PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-4064

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

THOMAS COMBS,

Defendant – Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Richard D. Bennett, Senior District Judge. (1:12-cr-00148-RDB-1)

Argued: May 5, 2022 Decided: June 7, 2022

Before MOTZ, QUATTLEBAUM, and HEYTENS, Circuit Judges.

Affirmed by published opinion. Judge Motz wrote the opinion, in which Judge Quattlebaum and Judge Heytens joined.

ARGUED: Cullen Oakes Macbeth, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Greenbelt, Maryland, for Appellant. Matthew Paul Phelps, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellee. **ON BRIEF:** James Wyda, Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Baltimore, Maryland, for Appellant. Jonathan F. Lenzner, Acting United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellee.

DIANA GRIBBON MOTZ, Circuit Judge:

In the hearing to determine whether to revoke Thomas Combs' supervised release and sentence him to additional time in prison, the district court twice referred to out-of-court statements by Combs' ex-wife. The court neither disclosed these statements to Combs' counsel prior to the revocation hearing nor gave counsel the opportunity to cross-examine the speaker. At the hearing, Combs never objected to the court's introduction of the statements or requested a continuance during which he might discover information about them. Combs argues on appeal, however, that the introduction of his ex-wife's statements during the revocation hearing constitutes plain error and asks that we remand this case to the district court for resentencing. Because we find that any error did not affect his substantial rights, we affirm.

I.

In 2012, Thomas Combs pled guilty to conspiracy to commit racketeering in violation of 18 U.S.C. § 1962(d) and was sentenced to a little over four years in prison and three years of supervised release. This case concerns what occurred after Combs was released from prison and began his term of supervised release. In August 2017, Combs assaulted his then-girlfriend N.D. and did not report his resulting contact with law enforcement to his probation officer. In light of this assault, after a revocation hearing, the district court revoked supervised release and sentenced Combs to time served and a new eighteen-month supervised release term with the same terms as those previously imposed.

The assault was the start of a series of supervised release violations. In January 2019, Combs admitted to using controlled substances. His probation officer later informed

the district court that Combs subsequently missed a urine test, failed to appear for treatment, and remained under the influence of controlled substances. As a result, after a second revocation hearing, the district court sentenced Combs to an additional two months in prison followed by four months of supervised release (a downward variance from the 6–12-month Guidelines range).

N.D. attended each of these revocation hearings. At each hearing, the district court referred repeatedly to N.D., invited her to call the probation officer if she had any issues, and asked her questions about Combs and her daughter. For example, during the second revocation hearing, the court noted twice that it would "like to hear from" N.D., and later repeated, "I definitely want to hear from" her.

Following his release from prison in June 2019, Combs once again admitted to violating the terms of his supervised release. This time, Combs was convicted of failure to obey a lawful order and disorderly conduct after an argument with N.D. He later was charged as a felon in possession of a firearm after sending a text message to N.D. with a picture of himself holding a gun. The text message said, "Do you think I won't use it?" He served the resulting sentence in state custody.

His probation officer then filed a petition to revoke supervised release based on these convictions and his failure to report to counseling. N.D. — now Combs' ex-wife — did not appear at the revocation hearing that followed (Combs' third). But at the hearing, the district court twice referred to N.D.'s out-of-court statements. First, after explaining the procedural history of the case, the district court stated:

> And while he was in state custody, I should note for the record there were concerns noted by your — I gather you[r] former wife [N.D.] with respect to your potential release. And it was confirmed by the U.S. Marshals service that a detainer was lodged against you, so that once you completed your state sentence you would not be released and be turned over to federal authorities.

Second, when announcing Combs' sentence, the district court stated: "[Y]ou have terrorized people, [N.D.], literally, I know she's called my chambers worried about when you would be released by the state, whether or not there was a federal detainer."

Before announcing his sentence, the district court also explained that Combs "clearly . . . had a serious drug problem and . . . clearly had emotional and mental issues." But it reasoned that Combs' "mental health issues have endangered people," emphasizing the court's duty to protect the public. The court concluded that the Guidelines range of thirty-seven to forty-six months was appropriate "in light of the long[,] tortured history of this case, not one, not two, but three different violations of supervised release." As a result, the district court imposed a sentence of thirty-seven months' imprisonment, a sentence at the bottom of the Guidelines range, with credit for time served and eighteen months of supervised release to follow.

II.

Combs appeals his sentence, arguing the district court erred by admitting N.D.'s out-of-court statements during the revocation hearing. He contends the district court violated Federal Rules of Criminal Procedure 32.1(b)(1)(B) and (C) by admitting her statements without balancing the interests of the parties, requiring a showing of good cause, or first disclosing the statements to Combs.

