

## APPENDIX

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File Name: 24a0234n.06

Case No. 23-3841

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, )

Plaintiff-Appellee, )

v. )

ROBERT PAUL DURRELL, )

Defendant-Appellant. )

FILED

Jun 04, 2024

KELLY L. STEPHENS, Clerk

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

O P I N I O N

Before: SUTTON, Chief Judge; McKEAGUE and BUSH, Circuit Judges.

**McKEAGUE, Circuit Judge.** Robert Durrell appeals the district court's decision to revoke his supervised release and sentence him to 14 months in prison. But binding precedent squarely forecloses Durrell's argument. We **AFFIRM**.

## I.

Robert Durrell started a term of supervised release in 2019 after serving a federal prison sentence. Durrell's supervised release was conditioned on his refraining from committing more crimes. But just a few years later, he robbed a convenience store at gunpoint.

The district judge revoked Durrell's supervised release after Durrell admitted to violating his release conditions. The government asked for a sentence at the top of the guidelines range, citing the serious nature of Durrell's violation. It also made deterrence and public-safety arguments. The district judge agreed with the government's arguments and sentenced Durrell to

No. 23-3841, *United States v. Durrell*

14 months' imprisonment. She added that the sentence "reflects the seriousness of [Durrell's] conduct and shows respect for the law." Hr'g Tr., R.18 at PageID 89. Durrell now appeals.<sup>1</sup>

## II.

Durrell's sole argument on appeal is that the district judge relied on a prohibited sentencing consideration. Under 18 U.S.C. § 3583(e), district courts must consider certain factors when revoking a defendant's supervised release. That statute cross-references most of the § 3553(a) sentencing factors but omits § 3553(a)(2)(A)—the factor directing courts to impose sentences that "reflect the seriousness of the offense," "promote respect for the law," and "provide just punishment." Thus, Durrell argues, the district judge erred by considering that factor.

But as Durrell acknowledges, we've already rejected his argument in binding caselaw. *See United States v. Lewis*, 498 F.3d 393 (6th Cir. 2007), *cert. denied*, 555 U.S. 813 (2008); *United States v. Esteras*, 88 F.4th 1163 (6th Cir. 2023), *reh'g en banc denied*, 88 F.4th 1170 (6th Cir. 2023) and 95 F.4th 454 (6th Cir. 2024). *Lewis* held that district courts can consider the § 3553(a)(2)(A) factor in supervised-release revocations. Among other things, it reasoned that § 3583(e)'s text didn't create an exclusive list of permissible considerations. *Lewis*, 498 F.3d at 399–400. Last year's *Esteras* decision reinforced *Lewis*'s reasoning and rebuffed arguments that intervening Supreme Court precedent undermined its holding.<sup>2</sup> *Esteras*, 88 F.4th at 1167–68. Because *Lewis* and *Esteras* bind us, we cannot rule in Durrell's favor. *See United States v. Ferguson*, 868 F.3d 514, 515 (6th Cir. 2017).

The district court's order is **AFFIRMED**.

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<sup>1</sup> Durrell didn't object to the district court's sentencing decision. That normally would trigger plain-error review on appeal. But the more forgiving abuse-of-discretion standard applies here because the district court never afforded Durrell an opportunity to object during his hearing. *See United States v. Bostic*, 371 F.3d 865, 872–73 (6th Cir. 2004).

<sup>2</sup> In two post-*Lewis* (but pre-*Esteras*) opinions, the Supreme Court noted that courts cannot consider the need for "retribution" when imposing an initial supervised-release term. *Tapia v. United States*, 564 U.S. 319, 326 (2011); *Concepcion v. United States*, 597 U.S. 481, 494 (2022). *Esteras* deemed the Court's observation consistent with *Lewis*'s rule. Although *Esteras* focused on *Tapia*, its logic applies equally to *Concepcion*. *See Esteras*, 88 F.4th at 1168.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	JUDGE PATRICIA A. GAUGHAN
	)	
Plaintiff,	)	CASE NO.: 1:20CR375
	)	
-vs-	)	<u>ORDER</u>
ROBERT PAUL DURRELL,	)	
	)	
Defendant,	)	

A Supervised Release Violation Hearing was held on October 12, 2023. Assistant U. S. Attorney Elizabeth Crook was present on behalf of the Government. Defendant Robert Paul Durrell was present and represented by his counsel Christian Grostic. Probation Officer Matti Liebler was present on behalf of the Probation Department. The defendant waived his right to an evidentiary hearing and admitted to violating the conditions of his supervised release, to wit: new law violation. The Court finds this violation to be a Grade B.

