit

Motion For Leave To Proceed *In Forma Pauperis*
Pursuant to the Criminal Justice Act and Supreme Court Rule 39

Pursuant to Title 18, United States Code §3006A(d)(6) and Rule 39 of this Court, Petitioner asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit without prepayment of fees or costs and to proceed In Forma Pauperis.

Petitioner was represented by counsel appointed pursuant to Title 18, United States Code §3006, the Criminal Justice Act, on appeal to the US Court of Appeals for the Sixth Circuit and at trial before the US District Court for the Northern District of Ohio.

Respectfully submitted,

/s *Michael Losavio*

Michael M. Losavio
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Louisville, Kentucky 40205
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Counsel of Record for Petitioner

CERTIFICATE

I certify a copy of this Motion was sent by Federal Express private service properly addressed to Hon. Elizabeth Prelogar, Office of the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N. W., Washington, DC 20530-0001 this 20th day of December 2022

/s Michael Losavio
Michael M. Losavio

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/s Michael Losavio
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(502) 417-4970
Counsel of Record for Petitioner
Bryan Wolfe

QUESTION PRESENTED FOR REVIEW

Question I Presented is: Was there adequate notice of a departure the night before sentencing, as to allow Wolfe a fair opportunity to rebut the claims that increased his sentence above the guidelines? The only notice of the issues of an upward departure, after the Presentencing Report noted there were no grounds for departure, was an 11th hour sentencing memorandum filed by the United States at 8:30 p.m. the night before the sentencing. This is especially true given the insufficient consideration of his personal life and mental stresses at the time of these offenses.

Question II Presented is: Were Wolfe's mental condition and his efforts at rehabilitation while incarcerated was fully considered in his sentencing? Although clear evidence of mental health issues on Wolfe's part, including a prior attempts at suicide, and a request for consideration of that in sentencing, Wolfe's mental state was not considered at all in his sentencing. Neither were his efforts at rehabilitation that were presented to the District Court. These led to a procedural and substantive error in his sentence where the trial court significantly departed upward focused on deterrence and punishment. This conflicts with both the Sentencing Guidelines and the sentencing factors of 18 USC 3553, shows consideration should be given as to lead to a lesser sentence than that which Wolfe received

Questions III Presented is: Was the Grouping/Unit/Multiple Count and racial/ethnic animus adjustments increasing the calculation of sentencing level erroneous as it overcounted Wolfe's sentence. The multi-offense adjustment. The calculation began with a level 15 for the highest offense level, for threatening communications, but then for each of the four counts added 1 level. This double counts as punishment the first count, as it adds a point to the base level of 15 even though that is already counted. Further, enhancing his sentencing level for racial/ethnic animus, with no finding of the evidence being beyond a reasonable doubt, especially given Wolfe's mental condition, and then using it as the basis to depart upward, was procedurally unreasonable. And did it also create another double jeopardy/double counting error that requires resentencing for Wolfe?

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT
WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Bryan Wolfe, Appellant, Petitioner

United States of America, Appellee, Respondent

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OPINIONS AND ORDERS BELOW

The opinion below of the United States Court of Appeals for the Sixth Circuit was rendered in *United States v. Bryan Wolfe,* Case number 21-4204 as File No File Name: 22a0516n.06; that opinion affirmed the judgment of the United States District Court for the Northern District of Ohio in case number 1:20-cr-00622-1 where the original sentence committed Wolfe to the custody of the Bureau of Prisons to a total term of 46 months imprisonment.

JURISDICTION

i. The opinion of the United States Court of Appeals for the Sixth Circuit was entered on 13 December 2022; pursuant to Rule 13.1 of the rules of this Court, the Petition is timely filed.

ii. A petition for a rehearing en banc was not filed in this matter; no extension of time within which to file a petition for a writ of certiorari has been made.

iii. This is not a cross-Petition pursuant to Rule 12.5.

iv. The statutory provision conferring jurisdiction upon this Court to review upon a writ of certiorari the judgment or order in question is 28 U.S.C. §1254.

Constitutional Provisions And Other Authorities Involved In This Case

Amend. 5, U.S. Constitution; 18 USC §3553; USSG §3A1.1(a); Fed. R. Crim Proc 32 (h); USSG §5H1.3

STATEMENT OF THE CASE

Jurisdiction in the First Instance

Subject matter jurisdiction vested in the U.S. District Court for the Northern District of Ohio pursuant to 18 U.S.C. §3231; Wolfe was indicted for offenses against the laws of the United States and was convicted upon a plea of guilty within that district.

Appellate jurisdiction vested in the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. §1291 and 28 U.S.C. §1294.

Presentation of Issues in the Courts Below and Facts

Bryan Wolfe was indicted for having a firearm though being disqualified and online misconduct involving online threats:

> 1. On or about September 18, 2020, in the Northern District of Ohio, Eastern Division, Defendant BRYAN SHANE WOLFE, knowing he had previously been convicted of a misdemeanor crime of domestic violence, that being: Domestic Violence, in violation of Ohio Revised Code Section 2919.25(A)(l), in Case Number 2015CRB287, in the Morrow County Municipal Court, on or about April 7, 2015, did knowingly possess in and affecting interstate commerce a firearm, to wit: a Smith and Wesson M&P 45 Shield Pistol, bearing Serial NumberHXB1978, and said firearm, having been shipped and transported in interstate commerce, all in violation of Title 18, United States Code, Section 922(g)(9).
>
> 2. On or about November 2, 2019, in the Northern District of Ohio, Eastern Division, and elsewhere, Defendant BRYAN SHANE WOLFE, did knowingly and willfully transmit in interstate and foreign commerce communications containing threats to kidnap the person of another, to wit: family members of T.J., a person whose identity is known to the grandjury, by posting online images and sending online messages to T.J., threatening to kidnap T.J. and the family members of T.J., in violation of Title 18, Section 875(c), United States Code.
>
> 3.On or about September 8, 2020, in the Northern District of Ohio, Eastern Division, and elsewhere, Defendant BRYAN SHANE

> WOLFE, did knowingly and willfully transmit in interstate and foreign commerce communications containing threats to injure the person of another, to wit: E.H., a person whose identity is known to the grand jury, by posting online images and sending online messages to E.H., threatening physical harm to E.H. and theproperty of E.H., in violation of Title 18, Section 875(c), United States Code.
>
> 4. On or about September 13, 2020, in the Northern District of Ohio, Eastern Division, and elsewhere, Defendant BRYAN SHANE WOLFE, did knowingly and willfully transmit in interstate and foreign commerce communications containing threats to injure the person of another, to wit: J.M., a person whose identity is known to the grand jury, by postingonline images and sending online messages to J.M., threatening physical harm to J.M. and the children of J.M., in violation of Title 18, Section 875(c), United States Code.

Wolfe thereafter changed his plea to guilty of Counts 1, 2, 3 and 4. But the evening before sentencing the United States filed a memorandum asking for an upward departure in sentencing, which the District Court then did.

Final Judgment was entered on December 16, 2021adjudging Wolfe guilty of Counts 1, 2, 3 and 4 and sentencing him to the imprisonment on each count of 46 months, all to run concurrently, an assessment of $400, forfeiture of a firearm and a term of supervised release of three years on each count to run concurrently.

The Court of Appeals for the Sixth Circuit affirmed the District Court on all issues.

This Petition follows.

REASONS FOR GRANTING THE WRIT

Question I: **Was there adequate notice of a departure the night before sentencing, as to allow Wolfe a fair opportunity to rebut the claims that increased his sentence above the guidelines? The only notice of the issues of an upward departure, after the Presentencing Report noted there were no grounds for departure, was an 11th hour sentencing memorandum filed by the United States at 8:30 p.m. the night before the sentencing. This is especially true given the insufficient consideration of his personal life and mental stresses at the time of these offenses.**

Sentencing was set for December 16, 2021, the day after the filing of the Report and Recommendation on a Plea of Guilty. But late on the eve of sentencing, at about 8:30 p.m. on December 15, 2021 and with no easy access to Wolfe's detention facility, even by Wolfe' lawyer, the United States filed its Sentencing Memorandum asking for an "Upward Variance." That request stated: "The United States requests the Court to impose a 48-month prison sentence, which is above the Guideline range sentence of 24-30 months. Such a sentence would properly reflect the seriousness of the offenses, promote respect for the law, provide just punishment, afford adequate deterrence, and protect the public from further crimes of the defendant."

Wolfe's attorney noted that "Two things, Your Honor. Because I only received the government's sentencing memorandum last night at around 8:30, and he's down in CCA, he has not had an opportunity to see it because obviously I couldn't get down there." but they could address issues later in the hearing. Wolfe stated did not have an opportunity to review it with his attorney but did review it himself. Both Wolfe and his attorney were satisfied with the report, with Wolfe noting having an argument regarding the multiple-count adjustment calculation.

