APPENDIX

FILED

JAN 6 2023

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CHRISTIAN RUBEN TIRADO, Defendant-Appellant.	No. 21-50247 D.C. Nos. 3:20-cr-03314-TWR-1 3:20-cr-03314-TWR MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Todd W. Robinson, District Judge, Presiding

Argued and Submitted November 17, 2022
Pasadena, California

Before: TASHIMA and NGUYEN, Circuit Judges, and FITZWATER,** District Judge.

Defendant-Appellant Christian Ruben Tirado ("Tirado") pleaded guilty to an information charging him with one count of importation of methamphetamine and one count of importation of fentanyl, in violation of 21 U.S.C. §§ 952 and 960. The

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

** The Honorable Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.

district court sentenced him to 84 months of imprisonment and 4 years of supervised release. Tirado challenges his sentence, contending that (1) the district court violated his due process rights by relying on facts not supported by the record about the nature and extent of his gang involvement, (2) the district court imposed an unconstitutionally vague condition of supervised release that prohibited Tirado from possessing gang-related paraphernalia without regard to whether it related to any gang with which Tirado was ever associated and whether Tirado knew of the gang-related properties, and (3) the district court impermissibly delegated its judicial function to the probation officer by asking the officer to read into the record three conditions of supervised release related to gangs that the parties had not reviewed.[1] We have jurisdiction under 18 U.S.C. § 3742 and 28 U.S.C. § 1291, and we affirm.

1. Tirado contends that the district court violated his due process rights by relying on facts not supported by the record about the nature and extent of his gang involvement. Because the parties dispute the applicable standard of review and we may affirm under a less deferential standard than plain error review, we will assume *arguendo* that plain error review does not apply. Instead, Tirado may prevail on his due process claim if he can show that the challenged information is "(1) false or

[1] The record does not disclose whether the sentencing judge had reviewed, or was aware of, the gang conditions.

unreliable, and (2) demonstrably made the basis for the sentence." *United States v. McGowan*, 668 F.3d 601, 606 (9th Cir. 2012) (quoting *United States v. Vanderwerfhorst*, 576 F.3d 929, 935-36 (9th Cir. 2009)). "Challenged information is deemed false or unreliable if it lacks 'some minimal indicium of reliability beyond mere allegation.'" *Vanderwerfhorst*, 576 F.3d at 936 (quoting *United States v. Ibarra*, 737 F.2d 825, 827 (9th Cir. 1984)). "[T]he Fifth Amendment guarantee of due process protects the defendant from consideration of improper or inaccurate information" at sentencing. *United States v. Safirstein*, 827 F.2d 1380, 1385 (9th Cir. 1987).

Tirado has failed to make the required showing. The presentence report ("PSR") referred to Tirado's gang affiliation, noting that local law enforcement had identified him as an active member of the El Cajon Dukes. The PSR recounted that, according to San Diego County Sheriff's records, Tirado was identified as an active member with the El Cajon Dukes street gang, and his moniker is "Bones."[2] Tirado did not file objections to the PSR. At sentencing, the district court directly asked Tirado's counsel to address the concern in the PSR about Tirado's gang affiliation and how that would impact his criminal history going forward. His attorney conceded that at least

[2] The PSR also acknowledged that no information was found identifying Tirado as a current gang member.

some of his criminal history was directly related to his gang affiliations. She focused instead on what she viewed as the best way to address concerns about his past ties to gangs: via the conditions of supervised release.[3] Moreover, the PSR reflected that Tirado had an extensive adult criminal history that placed him well above the number of points required to fall within category VI, the highest criminal history category. The extensiveness and nature of Tirado's criminal history further enabled the district court to draw reasonable inferences about the nature and extent of Tirado's gang membership and to account for it when imposing the sentence. Tirado has failed to show that the inferences the district judge could have drawn from the record when determining the sentence were unreasonable.

---

[3] In response to the district court's questions "How do you address the concern in the presentence report about his gang affiliation? And how does that impact his criminal history and going forward?" Tirado's counsel stated:

> Well, Your Honor, I don't deny that there is criminal history that's related to that. I think that the best way to address that in terms of going forward is with a condition — the conditions of supervised release.
>
> You know, custody isn't what's going to address his ties to — his past ties to gangs. What's going to address his past ties to gangs is the decision to move away from them, to stop using drugs and to go into a different path in life. So I think that those are concerns that can be addressed with the terms of supervised release.