This Court hereby sentences the defendant, Robert Paul Durrell, to the custody of the Bureau of Prisons for a period of 14 months to run consecutive to his state sentence. The Court does not order further supervision.

IT IS SO ORDERED.

/s/ Patricia A. Gaughan

Patricia A. Gaughan  
United States District Court Judge

Date October 12, 2023

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION AT CLEVELAND

4 UNITED STATES OF AMERICA, \* CASE NO. 1:20-cr-375  
\*  
5 Plaintiff, \*  
\*  
6 vs. \* OCTOBER 12, 2023  
\*  
7 ROBERT PAUL DURRELL, \*  
\*  
8 Defendant. \*

TRANSCRIPT OF **SUPERVISED RELEASE VIOLATION PROCEEDINGS**  
HELD BEFORE THE HONORABLE PATRICIA A. GAUGHAN  
SENIOR UNITED STATES DISTRICT JUDGE

14 APPEARANCES:

15 For the Plaintiff: Elizabeth M. Crook, AUSA

17 For the Defendant: Christian J. Grostic, Esq.

Probation Officer: Matti Liebler

25 Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

10:33:11 1 (In open court at 10:33 a.m.)

10:33:30 2 THE COURT: Mr. Durrell, please approach the

10:33:32 3 podium with counsel.

10:33:36 4 We are here in the matter of the United States of

10:33:39 5 America vs. Robert Paul Durrell, Case Number 20-cr-375.

10:33:46 6 Present in court is Mr. Durrell.

10:33:48 7 Is that correct, sir?

10:33:49 8 THE DEFENDANT: Yes, ma'am.

10:33:50 9 THE COURT: And did I pronounce your last name

10:33:52 10 correctly?

10:33:52 11 THE DEFENDANT: Yes, ma'am.

10:33:53 12 THE COURT: Represented by his attorney,

10:33:56 13 Mr. David Johnson.

10:33:57 14 ATTORNEY GROSTIC: Christian Grostic, Your

10:33:58 15 Honor.

10:33:58 16 THE COURT: I apologize.

10:34:04 17 ATTORNEY GROSTIC: It's okay.

10:34:04 18 THE COURT: I apologize.

10:34:04 19 ATTORNEY GROSTIC: Not a problem.

10:34:05 20 THE COURT: On behalf of the Government,

10:34:08 21 Ms. Elizabeth Crook.

10:34:09 22 AUSA CROOK: Good morning, Your Honor.

10:34:10 23 THE COURT: On behalf of Probation, Ms. Matti

10:34:13 24 Liebler.

10:34:13 25 PROBATION OFFICER LIEBLER: Good morning, Your

10:34:14 1 Honor.

10:34:14 2 THE COURT: We're here today, sir, for  
10:34:16 3 purposes of a supervised release violation hearing. I have  
10:34:20 4 before me a violation report dated March 13 of this year and  
10:34:28 5 a supplemental information report dated September 29 of this  
10:34:33 6 year.

10:34:35 7 According to these reports, there is one alleged  
10:34:40 8 violation. On August 23 you entered a plea of guilty to  
10:34:46 9 robbery, a felony of the second degree, with firearm  
10:34:50 10 specifications. The sentence was six to eight years at  
10:34:55 11 Lorain Correctional Institution, followed by 18 months up to  
10:35:00 12 three years of post-release control.

10:35:07 13 I'm going to first turn to counsel. Do you wish for  
10:35:10 14 this Court to hear testimony regarding this alleged  
10:35:15 15 violation, or does your client waive the taking of testimony  
10:35:18 16 and admit?

10:35:19 17 ATTORNEY GROSTIC: Your Honor, I've spoken  
10:35:21 18 with Mr. Durrell, and he would admit the violations per his  
10:35:24 19 plea in state court.

10:35:25 20 THE COURT: Sir, is that correct?

10:35:27 21 THE DEFENDANT: Yes, ma'am.

10:35:27 22 THE COURT: Based upon your admission, I do in  
10:35:30 23 fact find you to be in violation of supervised release. I  
10:35:35 24 find that the violation is a grade B violation. And with a  
10:35:45 25 criminal history category of III, you are looking at an

10:35:48 1 advisory sentencing guideline range of 8 to 14 months.

10:35:53 2 On the issue of sentencing, would you like me to first  
10:35:55 3 turn to you or your client?

10:35:57 4 ATTORNEY GROSTIC: I'd like to speak first,  
10:35:58 5 Your Honor.

10:35:58 6 THE COURT: Go right ahead.

10:35:59 7 ATTORNEY GROSTIC: Thank you, Judge.