This last minute effort to increase Wolfe's sentence circumvented the requirement of Fed. R. Crim Proc 32 (f) that any government objections must be made within 14 days of receiving the presentence report and served on a defendant, permitting the probation officer to investigate

and revise the PSR as needed. And it circumvented the Due Process protection of Fed. R. Crim Proc 32 (g) of seven (7) days notice.

Fed. R. Crim Proc 32 (h) requires that the District Court itself must reasonable notice to the parties before it departs due a ground not identified in the Presentence Report nor the prehearing submissions of the parties (emphasis added):

> (h) Notice of Possible Departure from Sentencing Guidelines. Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure

The Presentence Report, filed on 11 November 2021 and then modified with the objections of the parties on 7 December 2021, found no grounds warranting a departure.

With the lack of adequate notice, Wolfe was not afforded a reasonable opportunity to make his arguments against the upward departure, including his mental health issues, prior to sentencing of any unresolved objections, their grounds and the probation officer's comments thereon.

Fed. R. Crim Proc 32 (h) provides there be notice as to a possible departure in sentencing.

Although notice by the trial court is not required if an item is contained in a party's prehearing submission, allowing such submission the night before sentencing makes effective notice and adequate preparation for a response difficult if not impossible. Wolfe's counsel noted they had not reviewed the government's sentencing memorandum, and its request for an "upward variance," due to its late submission and receipt the evening before the morning Sentencing Hearing.

In *Burns v. United States*, this Supreme Court ruled that a district court must provide reasonable notice to a defendant of its intention to impose a harsher sentence than that

recommended by the Federal Sentencing Guidelines. Furthermore, the district court must articulate the specific grounds on which it intends to justify its upward departure. *Burns v. United States*, 501 U.S. 129 (1991) **(**Before a district court can depart upward from the applicable Guidelines range on a ground not identified as a ground for such departure either in the presentence report or in a prehearing submission by the Government, Rule 32 requires that the court give the parties reasonable notice that it is contemplating such a ruling, specifically identifying the ground for the departure. Pp. 501 U. S. 132-139.)1

This late notice did not give Wolfe the opportunity to develop his arguments to counter this upward departure and enhanced punishment to 46 months was nearly twice the low -end of his Presentence Report Guidelines range of 24 to 30 months (or over twice the 15 to 21 months under Wolfe's calculations)

It did not sufficiently identify reasons justifying such an upward departure beyond broad statements on respect for the law, deterrence and public safety.

Indeed, the Presentence Report noted that the average sentence in similar cases was 24 months imprisonment, per the mandate of 18 U.S.C. § 3553(a)(6) to avoid unwarranted sentence disparities among defendants with similar records.

The District Court reviewed the issues "any judge has to look at" including the impact on the victims, the threats against their children, "…if it's based on race or ethnic background, that adds another aspect to it that the individual who's the victim has much more difficulty dealing with why would somebody hate me just because I'm a certain type of individual and it becomes very difficult." and the effort taken to do this.(R. 65, TS, The Court, PageID 297 – 299) The District Court reviewed Wolfe's criminal convictions for aggressive conduct and that he was a

danger to the community, and "…something has to be done to ensure not only your safety but the safety of the community and to ensure that something like this won't happen again."

Then the District Court stated:

> I think that all the facts and circumstances in this case would warrant an upward departure. So I'm going to make a final finding that your total offense level is 20, Criminal History Category II, gives us a range of 37 to 46 months.
>
> So what I'm going to do is place you in the custody of the Bureau of Prisons to be in prison for a term of 46 months…

With inadequate notice Wolfe could not defend himself. This violated Fed. R. Crim Proc 32 and the requirements of Due Process set out in the Fifth Amendment and the Fourteenth Amendment. The District Court's sentence went upward from the advisory calculations in the Sentencing Guidelines in its calculation as to move this beyond possible status as a variance as discussed in *Irizarry v. United States*, 533 US. 708 (2008) The District Court raised Wolfe's sentencing level up to a 20 to set a Guidelines range maximum of 46 months, nearly twice the low -end of his Presentence Report Guidelines range of 24 to 30 months.

It was unfair and substantively and procedurally unreasonable to spring this on Wolfe at the last minute before sentencing, especially with all the comments about his mental health. Wolfe's sentence was substantively and procedurally unreasonable and should be vacated and this matter remanded for a new sentencing.

Question II. Were Wolfe's mental condition and his efforts at rehabilitation while incarcerated was fully considered in his sentencing? Although clear evidence of mental health issues on Wolfe's part, including a prior attempts at suicide, and a request for consideration of that in sentencing, Wolfe's mental state was not considered at all in his sentencing. Neither were his efforts at rehabilitation that were presented to the District Court. These led to a procedural and substantive error in his sentence where the trial court significantly departed upward focused on deterrence and punishment. This conflicts with both the Sentencing Guidelines and the sentencing factors of 18 USC 3553, shows consideration should be given as to lead to a lesser sentence than that which Wolfe received.

Given the detailed discussion in the record of Wolfe' mental problems and his efforts at rehabilitation, the District Court should have fully considered the impact of this on the 18 USC §3553 factors, his responsibility, its deterrent impact and his rehabilitative potential and given him the lesser sentence as requested by his counsel. U.S.S.G. §5H1.3 *Pepper v. United States*, 562 U.S. 476 (2011) , which held that a defendant's post conviction rehabilitation can be considered in setting a sentence on remand.

But, instead, the District Court departed upward, without adequate notice to Wolfe, as to significantly increase his sentence.

In the alternative, the District Court should have mentioned on the record why his mental illness did not impact and mitigate its sentencing of Wolfe as to permit this Court the opportunity for meaningful appellate review.

"The Guidelines explicitly allow the district court to take into consideration a defendant's mental and emotional state at the time of sentencing. U.S.S.G. §5H1.3. A lesser sentence would have been a substantively reasonable sentence.

Both the factors listed in 18 USC §3553 and the sentencing guidelines provision of U.S.S.G. §5H1.3. Mental and Emotional Conditions indicate that consideration of a lesser

sentence in order to permit the reintegration of the defendant into the community and access community mental health resources should be given by the sentencing court.[2]

It is incorrect to assume that punishment and deterrence factors of 18 USC 3553 are no different for those with mental illness than those with full rational capabilities. This reflects the lack of proper study of this relationship and clarity as to what, precisely, sentencing is meant to accomplish for those with mental illness.[3]

The record does not show that that was done in this case such that this Court can exercise its appellate oversight fully; this matter should be remanded for a resentencing to a lesser sentence for Mr. Wolfe or, in the alternative, for a review of his mental health issues and how they impact a sufficient but no more than necessary sentence.

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2 Mental illness issues are factors in prosecutions, sentencings, and challenges as to procedural and substantive reasonableness. See, e.g., *United States v. Manns,* 17a0301n.06, https://www.opn.ca6.uscourts.gov/opinions.pdf/17a0301n-06.pdf (accessed 5-2-2022) (unpublished) (The district court further reduced his total offense level by four points, pursuant to USSG §§ 5H1.3 and 5H1.4, due to Manns's mental and physical conditions.) ;*United States v. Smith*, File Name: 14a0317n.06, https://www.opn.ca6.uscourts.gov/opinions.pdf/14a0317n-06.pdf (accessed 5-2-2022) (unpublished) (While the district court could have addressed Smith's physical and mental conditions more extensively, we conclude that the district court was aware of them, was cognizant of their role in a § 3553(a) analysis, and incorporated them into the sentencing decision.); *United States v Pineda,* File Name: 18a0570n.06, https://www.opn.ca6.uscourts.gov/opinions.pdf/18a0570n-06.pdf, accessed (5-2-2022) (unpublished) (…The district court agreed that Pineda needed treatment and recommended that she participate in a dual diagnosis substance-abuse and mental-health treatment program. The district court stated: "In varying downward I am hopeful that [the psychologist] is correct, that with appropriate treatment the defendant can avoid re-offending. So I'm cautious but I'm cautiously optimistic that the defendant will avoid the problems going forward and to be able to reform her conduct and reunite with her children." We cannot say that the district court placed unreasonably little weight on Pineda's psychological issues and treatment potential); *United States v. Roser*, File Name: 13a0587n.06, https://www.opn.ca6.uscourts.gov/opinions.pdf/13a0587n-06.pdf, (accessed 5-2-2022) (unpublished):

3 Mirko Baric, A Rational (Unapologetically Pragmatic) Approach to Dealing with the Irrational-The Sentencing of Offenders with Mental Disorders, Harvard Human Rights Journal, https://harvardhrj.com/wp-content/uploads/sites/14/2016/09/Bararic-Sentencing-Offenders-with-Mental-Disorders.pdf (accessed 5-4-2022)

Wolfe's counsel pointed out these as mitigation issues to the District Court during sentencing:

> So this case has been going on for over a year, throughout the duration of which I've gotten to know Mr. Wolfe quite well.
>
> He's a complicated individual. He obviously is a high achiever with his career and his job and his aspirations, and he's done well and he's come up the ladder, but at the same time there's something -- there's something bothering him, and I don't -- you know, I don't pretend to be a mental health person in the least, but just in my interaction with him and the -- you know, the Court can see through the medical information that we submitted, he has unresolved issues.
>
> And as I sit here -- and I've been sitting here for many weeks trying to figure out how do you sentence this? You know, what's the remedy? I mean, obviously retribution, but when does that stop?
>
> And if they're really trying to rehabilitate people, Your Honor, I'm wondering that a longer prison term will really do anything except exactly the opposite. Everyone knows what it's like in prison, especially federal prison, and any kind of biases or weaknesses that a person brings into an institution are not only continued but made manifest.
>
> And so when I'm thinking about how to sentence this or what to ask to be sentenced, I think it's really important that Bryan of course gets punished -- and he agrees with that, he accepts responsibility for what he did -- that he gets punished, but also that he is somehow given the opportunity to get back into society and to figure out, you know, what has been holding him back. So I think that he has a lot of potential. He obviously has a lot of actual success.
>
> And this is a very unfortunate situation, very unfortunate situation. And so the question is how to punish, and through punishment, yes, but also through some sort of, if I may, reeducation or rehabilitation, which would definitely include some sort of mental counseling.

