

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 2018

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BRIAN WRIGHT, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

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

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**APPENDIX**

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BRIAN WRIGHT

# APPENDIX A

UNPUBLISHED MEMORANDUM OF THE  
NINTH CIRCUIT COURT OF APPEALS

NOVEMBER 2, 2018

**NOT FOR PUBLICATION**

**FILED**

UNITED STATES COURT OF APPEALS

NOV 2 2018

FOR THE NINTH CIRCUIT

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BRIAN WRIGHT,

Defendant-Appellant.

No. 17-10101

D.C. No.

2:14-cr-00357-APG-VCF-1

MEMORANDUM\*

Appeal from the United States District Court  
for the District of Nevada  
Andrew P. Gordon, District Judge, Presiding

Argued and Submitted October 11, 2018  
San Francisco, California

Before: McKEOWN, W. FLETCHER, and BYBEE, Circuit Judges.

Brian Wright appeals the conditions and length of supervised release imposed in 2016, the revocation of release and revocation sentence imposed in 2017, and the denial of his request for return of seized property. Because the parties are familiar with the facts, we do not repeat them here. We have jurisdiction under 28 U.S.C. § 1291, and we affirm in part, vacate in part, and

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

remand for further proceedings.

Even if we assume Wright's challenges to the terms of his 2016 sentence are not time-barred, *see* Fed. R. App. P. 4, they nonetheless lack merit. Because Wright did not raise objections to the conditions or length of supervised release, we review them for plain error. *United States v. Bonilla-Guizar*, 729 F.3d 1179, 1187 (9th Cir. 2013). The court did not err in justifying three years of supervised release with the need for rehabilitation. "Courts may factor in rehabilitation when they are terminating or extending supervised release, because neither of these actions involves sending a defendant to prison." *United States v. Grant*, 664 F.3d 276, 280 (9th Cir. 2011). In light of Wright's criminal history, it was not plain error for the district court to conclude that the search condition "reasonably related" to public safety and deterrence, did not deprive Wright of more "liberty than is reasonably necessary," and otherwise satisfied the requirements of 18 U.S.C. § 3583(d)(2).

We review *de novo* Wright's constitutional claims that the conditions prohibiting criminal activity and associating with persons "engaged in criminal activity" were impermissibly vague. *United States v. Evans*, 883 F.3d 1154, 1159-60 (9th Cir. 2018). The advertisements bearing Wright's phone number were connected to and in furtherance of criminal acts, *i.e.*, pandering and living off the proceeds of prostitution, clearly proscribed by the plain language of the condition.

A “m[a]n of common intelligence” need not “guess” that the condition prohibiting associating with persons “engaged in criminal activity” prohibits dating and residing with a person recently arrested for prostitution-related activities who, at his behest and with his support, continues to be engaged in similar behavior. *Id.* at 1160 (citation omitted). Neither condition was unconstitutionally vague. Nor was the association condition overbroad.

Turning to the revocation proceedings in 2017, Wright had “no right to the assistance of standby counsel” in such proceedings. *United States v. Mendez-Sanchez*, 563 F.3d 935, 947 (9th Cir. 2009). The appointment of standby counsel is “best left to the sound discretion of the” district court, *Locks v. Sumner*, 703 F.2d 403, 408 (9th Cir. 1983), and here, the magistrate judge laid out the circumstances and reasonably concluded that appointing new standby counsel days prior to the revocation hearing was inappropriate. Wright did not renew his request for standby assistance during the revocation hearing. Wright’s due process claim with respect to the library is without merit as it is rooted in the Sixth Amendment, *see Milton v. Morris*, 767 F.2d 1443, 1445 (9th Cir. 1985), which is “not relevant to revocation proceedings.” *United States v. Santana*, 526 F.3d 1257, 1262 (9th Cir. 2008).

As to Wright’s claim under the Jencks Act, production of the special agent’s grand jury testimony was not required because it did not “relate generally to the

events and activities testified to” during the revocation hearing. *United States v. Brumel-Alvarez*, 991 F.2d 1452, 1464 (9th Cir. 1992) (emphasis and internal quotation marks omitted). The grand jury testimony would have pertained to Wright’s alleged role in several robberies in 2014, while the special agent’s revocation hearing testimony focused on Wright’s violations of supervised release in 2016 and 2017. Any error in failing to conduct in camera review of the transcripts was harmless because their subject matter was not disputed. *See United States v. Riley*, 189 F.3d 802, 805-06 (9th Cir. 1999).

Because Wright did not move to suppress evidence related to the Government’s warrantless search of his cell-site location data during the revocation hearing, we review for plain error. *See United States v. Fernandez*, 388 F.3d 1199, 1217 (9th Cir. 2004). It is undisputed that “the exclusionary rule does not apply to supervised release revocation hearings.” *United States v. Hebert*, 201 F.3d 1103, 1104 (9th Cir. 2000). Even if evidence “obtained through an egregious violation of the Fourth Amendment” should be excluded in the revocation context, *Orhorhaghe v. INS*, 38 F.3d 488, 493 (9th Cir. 1994), no “egregious violation” occurred here.

