

No.

In The

Supreme Court of the United States

JOSEPH WOLOSZYN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

FAY ARFA, A LAW CORPORATION
Fay Arfa, Attorney-SBN 100143
10100 Santa Monica Blvd., #300
Los Angeles, CA 90067
Tel.: (310) 841-6805
Fax :(310) 841-0817
fayarfa@sbcglobal.net

*Attorney for Petitioner
Joseph Woloszyn*

QUESTIONS PRESENTED

- I. Did Woloszyn's Uncorroborated Statements to the Probation Officer Prove Woloszyn Violated the Terms of His Supervised Release?
- II. Does a Violation of Supervised Release require the Probationer act "willfully" and "knowingly" or just "knowingly?"
- III. Did Woloszyn Commit the California Crime of Criminal Threat Even if the Person Allegedly Threatened Did not Unequivocally Believe Woloszyn Would Act on his Threat?
- IV. Did the District Court Impose an Unreasonable Prison Sentence in light of Woloszyn's Inability to Overcome His Severe Addiction to Drugs?

LIST OF RELATED CASES

U.S.A. v. Joseph Woloszyn, No. 2:18-cr-00007, U.S. District Court
for the Eastern District of California, Judgment entered
September 23, 2021. (Dkt 52)

TOPICAL INDEX

	Page
QUESTIONS PRESENTED	ii
LIST OF RELATED CASES	iii
OPINION BELOW	1
JURISDICTION	2
REGULATIONS INVOLVED	2
CUSTODY STATUS OF PETITIONER	2
STATEMENT OF THE CASE	2
A. Woloszyn's Guilty Plea	2
B. The Revocation Proceedings	3
REASONS TO GRANT CERTIORARI	4
I. THE GOVERNMENT FAILED TO PROVE, BY A PREPONDERANCE OF THE EVIDENCE, THAT WOLOSZYN VIOLATED THE TERMS OF HIS SUPERVISED RELEASE	4
A. Introduction	4
B. The Burden of Proof at a Supervised Release Revocation Hearing	4
C. The Government Failed to Prove that Woloszyn Illegally Used Drugs (Charge 1)	5
1. The Facts	5
2. Woloszyn's Uncorroborated Statement Failed to Prove He Violated His Supervised Release	5

D. The Government Failed to Prove that Woloszyn Willfully Failed to Report for Drug Testing (Charge 3)	7
E. Violations for Vandalism and Making Threats (Charge 5)	12
1. The Facts	12
2. The Elements of a Criminal Threat	12
3. The Government Failed to Prove that Woloszyn Committed the Crime of Criminal Threat	13
II. THE DISTRICT COURT IMPOSED AN UNREASONABLE SENTENCE IN LIGHT OF WOLOSZYN'S INABILITY TO OVERCOME HIS ADDICTION TO DRUGS	15
A. Introduction	15
B. Standard of Review	16
C. Application of Guidelines After Revocation of Supervised Release	16
D. The District Court Imposed an Unreasonable Sentence	18
CONCLUSION	20

APPENDIX

Appendix A: United States Court of Appeals for the Ninth Circuit Memorandum (December 7, 2022)	App. 1
Appendix B: Judgment, United States District Court, Eastern District of California (September 23, 2021) -	App. 8

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Gall v. United States</i> , 552, U.S. 38 (2007)	16
<i>United States v. Demontiney</i> , No. CR-09-91-GF-DLC-RKS, 2013 U.S. District LEXIS 96507	11
<i>United States v. Gasca-Ruiz</i> , 852 F.3d 1167 (9th Cir. 2017) . . .	16
<i>United States v. Gibson</i> , No. CR 11-00734 WHA, 2018 U.S. District LEXIS 154960 (2018)	10, 11
<i>United States v. Montes-Ruiz</i> , 745 F.3d 1286 (9th Cir. 2014) . .	16
<i>United States v. Pugh</i> , 515 F.3d 1179 (11th Cir. 2008)	16, 19
<i>United States v. Simtob</i> , 485 F.3d 1058 (9th Cir. 2007)	16

STATE CASES

<i>Ayala v. Superior Court</i> , 67 Cal. App. 5th (2021)	13, 14
<i>In re Brown</i> , 17 Cal.4th 873 (1998)	6
<i>In re Morganti</i> , 204 Cal.App.4th 904 (2012)	19
<i>In re Ricky T.</i> , 87 Cal.App.4th 1132 (2001)	14
<i>In re Stoneroad</i> , 215 Cal.App.4th 596 (2013)	18
<i>In re Taylor</i> , 105 Cal.App.4th 1394 (2003)	19
<i>People v. Andersen</i> , 26 Cal.App.4th 1241 (1994)	6
<i>People v. Brugman</i> , 62 Cal. App. 5th (2021)	14
<i>People v. Lee</i> , 260 Cal.App.2d 836 (1968)	7