> I would ask -- and I've asked in the sentencing memorandum -- that the Court impose the lowest sentence available.

The record in this case details Wolfe's mental and emotional problems that seem to be the core of his behavior. His counsel noted in mitigation at sentencing that Wolfe had unresolved issues and that he definitely needed mental and counseling.

Further, while in pre-trial incarceration Wolfe was a model prisoner and participated in a 19-week Go Further Program course designed to produce positive outcomes in the re-entry process and reduce recidivism. The Northern Ohio Correctional Center program facilitator noted he was an active participant in the program, was compliant with facility rules and polices, was on good behavior and had zero conduct report. Id.

The issues with mental health were detailed in Wolfe's PSR, which stated:

> **Mental and Emotional Health**
> 71. On December 8, 2020, the defendant completed an initial mental health visit with NEOCC staff, and they indicated he suffered from anxiety disorder, unspecified. He was prescribed hydroxyzine and mirtazapine. According to reports, he refused mental health appointments in January, February, and March 2021. He completed another appointment in April 2021 after being referred to medical staff when an officer heard him say "this is why I wanted to kill myself." Medical staff indicated he was behaviorally and emotionally stable and did not appear to be a danger to himself.
>
> 72. Mr. Wolfe stated that he participated in counseling services with Cornerstone Counseling Services in 2020 in Ashland, Ohio. Records received from Cornerstone indicate he participated in two sessions in June and July 2020. He was diagnosed with Adjustment Disorder with mixed disturbance of emotions and conduct. He reported a lengthy history of mental health treatment beginning at age 11 and was "in and out of psychiatric hospitals" due to depression and suicide attempts. His mother verified that at age 16 he attempted to hang himself. She stated she found him hanging and he was cut down by his stepfather. Mr. Wolfe does not believe he needs medication, but rather counseling. He believes he needs to learn to deal with his "trauma from growing up." His mother emphasized the need for mental health medications.
>
> 73. While incarcerated at NEOCC, the defendant has received positive feedback from his unit manager for his work performance. He completed the "Go Further", "Destination," and "On Ramp" programs. He also reported that he started an inmate led group named "halfempty, half-full" with other inmates.

In his request for a variance, Wolfe noted for the Presentence Report that:

Paragraph 108: Variance
Defendant notes that, during his presentence interview, he provided the officer with many Booker grounds for a variance, including:
...
2. Diminished mental capacity; Emotional Disorder (defendant has depression; anxiety, bipolar and other mental health issues)

3. Statistically low probability of recidivism as well as the following collateral consequences:
(1) Substantial mental and personal stress as a result of prosecution (defendant was on sleeping meds the first 5 months of incarceration…

Wolfe wrote for the Presentence Report, showing acceptance of responsibility, that:

Adjustment for Acceptance of Responsibility
14. The defendant provided the following written statement accepting responsibility for his actions:

I do not condone this type of behavior and have raised my children to love everyone, respect everyone, and to judge no one. Yes since November 2018 life has been one calamity after another with taking care of a very sick little girl on my own, my now ex-wife leaving both of us, etc. etc. but theses would be excuses and since the definition of excuse is "to overlook or condone" I am not making any excuses. What about the family that is watching their 8 year old die of leukemia and that child may not be around for another holiday. They are no lashing out. Or the single dad that is trying to get by on limited income because his hours were cut or is not working two jobs.

Could the past 3 ½ years be considered "reasons" or "explanations" for my actions? Only if I allow them to become excuses.

There has not yet been one single nigh in the past 1 year 3 months and 4 days that I have not prayed for or forgot about the victims. Not one day that I have not felt some sort of empathy for them. Felling sympathy is a compassionate response to actions but having empathy identifies with the victims and this I have done for 454 days and counting because I have children the same age.

Losing my career, my home, my wife, my children, my livelihood and my freedom for well over a year is no comparison for the loss not only to the

> victims and their families have had to live with, but my children have lost their daddy, I have missed the first walks, first days of kindergarten and homecoming. The victims have lost solace in safety and security. The stone that I cast into that water sent out ripple effects that will cause pain for years to come.
>
> I am truly sorry for the pain and suffering the victims, their families and my own children have had to endure because of these malicious actions. The losses have actually brought about two very important characteristics in the way of humility and empathy.
>
> I hope and pray that one day I will be forgiven by everyone involved. Apologetically and Respectfully,
>
> /s/ Bryan S. Wolfe 18 September 2021.

His attorney noted he needed mental counseling during his sentencing hearing.

And Wolfe reviewed this in his Sentencing, stating:

> Wolfe: …So not only have I ruined the lives of these victims, but I've ruined my family's lives. I've ruined my children's lives, being a single parent.
>
> You know, we choose our own reality. I messed up a lot of lives. That's just the bottom line.
>
> There's not a day that goes by that I don't think -- I'm the same I am now as I was when I met Miss Fortunato. I was very distraught that day.
>
> I just don't know what else to say, I'm sorry for what I've done.

The trial court asked Wolfe why he did all this, to which Wolfe discuss the problems he had then while noting how others with worse situations were not "…making egregious threats and doing evil misconduct…Two things that I've learned in here is humility and empathy. Sympathy's one thing, but when you learn empathy, it totally changes you. *I can't give an honest reason why I did it*." (emphasis added)

The trial court then discussed the nature of the offense, the effort involved and Wolfe's

past, finding him a danger to the community and the need to ensure the safety of the community and ensure it does not happen again; noting this all warranted an upward departure such that the trial court found Wolfe's offense level to be 20 with a Criminal History of II, giving a sentencing range of 37 to 46 months and, therefore the trial court sentenced Wolfe to 46 months imprisonment.

The trial court's upward departure 46 months was nearly twice the low -end of his Presentence Report Guidelines range of 24 to 30 months (or over twice the 15 to 21 months under Wolfe's calculations.)

This all showed a focus not on rehabilitation but on deterrence: "you, I hope this is sufficient to be the wake-up call because this is the longest time that you'll ever do while you're in jail."

Yet in departing upward so greatly it did not address the issues raised as to Wolfe's mental condition nor his efforts at rehabilitation, though it did note his remorse. Id.

Deterrence, whether specific or general, resting on a premise of rational choice, may not improve public safety where the mentally ill are involved.[4]

Focusing on the future, the District Court over-focused on "specific deterrence" but failed to consider the diminished role of "specific deterrence" in cases of mental illness and the important factor of rehabilitation5 and the role of mental illness in offending, sentencing and the application of the factors of 3553 and the Sentencing Guidelines. Mental illness is a compelling

4 See Nagin, Daniel S., "Deterrence in the Twenty-First Century," in Crime and Justice in America: 1975-2025, ed. M. Tonry, Chicago, Ill.: University of Chicago Press, 2013: 199-264 ("The evidence in support of the deterrent effect of the certainty of punishment is far more consistent than that for the severity of punishment….)

5 *Pepper v. United States*, 562 U.S. 476 (2011) held that a defendant's post conviction rehabilitation can be considered in setting a sentence on remand.

case for consideration in the sentencing calculus so as not to perpetuate the criminalization of mental illness and offer real rehabilitation of the offender.[6]

The District Court's Statement of Reasons stated reason for variance above the guideline range is nature and circumstances of the offense and the Victim Impact.

A sentence is substantively unreasonable when it fails to consider pertinent 18 USC §3553(a) factors or gives an unreasonable amount of weight to any pertinent factor.