Wright also contends that evidence related to the advertisement and telephone recording databases should have been excluded because it was obtained without a warrant. However, the special agent did not conduct a Fourth

Amendment “search” by accessing these databases. *See United States v. Diaz-Castaneda*, 494 F.3d 1146, 1151 (9th Cir. 2007). Further, Wright lacked any protected privacy interest in the information obtained from the databases. *See United States v. Borowy*, 595 F.3d 1045, 1048 (9th Cir. 2010) (publicly exposed digital files); *United States v. Van Poyck*, 77 F.3d 285, 290-91 (9th Cir. 1996) (recorded jail calls).

There was ample evidence supporting the conclusions that Wright engaged in pandering, lived off the proceeds of prostitution, associated with persons engaged in criminal activity, resisted officers, and changed his residence. “[V]iewing the evidence in the light most favorable to the government,” we conclude that a “rational trier of fact could have found the essential elements of [the alleged] violation[s]” by a “preponderance of the evidence.” *United States v. Jeremiah*, 493 F.3d 1042, 1045 (9th Cir. 2007) (internal quotation marks omitted).

With respect to Wright’s claim of error regarding calculation of the Guidelines range, even assuming the district court did not conclusively determine the grade, any such error was harmless. The district court included the correct Guidelines range in its analysis and “perform[ed the] sentencing analysis [three times], beginning with . . . the correct and incorrect range[s].” *United States v. Munoz-Camarena*, 631 F.3d 1028, 1030 n.5 (9th Cir. 2011). Thus, the conditions and length of Wright’s original supervised release, the revocation of that release,

and the revocation sentence are affirmed.

Reviewing de novo, we reach a different conclusion regarding the denial of Wright's request for the return of cash seized during his 2014 arrest.<sup>1</sup> See *United States v. Marolf*, 173 F.3d 1213, 1216 (9th Cir. 1999). Because Wright sought return of this property after his underlying criminal proceedings ended, he "[was] presumed to have a right to its return, and the government ha[d] the burden of demonstrating that it ha[d] a legitimate reason to retain the property." *United States v. Martinson*, 809 F.2d 1364, 1369 (9th Cir. 1987). However, the magistrate judge's conclusion that "Wright has not shown he is the rightful owner of the money and is not entitled to" its return improperly relieved the Government of its threshold burden of establishing that the cash was "contraband or subject to forfeiture." *Id.*; see *United States v. Gladding*, 775 F.3d 1149, 1152-53 (9th Cir. 2014). We vacate the order accepting the report and recommendation on seizure of the cash and remand for further proceedings.

**AFFIRMED IN PART, VACATED IN PART, AND REMANDED.**

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<sup>1</sup> Contrary to the Government's assertion, the district court accepted and docketed Wright's notice of appeal of this order.



# **APPENDIX B**

**ORDER OF THE NINTH CIRCUIT COURT OF APPEALS  
DENYING PETITION FOR PANEL REHEARING**

**DECEMBER 11, 2018**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**FILED**

DEC 11 2018

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BRIAN WRIGHT,

Defendant-Appellant.

No. 17-10101

D.C. No.

2:14-cr-00357-APG-VCF-1

District of Nevada,

Las Vegas

ORDER

Before: McKEOWN, W. FLETCHER, and BYBEE, Circuit Judges.

The petition for panel rehearing is denied.

# **APPENDIX C**

**JUDGMENT IN A CRIMINAL CASE OF THE UNITED STATES  
DISTRICT COURT FOR THE DISTRICT OF NEVADA**

**MARCH 6, 2017**

UNITED STATES DISTRICT COURT

District of Nevada

UNITED STATES OF AMERICA

v.

BRIAN WRIGHT

**Judgment in a Criminal Case**

(For **Revocation** of Probation or Supervised Release)

Case No. 2:14-cr-00357-APG-VCF-1

USM No. 49211-048

Brian Wright, Pro Se

Defendant's Attorney

**THE DEFENDANT:**

admitted guilt to violation of condition(s) \_\_\_\_\_ of the term of supervision.  
 was found in violation of condition(s) count(s) #1,#2,#3 and #5 of Petition 322 and 1 of the addendum  
 The defendant is adjudicated guilty of these violations: 331 after denial of guilt.

<u>Violation Number</u>	<u>Nature of Violation</u>	<u>Violation Ended</u>
#1 of Petition #322	Shall Not Commit Crime	January 2017
#2 of Petition #322	Refrain From Unlawful Use of Controlled Substance	January 10, 2017
#3 of Petition #322	Report Change of Residence or Employment	December 1, 2016
#5 of Petition #322	Shall Not Associate with Criminals	December 22, 2016

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has not violated condition(s) #6 of Petition #322 and is discharged as to such violation(s) condition.

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.