<i>People v. Schmeck</i> , 37 Cal. 4th 240 (2005)	6
<i>People v. Toledo</i> , 26 Cal.4th 221 (2001)	13, 14
<i>People v. Torres</i> , 173 Cal.App.4th 977 (2009)	6

FEDERAL STATUTES

18 U.S.C. § 1503	2
18 U.S.C. § 1623	2
18 U.S.C. § 3553	2, 4, 15, 17, 19
18 U.S.C. § 3583	2, 4, 16, 17

STATE STATUTES

Cal. Health & Saf. Code § 11362	18
Cal. Penal Code § 422	3, 4, 12
Cal. Penal Code § 594	3, 4, 19

No.

JOSEPH WOLOSZYN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

JOSEPH WOLOSZYN petitions for a writ of certiorari to review the United States Court of Appeals for the Ninth Circuit's Memorandum affirming the revocation of his supervised release. (App. A)

OPINION BELOW

On December 7, 2022, the Ninth Circuit Court of Appeals entered a Memorandum affirming the district court's revocation of Woloszyn's supervised release. (App. A)

JURISDICTION

The Court has jurisdiction. 28 U.S.C. § 1254(1)

REGULATIONS INVOLVED

18 U.S.C. § 3583 (e)(1) (e) (Modification of conditions or revocation of supervised release; 18 U.S.C. § 3553 (Factors To Be Considered in Imposing a Sentence)

CUSTODY STATUS OF PETITIONER

Woloszyn completed his term in the Sacramento County Jail and has been released to a halfway house.

STATEMENT OF THE CASE

A. Woloszyn's Guilty Plea

On September 25, 2018, Woloszyn pled guilty to one count of Obstruction of Justice and Attempted Obstruction of Justice (18 U.S.C. § 1503) and four counts of False Declarations Before a District Court. 18 U.S.C. § 1623. (ER 96-97)

On April 17, 2019, the district court sentenced Woloszyn to 27 months as to each of the five counts to run concurrent, for a total term of 27 months. The district court also sentenced Woloszyn to a 36 months term of supervised release on each of the five counts to run concurrent. The supervised release included

terms that Woloszyn not use illegal drugs, that he submit to drug testing, and that he not violate any federal, state, or local laws.

(ER 84-85)

B. The Revocation Proceedings

On August 4, 2021, a superseding petition charged Woloszyn with violations of his supervised release. (ER 58-61) After an evidentiary hearing, the district court found that, on November 20, 2020, Woloszyn illegally used drugs (Charge 1); on March 10, 2021, Woloszyn failed to appear for drug testing (Charge 3); and on April 10, 2021, Woloszyn threatened someone (Cal. Penal Code § 422) and slashed the apartment manager's car tires Cal. Penal Code § 594(a). (Charge 5). (ER 53-55)

On September 21, 2021, the district court revoked Woloszyn's term of supervised released and sentenced him to the maximum term of 24 months in prison and 12 months of supervised release. The government dismissed the remaining Charges 2, 4, and 6. (ER 14-16)

Woloszyn appealed and the Ninth Circuit upheld the district court's revocation of Woloszyn's supervised release. (ER 101)

REASONS TO GRANT CERTIORARI

I. THE GOVERNMENT FAILED TO PROVE, BY A PREPONDERANCE OF THE EVIDENCE, THAT WOLOSZYN VIOLATED THE TERMS OF HIS SUPERVISED RELEASE

A. Introduction

On August 17, 2021, the district court found that, on November 20, 2020, Woloszyn illegally used drugs (Charge 1); on March 10, 2021, Woloszyn failed to appear for drug testing (Charge 3); and, on April 10, 2021, he threatened someone (Cal. Penal Code § 422) and slashed the apartment manager's car tires. Cal. Penal Code § 594(a)(Charge 5). (ER 53-55)

The Ninth Circuit's memorandum upholding the district court's decision should be reversed because the government failed to present sufficient evidence to prove, by a preponderance of the evidence, that Woloszyn violated the terms of his supervised release.

B. The Burden of Proof at a Revocation Hearing

A court may, after considering certain factors in 18 U.S.C. § 3553(a), revoke a defendant's supervised release if the court finds by a preponderance of the evidence that the defendant violated a condition of his supervised release. 18 U.S.C. § 3583(e)(3).