This Court reviews under a reasonableness standard the district court's consideration of the factors listed in §3553 (a), which sets out 12 detailed factors in 7 separate sections to be considered by a court in imposing a sentence of which only two involve consideration of guidelines provisions and guideline policy statements as issued by the Sentencing Commission. 18 U.S.C. §3553(a) (2) instructs the district court that its duty in sentencing is to impose ... "a sentence which is sufficient in the case at hand", "without being greater than necessary" to achieve four articulated objectives. These congressionally defined purposes are: (A) "just punishment" in light of the "seriousness of the offense" ; (B) "deterrence" both the general (deterrence of others) and specific (of the defendant); (C) incapacitation " to protect the public" and (D) any "needed" rehabilitation and correctional treatment" of the offender.

As established by the introductory language to §3553 quoted above, Congress has embedded in the federal sentencing legislation the over-riding moral command to impose on any convicted person the least suffering that is demanded by the general welfare.

This is within the context that each person is an individual who must be so adjudged in her or her sentencing:

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6 Georgia L. Sims, The Criminalization of Mental Illness: How Theoretical Failures Create Real Problems in the Criminal Justice System, 62 Vanderbilt Law Review 1053 (2019) Available at: https://scholarship.law.vanderbilt.edu/vlr/vol62/iss3/6

> "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.

Gall v. United States, 128 S. Ct. 586, 598 (2007), *quoting Koon v. United States*, 518 U.S. 81, 113 (1996).

But this was not done here.

As such, Wolfe's was solely a punitive sentence directed towards punitive deterrence, and not one that was sufficient but no more than necessary as required by 18 U.S.C. § 3553(a). And neither was it one to support rehabilitation when it was evident Wolfe tried hard to improve his conduct while incarcerated.

Wolfe's sentence was procedurally and substantively unreasonable and should be vacated and this matter remanded for a new sentencing, with the possibility of a mental health evaluation for Wolfe and possible recommendation of appropriate treatment while incarcerated.

Question III: Was the Grouping/Unit/Multiple Count and racial/ethnic animus adjustments increasing the calculation of sentencing level erroneous as it overcounted Wolfe's sentence? The calculation began with a level 15 for the highest offense level, for threatening communications, but then for each of the four counts added 1 level. This double counts as punishment the first count, as it adds a point to the base level of 15 even though that is already counted. Further, enhancing his sentencing level for racial/ethnic animus, with no finding of the evidence being beyond a reasonable doubt, especially given Wolfe's mental condition, and then using it as the basis to depart upward, was procedurally unreasonable. And did it also create another double jeopardy/double counting error that requires resentencing for Wolfe?

The District Court did not determine beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense of conviction because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person as to justify a sentencing level increase by three levels. USSG §3A1.1(a).

And to add 3 points for USSG §3A1.1(a) it was double jeopardy for the District Court to depart upward as to increase the sentencing level to 20 and thus an increased punishment**.**

> **Victim Related Adjustment:** If the Court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense of conviction because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person, increase by three levels. USSG §3A1.1(a). +3 (emphasis added)

The counting as to set Wolfe's sentencing level was erroneous and procedurally unreasonable. His sentence should be vacated and this matter remanded for a new sentencing.

Adding 3 points for motive and then departing upward to 20 as a sentencing level for the same motive violates Double Jeopardy, as it adds more punishment than Congress intended for Wolfe's conduct. See *Blockburger v. United States*, 284 U.S. 299 (1932)

Punishing Wolfe under the Guidelines enhancement for race or ethnic based motivation and

then departing upward on those same grounds may implicate the prohibition on Double Jeopardy of the Fifth Amendment.

The constitutional bar against double jeopardy, under the Fifth Amendment to the United States constitution, is not purely a "defense" to a charge but a prohibition of abuse by multiple punishments for one act.

This double punishment may violate prohibitions as to double jeopardy: no multiple punishments for the same offense[7].

To determine whether two charged offenses are in law the same offense, the U.S. Supreme Court set this test:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.
> *Blockburger v. United States*, 284 U.S. 299 (1932).

Facially these appear to fail the *Blockburger* test and violate the 5th Amendment prohibition on Double Jeopardy by imposing multiple sentences for the same conduct. *North Carolina v. Pearce*, above[1].

But this Supreme Court in *Albernaz v. United States*, 450 U.S. 333 (1981), a case where the multiple convictions passed the *Blockburger* test stated

> [the] *Blockburger* test is a 'rule of statutory construction,' and because it serves as a means of discerning congressional purpose *the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent. Albernaz v. United States*, 450 U.S., at 340

Th=ise Court continued its observations:

"[The] question of what punishments are constitutionally permissible is no different from

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7 *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969): *Ohio v. Johnson*, 467 U.S. 493, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984) See *Blockburger v. United States*, 284 U.S. 299 (1932).

> the question of what punishments the Legislative Branch intended to be imposed. *Where Congress intended, as it did here, to impose multiple punishments, imposition of such sentences does not violate the Constitution*," 450 U.S., at 344(emphasis added). (footnote omitted)

This Court relied therein on its ruling in *United States v. Whalen*, 445 U.S. 684 (1980) wherein it noted:

> The Double Jeopardy Clause at the *very least* precludes federal courts from imposing consecutive sentences unless authorized by Congress to do so. The Fifth Amendment guarantee against double jeopardy embodies in this respect simply one aspect of the basic principle that within our federal constitutional framework the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress. See *United States* v. *Wiltberger*, 5 Wheat. 76, 95; *United States* v. *Hudson & Goodwin*, 7 Cranch 32, 34.If a federal court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates not only the specific guarantee against double jeopardy, but also the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty (footnote omitted) (emphasis added)

The *Whalen* court noted this limitation of Congressional scope was "the very least" the Double Jeopardy Clause limited. Ultimately this Supreme Court did state, in a double jeopardy challenge arising from cumulative punishments under two Missouri statutes, that for cumulative sentences imposed for a single act, "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter*, 459 U.S. 359, 366 (1983).

A Finding of Racial Animus Beyond a Reasonable Doubt Was Never Made as to Allow This Court to Review the Sentencing Decision

Further, enhancing Wolfe's sentencing level for racial/ethnic animus, and then using it as the basis to depart upward, was another double jeopardy/double counting error that requires resentencing for Wolfe. The District Court made no findings that Wolfe did this due to racial/ethnic animus, which it must find beyond a reasonable doubt and this Court then reviews for reasonableness.

Some might argue that the text of Wolfe's statements make it evident there was a racial/ethnic animus. But Wolfe has serious mental health issues. In his sentencing hearing he was remorseful, sincerely, and, rather than offer a self-serving explanation, Wolfe said:

> Wolfe: …So not only have I ruined the lives of these victims, but I've ruined my family's lives. I've ruined my children's lives, being a single parent.
>
> You know, we choose our own reality. I messed up a lot of lives. That's just the bottom line.
>
> There's not a day that goes by that I don't think -- I'm the same I am now as I was when I met Miss Fortunato. I was very distraught that day.
>
> I just don't know what else to say, I'm sorry for what I've done.

The trial court asked Wolfe why he did all this, to which Wolfe discuss the problems he had then while noting how others with worse situations were not "…making egregious threats and doing evil misconduct…Two things that I've learned in here is humility and empathy. Sympathy's one thing, but when you learn empathy, it totally changes you. *I can't give an honest reason why I did it*." (emphasis added)

Any indication of racial/ethnic animus is a manifestation of Wolfe's mental illness, not intent or knowledge. This is critical and something that must be found beyond a reasonable doubt as the evidence itself was insufficient to establish beyond a reasonable doubt this improper motivation. The only proof here of this were the improper statements and threats made in emails/e-communications to the victims and the correlation to the ethnicity of those three victims. That is insufficient.

Wolfe's sentence must be vacated and remanded for a new sentencing with full review on the record of this issue.

Multiple Count adjustment

The Presentence Report used a Multiple Count adjustment that used the highest offense level of the four offenses and then added 1 point for each of them to give a sentencing level of 19. Wolfe objected to this under this analysis as set out in the Addendum to the PSR.

Wolfe argued at sentencing that this would further bring down his Guidelines range to 15 to 23 months imprisonment.

A Double Counting Violation

But there is here a structural double jeopardy in the multiple punishment for the same core conduct.

The Grouping/Unit/Multiple Count adjustment calculation was erroneous as it overcounted Wolfe's sentencing level via a multi-offense adjustment. The calculation began with a level 15 for the highest offense level, for threatening communications, but then for each of the four counts added 1 level. This double counts as punishment the first count, as it adds a point to the base level of 15 even though that is already counted. It violates the prohibition on double punishment, and as such Wolfe's sentence should be vacated and this matter remanded for resentencing.

Setting a 15 point level for the offenses related to Wolfe's internet threats and then adding 1 point for <u>each</u> count was itself a double counting. If but one count, the sentencing level would have only been a 15. But to count an extra point for each of all of the three counts, rather than the additional two counts, is to double count punishment for the first count on top of the second and third counts. This is not the punishment intended nor permitted, and violates the Fifth Amendment prohibition on double jeopardy and double punishment for the same conduct. This is improper and Wolfe's sentencing should be vacated and set aside and this matter remanded for a new sentencing.