Last Four Digits of Defendant's Soc. Sec. No.: 7881

Defendant's Year of Birth: 1984

City and State of Defendant's Residence:  
Nevada

February 28, 2017

Date of Imposition of Judgment



Signature of Judge

ANDREW P. GORDON, UNITED STATES DISTRICT JUDGE

Name and Title of Judge

March 6, 2017

Date



DEFENDANT: BRIAN WRIGHT  
CASE NUMBER: 2:14-cr-00357-APG-VCF-1

**IMPRISONMENT**

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

21 months

- 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 \_\_\_\_\_  a.m.  p.m. on \_\_\_\_\_ .
  - as notified by the United States Marshal.
- The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
  - before 2 p.m. on \_\_\_\_\_ .
  - as notified by the United States Marshal.
  - as notified by the Probation or Pretrial Services Office.

**RETURN**

I have executed this judgment as follows:

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_  
at \_\_\_\_\_ with a certified copy of this judgment.

\_\_\_\_\_  
UNITED STATES MARSHAL

By \_\_\_\_\_  
DEPUTY UNITED STATES MARSHAL

DEFENDANT: BRIAN WRIGHT

CASE NUMBER: 2:14-cr-00357-APG-VCF-1

**SUPERVISED RELEASE**Upon release from imprisonment, you will be on supervised release for a term of: 15 months**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, not to exceed 104 tests annually.
  - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4.  You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
5.  You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *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. *(check if applicable)*
6.  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: BRIAN WRIGHT

CASE NUMBER: 2:14-cr-00357-APG-VCF-1

**STANDARD CONDITIONS OF SUPERVISION**

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

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

Defendant's Signature \_\_\_\_\_

Date \_\_\_\_\_



DEFENDANT: BRIAN WRIGHT

CASE NUMBER: 2:14-cr-00357-APG-VCF-1

**SPECIAL CONDITIONS OF SUPERVISION**

1. Possession of Weapons - You shall not possess, have under your control, or have access to any firearm, explosive device, or other dangerous weapons, as defined by federal, state, or local law.
2. Warrantless Search - You shall submit your person, property, residence, place of business and vehicle under your control to a search, conducted by the United States probation officer or any authorized person under the immediate and personal supervision of the probation officer, at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of supervision; failure to submit to a search may be grounds for revocation; the defendant shall inform any other residents that the premises may be subject to a search pursuant to this condition.
3. Substance Abuse Treatment - You shall participate in and successfully complete a substance abuse treatment and/or cognitive based life skills program, which will include drug/alcohol testing and/or outpatient counseling, as approved and directed by the probation office. You shall refrain from the use and possession of beer, wine, liquor, and other forms of intoxicants while participating in substance abuse treatment. Further, you shall be required to contribute to the costs of services for such treatment, as approved and directed by the probation office based upon your ability to pay.
4. Home Confinement with Location Monitoring - You shall be confined to home confinement with location monitoring, including GPS if available, for a period of 90 days.
5. Mental Health Treatment - You shall participate in and successfully complete a mental health treatment program, which may include testing, evaluation, and/or outpatient counseling, as approved and directed by the probation office. You shall refrain from the use and possession of beer, wine, liquor, and other forms of intoxicants while participating in mental health treatment. Further, you shall be required to contribute to the costs of services for such treatment, as approved and directed by the probation office based upon your ability to pay.
6. Access to Financial Information - You shall provide the probation officer access to any requested financial information, including personal income tax returns, authorization for release of credit information, and any other business financial information in which you have a control or interest.
7. No Contact Condition – You shall have no contact, telephonically electronically, directly, or indirectly, associate with, of knowingly be within 500 feet of females who have been arrested for Trespassing, Loitering, or Soliciting for the Purpose of Prostitution, without prior approval of the probation officer. The offender may have contact with females whom he shares a child with. Furthermore, if confronted by females who have been arrested for Trespassing, Loitering, or Soliciting for Purposes of Prostitution in a public place, you shall immediately remove yourself from the area.
8. Community Service – If unemployed, you must complete 32 hours of community service per month, as approved and directed by the probation officer.

DEFENDANT: BRIAN WRIGHT  
 CASE NUMBER: 2:14-cr-00357-APG-VCF-1

**CRIMINAL MONETARY PENALTIES**

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

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

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

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

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

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
<b>TOTALS</b>	\$ <u>0.00</u>	\$ <u>0.00</u>	

Restitution amount ordered pursuant to plea agreement \$ \_\_\_\_\_

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

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

the interest requirement is waived for the  fine  restitution.

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

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

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

DEFENDANT: BRIAN WRIGHT  
CASE NUMBER: 2:14-cr-00357-APG-VCF-1

**SCHEDULE OF PAYMENTS**

Having assessed the defendant’s ability to pay, payment of the total criminal monetary penalties shall be due as follows:

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

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

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

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Joint and Several Amount and corresponding payee, if appropriate.

- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):
- The defendant shall forfeit the defendant’s interest in the following property to the United States:

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