C. The Government Failed to Prove that Woloszyn Illegally Used Drugs (Charge 1)

1. The Facts

On November 16, 2020, Woloszyn's probation officer randomly visited Woloszyn's home to test him for drug use. (ER 27) Woloszyn told the probation officer that, if tested, he would test positive for methamphetamine and marijuana. Based on Woloszyn's comments, and because the threat of COVID-19 required the probation officer to limit his contacts, the probation officer never tested Woloszyn for drug use. (ER 28)

The probation officer "... felt that with Mr. Woloszyn's admission, that a drug test at that point was not needed, and -- and, you know, me entering in close quarters drug testing someone who, for the most part, you know, had been a transient, struggling to find residency or a stable residence. I felt or I deemed it unnecessary, and it would put myself at risk." (ER 28)

2. Woloszyn's Statement Failed to Prove He Violated His Supervised Release

Relying on *United States v. Hilger*, 728 F.3d 947, 949 (9th Cir. 2013), the Ninth Circuit upheld the district court's ruling that Woloszyn violated the terms of his supervised release, based

solely on his statements, because the corpus delicti rule does not apply to supervised release proceedings. (App. at 3)

But the Ninth Circuit overlooked the government presented no evidence, other than Woloszyn's statement, to prove that Woloszyn used illicit drugs. The government presented no evidence that Woloszyn seemed under the influence of methamphetamine or that he displayed symptoms consistent with methamphetamine use.

The government presented no evidence that Woloszyn "spoke really fast," had very dry lips, and his pupils 'seemed to be dilated.' See, e.g., *In re Brown*, 17 Cal.4th 873, 905 (1998) (dilated pupils is symptom of methamphetamine use); *People v. Torres*, 173 Cal.App.4th 977, 981-982 (2009) ("fidgetiness" and dilated pupils are symptoms of being under the influence of methamphetamine); *People v. Andersen*, 26 Cal.App.4th 1241, 1247 (1994) (dry mouth is a symptom of methamphetamine use); *People v. Schmeck*, 37 Cal. 4th 240, 256 (2005) (person "hyperactive, sweating, rubbing his hands together, and talking to himself, would exhibit symptoms consistent with methamphetamine use.")

The government presented no evidence that Woloszyn seemed under the influence of marijuana or that he displayed symptoms consistent with marijuana use. See *David v. Hernandez*, 13 Cal.App.5th 692, 699 (2017) (symptoms of marijuana use include high blood pressure, rapid pulse, rapid respiratory rate, and memory loss); *People v. Lee*, 260 Cal.App.2d 836, 838-39 (1968) (immediate reaction to marijuana use is dilation of the pupils of the eyes; if there is extended use of marijuana, the eyes will become bloodshot; marijuana odor will stay on the breath for at least an hour after smoking marijuana).

Without any independent corroboration of Woloszyn's statement, the government failed to present sufficient evidence that Woloszyn used illicit drugs. The finding that Woloszyn possessed or used illegal drugs, in violation of his supervised release, should be reversed.

D. The Government Failed to Prove that Woloszyn Willfully Failed to Report for Drug Testing (Charge 3)

On March 8, 2021, probation officer telephoned Woloszyn and told him to report, on March 10, 2021, to the probation office for drug testing. (ER 29) Woloszyn told the probation officer that

he had transportation issues. The probation officer could not transport Woloszyn to the probation office. (ER 32-34)

On March 10, 2021, Woloszyn failed to report to the probation office for drug testing. (ER 29) The probation officer emailed him and asked, “Where are you?” (ER 30)

The district court found the evidence sufficient to prove that Woloszyn violated his terms of supervised release because Woloszyn had the “obligation and responsibility, not the probation officer's obligation, to make sure that he got down to the office, and it was also Mr. Woloszyn's obligation to try to contact the probation officer if on March 10th, 2021, when he was required to appear, that he would be unable to appear.” (ER 53-54)

The Ninth Circuit upholds the district court's finding that Woloszyn failed to report for drug testing because Woloszyn knowingly failed to report for drug testing, even if he did not willfully fail to do so. (App. at 3) The Ninth Circuit “presume[s] that knowledge is the default standard.” (App. at 3) The Ninth Circuit finds that knowledge is the only *mens rea* for a violation of supervised release. The Ninth Circuit finds that Woloszyn

knowingly failed to report for a drug test because he knew he had to appear but could not appear even if he had no transportation. (App. at 4)

But the Ninth Circuit overlooks that, although Woloszyn knew he was supposed to be tested, but he had no means to travel. And Woloszyn informed his probation officer that he could not appear on March 10, 2021.

