RECORD NO. 19-4466

In The
United States Court of Appeals
For The Fourth Circuit

UNITED STATES OF AMERICA,
Plaintiff – Appellee,

v.

MARYSA RENEE COMER,
Defendant – Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA AT CHARLOTTE

REPLY BRIEF OF APPELLANT

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INTRODUCTION

The government's attempts to save the social networking ban fail for several reasons.

First, this Court should reject the government's position that certain arguments should be reviewed for plain error. Comer preserved the claims, and their accompanying arguments, by specifically objecting in the district court. They should be reviewed for an abuse of discretion.

Second, the government's argument that "fair notice" requirements do not apply in revocation hearings has been flatly rejected by at least eight sister circuit courts. Furthermore, their argument that the term "social networking" is easily understood was flatly contradicted by the Supreme Court in *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736-37 (2017). The term, and as applied to the condition, is unconstitutionally vague.

Third, despite the government's argument to the contrary, the social networking ban is just that: a ban. And the ban is overbroad, because it fails to narrowly tailor the breadth of the ban with the § 3553(a) factors, as required by statute and this Court's authority.

Fourth, the government is wrong when it argues that the court's delegation to probation to define the nature and extent of the social networking ban was merely a routine task. The term "social networking" is vague and overbroad. Determining the nature of the ban, then, is not a ministerial task appropriately delegated to probation.

Instead, the ban permits probation to define the nature of the ban, and to give wide access or none at all. The court's act improperly delegated its role under Article III of the Constitution.

Fifth, caselaw supports Comer's substantive due process claim. And because the ban is not narrowly tailored, it infringes upon that constitutional right.

Finally, the government is simply incorrect that Comer did not object to the probation officer sitting and consulting with the prosecutor during the revocation hearing. Plain error does not apply here. Moreover, the error gave the government a real and perceived unfair advantage during the hearing.

ARGUMENT

I. The district court abused its discretion by imposing a supervised release condition subject to careful review, that isn't reasonably related to sentencing factors, and isn't narrowly tailored to the purpose of deterring the defendant and protecting the public.

A. Plain error does not apply.

The government concedes that Comer preserved her arguments that the social networking condition requires a greater deprivation of liberty than necessary and that the district court improperly delegated its authority to probation. Govt. Br. 18. It argues, however, that she raises both her vagueness and substantive due process challenges for the first time on appeal, and therefore this Court should review for plain error. Govt. Br. 19-20. The government is wrong for several reasons.

Contrary to the government's assertions, Comer's objections at her supervised release hearing were sufficient to preserve the vagueness and substantive due process challenges on appeal. A defendant "preserves a claim of error by informing the court—when the ruling is made or sought—of the action [she] wishes the court to take." Fed. R. Crim. P. 51(b). Comer did so. With regard to the vagueness challenge, Comer objected "to the bans on internet or social media"; noted the term "social networking accounts" is "not even defined"; argued the ban lacked "specific and set limitations"; and stated that the ban is a "general ban on social media or even the internet." JA 98, 102-3. And she preserved her objection to the substantive due process violation, when she argued that the ban is a "far greater deprivation of liberty than necessary"; that a person should be able to "read the *Washington* Post or even have an Amazon account"; argued the ban lacked "specific and set limitations"; and stated that the ban is a "general ban on social media or even the internet." *Id.*

Comer's specific objections below to the social networking condition were more than sufficient to preserve these issues for appeal. As noted in her opening brief, this Court applies the abuse of discretion standard when a defendant objects to a special condition of supervised release. *United States v. Worley*, 685 F.3d 404, 407 (4th Cir. 2012). The objection need not meet a "'formulaic' objection standard" to preserve the issue for appeal. *United States v. Faulls*, 821 F.3d 502, 509 (4th Cir. 2016) (citation omitted). Comer's repeated and detailed objections to the special condition sufficiently preserved these issues for appeal.