10:36:00 8 And of course, we are here on a supervised release  
10:36:05 9 violation. I frequently turn to the statute first again,  
10:36:09 10 and it always strikes me that Section 3583, which governs  
10:36:13 11 supervised release violations, among the factors to consider  
10:36:16 12 it omits Section 3553(a)(2)(A), which is the need for  
10:36:21 13 punishment, respect for the law, and to reflect the  
10:36:26 14 seriousness of the offense.

10:36:27 15 And the Supreme Court last year in *Concepcion vs.*  
10:36:31 16 *United States* said that Congress has expressly precluded  
10:36:34 17 district courts from considering the need for punishment in  
10:36:36 18 this context. That's at 142 Supreme Court 2400.

10:36:39 19 I say that just because we are here on a serious  
10:36:42 20 offense. Mr. Durrell has admitted both in this Court and in  
10:36:48 21 state court. And the state court of course was the forum  
10:36:52 22 for punishment, and it's imposed a substantial punishment,  
10:36:55 23 six to eight years in prison, followed by, as the Court  
10:36:59 24 noted, time on post-release control.

10:37:01 25 I also in this context, though, turn to the violation

10:37:04 1 report from March, March 13, that the Court already  
10:37:06 2 referenced. And I noted that Mr. Durrell, his supervision  
10:37:11 3 started in October of 2019. Here we are in 2023? No  
10:37:16 4 violations in the meantime.

10:37:17 5 He was working in the meantime. He had a steady  
10:37:20 6 residence. He had completed RDAP and the post -- the  
10:37:25 7 community part of RDAP. So part of the question here is  
10:37:28 8 what happened?

10:37:31 9 And we do ask the Court to take all those positive  
10:37:35 10 things into account as well as the state sentence.

10:37:37 11 But in speaking to Mr. Durrell, he had several family  
10:37:41 12 members die all at approximately the same time, and as he  
10:37:46 13 described it to me, he fell apart. That's not an excuse,  
10:37:50 14 obviously, at all.

10:37:51 15 But I do just want to note for the Court all those  
10:37:54 16 positive things that he did that reflects that he is  
10:37:56 17 somebody who can turn his life around for a significant time  
10:38:00 18 period.

10:38:02 19 He obviously needs to find a way to push through those  
10:38:06 20 tough times that we all face. But he's going to have a  
10:38:09 21 significant state sentence and post-release control from the  
10:38:11 22 state to work on that and to pay for his crimes here.

10:38:16 23 So we ask, taking all that into account, that whatever  
10:38:19 24 sentence the Court imposes be run concurrent with the state  
10:38:23 25 and that the state now take jurisdiction over post-release

10:38:27 1 control and his transition into the community from there.

10:38:31 2 Thank you.

10:38:32 3 THE COURT: Sir, do you have anything to say?

10:38:34 4 THE DEFENDANT: Your Honor, my attorney pretty  
10:38:38 5 much covered everything. I was doing -- well, I felt like I  
10:38:41 6 was doing everything I should have been doing, and I was  
10:38:43 7 doing very good out there. Last year was my first year that  
10:38:46 8 I made over six figures legally and doing everything right,  
10:38:50 9 and I had a good job and I was excelling at my job.

10:38:55 10 I just lost my whole -- everybody in my family, all my  
10:38:57 11 elders, within a couple -- a 12-month period. My mother.  
10:39:01 12 My father died the year I got out of prison. My daughter's  
10:39:04 13 mother died the week I came home from prison. And then the  
10:39:08 14 ones I had left, my mother, my godfather, and my grandmother  
10:39:11 15 all died within a 90-day period. I just -- I just lost it,  
10:39:15 16 man.

10:39:16 17 And I apologize to the Court and everybody. That's  
10:39:22 18 it.

10:39:22 19 THE COURT: On behalf of the Government?

10:39:24 20 AUSA CROOK: Judge, I think the facts and  
10:39:29 21 circumstances of the violation, I don't think a concurrent  
10:39:35 22 sentence actually would reflect the serious nature of what  
10:39:37 23 happened. And I just overheard the question of what  
10:39:41 24 happened.

10:39:41 25 It clearly states in the report that Mr. Durrell

10:39:45 1       robbed someone by gunpoint on March 6, 2023. Not only did  
10:39:50 2       he rob this person, it says in the report that's dated on  
10:39:54 3       March 13, 2023, he said that he had already killed two  
10:39:58 4       people, check the news, and he had taken cash from that  
10:40:02 5       person. And then once State Police obtained a search  
10:40:05 6       warrant for his residence, they found not only a black  
10:40:10 7       Airsoft pistol, they also found pills, white powder  
10:40:13 8       substance, drug paraphernalia, crack pipes, as well as the  
10:40:16 9       clothing that was worn during the robbery.