The cases cited by the Ninth Circuit differ. *United States v. Phillips*, 704 F.3d 754, 768 (9th Cir. 2012) did not present a *mens rea* issue. In *Phillips*, the defendant challenged the term, “frequent[ing] places where controlled substances are illegally sold, used, distributed, or administered” as “vague and overbroad.” *Id.* at 767.

United States v. Napulou, 593 F.3d at 1045, involved a supervised condition of release prohibiting knowing contact with persons with misdemeanor convictions. See also, *United States v. Vega*, 545 F.3d 743, 750 (9th Cir. 2008) (reading a "knowing" element into the condition prohibiting association with members of a criminal gang).

Courts have required a violation of supervised release to be

willful. In *United States v. Jeremiah*, 493 F.3d 1042, 1045-46 (9th Cir. 2007), Jeremiah did not deny that he missed making at least some full restitution payments, but he contended that these violations were not "wilful." The *Jeremiah* court found the condition of release required a wilful failure to appear. *Id.* at 1045-46; see also *United States v. Gibson*, No. CR 11-00734 WHA, 2018 U.S. Dist. LEXIS 154960, at *13 (N.D. Cal. Sep. 11, 2018) (Government failed to prove defendant's failure to report a secondary residence as a willful violation of defendant's supervised release).

The Ninth Circuit overlooks the term "willful" depends on its context. See, *Ratzlaf v. United States*, 510 U.S. 135, 141 (1994) (second and third alterations in original). The definition of "willfulness" depends on the particular crime charged. See, e.g., *United States v. Hernandez*, 859 F.3d 817, 822 (9th Cir. 2017) (*per curiam*) (Criminal prosecution for transporting firearms into one's state of residence; *United States v. Reyes*, 577 F.3d 1069, 1079 (9th Cir. 2009) (prosecution for securities fraud)

And other cases define "willfulness" as an intentional violation of law. See *Cheek v. United States*, 498 U.S. 192, 201

(1991) (“Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty.”); *Williamson v. United States*, 207 U.S. 425, 453 (1908) (A defendant who reasonably relies on the advice of counsel may “not be convicted of [a] crime which involves willful and unlawful intent[.]”); see also *United States v. Heuer*, 4 F.3d 723, 732 (9th Cir. 1993) To make a false statement “willfully” under 18 U.S.C. § 1001, the defendant must have both the specific intent to make a false statement and the knowledge that his or her conduct was unlawful.

Woloszyn had a meritorious excuse for not appearing for testing. The government failed to prove that Woloszyn willfully violated the terms of his supervised release. See *United States v. Demontiney*, No. CR-09-91-GF-DLC-RKS, 2013 U.S. Dist. LEXIS 96507, at *6 (D. Mont. June 19, 2013) (Defendant *willfully* violated his supervised release conditions); *United States v. Gibson*, No. CR 11-00734 WHA, 2018 U.S. Dist. LEXIS 154960, at *13 (N.D. Cal. Sep. 11, 2018) (Government failed to prove

defendant's failure to report a secondary residence as a *willful* violation of defendant's supervised release).

E. Violations for Vandalism and Making Threats (Charge 5)

1. The Facts

Thirty-two residents lived in De La Torre's eight unit apartment building. (ER 36-37) On April 9, 2021, Woloszyn visited the apartment building and left his California ID card. The next day, on April 10, 2021, Woloszyn returned to get his ID card. De La Torre refused to allow Woloszyn to enter the premises and refused to allow anyone to give Woloszyn his ID card. (ER 40, 44)

Woloszyn got upset and said he would crash his car into the apartment building and come with a gun and shoot everyone. De La Torre thought Woloszyn "*might* actually crash his car" into the apartment building and "*might*" shoot him. (ER 40) (Italics added).

As De La Torre called 911, Woloszyn slashed the tires on De La Torre's truck. (ER 41, 42, 47, 50-51)

2. The Elements of a Criminal Threat

"To prove a violation of [Cal. Penal Code] section 422, the

prosecution must prove: (1) that the defendant ‘willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,’ (2) that the defendant made the threat ‘with the specific intent that the statement ... is to be taken as a threat, even if there is no intent of actually carrying it out,’ (3) *that the threat ... was ‘on its face and under the circumstances in which it [was] made, ... so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,’* (4) that the threat actually caused the person threatened ‘to be in sustained fear for his or her own safety or for his or her immediate family’s safety,’ and (5) that the threatened person’s fear was ‘reasonabl[e]’ under the circumstances.” (Italics added). *People v. Toledo*, 26 Cal.4th 221, 227–228 (2001); *Ayala v. Superior Court*, 67 Cal. App. 5th 296, 301 (2021)

3. The Government Failed to Prove that Woloszyn Committed the Crime of Criminal Threat

The Ninth Circuit finds that “Woloszyn made specific, credible threats to harm De La Torre while in his immediate presence.” (App. at 5) But the evidence failed to prove that

Woloszyn made an “unequivocal, unconditional, immediate, and specific as to convey” to De La Torre “. . . a gravity of purpose and an immediate prospect of execution of the threat.” *People v. Toledo*, 26 Cal.4th at 227–228; *Ayala v. Superior Court*, 67 Cal. App. 5th at 301.