Ordinarily, we review a district court's evidentiary decisions in a supervised release revocation hearing for abuse of discretion. *United States v. Doswell*, 670 F.3d 526, 529 (4th Cir. 2012). But because Combs never objected to the introduction of N.D.'s out-of-court statements before the district court, we review here only for plain error. To show that the district court plainly erred, Combs must establish that "(1) an error occurred; (2) the error was plain; and (3) the error affected [his] substantial rights." *United States v. Bennett*, 986 F.3d 389, 397 (4th Cir. 2021), *cert. denied*, 142 S. Ct. 595 (2021). Even if all three factors are satisfied, we exercise our discretion to correct the error only if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)) (alteration in original).

III.

Rule 32.1 of the Federal Rules of Criminal Procedure sets out the basic procedures required during a revocation hearing. Rule 32.1(b)(2)(B) states that a person subject to a revocation hearing "is entitled to . . . disclosure of the evidence against" him. Additionally, Rule 32.1(b)(2)(C) states that a person charged with a violation of the terms of supervised release "is entitled to . . . an opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear." Thus, under subsection (C), "prior to admitting hearsay evidence in a revocation hearing, the district court must balance the releasee's interest in confronting an adverse witness against any proffered good cause for denying such confrontation." *Doswell*, 670 F.3d at 530. "Reliability is a critical factor in [that] balancing test. . . ." *Id.* at 531. And "unless the government makes a showing of good cause for why the relevant

witness is unavailable, hearsay evidence is inadmissible at revocation hearings." *United States v. Ferguson*, 752 F.3d 613, 617 (4th Cir. 2014).

The Government primarily contends that the district court committed no error at all here because neither of these rules applies to the *sentencing* portion of the revocation hearing. According to the Government, Rules 32.1(b)(2)(B) and (C) apply *only* to the portion of the proceedings in which the court determines whether there has been a violation of supervised release. The Government calls this the "guilt phase," which it distinguishes from a revocation hearing's "sentencing phase." Br. of Appellee at 9.

The argument that the Rules do not apply to the "sentencing phase" cannot be correct. First, nothing in the text of the Rule indicates that it applies only to the so-called "guilt phase." The Government points us to the title of Rule 32.1(b)(2) — "Revocation Hearing" — and contrasts that with Rule 32, entitled "Sentencing and Judgment." It argues that if Rule 32.1(b)(2) applied to sentencing proceedings, the Rule's title would say "Sentencing" as well. However, "Sentencing" and "Revocation Hearing" need not be mutually exclusive. The Rule certainly never draws such a distinction. And we see no reason why the term "Revocation Hearing" cannot encompass *both* the guilt phase and the sentencing phase of the proceedings. *Cf. Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) ("The title of a statute cannot limit the plain meaning of the text." (alterations and citation omitted)).

Moreover, subsection (E) of the same Rule provides a person charged with a violation of the terms of supervised release the right "to make a statement and present any information *in mitigation*." Fed R. Crim. P. 32.1(b)(2)(E) (emphasis added). The Advisory

Committee explained that this subsection (E) reflects "the importance of allocution and now explicitly recognizes that right at Rule 32.1(b)(2) revocation hearings." Fed. R. Crim. P. 32.1 Advisory Committee Notes (2005). The Government does not dispute that mitigation and allocution relate to sentencing. That Rule 32.1(b)(2) lists the right to allocution together with the rights to the disclosure of evidence and to question adverse witnesses in a single list of procedural protections — drawing no distinction between the guilt and sentencing phases of a revocation hearing — indicates strongly that the Rule applies to the *entire* proceeding.

The origins of Rule 32.1 make that conclusion even more apparent. Rule 32.1 "formalized" the due process rights originally set forth in *Morrissey v. Brewer*, 408 U.S. 471 (1972). *See Ferguson*, 752 F.3d at 616; *see also Doswell*, 670 F.3d at 530. In *Morrissey*, the Supreme Court explained that "a revocation decision" resolves two questions: (1) "a wholly retrospective factual question" about whether a violation of the terms of release has occurred; *and* (2) a "discretionary" question about whether "the parolee [should] be recommitted to prison or" if "other steps [should] be taken to protect society and improve chances of rehabilitation." 408 U.S. at 479–80. *Morrissey* thus supports a broad reading of "Revocation Hearing" as applying to the "sentencing phase" as well as the "guilt phase."

As a final attempt to overcome the more obvious reading of Rule 32.1, the Government argues that it would be nonsensical to impose stricter procedural requirements during revocation sentencings than we do during ordinary sentencings. The Government points to our decision in *United States v. Powell*, in which we stated that we "have

repeatedly allowed a sentencing court to consider 'any relevant information before it, including uncorroborated hearsay, provided that the information has sufficient indicia of reliability.'" 650 F.3d 388, 392 (4th Cir. 2011) (quoting *United States v. Wilkinson*, 590 F.3d 259, 269 (4th Cir. 2010)).