10:40:17 10       I understand that he has a lengthy sentence, but he  
10:40:21 11       had a lengthy sentence with this Court. He was sentenced  
10:40:23 12       previously for conspiracy and served 56 months for that  
10:40:28 13       violation. And some of it was consecutive to a supervised  
10:40:32 14       release violation in another case, but he's still not  
10:40:34 15       getting the message.

10:40:36 16       And the violation here put other people at harm and  
10:40:40 17       risk. He robbed someone at gunpoint. This isn't a  
10:40:42 18       violation where he tests positive for marijuana or fails to  
10:40:46 19       do something minor. We're talking about a grade B violation  
10:40:50 20       involving a firearm.

10:40:51 21       And the notion that because he had some difficult  
10:40:56 22       circumstances that caused him to make this choice, that's  
10:41:00 23       just every day. Numerous people have difficult  
10:41:03 24       circumstances, but they're not picking up a firearm and  
10:41:05 25       robbing someone at gunpoint while on federal supervision

10:41:09 1 following a lengthy term of federal imprisonment.

10:41:11 2 So, Judge, with that I would suggest -- I would  
10:41:15 3 suggest on behalf of the Government the 14 months that's  
10:41:18 4 described under the guideline provisions. And also under  
10:41:23 5 Sentencing Guidelines 7B1.3(f), it states that any term of  
10:41:27 6 imprisonment imposed upon the revocation of probation or  
10:41:30 7 supervised release shall be ordered to be served  
10:41:31 8 consecutively to any sentence of imprisonment that the  
10:41:35 9 person under supervision is serving whether or not the  
10:41:38 10 sentence of imprisonment being served resulted from the  
10:41:41 11 conduct that is the basis of the revocation of probation or  
10:41:44 12 supervised release.

10:41:44 13 So, Judge, based upon the circumstances of the  
10:41:48 14 violation, the guidelines provision that provides the 14  
10:41:52 15 months, which is the higher end of the range, and the fact  
10:41:55 16 that the guidelines also provide that it should be served  
10:41:58 17 consecutively, we would request 14 months consecutively with  
10:42:02 18 no period of supervised release to follow.

10:42:07 19 THE COURT: On behalf of Probation?

10:42:08 20 PROBATION OFFICER LIEBLER: Thank you, Your  
10:42:08 21 Honor. I'm covering this hearing on behalf of Amanda  
10:42:14 22 Cambeiro.

10:42:15 23 It appears that Mr. Durrell did almost successfully  
10:42:19 24 complete four years of supervised release. However, this is  
10:42:21 25 a very serious violation given the nature of the conduct

10:42:24 1 underlying it. Although he was successful for what appeared  
10:42:30 2 over three years, I mean, this cannot go unnoticed, and  
10:42:36 3 appropriate sanction should be taken.

10:42:41 4 THE COURT: Anything further? You get the  
10:42:43 5 last word if you so choose.

10:42:44 6 THE DEFENDANT: Me?

10:42:46 7 THE COURT: No, your counsel.

10:42:47 8 ATTORNEY GROSTIC: Nothing that I haven't  
10:42:48 9 previously raised, Your Honor. Thank you.

10:42:52 10 THE COURT: It is the judgment of this Court,  
10:42:52 11 sir, that you be committed to the custody of the Bureau of  
10:42:54 12 Prisons to be imprisoned for a term of 14 months consecutive  
10:42:55 13 to the state sentence. There will be no further  
10:42:59 14 supervision.

10:42:59 15 I do in fact find the sentence to be sufficient but  
10:43:04 16 not greater than necessary to satisfy the purposes of  
10:43:05 17 sentencing.

10:43:06 18 The bottom line is I agree with the Government. A  
10:43:10 19 sentence of 14 months reflects the seriousness of this  
10:43:17 20 conduct and shows respect for the law.

10:43:20 21 Good luck to you, sir.

10:43:22 22 THE DEFENDANT: Thank you, Your Honor.

10:43:23 23 THE COURT: Obviously, you do have the right  
10:43:24 24 to appeal, and it will be -- costs will be borne by the  
10:43:28 25 Government.

10:43:29 1 Good luck.

10:43:30 2 (Proceedings adjourned at 10:43 a.m.)

3 \* \* \* \* \*

4 C E R T I F I C A T E

5  
6 I certify that the foregoing is a correct transcript  
7 of the record of proceedings in the above-entitled matter  
8 prepared from my stenotype notes.

9

10 /s/ Lance A. Boardman  
11 LANCE A. BOARDMAN, RDR, CRR

12 October 24, 2023  
13 DATE

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