De La Torre “believed” Woloszyn “*might* actually crash his car” into the apartment building and “*might*” shoot him. (ER 40) (Italics added). De La Torres’ “belief” without any evidence that Woloszyn had the means to shoot him could not support the charge by a preponderance of the evidence that Woloszyn conveyed a “gravity of purpose and an immediate prospect of execution of the threat.” Cf. *People v. Brugman*, 62 Cal. App. 5th 608, 633 (2021) (Brugman held a loaded gun to C’s head and threatened to “smoke” her, that he said “I’m done with this shit. I’m going to kill you,” and that she was “going to go six feet under” and “nobody is ever going to find [your] body.”); *In Ricky T.*, 87 Cal.App.4th 1132 (2001) (The minor’s remark, “‘I’m going to get you’ [was] ambiguous on its face and no more than a vague threat of retaliation without prospect of execution.” *Id.* at 1138. The government failed to prove by a preponderance of the

evidence that Woloszyn committed the criminal threat offense.

II. THE DISTRICT COURT IMPOSED AN UNREASONABLE SENTENCE IN LIGHT OF WOLOSZYN'S INABILITY TO OVERCOME HIS ADDICTION TO DRUGS

A. Introduction

The Ninth Circuit finds the district court properly considered all the necessary sentencing factors in 18 U.S.C. § 3553(a) and found Woloszyn's two new crimes, outweighed any potentially mitigation factors. (App. at 6) The Ninth Circuit overlooked that the district court failed to adequately consider Woloszyn's explanation and acceptance of responsibility for his actions. And, the district court failed to consider that Woloszyn's criminal history mainly consisted of minor misdemeanor offenses except for one 2012 felony conviction for criminal threats. (PSR 9, 10 of 22)

The Ninth Circuit overlooked that the district court imposed a substantively unreasonable sentence in light of Woloszyn's instability and the minor nature of his violations. The ". . . district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of

the case." *United States v. Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008) (citation and internal quotation omitted).

B. Standard of Review

Appellate courts "... review a sentence imposed on revocation of supervised release under the *Booker* reasonableness standard. . ." *United States v. Montes-Ruiz*, 745 F.3d 1286, 1289 (9th Cir. 2014) (citation and internal quotation marks omitted).

Appellate courts review de novo the district court's interpretation of the Guidelines, and the district court's factual findings for clear error. See *United States v. Gasca-Ruiz*, 852 F.3d 1167, 1170 (9th Cir. 2017) (en banc).

C. Application of Guidelines After Revocation of Supervised Release

After finding that an offender has violated the terms and conditions of supervised release, a court may "revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on post release supervision." 18 U.S.C. § 3583(e); See *Gall v. United States*, 552, U.S. 38, 51 (2007); *United States v. Simtob*, 485 F.3d at 1062-63

(primary purpose of a revocation sentence is to sanction the defendant's breach of the court's trust but the court can also consider the seriousness of the violation conduct as part of its review of the defendant's criminal history, and propensity for recidivism).

The factors a court must consider in sentencing a defendant after a revocation of supervised release include: (1) the nature and circumstances of the offense and the defendant's history and characteristics; (2) the need for the sentence to deter criminal conduct, protect the public from the defendant's further crimes, and provide the defendant with needed educational or vocational training, medical care, or other correctional treatment; (3) the sentencing guideline range; (4) any pertinent policy statement; (5) the need to avoid unwarranted sentence disparities among similarly situated defendants; and (6) the need to provide restitution to victims of the offense. See 18 U.S.C. §§ 3553(a) and 3583(e).

The district court must revoke supervised release for possession of controlled substance or for refusal to comply with drug testing. 18 U.S.C. § 3583 (g).

D. The District Court Imposed an Unreasonable Sentence

The Ninth Circuit upholds Woloszyn's sentence because it was "within the guideline range," because of Woloszyn's criminal history and because of the "seriousness of the violations." (App. at 7)

The district court overlooked Woloszyn accepted responsibility for his actions. He explained he had no money, no home, no transportation, no way to contact his probation officer, and felt hopeless and helpless after the loss of his employment, and the death of his beloved mother. (ER 13-14)

The Ninth Circuit overlooked the minor nature of Woloszyn's actions. For example, Woloszyn legally possessed marijuana under California law. Cal. Health & Saf. Code, §§ 11362.1 (legalizing marijuana for personal use), 11362.5 (legalizing marijuana for compassionate use).