But as Combs notes, the two contexts are not comparable. A criminal conviction imposed after an initial criminal trial carries with it societal stigma and, often, the loss of civil rights like the rights to vote and serve on a jury. *See Ball v. United States*, 470 U.S. 856, 865 (1985) (describing "the societal stigma accompanying any criminal conviction"); *United States v. Logan*, 453 F.3d 804, 807 (7th Cir. 2006) (describing deprivation of civil rights associated with criminal convictions). In contrast, the guilt phase of a revocation hearing involves few, if any, of these collateral consequences. *Cf. United States v. Gibbs*, 897 F.3d 199, 203 (4th Cir. 2018) (a violation of conditions of supervised release "is not treated as new criminal conduct but rather as a 'breach of trust' in failing to abide by the conditions of [an] original sentence" (citing U.S.S.G. ch. 7, pt. A, introductory cmt. 3(b)). Instead, the most meaningful consequences for a releasee come at the sentencing stage, when a court decides whether to revoke the terms of supervised release and impose additional prison time.[1]

[1] For this reason, we do not find persuasive the Tenth Circuit's reasoning in *United States v. Ruby*, 706 F.3d 1221 (10th Cir. 2013). We cannot agree that there is "no meaningful difference between sentencing at a revocation proceeding and sentencing after a guilty plea or jury verdict of conviction." *Id.* at 1227; *see Gibbs*, 897 F.3d at 203 (noting a "distinction between original sentencing and revocation sentencing"); *United States v. Crudup*, 461 F.3d 433, 438-39 (4th Cir. 2006) (emphasizing "the unique nature of supervised release revocation sentences" as compared to "original sentences").

Thus, we reject the Government's argument that Rules 32.1(b)(2)(B) and (C) do not apply to the sentencing phase of a revocation proceeding and conclude that the district court erred in introducing N.D.'s statements without balancing the interests of the parties, requiring a showing of good cause, or first disclosing the statements to Combs.

IV.

Notwithstanding our disagreement with the Government's arguments regarding the applicability of Rule 32.1(b)(2) to sentencing — and assuming that the district court plainly erred here in violating those provisions — we must conclude that any error did not affect Combs' substantial rights. To establish the third prong of plain error, Combs "must 'show a reasonable probability that, but for the error,' the outcome of the proceeding would have been different." *Molina-Martinez v. United States*, 578 U.S. 189, 194 (2016) (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 76 (2004)). Here, the question is whether, absent the improperly admitted statements, Combs has shown a reasonable probability that the district court would have imposed a lower sentence.[2]

The record provides no evidence of such a probability. Though the district court offered only a brief explanation for its decision, the court did expressly consider several factors in addition to N.D.'s statements in announcing the sentence. The court made note of Combs' history of repeated violations of his conditions of supervised release, his

[2] The parties agree that we apply the same substantial rights analysis to errors under Rule 32.1(b)(2)(B) as we do to those under Rule 32.1(b)(2)(C). *See United States v. Hayes*, 171 F.3d 389, 394–95 (6th Cir. 1999). Combs need not "rebut evidence he has never seen," i.e., the undisclosed statements from his ex-wife, "in order to establish that he was prejudiced by the district court's reliance on that evidence." *Id.* at 394.

continual drug use, the court's duty to protect public safety, and the sentencing factors under 18 U.S.C. § 3553(a). In particular, the court stated: "I am compelled to find that the guideline range is appropriate in light of the long[,] tortured history of this case, not one, not two, but three different violations of supervised release." And although the court mentioned that Combs had "terrorized" his ex-wife, it also referred to Combs' prior conviction for robbery with a dangerous weapon. The district court emphasized that during one of the previous revocation hearings, it had delayed the proceedings "to hopefully see if [Combs would be] able to turn [his] life around," but it found that Combs had not done so. Looking more broadly to the district court's discussion of the case throughout the hearing, the court recounted in detail the previous violations of supervised release, giving those violations great weight.

Moreover, even putting aside N.D.'s ex parte phone calls, the court was already aware that Combs had "terrorized" N.D. Indeed, the very first revocation hearing arose from his assault of N.D., which Combs himself admitted and agreed had been a "horrible choice." A letter N.D. previously sent to the court described her fear of Combs in detail. That letter was disclosed to all parties before the hearing, and Combs does not argue the district court could not have considered it. Moreover, Combs did have an opportunity to respond or rebut this letter and failed to do so. And finally, the conviction that formed the basis of the revocation proceedings at issue here arose from a threatening message Combs sent to N.D., prompting her to call law enforcement.

Of course, we do not know exactly what N.D. said in her phone calls to the court. As the Sixth Circuit has noted, under these circumstances, it is difficult to know whether

the statements were "cumulative of other evidence properly before the court" because the full content of the communications with the court were never revealed. *United States v. Hayes*, 171 F.3d 389, 394–95 (6th Cir. 1999). And as we held in *Ferguson*, "[b]ecause cross-examination is such a vital tool for the defendant, it is difficult, after the fact, to assess the full harm of [such] a legal error." 752 F.3d at 619. But considering the wealth of information the district court already had before it as to Combs' treatment of his ex-wife, the court's heavy emphasis on the frequency of violations and the threat to public safety posed by Combs, and the bottom-of-the-Guidelines sentence it imposed, we must conclude that Combs has not shown a reasonable probability that the outcome of the proceedings would have been different absent consideration of the undisclosed statements.

V.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.