Moreover, on appeal, a defendant is permitted to refine her arguments and to offer variations on them. In *Yee v. City of Escondido*, 503 U.S. 519 (1992), the Supreme Court explained that once a party makes a claim—in *Yee*, that the Fourth Amendment's exclusionary rule applies—he can "formulate[ ] any argument [he] like[s] in support of that claim" on appeal, even if he did not present it to the lower court. *Id.* at 535. In *Yee*, the petitioners challenged a city ordinance as an unconstitutional taking. *Id.* at 534-35. On appeal to the Supreme Court, they argued for the first time that the ordinance constituted a taking by regulation; in the state courts, they had argued it was a taking by physical occupation. *Id.* at 534. The Court explained that these two arguments did not constitute "separate claims." *Id.* at 534-35 (emphasis in original). Rather, they were "separate arguments in support of a single claim—that the ordinance effects an unconstitutional taking" and were preserved. *Id.* at 535. *See also United States v. Lynn*, 592 F.3d 572, 578, 582 (4th Cir. 2010) (this Court held that making arguments under § 3553 "for a sentence different than the one ultimately imposed" is sufficient to preserve a claim of procedural sentencing error); *United States v. Ross*, 912 F.3d 740, 746 n.2 (4th Cir. 2019) ("[r]ecent circuit precedent suggests . . . that the abuse of discretion standard should now apply because Ross challenged the term of confinement and thus preserved his challenge to the special conditions imposed as part of his supervised release.")

Here, Comer asserted a claim in the district court—an objection to the imposition of the social media ban. *See* JA 98, 102-3. Now she presents the same claim

on appeal. She makes additional arguments in support of that claim. But even if some of the arguments are new—a fact which Comer does not concede—under *Yee*, *Lynn*, and *Ross*, plain error review does not apply.

This Court's decision in *United States v. Davis*, 855 F.3d 587, 595 (4th Cir. 2017) does not apply. Govt. Br. 20. There, the defendant argued for the first time on appeal that the district court improperly interpreted or applied the Sentencing Guidelines. 855 F.3d at 595. She had not challenged the Guidelines calculation at sentencing. *Id.* Unlike *Davis*, Comer asserts the same claim here that she asserted in the district court.

Yee controls. Comer is permitted to assert any argument on appeal in support of her claim that the social networking ban was improperly applied as a condition of supervised release. Plain error review does not apply. This Court reviews the imposition of a special condition of supervised release for an abuse of discretion. *United States v. Worley*, 685 F.3d 404, 407 (4th Cir. 2012). And claims that a condition infringes upon her substantive due process rights are "subject to careful review." *United States v. Ritter*, 118 F.3d 502, 504 (6th Cir. 1997). Those are the standards that govern here.

B. The social networking ban is unconstitutionally vague.

The government complains that Comer did not cite any published authority holding that supervised release provisions must provide "fair notice of the prohibited conduct," and she therefore cannot demonstrate plain error. Govt. Br. 31-32. But as noted above in section I(A), Comer is entitled to a review for abuse of discretion,

rather than plain error. Moreover, the government's argument that a supervised release condition should not be held to a "fair notice" standard—absent any citation to authority—has been rejected by a majority of the circuits to consider the issue. Comer can demonstrate that the social networking ban is unconstitutionally vague.

This Court held in an unpublished decision that, just like a statute, a condition of supervised release violates due process if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning." *United States v. Versher*, 629 F. App'x. 528, 530 (4th Cir. 2015) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (citations omitted). At least ten circuit courts are in accord. *See United States v. Simmons*, 343 F.3d 72, 81 (2d Cir. 2003) ("Due process requires that the conditions of supervised release be sufficiently clear" to provide notice); *United States v. Loy*, 237 F.3d 251, 262 (3d Cir. 2001) (the same void for vagueness principles that apply to statutes apply to supervised release conditions); *United States v. Paul*, 274 F.3d 155, 166 (5th Cir. 2001) (same) (citation omitted); *United States v. Zobel*, 696 F.3d 558, 575-76 (6th Cir. 2012) (same); *United States v. Schave*, 186 F.3d 839, 843 (7th Cir. 1999) (same); *United States v. Thompson*, 653 F.3d 688 (8th Cir. 2011); *United States v. Johnson*, 626 F.3d 1085, 1090 (9th Cir. 2010) (citation omitted) (same); *Leatherwood v. Allbaugh*, 861 F.3d 1034, 1044 (10th Cir. 2017) (same); *United States v. Nash*, 438 F.3d 1302 (11th Cir. 2006); *United States v. Rock*, 863 F.3d 827, 832-33 (D.C. Cir. 2017) (same). This Court should adopt the reasoning in *Vercher* and its sister circuits and hold that a vague supervised release condition violates due process.