And, even if Woloszyn used illegal drugs and failed to report for testing, the district court abused its discretion by revoking Woloszyn's supervised release due to a drug relapse because, "[t]he risk a former drug or alcohol abuser will relapse . . . can never be entirely eliminated" *In re Stoneroad*, 215

Cal.App.4th 596, 625 (2013), quoting *In re Morganti*, 204

Cal.App.4th 904, 921 (2012).

And California entitles a nonviolent offender to diversion for substance abuse treatment despite several relapses before he or she becomes subject to incarceration. *In re Taylor*, 105 Cal.App.4th 1394, 1397-1398 (2003) ("[a]nticipating that drug abusers often initially falter in their recovery, Proposition 36 gives offenders several chances at probation before permitting a court to impose jail time.")

And the California crime of felony vandalism, where the damage exceeds four hundred dollars, can result in imprisonment in state prison or by a county jail *not exceeding one year*. Cal. Penal Code § 594 (b).

The district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case." *Pugh*, 515 F.3d at 1191 (citation and internal quotation omitted).

CONCLUSION

Woloszyn respectfully that this Court grant Certiorari.

DATED: February 28, 2023

Respectfully submitted,
FAY ARFA, A LAW CORPORATION

s/ Fay Arfa

Fay Arfa, Attorney for Petitioner

APPENDIX

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEC 7 2022

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH WOLOSZYN, AKA BJ the
General, AKA Joe Bread, AKA JB, AKA Jay
Squeezza, AKA Squeeze,

Defendant-Appellant.

No. 21-10286

D.C. Nos.
2:18-cr-00007-JAM-1

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
John A. Mendez, District Judge, Presiding

Submitted November 18, 2022**
San Francisco, California

Before: TASHIMA and PAEZ, Circuit Judges, and SESSIONS,*** District Judge.

Joseph Woloszyn appeals the district court's judgment revoking his

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

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

*** The Honorable William K. Sessions III, United States District Judge for the District of Vermont, sitting by designation.

supervised release and the sentence imposed upon revocation. On appeal, Woloszyn challenges the sufficiency of the evidence as to each violation. He also raises procedural and substantive challenges to his sentence. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

1. Revocation of Supervised Release. We review the district court's decision to revoke a term of supervised release for abuse of discretion. *United States v. Verduzco*, 330 F.3d 1182, 1184 (9th Cir. 2003). "On a sufficiency-of-the-evidence challenge to a supervised release revocation, we ask whether, viewing the evidence in the light most favorable to the government, any rational trier of fact could have found the essential elements of a violation by a preponderance of the evidence." *United States v. King*, 608 F.3d 1122, 1129 (9th Cir. 2010) (citation omitted).

Charge 1: Illegal Drug Use. There was sufficient evidence for the district court to find that Woloszyn used illegal drugs. Woloszyn's probation officer testified that on November 16, 2020, Woloszyn admitted he would test positive for marijuana and methamphetamine if a drug test were administered. The probation officer did not administer a drug test because he believed Woloszyn's statement constituted sufficient evidence of his drug use. On appeal, Woloszyn argues the government failed to provide "independent corroboration" of his statement, in violation of the *corpus delicti* rule, which generally requires that a person's

confession be corroborated by independent evidence in order to serve as the basis for a conviction. *United States v. Lopez-Alvarez*, 970 F.2d 583, 589 (9th Cir. 1992). This argument is foreclosed by *United States v. Hilger*, where we held that the *corpus delicti* rule does not apply to supervised release revocation proceedings. 728 F.3d 947, 949 (9th Cir. 2013). Like the defendant in *Hilger*, Woloszyn had the opportunity to cross-examine his probation officer about the veracity of his statement. *Id.* at 951. On cross-examination, counsel confirmed that Woloszyn admitted to using marijuana and methamphetamine. Thus “the district court’s decision to credit [Woloszyn’s admission] was amply supported by the record.” *Id.* at 953.