2. Tirado maintains that one of the gang-related conditions of supervised release—prohibiting him from wearing, displaying, using, or possessing articles of clothing, insignia, and other property "that are known to represent criminal street gang affiliation, association with or membership in the 'El Cajon Dukes' criminal street gang, or any other criminal street gang" without the probation officer's permission—is unconstitutionally vague. "We review the district court's order of a supervised release condition for abuse of discretion," but we review de novo whether a condition of supervised release violates the Constitution, *United States v. Watson*, 582 F.3d 974, 981 (9th Cir. 2009).

We have upheld conditions similar to the one challenged here. *See, e.g.*, *United States v. Soltero*, 510 F.3d 858, 865 (9th Cir. 2007) (per curiam) (upholding condition that provided that the defendant "shall not associate with any known member of any criminal street gang . . . , specifically, any known member of the Delhi street gang."). In *Soltero*, for example, we held that the term "criminal street gang" was not impermissibly vague. *Id.* at 866-67, 867 n.9. In a footnote we "note[d] that [the defendant] only violates the condition if the gang member he associates with is *known to him* to be a gang member[.]" *Id.* at 867 n.9.

We have emphasized that the inclusion of a scienter element negates a valid objection based on vagueness. *See, e.g.*, *United States v. Vega*, 545 F.3d 743, 750 (9th

Cir. 2008) ("We construe [the condition] consistent with well-established jurisprudence under which we presume prohibited criminal acts require an element of *mens rea*. Applying this presumption, we read the condition to prohibit knowing association with members of a criminal street gang. So construed, the condition is not impermissibly vague.") (citations omitted)).

The condition challenged here likewise is not unconstitutionally vague. It contains a scienter requirement: the restricted items, including clothing, insignia, and other property, must be "known to represent criminal street gang affiliation, association with or membership in the 'El Cajon Dukes' criminal street gang or any other criminal street gang." "[W]ith this limitation, 'men of common intelligence' need not guess at the meaning of" the condition. *Soltero*, 510 F.3d at 867.

3. Finally, Tirado contends that the procedure the district judge employed when imposing the sentence—directing the probation officer to read supervised release conditions into the record rather than pronouncing them himself—impermissibly delegated the judge's exclusive sentencing authority. Because Tirado did not adequately preserve this procedural objection, *see United States v. Hernandez*, 251 F.3d 1247, 1250 n.3 (9th Cir. 2001), we review for plain error, *United States v. Valencia-Barragan*, 608 F.3d 1103, 1108 (9th Cir. 2010). "Plain error is (1) error, (2) that is plain and (3) affects 'substantial rights.'" *United States v. Barsumyan*, 517

F.3d 1154, 1160 (9th Cir. 2008) (citing *United States v. Olano*, 507 U.S. 725, 732-34 (1993)). An error is "some sort of '[d]eviation from a legal rule.'" *Puckett v. United States*, 556 U.S. 129, 135 (2009) (brackets in original) (quoting *Olano*, 507 U.S. at 732-33). And "'[a]n error is plain if it is clear or obvious under current law.'" *United States v. Gonzalez Becerra*, 784 F.3d 514, 518 (9th Cir. 2015) (quoting *United States v. De La Fuente*, 353 F.3d 766, 769 (9th Cir. 2003)).

Sentencing is an exclusively judicial function. *See United States v. Stephens*, 424 F.3d 876, 881 (9th Cir. 2005). And the judge must impose the nonstandard conditions of supervised release orally, in the defendant's presence. *See United States v. Napier*, 463 F.3d 1040, 1042 (9th Cir. 2006). But we have never held that a judge must personally recite each and every condition of supervised release when pronouncing the sentence. Accordingly, without suggesting that a judge's failure at sentencing to orally pronounce a particular condition of supervised release can never be reversible error, we hold that Tirado has failed to demonstrate *plain error* based on the probation officer's recitation of conditions (here, special gang conditions) that the district judge, when orally pronouncing the sentence in the defendant's presence, directed the probation officer to "recite into the record."

AFFIRMED.