Under this standard of "void for vagueness," Comer can demonstrate the social networking ban is unconstitutionally vague. A supervised release condition is unconstitutionally vague if "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." *Hill v. Colorado*, 530 U.S. 703, 732 (2000) (stating the standard for a vague statute). The government asserts that "social networking" has an ordinary meaning. Govt. Br. 33-34. The Supreme Court recently recognized, however, that the term "social networking" has many different possible interpretations. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736-37 (2017). In *Packingham*, the Court considered whether a statute prohibiting a sex offender from "access[ing] a commercial social networking site" violated the First Amendment. *Id.* In its analysis, the Court noted that the "broad wording" of the statute "might well bar access not only to commonplace social media websites but also to websites as varied as Amazon.com, Washingtonpost.com, and Webmd.com." *Id.* at 1736-37.[1]

Perhaps recognizing this problem, the government attempts to distinguish the ban in Comer's case as only prohibiting the possession of social networking "accounts." Govt. Br. 34. They argue that the word "accounts" also has a common meaning and is therefore not vague. *Id.* However, the ban still prohibits Comer from having any social networking accounts. The addition of the word "accounts" does not

[1] The Court identified sites such as Facebook, LinkedIn, and Twitter as "commonly understood" types of social networking sites. *Id.* at 1737.

further define "social networking." And the government ignores the multiple examples offered by Comer in her opening brief that may—or may not—be social networking accounts. *See* Op. Br. 11-12, 21 (citing recipe, music, news, home style, photo, and movie and restaurant review sites, all of which require a user account to participate). Even Amazon requires an account to utilize the site's services. *Packingham*, 137 S. Ct. at 1736. Is this a social networking account that requires approval from the probation officer? It is unclear as the ban is drafted in the judgment.

Absent further direction and explanation from the district court, the social networking ban "fails to provide [Comer] a reasonable opportunity to understand what conduct it prohibits." *Hill*, 530 U.S. at 732. It is unconstitutionally vague and the district court abused its discretion in imposing it. This Court should vacate it.

C. The social networking ban is overbroad because it requires a greater deprivation of liberty than is reasonably necessary.

The district court imposed an overbroad social networking ban, that was not narrowly tailored to the factors outlined in § 3553(a). The government defends the ban, alleging that it is reasonably related to the statutory sentencing factors, and that the ban is not overly broad because it merely requires probation's "approval." The government's arguments cannot save the ban, however, because the ban constitutes a significant liberty intrusion that is more restrictive than necessary to meet Comer's supervision goals.

The government first argues the social networking ban is appropriate because it is "reasonably related to the relevant statutory sentencing factors." Govt. Br. 21-23. Initially, the government identifies the nature of Comer's underlying offense, which involved her use of social networking sites to recruit other young women, as the basis for the ban. *Id.* Comer pled guilty to conduct that included the improper use of social networking sites. Op. Br. 2-3, 18-19; JA 1, 84. She also reminded the court at her revocation hearing that it was important to consider the "whole picture" of the "nature and circumstances" of her offense: that before she became a part of the trafficking scheme, she was a trafficked victim herself. JA 85. Her much older, male co-conspirator "[b]eats her with a belt. Urinates on her. Urinates in her mouth. Forces her to have sexual intercourse with himself along with other people as well for his satisfaction. … It's a nasty and cruel thing and it also happened to her. She was a victim of being human trafficked at the age of 19 years old." JA 84-85, 86. Counsel further explained that such severe trauma "can also provide for a person who would otherwise never do certain things [to] deflect the trauma that's been put on them on to another person in some ways to save themselves." JA 86.