Charge 3: Failure to Report for Drug Testing. There was sufficient evidence to support the court’s finding that Woloszyn failed to report for drug testing on March 10, 2021, in violation of the terms of his supervised release. As a threshold matter, the government was required to prove only that Woloszyn *knowingly* failed to report for drug testing, not that he *willfully* failed to do so. Although the supervised release condition in question does not specify a mens rea element, we generally presume that knowledge is the default standard. *See, e.g.*, *United States v. Phillips*, 704 F.3d 754, 768 (9th Cir. 2012) (explaining that we “imported a mens rea element . . . that the defendant was prohibited from *knowingly* associating with members of a criminal street gang”); *United States v.*

Napulou, 593 F.3d 1041, 1045 (9th Cir. 2010) (construing a condition as prohibiting “only knowing contact with persons with misdemeanor convictions”); *see also United States v. Vega*, 545 F.3d 743, 750 (9th Cir. 2008).

Here, the government presented ample evidence that Woloszyn knowingly failed to report for a drug test. Woloszyn’s probation officer testified that he called Woloszyn on March 8, 2021, and directed him to report to the probation office at 10:00 a.m. on March 10, 2021. Woloszyn failed to appear, reportedly because he was unable to obtain transportation to the probation office. Woloszyn does not dispute that he was aware he had to report for drug testing as a condition of his supervised release, he received and understood the probation officer’s instruction to report, and yet he did not appear. There was sufficient evidence for the district court to find that Woloszyn knowingly violated this term of his supervised release.

Charge 5: New State Law Violation (Criminal Threats). Finally, there was sufficient evidence for the district court to find that Woloszyn committed criminal threats in violation of California Penal Code section 422(a). The government presented the testimony of Alberto De La Torre, the landlord and owner of the Bell Terrace Apartments in Sacramento. De La Torre testified that Woloszyn went to Bell Terrace on April 10, 2021 to retrieve an identification card that he had left at the property. De La Torre refused to allow Woloszyn onto the property because, over the previous three to four weeks, Woloszyn had continuously visited the

property, “shown violence,” and “attacked” people “physically.” When Woloszyn became angry that he could not retrieve his identification card, he threatened to crash his car into the building and return with a gun and shoot everyone present. Woloszyn then used a knife to slash all four tires on De La Torre’s truck. Another witness, Ernesto De La Torre, corroborated De La Torre’s testimony.

Woloszyn argues that his threats failed to convey “a gravity of purpose and an immediate prospect of execution.” Cal. Penal Code § 422(a). This argument lacks merit. Woloszyn’s statements were “sufficiently unequivocal, unconditional, immediate, and specific” to violate section 422(a), “based on all the surrounding circumstances.” *People v. Mendoza*, 69 Cal. Rptr. 2d 728, 732 (Ct. App. 1997). Although De La Torre may not have known whether Woloszyn had the means to crash a car into the building or shoot anyone at that exact moment, “Section 422 does not require an immediate ability to carry out the threat.” *People v. Smith*, 100 Cal. Rptr. 3d 471, 474 (Ct. App. 2009) (citations omitted). It is sufficient that Woloszyn made specific, credible threats to harm De La Torre while in his immediate presence.

2. Sentence. We review a sentence imposed in the context of revocation of supervised release for reasonableness. *United States v. Cate*, 971 F.3d 1054, 1057 (9th Cir. 2020). The reasonableness standard requires us to ask whether the trial court abused its discretion. *United States v. Apodaca*, 641 F.3d 1077, 1079 (9th

Cir. 2011) (citation omitted). We employ a two-step analysis in applying this standard: “we first consider whether the district court committed significant procedural error, then we consider the substantive reasonableness of the sentence.” *Id.* at 1081-81 (citation omitted).

The district court did not commit procedural error in sentencing Woloszyn to 24 months of imprisonment and 12 months of supervised release. In doing so, the district court adequately considered the sentencing factors set forth in 18 U.S.C. § 3553(a), including the nature of the violations and Woloszyn’s history and characteristics. Woloszyn argues that the court improperly overlooked his acceptance of responsibility, the difficult circumstances he faced leading up to the violations, and the potentially harsh sentence he might receive in state court for vandalism and criminal threats. The district court, however, was well within its discretion to decide that the seriousness of Woloszyn’s violations, including evidence that he committed two new crimes, outweighed any potentially mitigating factors. The court was also not required specifically to address on the record every sentencing factor it considered. *See Cate*, 971 F.3d at 1059. Rather, “the sentencing judge’s statement of reasons was brief but legally sufficient.” *Rita v. United States*, 551 U.S. 338, 358 (2007).

The sentence imposed was also not substantively unreasonable. “We afford significant deference to a district court’s sentence under 18 U.S.C. § 3553 and

reverse only if the court applied an incorrect legal rule or if the sentence was ‘illogical, implausible, or without support in inferences that may be drawn from the facts in the record.’” *United States v. Martinez-Lopez*, 864 F.3d 1034, 1043-44 (9th Cir. 2017) (citing *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc)). A sentence of 24 months was within the guidelines range calculated by the district court. The district court’s rationale for sentencing Woloszyn to a high-end sentence because of his criminal history and the seriousness of the violations is supported by the record. *See, e.g., id.* at 1044 (upholding a within-guidelines range sentence for a recidivist defendant).