CONCLUSION

The judgment and sentence were erroneous and this Petition for Writ of Certiorari should be granted and Mr. Wolfe given the relief he has argued for herein.

Respectfully submitted,

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Certification of Word Count and Petition Length

The undersigned certifies that this Petition for a Writ of Certiorari does not exceed 7700 words, not counting the appendix materials, and is in compliance with the length rules of Supreme Court Rule 33.

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Certificate of Service

A copy of the foregoing Petition for a Writ of Certiorari has been served this day by U.S. Postal Mail or via a private expedited service on Hon. Elizabeth B. Prelogar, Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W., Washington, D. C. 20530–0001

This 20th day of December, 2022

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Judgment of the U.S. District Court for the Northern District of Ohio……B 1-8…
United States v. Bryan Wolfe,

Amend. 5, U.S. Constitution; 18 USC §3553; USSG §3A1.1(a); Fed.
R. Crim Proc 32 (h); USSG §5H1.3

Statutes Involved in this Petition

Fifth Amendment to the US Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 USC §3553

(a)FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—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.[1]
(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.
(b)APPLICATION OF GUIDELINES IN IMPOSING A SENTENCE.—
(1)IN GENERAL.—
Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

A1

NOT RECOMMENDED FOR PUBLICATION
File Name: 22a0516n.06 Case No. 21-4204

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BRYAN WOLFE,
Defendant-Appellant.

FILED
Dec 13, 2022
DEBORAH S. HUNT, Clerk

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

OPINION

Before: LARSEN, DAVIS, and MATHIS, Circuit Judges.

MATHIS, Circuit Judge. Bryan Wolfe pleaded guilty to charges of possession of a firearm after being convicted of a misdemeanor crime of domestic violence and multiple counts of making interstate threatening communications. The district court sentenced Wolfe to an above-Guidelines sentence of 46 months of imprisonment. Wolfe appeals his sentence. Finding no error, we affirm.

I.

This action arises from Wolfe threatening children and adults in Ohio and Michigan after engaging in online arguments on Facebook.

On November 2, 2019, Wolfe sent threatening messages to victim one, T.J., via Facebook. Wolfe, using an account under the name of "Dolf Hidler," began sending T.J. pictures of her family members and threatened to kidnap them. (R. 48, Page ID 169). Specifically, Wolfe stated:

Not sure which of your family. Maybe you yourself. But I will take

> one from you. Maybe that little baby. Snatch her from your presence. Or maybe the ugly ass boy. He looks like he came out of a tube. Bitch the clock is ticking. You can take this as a joke and should leave my CUNTry (sic) and go back to chucking spears. But I will take one. Laugh your inferior black asses off. Think it's a game. But don't do your ghetto crying after the fact. Ps (sic) your entire family are inferior and the worthless stank hoe bitches are inferior. And we won't be extinct but I laugh every time one of you is killed. Tick tock bitch.

(*Id.*). T.J. and her family members are African American.

On September 8, 2020, Wolfe sent victim two, E.H., threatening messages via Facebook. Wolfe, this time using an account under the name "Shaun Wolfie", threatened to burn a Quran in E.H.'s yard and sent him a picture of E.H.'s home, followed by a picture of a bonfire. Wolfe also communicated with E.H. using slurs and derogatory terms, stating "Fuck Mohammed," and referring to him as "haji" and "faggot." (*Id.* at 170).

On September 13, 2020, Wolfe sent threatening messages to victim three, J.M., via Facebook. Wolfe, again using the "Shaun Wolfie" profile name, threatened to kill J.M.'s children. Specifically, Wolfe stated: "And it's why you and your nigger will swing from knots cunt. He will be saying 'I can't breath' (sic) while I am drinking a beer and you're bleeding watching it all." (*Id.*). Wolfe also sent J.M. a picture of her children, who are biracial (African American and Caucasian).

After receiving reports of these threats, on September 18, 2020, law enforcement officers

executed a federal search warrant at Wolfe's home. During the search, they recovered a Smith and Wesson M&P 45 Shield Pistol on a mantle in the living room. Because Wolfe had been previously convicted of a misdemeanor of domestic violence, he was prohibited from possessing a firearm.

A federal grand jury returned a superseding indictment charging Wolfe with one count of illegally possessing a firearm after having been convicted of a misdemeanor crime of domestic violence in violation of 18 U.S.C. § 922(g)(9) ("Count 1"), and three counts of making interstate threatening communications in violation of 18 U.S.C. § 875(c) ("Counts 2 through 4"). Wolfe executed a written plea advisement, and on August 26, 2021, he pleaded guilty to all charges in the superseding indictment. During the change of plea hearing, the Government advised Wolfe and the district court that it anticipated requesting an upward variance at sentencing.

1. Presentence Investigation Report

The Presentence Investigation Report ("PSR") assigned a base offense level of 14 for Count 1 under U.S.S.G. § 2K2.1(a)(6). The base offense level for each of Counts 2 through 4 was 12, with a three-level hate-crime enhancement pursuant to U.S.S.G. § 3A1.1, bringing the adjusted offense level to 15. Wolfe also received a four-level multiple-count enhancement, resulting in a combined adjusted offense level of 19. The PSR recommended a three-level reduction for acceptance of responsibility, bringing Wolfe's final offense level to 16.

Although Wolfe had a lengthy criminal history, including convictions for assault, disorderly conduct, aggravated assault, menacing, driving under the influence, and domestic violence, his criminal history category was II. Based on an offense level of 16 and criminal history category II, Wolfe's advisory Guidelines range was 24 to 30 months of imprisonment.

Wolfe objected to the multiple-count enhancement, arguing that because Counts 2 through 4 involved different victims and were not part of the same transaction, they could not be grouped.

Wolfe also argued for a downward variance based on, *inter alia*, his "diminished mental capacity."

2. Sentencing Hearing

On December 14, 2021, Wolfe filed a sentencing memorandum requesting a sentence at the low end of the "proper sentencing guideline range," citing, *inter alia*, his mental health as grounds for imposing a lower sentence. (R. 50, PageID 199–200). On December 15, 2021, the Government filed its sentencing memorandum and requested an upward variance.

On December 16, 2021, the district court sentenced Wolfe. The court adopted the PSR, overruling Wolfe's objection to the multiple-count enhancement. Wolfe did not object to the PSR on any other grounds.

The district court noted that it had reviewed the sentencing memoranda from Wolfe and the Government. The court also discussed the § 3553(a) sentencing factors with Wolfe to ensure he understood their application. Wolfe's attorney argued for the lowest sentence available under the Guidelines range, noting that although Wolfe was a high achiever in his career, he had unresolved mental health issues. The Government requested that the court vary upward and impose a 48-month sentence based on the nature and circumstances of the offenses in which Wolfe made serious threats against racial and ethnic minorities, as well as Wolfe's history and characteristics. The Government argued that such a sentence would properly reflect the seriousness of the offense and provide adequate deterrence.

When Wolfe allocuted, he apologized, claiming he had ruined his life, as well as the lives of his family and of the victims. Wolfe indicated that his life had been difficult during the two years before his crimes and said, "I can't give an honest answer why I did it." (R. 65, PageID 296–97). After hearing from Wolfe, the court advised that its sentence was based, in significant part, on the nature and circumstances of Wolfe's actions and the impact on his victims, stating that

"[h]aving a threat against [a parent] would be bad enough, but having a threat against one of their children and in feeling kind of helpless that they can't protect their own child and not knowing where the threat's coming from or why the threat is coming" was difficult to comprehend. (*Id.* at 297–98). The court also noted that the racial nature of the threats added to the difficulty victims likely faced when trying to deal with the threats. Additionally, the court expressed that "one of the things that really bothered [the court] about this was that it took a lot of work and effort on [Wolfe's] part to investigate—this wasn't like a one-time thing." (*Id.* at 298).

The district court acknowledged Wolfe's history and characteristics, including his difficulties at home and at work, and noted his criminal history. The court concluded that Wolfe was a danger to the community based on the "vile fashion" of his actions toward strangers and that it was necessary to protect "not only [Wolfe's] safety but the safety of the community and to ensure that something like this won't happen again."

As such, the court noted that an upward "departure" was appropriate based on the facts and circumstances of the case and sentenced Wolfe to 46 months of imprisonment, stating that this was sufficient to deter Wolfe from committing similar acts in the future. (*Id.* at 300–301). The court further recommended that Wolfe receive mental health treatment while incarcerated. Wolfe did not lodge any additional objections to the sentence.