This is not to say that Comer is not responsible for her actions or her abuse of social networking sites as part of the underlying offense. The nature of that abuse, however, must be put into context. And in any event, the district court acknowledged that it reviewed summaries of Comer's conduct from the Washington offense, but "I don't know that she's – I don't have any evidence she's sex trafficking again." JA 104.

Instead, the court said it imposed the social networking ban because of Comer's subsequent conduct on supervised release. JA 104-05.

The ban also fails to meet the § 3553(a) factors, because it creates a "deprivation of liberty" that is far broader than necessary. *United States v. Malenya*, 736 F.3d 554, 559 (D.C. Cir. 2013). Federal appellate courts treat this provision as a narrow tailoring requirement. *Id.* In this case, Comer noted in her opening brief that had the district court simply prohibited her from accessing Facebook—which is the only site she is accused of misusing while on supervision—the narrow condition would have addressed both her "history and characteristics," and it would have complied with 18 U.S.C. § 3583(d)(2)'s direction that "special conditions must 'involve no greater deprivation of liberty than is reasonably necessary' to achieve the goals enumerated in § 3553(a)." *United States v. Armel*, 585 F.3d 182, 186 (4th Cir. 2009) (quoting 18 U.S.C. § 3583(d)(2) (internal alterations omitted)). Instead, the court imposed a complete social networking ban, subject only to the discretion of the probation officer.

Comer argues that the conditions already in place, including monitoring of any and all electronic devices, is more narrowly tailored to comply with the § 3553(a) factors. The government disputes that the computer monitoring condition is sufficient to successfully monitor Comer's social media usage, because she did not comply with that condition. Govt. Br. 25. Comer admitted at the hearing that she did not comply with that condition. JA 66. And she admitted in her opening brief that

restricting her access to Facebook would be an appropriate, narrowly-tailored condition here. As the Second Circuit recognized, "a more focused restriction [on the internet] can be enforced by unannounced inspections of [a defendant's] premises and examination of" his computers and other electronic devices. *Sofsky*, 287 F.3d at 126-27. A broad ban of all social networking sites, however, is not narrowly tailored.

The government attempts to reframe the social networking condition not as a "ban" but as a condition of approval. Govt. Br. 24-26, 28-30. It is not, they allege, a "blanket ban on all social networking sites and apps," because the condition "is limited to the kinds of accounts that can easily be used to facilitate" the type of conduct Comer had previously engaged in. Govt. Br. 24. However, nothing in the judgment limits the condition in this way. JA 115.

And even if the ban is a condition of approval, the government does not cite any authority approving of the restrictions here. Nor does it respond to Comer's cited authority that other courts do not consider similar "approval conditions" as limited in any way. *See* Op. Br. 20-21 (and citing caselaw). Indeed, courts routinely vacate such conditions. For example, the First Circuit considered a nearly identical argument from the government that the defendant did not face a complete ban but a "conditional limitation." *United States v. Ramos*, 763 F.3d 45, 61 (1st Cir. 2014). Indeed, a discretionary approval condition "undermines the command to sentencing courts not to deprive offenders of more liberty than is necessary to carry out the goals of supervised release." *Id*; *see also United States v. Freeman*, 316 F.3d 386, 392 (3d Cir. 2003)

(condition prohibiting the possession of any on-line computer without approval of the probation officer was overbroad); *United States v. Blair*, 933 F.3d 1271, 1278-79 (10th Cir. 2019) (internet and computer ban subject to probation officer's approval was overbroad, in part because the condition did not require the probation officer to permit the defendant any access); *United States v. Sofsky*, 287 F.3d 122, 126 (2d Cir. 2002) (recognizing that just as a "defendant might use the telephone to commit fraud, this would not justify a condition of probation that includes an absolute bar on the use of telephones" absent approval from the probation officer).[2]

The same is true here. As outlined above and in her opening brief, Comer acknowledges that a narrowly tailored limiting of her social networking is appropriate under § 3553(a). But she objects to the breadth of the ban in this case, which provides the probation officer, instead of the court, exclusive and complete discretion to deny her access to such sites. Nothing in the condition, for example, requires the probation officer to approve any of Comer's requests for social networking accounts. JA 115. And although the officer stated at the hearing that she would, for example, permit Comer to read the news, the court's written judgment does not contain such