AFFIRMED.

UNITED STATES DISTRICT COURT

Eastern District of California

UNITED STATES OF AMERICA

v.

JOSEPH WOLOSZYN**JUDGMENT IN A CRIMINAL CASE**(For **Revocation** of Probation or Supervised Release)Criminal Number: **2:18CR00007-01**

Defendant's Attorney: Olaf Hedberg, Appointed

THE DEFENDANT:

admitted guilt to violation of charge(s) _____ as alleged in the violation petition filed on _____.

was found in violation of conditions of supervision as to Charges 1, 3 and 5 after denial of guilt, as alleged in the violation petition filed on 8/4/2021.

The defendant is adjudicated guilty of these violations:

Violation Number	Nature of Violation	Date Violation Ended
1	UNLAWFUL USE OF A CONTROLLED SUBSTANCE	11/16/2020
3	FAILURE TO PARTICIPATE IN DRUG TESTING AS DIRECTED	3/8/2021
5	NEW LAW VIOLATION	4/10/2021

The court: revokes: modifies: continues under same conditions of supervision heretofore ordered on 4/16/2019.

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

Charges 2, 4 and 6 are dismissed.

Any previously imposed criminal monetary penalties that remain unpaid shall remain in effect.

It is ordered that the defendant shall 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.

9/21/2021

Date of Imposition of Sentence

/s/ John A. Mendez

Signature of Judicial Officer

John A. Mendez, United States District Judge

Name & Title of Judicial Officer

9/23/2021

Date

DEFENDANT: **JOSEPH WOŁOSZYN**

CASE NUMBER: **2:18CR00007-01**

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:
24 months.

- No TSR: Defendant shall cooperate in the collection of DNA.
- The court makes the following recommendations to the Bureau of Prisons:
- The defendant is remanded to the custody of the United States Marshal.
- The defendant shall surrender to the United States Marshal for this district
 - at ____ on ____.
 - as notified by the United States Marshal.
- The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
 - before ____ on ____.
 - as notified by the United States Marshal.
 - as notified by the Probation or Pretrial Services Officer.

If no such institution has been designated, to the United States Marshal for this district.

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: **JOSEPH WOŁOSZYN**

CASE NUMBER: **2:18CR00007-01**

SUPERVISED RELEASE

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

MANDATORY CONDITIONS

You must not commit another federal, state or local crime.

You must not unlawfully possess a controlled substance.

You must refrain from any unlawful use of controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two (2) periodic drug tests thereafter, not to exceed four (4) drug tests per month.

- The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse.
- You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution.
- You must cooperate in the collection of DNA as directed by the probation officer.
- 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 the location where you reside, work, are a student, or were convicted of a qualifying offense.
- You must participate in an approved program for domestic violence.

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: **JOSEPH WOŁOSZYN**CASE NUMBER: **2:18CR00007-01**

STANDARD CONDITIONS OF SUPERVISION

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

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the Court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the Court or the probation officer.
4. You must answer truthfully the questions asked by the probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment, you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the Court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
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. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall submit to the search of his person, property, home, and vehicle by a United States probation officer, or any other authorized person under the immediate and personal supervision of the probation officer, based upon reasonable suspicion, without a search warrant. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.
2. As directed by the probation officer, the defendant shall participate in an outpatient correctional treatment program to obtain assistance for drug or alcohol abuse.
3. As directed by the probation officer, the defendant shall participate in a program of testing (i.e., breath, urine, sweat patch, etc.) to determine if he has reverted to the use of drugs or alcohol.
4. The defendant shall abstain from the use of alcoholic beverages and shall not frequent those places where alcohol is the chief item of sale.
5. As directed by the probation officer, the defendant shall participate in a program of outpatient mental health treatment.
6. As directed by the probation officer, the defendant shall participate in a co-payment plan for treatment or testing and shall make payment directly to the vendor under contract with the United States Probation Office of up to \$25 per month.
7. The defendant shall participate in a cognitive behavioral treatment program as directed by the probation officer.
8. The defendant shall not associate with any known gang member of the North Highlands Gangster Crips, Trigga Mob street gang or any other known member of a criminal street gang, as directed by the probation officer.
9. The defendant shall have no contact with Alberto De La Torre, and shall stay-away from Bell Terrace Apartments, and all apartment tenants residing at 1738 Bell Street, Sacramento, CA 95825.