The court entered the judgment and filed its statement of reasons. In the statement of reasons, the court indicated that it had imposed a sentence outside the applicable sentencing Guidelines range and determined that a "variance" was appropriate. As it stated during its oral pronouncement of the sentence, the court based its reasoning for a variance on the nature and circumstances of the offense and victim impact, as well as the need to afford adequate deterrence to criminal conduct and to protect the public from further crimes by Wolfe. Wolfe timely appealed.

II.

Wolfe presents the following issues on appeal: (1) whether the court's sentencing of Wolfe represented a "departure" rather than a "variance" from the Guidelines such that advance notice was required under Federal Rule of Criminal Procedure 32(h); (2) whether the court's calculation of his sentence based on the multiple-count and hate-crime enhancements under the Guidelines was erroneous; (3) whether the district court properly considered Wolfe's mental health and his efforts at rehabilitation while incarcerated in its sentencing decision; and (4) whether the court's application of the multiple-count and hate-crime enhancements violated the Fifth Amendment prohibition against double jeopardy. The second and third issues raised by Wolfe are appropriately addressed under an inquiry into the reasonableness of Wolfe's sentence. For the reasons explained below, we affirm Wolfe's sentence.

A.

The first issue is whether Wolfe's sentence constituted a "departure" or a "variance" from the Guidelines. This is a question of law that we consider *de novo*. *United States v. Denny*, 653 F.3d 415, 419 (6th Cir. 2011).

We have explained the difference between a departure and a variance as follows:

> "Departure" is a term of art under the Guidelines and is distinct from "variance." A Guidelines "departure" refers to the imposition of a sentence outside the advisory range or an assignment of a criminal history category different than the otherwise applicable category made to effect a sentence outside the range. Importantly, a departure results from the district court's application of a particular Guidelines

> provision, such as § 4A1.3 or § 5, Part K. A "variance" refers to the selection of a sentence outside of the advisory Guidelines range based upon the district court's weighing of one or more of the sentencing factors of § 3553(a). While the same facts and analyses can, at times, be used to justify both a Guidelines departure and a variance, the concepts are distinct.

United States v. Grams, 566 F.3d 683, 686–87 (6th Cir. 2009) (per curiam) (internal citations omitted).

The distinction between the two concepts matters because a departure triggers certain notice requirements. Rule 32(h) of the Federal Rules of Criminal Procedure requires district courts to provide the parties with reasonable notice that it is considering a departure from the Guidelines "on a ground not identified for departure either in the presentence report or in a party's prehearing submission." Fed. R. Crim. P. 32(h). This notice provision does not apply when the district court applies a "variance" based on the sentencing factors of 18 U.S.C. § 3553(a). *See Irizarry v. United States*, 553 U.S. 708, 714–16 (2008). Therefore, if the district court applied an upward "departure," there would be a question as to whether Wolfe was provided with reasonable notice of the intent to seek such a departure. We need not reach this question, however, because the record shows that the district court varied from the Guidelines range; it did not depart.

We first review the oral sentence pronounced by the district court to determine whether it intended to apply a departure or variance. *See United States v. Penson*, 526 F.3d 331, 334 (6th Cir. 2008) ("[W]hen an oral sentence conflicts with the written sentence, the oral sentence controls.") (quotation and citation omitted). The rationale for giving an oral sentence primacy is that "criminal punishment 'affects the most fundamental human rights,'" and as such, "'[s]entencing should be

conducted with the judge and defendant facing one another and not in secret.'" *Id.* (quoting *United States v. Villano*, 816 F.2d 1448, 1452 (10th Cir. 1987) (en banc)). The terminology used during sentencing matters, but we have observed that "no specific magic words are necessary to render a sentence reasonable." *United States v. Davis*, 458 F.3d 505, 507 (6th Cir. 2006).

The district court's decision to sentence Wolfe to a sentence longer than that recommended under the Guidelines does not necessarily mean the court departed from the Guidelines even though the court used the word "departure." The question of whether the district court made a variance or departure ultimately comes down to its grounds for deviating; that is, whether the court sentenced Wolfe above the Guidelines range based on § 4A1.3 or Part K, § 5 of the Guidelines, or based on the § 3553(a) factors. *Denny*, 653 F.3d at 420. Congress has instructed that "a court shall impose a sentence sufficient, but not greater than necessary," and in doing so, the court is to consider certain factors, including "the nature and circumstances of the offense," "the history and characteristics of the defendant," "the seriousness of the offense," the need "to promote respect for the law," the provision of "just punishment," the protection of the public, and the need to "afford adequate deterrence." 18 U.S.C. § 3553(a)(1), (a)(2)(A)–(C). These factors allow the court "a 'much broader range of discretionary decisionmaking' than the discretion provided by the Sentencing Guidelines." *Denny*, 653 F.3d at 420 (quoting *United States v. Stephens*, 549 F.3d 459, 466–67 (6th Cir. 2008)).

This case is similar to *Denny*. In *Denny*, although the district court used the term "departure" in speaking about the defendant's sentence, we determined that the district court's failure to use the word "variance" was not conclusive evidence that the court had departed from the Guidelines range, rather than varied, because the district court made clear references to the § 3553(a) factors in fashioning a sentence. *See id.* at 420–21. Here, the district court also did not use the term "variance" and used the term "departure" one time.

In sentencing Wolfe, the court did not identify any of the numerous departure provisions in the Guidelines. And, in fact, Wolfe does not identify any departure provision that he claims the district court relied on in sentencing him above the Guidelines range. The court focused on the § 3553(a) factors. In its discussion of the nature and characteristics of the offense, the court discussed the effort Wolfe put into threatening his victims, his use of racial and ethnic slurs, and the fact that he threatened children. The court also discussed Wolfe's personal history and characteristics, including his difficulties with his family, job, and home life, as well as his criminal history. The court also recognized its need to protect the community and to prevent Wolfe from committing this type of behavior again. Based on the oral sentence pronouncement, we find that the district court intended to vary above the Guidelines range rather than depart, thus rendering Rule 32(h)'s notice requirement inapplicable.

The district court's written judgment also supports this conclusion. In its statement of reasons,[1] the court indicated that it was adopting the PSR without change and marked the box next to the statement specifying it had "imposed a sentence otherwise outside the sentencing guideline system **(i.e., a variance)**." (R. 56, PageID 265–66 (emphasis added)). The district court left Section V of the form, related to departures, blank and filled in Section VI related to variances, noting that it was relying on the following § 3553(a) factors in sentencing: the nature and circumstances of the offense (including victim impact), the affording of adequate deterrence to criminal conduct, and the protection of the public from further crimes of Wolfe.

B.

We construe Wolfe's claims regarding the court's calculation of his Guidelines range, including its application of the multiple-count and hate crime enhancements, and the court's consideration of his mental health condition during sentencing, as challenging the reasonableness

of Wolfe's sentence.

1. Procedural Reasonableness

We first review Wolfe's sentence for procedural reasonableness, which is satisfied as long as "the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range." *Gall v. United States*, 552 U.S. 38, 51 (2007); *see also Denny*, 653 F.3d at 423. We review the district court's legal conclusions *de novo*, and its factual findings for clear error. *See United States v. Henry*, 819 F.3d 856, 864 (6th Cir. 2016) (citing *United States v. Taylor*, 648 F.3d 417, 431 (6th Cir. 2011)).

When the district court gives the parties an opportunity to raise errors after pronouncing the sentence, and the appealing party fails to do so, we review for plain error. *United States v. Bostic*, 371 F.3d 865, 872–73 (6th Cir. 2004). Under plain error review, Wolfe must show an "(1) error (2) that 'was obvious or clear,' (3) that 'affected [Wolfe's] substantial rights' and (4) that 'affected the fairness, integrity, or public reputation of the judicial proceedings.'" *United States v. Vonner*, 516 F.3d 382, 386 (6th Cir. 2008) (quoting *United States v. Gardiner*, 463 F.3d 445, 459 (6th Cir. 2006)). Plain error will only be found in "'exceptional circumstances' . . . 'where the error is so plain that the trial judge . . . [was] derelict in countenancing it.'" *Id.* (quoting *Gardiner*, 463 F.3d at 459).

Wolfe claims that his sentence is procedurally unreasonable because the district court: (1) erred in applying the multiple-count enhancement, (2) applied the wrong standard for the hate-crime enhancement, and (3) did not properly consider his mental condition and efforts at

rehabilitation while incarcerated. We address each of these grounds in turn.

a. Multiple-count enhancement

The district court did not err in applying the multiple-count enhancement under the Guidelines, which provide "the starting point and the initial benchmark" for the district court when crafting a sentence. *Gall*, 552 U.S. at 49. The "district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." *Id.* (citing *Rita v. United States*, 551 U.S. 338, 347–48 (2007)). Then, after allowing the parties to argue for a sentence they deem appropriate, the district court should consider the § 3553(a) factors. *See id.* at 49–50. After determining the appropriate sentence based on the facts presented, the district court "must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Id.* at 50.