[2] The government also asserts the condition is not overbroad, because Comer previously agreed to it. Govt. Br. 26-27. However, as the government acknowledges, Comer was not represented by counsel in those previous proceedings. JA 63. And a prior, uncounseled concession does not cure the constitutional and statutory error. The previous proceedings involved a modification of probation, not a revocation, which is at issue here. JA 63. There are different due process protections required for modifications versus revocations. *Compare* Federal Rule of Criminal Procedure 32.1(c) (modifications) *with* Rule 32.1(b) (revocations).

protections. The district court abused its discretion when it imposed an overly broad social networking ban. The condition should be vacated.

D. The court impermissibly delegated its Article III authority to the probation officer to determine the nature and extent of the social networking ban.

The government concedes that it is within the purview of the district court alone to interpret the term "social networking." Govt. Br. 28. It argues there was no improper delegation to probation here, because the term "social networking" has "established meaning," and therefore the probation officer was not called upon to determine the nature or extent of the ban. Govt. Br. 28-29, 32-35. The government is wrong.

As noted above in Section I(B), the Supreme Court recently recognized that the term "social networking" is open to many interpretations. *Packingham*, 137 S. Ct. at 1736-37 (noting the "broad wording" of North Carolina's statute defining social networking "might well bar access not only to commonplace social media websites but also to websites as varied as Amazon.com, Washingtonpost.com, and Webmd.com.") And other courts are in accord. Experts have testified that even when a state legislature defines social networking in a statute, the meaning is still "ambiguous." *Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1097 (D. Neb. 2012). In *Doe,* the expert explained if the definition of social networking includes the creation of an online account, "many commercial sites that wouldn't ordinarily think of themselves as social networking but they have this functionality, such as Amazon.com, L.L. Bean,

Blogspot, and WordPress. … All of these sites have a way for you to post your profile and talk to other users." *Id.* at 1099 (internal quotations omitted). *See also Doe v. Jindal*, 853 F. Supp. 2d 596, 605-06 (M.D. La. 2012) (finding statute void for vagueness when it did not "clarify which websites are prohibited"); *cf. Doe v. Kentucky ex rel. Tilley*, 283 F. Supp. 3d 608 (E.D. Ky. 2017) (statute requiring defendant to report to probation any "internet communication name identities" was unconstitutionally vague, because, like the Court in *Packingham*, the court could not determine what constituted "internet communication identities.")

The government attempts to justify the district court's impermissible delegation here, arguing that a probation officer "routine[ly]" exercises some measure of discretion in implementing supervised release conditions, and the social networking ban is no different. Govt. Br. 27. But while a court may appropriately delegate a ministerial task to probation, it is inappropriate to delegate the decision on "the nature and extent of the defendant's punishment." *United States v. Schrode*, 839 F.3d 545, 555 (7th Cir. 2016). In *United States v. Miller*, 341 F. App'x 931 (4th Cir. 2009), for example, this Court, on plain error review, upheld a court's delegation to probation to determine the *length* of mental health and substance abuse treatment. *Id.* at 932-33. The district court, however, determined the *nature* of the treatment.

And the government's cited cases are inapposite, because they represent instances of a probation officer performing a ministerial task, rather than one deciding the actual nature and scope of a condition. *See e.g. United States v. Rodriguez*, 558 F.3d

408 (5th Cir. 2009) (probation assessed prohibited areas for residence restrictions), *but see United States v. Barber*, 865 F.3d 837, 840 (5th Cir. 2017), (noting that since 2009, the Fifth Circuit has rejected similar probation approval conditions)); *United States v. Jeremiah,* 493 F.3d 1042 (9th Cir. 2007) (probation had to approve use of credit card); *United States v. Nash*, 438 F.3d 1302, 1306 (11th Cir. 2006) (probation approving new bank accounts was a "ministerial function").

Here, the district court relied completely on the probation officer to explain to him how she perceived the nature and scope of the condition. JA 99 (asking the officer to "talk to me" regarding the scope of the ban.) His oral pronouncement of the condition, and his written judgment, gave no further instructions to define the nature and scope of the ban. This was an improper delegation of the court's role to the probation officer, in violation of Article III of the Constitution. *See Barber*, 865 F.3d at 840 (holding that language requiring a probation officer's approval "create[s] ambiguity as to whether the district court" impermissibly delegated its authority and citing cases from 2009-2017 in accord). *See also* Op. Br. 23-25 (citing cases); *see cf. United States v. Wagner*, 872 F.3d 535, 542-43 (7th Cir. 2017) (the court improperly delegated to a treatment provider the decision of whether the defendant could possess adult pornography).

E. Under "careful review," the social networking ban impermissibly infringes upon Comer's fundamental liberty interests.

The government argues there is no precedent supporting Comer's due process right to locate and associate with a romantic partner. However, the government simply ignores all of the legal authority cited by Comer that recognizes a person's right to engage in romantic intimacy and associate with a life partner. Op. Br. 14-17.

Instead, they argue that the social networking ban is valid—even if it infringes on Comer's substantive due process rights—because it is "directly related to advancing the individual's rehabilitation and protecting the public from recidivism." Govt. Br. 30-31. But as outlined above, section I(C), the social networking ban does not relate to advancing her rehabilitation and protecting the public, because it is overbroad, impermissibly delegates authority to fashion a sentence to probation, and is unconstitutionally vague. Nor does the government's assertion that because Comer used dating apps in her underlying offense cure the constitutional error here. The district court was specifically asked if he considered the underlying offense in approving the ban. He responded that he didn't "have any evidence she's sex trafficking again." JA 104-05. The court instead indicated it was imposing the ban because Ms. Comer engaged in new improper activity while on supervised release. JA 104-05. And the court referenced Comer's use of "these apps" to commit the new acts. JA 104-05. However, as noted above, Facebook is the only social networking platform that Comer abused on supervision.

Upon "careful review," the district court's ban on social networking sites was not narrowly tailored to meet the sentencing goals of § 3553(a) and the ban infringes upon Comer's substantive due process rights. The condition should be vacated.

II. The court permitted the probation officer to operate as an arm of the prosecution at Comer's revocation hearing in violation of her constitutional rights.

A. This Court should review this issue for an abuse of discretion, rather than for plain error.

The government alleges Comer did not object when the probation officer sat at government counsel's table and consulted with the prosecutor throughout the revocation hearing, and therefore this Court should review for plain error. Govt. Br. 36-7. The government, however, ignores the entirety of the discussion between defense counsel and the district court regarding the lack of due process throughout the proceedings. Comer fairly presented this issue to the district court—indeed the district court directly addressed the issue—and it is preserved for review on appeal.

At the revocation hearing, the probation officer testified at length regarding her petition to revoke Comer's supervised release. JA 66-87. After her testimony, defense counsel argued to the district why she did not believe home detention was necessary.[3] During that discussion: (1) defense counsel objected to the practice of probation sitting and consulting with the prosecutor; and (2) the district court clearly understood

[3] Comer ultimately was given a curfew rather than home detention.

her objection to the probation officer's role in the hearing and addressed it on the record.

> **Defense Counsel:** The ironic part about that recommendation, Your Honor, is at bond I asked for home detention for this young lady and they fought me tooth and nail. They had every reason under the sun for why it was inappropriate for her given her background, given the allegations, that home detention was not appropriate. She must be detained. And here she is in a jumpsuit. So for them to now argue -- *I would just note I am not privy to the same information probation is currently adding to the prosecutor because they don't sit at our table.*
>
> **The Court:** *Well, they don't have to turn everything over.* They have to turn over -- I know there's a difference between what the U.S. attorneys and the defense bar may think is -- in these kinds of hearings is discoverable. They do have to turn over Jenks material, but they do not have to turn over all these files like it's another case. We'll wait for a court somewhere sometime to rule differently on that – on that aspect, but right now it's pretty clear that that's not required in these cases.
>
> **Defense Counsel:** Understood, Your Honor. I'll move on.
>
> **The Court:** *We're not going to – we're not going to have massive trials on these supervised release things* where all this discovery that has nothing to do with what the violations are. This is something -- this becomes the Court's business once they're under supervised release.
>
> **Defense Counsel:** Understood.