First, the district court did not miscalculate Wolfe's Guidelines range when it adopted the PSR and made an initial finding that Wolfe had a total offense level of 16 and a criminal history category of II. Indeed, the district court "must follow the clear and unambiguous language of the Sentencing Guidelines when interpreting and applying specific provisions." *United States v. Young*, 266 F.3d 468, 484 (6th Cir. 2001). In his objection to the PSR and at sentencing, Wolfe argued that because the counts involved different victims and were not part of the same transaction, they could not be grouped under § 3D1.2, which meant that § 3D1.3 would not apply, and as such, the calculation of the combined adjusted offense level under § 3D1.4 was incorrect. (PSR (Sealed), R. 48, PageID 186–87). The district court found that the counts could not be grouped, and as such, each count was its own group, though grouping counts was different from determining the combined adjusted offense level under § 3D1.4.

The district court accurately determined that the counts could not be grouped. *See, e.g.*,

U.S.S.G. Commentary to Ch. 3, Part D, Illustration 1 ("Defendant A was convicted of four counts, each charging robbery of a different bank. Each would represent a distinct Group."). This does not impact the application of § 3D1.4, which provides that "[t]he combined offense level is determined by taking the offense level applicable to the Group with the highest offense level and increasing that offense level" by a specific number of units based on the increase in offense level. The group with the highest offense level is assigned one unit, and an additional unit is counted "for each Group that is equally serious or from 1 to 4 levels less serious." U.S.S.G. § 3D1.4(a). Application Note 2 confirms this procedure for determining the combined offense level when faced with more than one Group (or count):

> First, identify the offense level applicable to the most serious Group; assign it one Unit. Next, determine the number of Units that the remaining Groups represent. Finally, increase the offense level for the most serious Group by the number of levels indicated in the table corresponding to the total number of Units.

Wolfe has failed to show that the district court made an error in applying the multi-count enhancement. To the contrary, it appears the court followed the Guidelines exactly. Count 1 had an offense level of 14 and Counts 2 through 4 each had offense levels of 15 after the hate-crime enhancement was applied. Counts 2 through 4 were the most serious with an offense level of 15. Thus, one unit was added to one of these counts, and because all three counts had an offense level of 15, it did not matter which group received that one unit. Then, one unit was added for each of the remaining counts because the seriousness of each remaining count was within one to four levels less serious, bringing the combined adjusted offense level to 19.

Second, Wolfe's argument that the court double-counted levels by adding one unit to each

of Counts 2 through 4 fails. Double counting "'occurs when precisely the same aspect of a defendant's conduct factors into his sentence in two separate ways.'" *United States v. Duke*, 870 F.3d 397, 404 (6th Cir. 2017) (quoting *United States v. Farrow*, 198 F.3d 179, 193 (6th Cir. 1999)). Even though "this Circuit retains [a] dim view of double counting," not all double counting is impermissible. *United States v. Smith*, 196 F.3d 676, 681 (6th Cir. 1999). We have identified "two situations where double counting is permissible: 1) where 'the Sentencing Guidelines expressly mandate double counting . . . through the cumulative application of sentencing adjustments,' and 2) 'where it appears that Congress or the Sentencing Commission intended to attach multiple penalties to the same conduct.'" *United States v. Clark*, 11 F.4th 491, 495 (6th Cir. 2021) (quoting *Farrow*, 198 F.3d at 194). Generally, we first determine whether double counting occurred and, if so, we determine whether any such double counting was impermissible. *Duke*, 870 F.3d at 404.

Wolfe argues that the district court double counted by adding one unit for each of the interstate threatening communication counts when calculating the multiple-count enhancement under § 3D1.4. Simply put, this is not double counting because the same aspect of Wolfe's conduct was not factored into his sentence in two separate ways through application of the multiple-count enhancement. There were four separate counts to consider in calculating the combined adjusted offense level under § 3D1.4. Had Counts 2 through 4 been grouped together, Wolfe's combined adjusted offense level would have been lower. But, as discussed above, Counts 2 through 4 could not be grouped together because they involved different victims and separate transactions.

b. Hate-crime enhancement

Next, Wolfe argues that the district court did not apply the appropriate standard in applying the § 3A1.1(a) hate-crime enhancement. Because Wolfe did not object to the application of the hate-crime enhancement, we review for plain error. *United States v. Vonner,* 516 F.3d 382, 386

(6th Cir. 2008) (en banc). The hate-crime guideline provides:

> If the finder of fact at trial or, in the case of a plea of guilty or *nolo contendere*, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense of conviction because of the actual or perceived race, color, religion, national origin, ethnicity, gender, gender identity, disability, or sexual orientation of any person, increase by **3** levels.

U.S.S.G. § 3A1.1(a).

The appropriate standard for applying the hate-crime enhancement is beyond a reasonable doubt. *Id.* Although the district court did not explicitly use the words "beyond a reasonable doubt," the court adopted the PSR and noted that Wolfe intentionally selected his victims based on race, religion, and/or ethnicity, asking "I mean, why would you pick on a black individual or a Muslim individual, you have an idea of why you would search that out and do that" and noting that threats "based on race or ethnic background" are more difficult for the victims. (R. 65, PageID 298).

The record supports a finding that Wolfe intentionally selected his victims based on their race, religion, and/or ethnicity beyond a reasonable doubt. Wolfe's threats appear in detail in both the plea advisement and the PSR. Wolfe initialed each page of the plea advisement and signed it. When asked, Wolfe confirmed that he went over the facts as listed in the plea advisement with his attorney and that the conduct listed in the plea advisement explained his conduct. He further indicated that he did not have any corrections. Wolfe did not object to the PSR's application of the hate-crime enhancement or the facts supporting that enhancement. The district court adopted the PSR, which included the hate-crime enhancement in its calculations, without change. Thus, there is sufficient evidence in the record establishing beyond a reasonable doubt that Wolfe intentionally

selected his victims based on their race, religion, and/or ethnicity. U.S.S.G. § 3A1.1(a). As such, the district court did not plainly err in applying the hate-crime enhancement.

c. Consideration of mental health and post-conviction rehabilitation

Wolfe also argues that the district court failed to fully consider the impact of his mental health and post-conviction rehabilitation efforts when fashioning his sentence. Specifically, Wolfe claims that the court did not address these points on the record in a way that allows for meaningful appellate review.

The Supreme Court has held that "[t]he sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority." *Rita*, 551 U.S. at 356 (citing *United States v. Taylor*, 487 U.S. 326, 336–37 (1988)). Additionally, "when 'a defendant raises a particular argument in seeking a lower sentence, the record must reflect both that the district judge considered the defendant's argument and that the judge explained the basis for rejecting it.'" *United States v. Jones*, 489 F.3d 243, 251 (6th Cir. 2007) (quoting *United States v. Richardson*, 437 F.3d 550, 554 (6th Cir. 2006)). There is no mandate on exactly what level of detail is required from the district court, and instead "we ask whether the sentencing judge provided an explanation for the sentence sufficient for this court to discern that the judge weighed the relevant factors and did not 'simply selec[t] what the judge deem[ed] an appropriate sentence without such required consideration.'" *United States v. Coleman*, 835 F.3d 606, 616 (6th Cir. 2016) (quoting *United States v. Moon*, 513 F.3d 527, 539 (6th Cir. 2008)).

We discern no error. Wolfe's mental health condition was addressed in the PSR, which detailed Wolfe's previous suicide attempt, and in Wolfe's sentencing memorandum, in which Wolfe claimed he "suffered from mental instability" and "periodically attended mental health

counseling, including medication[.]" (R. 48, PageID 178; R. 50, PageID 200). The court noted at sentencing that it had reviewed these documents. The court, in sentencing Wolfe, recommended that Wolfe receive mental health treatment both while incarcerated and while on supervised release. Thus, Wolfe has failed to show that the court did not consider his mental health condition in fashioning the sentence.

2. Substantive Reasonableness

Having determined that Wolfe's sentence was procedurally reasonable, we now review Wolfe's sentence for substantive reasonableness, considering the "totality of the circumstances, including the extent of any variance from the Guidelines range," the weight placed on the § 3553(a) factors in sentencing, and the length of the sentence. *Gall*, 552 U.S. at 51; *see also United States v. Rayyan*, 885 F.3d 436, 442 (6th Cir. 2018). Substantive reasonableness focuses on whether a "sentence is too long (if a defendant appeals) or too short (if the government appeals)." *Rayyan*, 885 F.3d at 442. "The point is not that the district court failed to consider a factor or considered an inappropriate factor; that's the job of procedural unreasonableness." *Id.* at 442. Rather, substantive unreasonableness is "a complaint that the court placed too much weight on some of the § 3553(a) factors and too little on others in sentencing the individual." *Id.* Our review is highly deferential, and "the fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." *Gall*, 552 U.S. at 51. Because Wolfe's sentence falls outside the Guidelines range, there is no presumption of reasonableness. *See Rita*, 551 U.S. at 341.