> **The Court:** *The probation office is not an arm of the U.S. Attorney's Office. They bring them in, but they're part of the court system. They're part of the third branch.*
>
> **Defense Counsel:** Understood, Your Honor.

JA 87-88 (emphasis added).

Plain error review is inappropriate in this case. Such review only applies if a defendant fails to make a "contemporaneous objection." *United States v. Smith*, 640 F.3d 580, 586 (4th Cir.), *cert. denied*, 565 U.S. 955 (2011) (citing Fed. R. Crim. P. 51(b) and *United States v. Hanno*, 21 F.3d 42, 42 n.2 (4th Cir. 1994)). This Circuit has rejected any "formulaic approach" to preserving an objection. *United States v. Bernard*, 708 F.3d 583, 595 (4th Cir. 2013). The purpose of the rule is to "prevent[] a litigant from sandbagging the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor." *Puckett v. United States*, 556 U.S. 129, 134 (2009) (internal quotations omitted).

Here, there is no concern that Comer intended to "sandbag[]" the court; indeed, she complained directly to the district court about the unfairness of the probation officer sitting with and consulting the government throughout the hearing. JA 87. The objection was made contemporaneously. JA 87-88. And the district court had ample opportunity to rule on the objection; indeed it addressed the objection directly. JA 88 ("Well, they don't have to turn everything over," and "The probation office is not an arm of the U.S. Attorney's Office.")

Comer preserved this issue and this Court should review for an abuse of discretion. *See generally United States v. Doswell*, 670 F.3d 526, 529-30 (4th Cir. 2012) (applying "abuse of discretion" standard when district court improperly admitted hearsay evidence at revocation hearing); *United States v. Ferguson*, 752 F.3d 613, 617-20 (4th Cir. 2014) (applying "abuse of discretion" standard when district court denied defendant's ability to confront and cross-examine witnesses at revocation hearing).

B. The constitutional error gave the government an unfair advantage at the hearing, and it encouraged the perception that the probation officer is an arm of the prosecution.

The government complains that "Comer has identified no prejudice from" the probation officer's "seating arrangement." Govt. Br. 38. However, the government is wrong. Comer did provide evidence of prejudice; the government simply chose to ignore it.

Comer identified four pieces of information in her opening brief that were elicited by the government on direct examination of the probation officer but were not contained in the violation petition. Op. Br. 27-28. At least two of those pieces of information—that according to the unnamed mother of "Josh", her son "had disabilities" that Comer attempted to exploit, that Comer arranged a drug deal for Josh, and that Josh was writing his disability checks over to Comer (JA 68-69, 74-75 & Op. Br. 27-28); and that Comer's written statement was purportedly not the same as what she told the probation officer (JA 68-69, 75)—do not appear in the 26 pages of

discovery.[4] It is also unknown if other information was relayed to the prosecutor while the probation officer was sitting at the government's counsel table.

Comer was entitled to "the full disclosure of all facts on which the probation officer's sentencing recommendation relies." *United States v. Peterson*, 711 F.3d 770, 778 (7th Cir. 2013). *See also Morrissey v. Brewer*, 408 U.S. 471, 485-90 (1972) (outlining due process requirements in a revocation proceeding, including "disclosure to the parolee of evidence against him."); *Ferguson*, 752 F.3d at 616 (same); Fed. R. Crim. P. 32.1(b)(2)(B). She was also entitled to reliable evidence. *Doswell*, 670 F.3d at 531. Under the authority of this Circuit, hearsay evidence (such as the statements of Josh's mother) may only be admitted in a revocation proceeding after the district court first "balance[s] the releasee's interest in confronting an adverse witness against any proffered good cause for denying such confrontation." *Id.* at 530-31. The evidence offered against Comer did not meet these constitutional thresholds.