Wolfe's sentence was substantively reasonable. The district court did not arbitrarily select Wolfe's sentence but instead based its decision on the § 3553(a) factors, with particular focus on the seriousness of the offense, the impact on the victims, and Wolfe's criminal history. Importantly,

the court also specified deterrence and protection of the community as reasons for its sentencing decision. Wolfe's claim that the court focused too much on deterrence in light of Wolfe's mental health condition is unavailing because the court considered Wolfe's mental health in fashioning a sentence. Wolfe argues that "[i]t is incorrect to assume that punishment and deterrence factors of 18 USC 3553 are no different for those with mental illness than those with full rational capabilities." Yet he provides no jurisprudential or evidentiary support for this idea. The district court, having reviewed all the evidence in the record and interacting with Wolfe, was in the best position to determine an appropriate sentence. *See Gall*, 552 U.S. at 51 ("The sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case. The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record.").

C.

Wolfe's argument that the court violated his double jeopardy rights by applying the multiple-count and hate-crime enhancements is unavailing. Because Wolfe raised this argument for the first time on appeal, we review the district court's decision for plain error. *See United States v. Wheeler*, 330 F.3d 407, 413 (6th Cir. 2003) (citing *United States v. Koeberlein*, 161 F.3d 946, 949 (6th Cir. 1998)).

The Double Jeopardy Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Supreme Court has "found double jeopardy protections inapplicable to sentencing proceedings . . . because the determinations at issue do not place a defendant in jeopardy for an 'offense[.]'" *Monge v. California*, 524 U.S.

721, 728 (1998) (internal citations omitted); *see Wheeler*, 330 F.3d at 413. The same rule applies to sentencing enhancements (or adjustments), which are "not to be viewed as either a new jeopardy or additional penalty," but rather as "a stiffened penalty" for the crime. *Monge*, 524 U.S. at 728. Indeed, "double jeopardy concerns are not implicated when . . . a district court simply applies multiple guidelines to determine the appropriate sentence for an offense of conviction." *Wheeler*, 330 F.3d at 413.

Because the district court simply applied the Guidelines in determining Wolfe's sentencing range, there is no violation of double jeopardy in applying the multiple-count and hate-crime enhancements.

III.

Based on the foregoing, we **AFFIRM** Wolfe's sentence.

UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

No. 21-4204

UNITED STATES OF AMERICA,
Plaintiff - Appellee, v.

BRYAN SHANE WOLFE,
Defendant - Appellant.

FILED
Dec 13, 2022
DEBORAH S. HUNT, Clerk

Before: LARSEN, DAVIS, and MATHIS, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the
Northern District of Ohio at Cleveland.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the sentence imposed on Bryan Shane Wolfe by the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

§ **JUDGMENT IN A CRIMINAL CASE**
§ Case Number: **1:20-CR-00622-DCN(l)**
§ USM Number: **09114-509**
§ **Erin R. Flanagan**
§ Defend ant 's Attorney

UNITED STATES OF AMERICA
V.

BRYAN SHANE WOLFE

THE DEFENDANT:

IZI	pleaded guilty to count(s)	**One, Two, Three and Four of the Superseding Indictment**
□	pleaded guilty to count(s) before a U.S. MagistrateJudge, which was accepted by the court.	
□	pleaded nolo contendere to count(s) which wasaccepted by the court	
□	was found guilty on count(s) after a plea of not guilty	

The defendant is adjudicated guilty of these offenses:

Title & Section/ Nature of Offense	**Offense Ended**	**Count**
18:9 22(g)(9) Possession Of Firearm Having Previously Convicted Of A Misdemeanor Crime Of Domestic Violence	09/1 8/2020	1s
l 8:875(c) Interstate Threatening Communications	09/18/2020	2s
18:875(c) Interstate Threatening Communications	09/1 8/2020	3s
l 8:875(c) Interstate Threatening Communications	09/1 8/2020	4s

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Refo1m Act of 1984.

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

D Count(s) D isD 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.

Signature of Judge

DONALD C. NUGENT, United States District Jud_e
Name and Title of Judge

December 16, 2021
Date

December 16, 2021 Date of Imposition of Judgment

DEFENDANT: BRYAN SHANE WOLFE
CASE NUMBER: 1:20-CR-00622-DCN(l)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total tenn of:

46 months as to count ls; 46 months as to count 2s; 46 months as to count 3s; 46 months as to count 4s. Tenns to run concurrent and include credit for time served in federal custody.

D The court makes the following recommendations to the Bureau of Prisons:

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

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

D at □ a.m. □ p.m. on

0 as notified by the United States Marshal.

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

0 before 2 p.m. on

0 as notified by the United States Marshal.

0 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: BRYAN SHANE WOLFE
CASE NUMBER: 1:20-CR-00622-DCN(l)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : three (3) years with standard/special conditions as directed.

MANDATORY CONDITIONS

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.
   D The above drug testing condition is suspended, based on the court's detennination that you pose a low risk of future substance abuse. *(check if applicable)*
4. D You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution *(check if applicable)*
5. !ZI You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. D You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C . § 20901, et seq.)
   as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable)*
7. D You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: BRYAN SHANE WOLFE
CASE NUMBER: 1:20-CR-00622-DCN(l)

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 neededby probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

I. 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 timeframe.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how andwhen 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 fromthe 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 notifyingthe 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 officerto 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 fromdoing 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. If not in compliance with the condition of supervision requiring full-time occupation, you may be directed to perform up to 20 hours of community service per week until employed, as approved or directed bythe pretrial services and probation officer.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted ofa felony, you must not knowingly communicate or interact with that person without first getting the permission of theprobation 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. As directed by the probation officer, you shall notify third parties who may be impacted by the nature of the conduct underlying your current or prior offense(s) of conviction and/or shall permit the probation officer to make such notifications, and/or confirm your compliance with this requirement.
13. You must follow the instructions of the probation officer related to the conditions of supervision .

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. I understand additional information regarding these conditions is available at the www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: BRYAN SHANE
CASE NUMBER: WOLFE1:20-CR-00622-DCN(l)

SPECIAL CONDITIONS OF SUPERVISION

Mandatory Drug Testing

You must refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release from imprisonment and to at least two periodic drug tests thereafter, asdetermined by the Court.

Mental Health Treatment

You must undergo a mental health evaluation and/or 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.).

Search / Seizure

You must submit your person, property, house, residence, vehicle, papers, computers (as definedin 18 U.S.C. § 1030(e)(l)), other electronic communications or data storage devices or media, oroffice, 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 premisesmay be subject to searches pursuant to this condition.

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

Driver License and Insurance

You must possess a valid driver license and insurance to operate a motor vehicle.

No Contact with Victims

You may have no contact, directly or indirectly, with the victims in this case.

DNA

You must cooperate in the collection of DNA as directed by the probation officer.

DEFENDANT: BRYAN SHANE WOLFE
CASE NUMBER: 1:20-CR-00622-DCN(l)

CRIMINAL MONETARY PENALTIES

The defendant must a the total criminal monetary penalties under the schedule of payments page.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$400.00	$.00	$.00	$.00	

D The determination ofrestitution is deferred until An *Amended Judgment in a Criminal Case (A0245C)* will be enteredafter such determination.

D 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. However, pursuant to **18** U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

D Restitution amount ordered pursuant to plea agreement $

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

D 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 D restitution

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

* Amy, Vicky, and Andy Child Pornograph y Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims ofTrafficking Act of 2015, Pub. L. No. 114-22
*** Findings for the total amount of losses are required under Chapters 109A, 110, 1 IOA, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: BRYAN SHANE
CASE NUMBER: WOLFE1:20-CR-00622-DCN(1)

SCHEDULE OF PAYMENTS

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

A D Lump sum payments of$_____due immediately, balance due

D not later than , or

□ inaccordance 0 C, 0 D, O E,or O Fbelow; or

B D C, Payment to begin immediately (may be combined with □ D D,or D F below); or

C D Payment in equal_____*(e.g., weekly, monthly, quarterly)* installments of$ over a period of

_____*(g., months or years),* to commence___*(e.g., 30 or 60 days)* after the date of this judgment;or

D D Payment in equal 20 *(e.g., weekly, monthly, quarterly)* installments of$__over a period of

_____*(g., months or years),* to commence___*(e.g., 30 or 60 days)* after release fromimprisonment to a term of supervision; or

E D Payment during the term of supervised release will commence within _____*(eg., 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 IZI Special instructions regarding the payment of criminal monetary penalties:
It **is ordered that the Defendant shall pay to the United States a special assessment of $400.00 for Counts ls, 2s, 3sand 4s, which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.**

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties isdue during 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.

D Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers *(including defendant number),* Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

D Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the sameloss that gave rise to defendant's restitution obligation .

D The defendant shall pay the cost of prosecution.

D The defendant shall pay the following court cost(s):

D The defendant shall forfeit the defendant's interest in the following property to the United States:

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