Moreover, the simple fact that the probation officer conferred and collaborated with the government during the hearing tilted the scales of due process and the separation of powers away from Comer and towards the government. *See United States v. Turner*, 203 F.3d 1010, 1014 (7th Cir. 2000) (finding no error when defendant made only a generalized claim but recognizing the possibility for such error). The

[4] Comer's written statement does appear in the discovery. It is unclear, however, how her statement is "inconsistent" with what she told her probation officer.

government argues that the probation officer was well within her right to communicate with the government. Govt. Br. 39. Comer does not object to the probation officer speaking with the prosecution, so long as she also communicates the same information to the defense. The probation officer is, after all (and as the district court recognized), part of the "third branch" of government. JA 87-88. Scholars and courts have explained the importance of probation officers being perceived as neutral parties rather than "surrogate prosecutors." *Turner*, 203 F.3d at 1014 (citation omitted). Here, that perception improperly skewed towards the prosecution.

Comer was deprived of due process and protections under the separation of powers during her revocation hearing. She should be given a new one. In addition, she requests guidance from this Court to the district courts—as the Seventh Circuit did in *Turner*—on the proper role of the probation officer in the revocation proceedings. 203 F.3d at 1014.

III. Comer can demonstrate plain error.

"To succeed under plain error review, a defendant must show that: (1) an error occurred; (2) the error was plain; (3) and the error affected his substantial rights." *United States v. Lockhart*, 947 F.3d 187 (4th Cir. 2020) (en banc) (citing *United States v. Olano*, 507 U.S. 725, 732 (1993)). Here the government contends that three of Comer's arguments should be reviewed for plain error. As explained in sections I(A) and II(A) above, plain error does not apply because Comer preserved each argument by objecting below. But even if it does, she can prevail.

The government first contends that Comer cannot establish that the district court plainly erred by imposing an unconstitutionally vague condition because she cites no binding precedent holding that vague conditions of supervised release violate due process. Govt. Br. 32. This argument ignores the fact that plain error may exist if other circuits have ruled on the question and there is no circuit split. *United States v. Carthorne*, 726 F.3d 503, 517 (4th Cir. 2013); *United States v. Neal*, 101 F.3d 993, 998 (4th Cir. 1996). As noted above in section I(B), at least ten circuits have applied due process principles of vagueness to supervised release conditions, and there are no dissenting circuits. Thus, the error is plain and it affected Comer's substantial rights to due process.

Next, the government argues that Comer cannot demonstrate plain error on substantive due process grounds, because she "cites no precedent recognizing" the right. Govt. Br. 30. But the government ignores Comer's citation to Supreme Court and Circuit precedent in her opening brief, which recognize a liberty interest to associate with a life partner. Op. Br. 14-16 (citing *Lawrence v. Texas*, 539 U.S. 558, 564 (2003); *United States v. Wolf Child*, 699 F.3d 1082 (9th Cir. 2012); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923); *United States v. Worley*, 685 F.3d 404 (4th Cir. 2012)). Comer has demonstrated plain error that affected her substantial rights.

Finally, the government claims the district court did not plainly err when it permitted probation to sit and consult with the prosecution during the revocation hearing. Govt. Br. 37-37. The government faults Comer for not citing any authority in

support of her argument that the district court erred. Govt. Br. 41. But that position again ignores the ample authority cited by Comer which protects her rights during a supervised release hearing under both the separation of powers doctrine in Article III of the Constitution and the Due Process Clause under the Fifth Amendment. Op. Br. 26-27. And contrary to the government's assertion, Comer identified specific prejudice she suffered as a result of the error. Op. Br. 27-28; section II(B), *supra*. She has demonstrated that the error is plain and that it affected her substantial rights.

CONCLUSION

For the reasons stated above and in the opening brief, this Court should vacate Comer's new conditions of supervised release and remand this matter to the district court for a new revocation hearing.

Dated this 18th day of February, 2020.

Respectfully submitted,

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Dated: February 18, 2020

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Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 18th day of February, 2020, I caused this Reply Brief of Appellant to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 18th day of February, 2020, I caused the required copy of the Reply Brief of Appellant to be hand filed with the Clerk of the Court.

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