IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4466

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARYSA COMER,

Defendant – Appellant.

Appeal from the United States District Court
for the Western District of North Carolina

The Honorable Max O. Cogburn Jr., District Judge

BRIEF OF THE UNITED STATES

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JURISDICTIONAL STATEMENT

Marysa Comer challenges the district court's imposition of a sentence of supervised release that includes a condition requiring her to obtain the permission of her probation officer to utilize social-networking accounts. The United States District Court for the Western District of Washington had jurisdiction over Comer's original criminal case under 18 U.S.C. § 3231. *See* J.A. 34, 149. That court transferred jurisdiction over Comer as a "person on supervised release" under 18 U.S.C. § 3605, which authorized the District Court for the Western District of North Carolina (Hon. Max O. Cogburn Jr., J.) to exercise the authority to modify Comer's conditions. Comer filed a timely notice of appeal, J.A. 112, 117, and this Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

I. After using social-networking sites to both recruit and extort victims, Comer pleaded guilty to a sex-trafficking offense. The district court revoked her supervised release, which she violated by using social-networking sites to communicate with a participant in drug sales

that she sought to facilitate. Did the court act within its discretion by imposing a new supervised-release sentence requiring Comer to obtain her probation officer's permission before using social-networking accounts?

II. Did the district court plainly err by omitting to order on its own initiative that the probation officer not sit at counsel table and confer with the United States during Comer's revocation hearing?

STATEMENT OF THE CASE

A. Comer pleads guilty to a sex-trafficking offense after using social-networking sites to recruit, control, and extort victims.[1]

In 2014, Marysa Comer and her coconspirator, David Delay, used online-dating and social-networking sites to recruit young women into their prostitution operation. J.A. 124. "Comer used emotional, verbal,

[1] The facts related to Comer's criminal offense and conduct during proceedings in her original case are based on her presentence report prepared by the probation office of the Western District of Washington, J.A. 119, which the United States District Court for the Western District of North Carolina considered without objection during Comer's revocation hearing. J.A. 104–05.

and physical abuse to keep the females engaged in prostitution." J.A. 124.

Comer recruited, for example, a developmentally delayed, 19-year-old high school student, M.K., whom she met through "Meetme.com," J.A. 125, a "social networking site," *United States v. Mathis*, 786 F.3d 1068, 1070 (8th Cir. 2015), *rev'd on other grounds*, 136 S. Ct. 2243, (2016). Comer talked with her "online for approximately four months," "persuaded her to leave her parents," and "picked her up from school" with Delay to move in with them. J.A. 125. Comer and Delay arranged dates in which M.K. provided sex for money on several occasions. J.A. 125. If M.K. "refused a date, Marysa Comer would punch, slap, shove, kick, and throw things at her." J.A. 125.

"Comer had the passwords" to M.K.'s "electronic devices." J.A. 125. M.K. "was provided a cell phone and a computer in order to access her email and Facebook accounts; however, she was monitored as to who she could talk to and communicate with." J.A. 125.

M.K. left Delay and Comer's residence in November of 2014. J.A. 125. She had wanted to leave earlier, but "was afraid of what they

would do to her if she left." J.A. 125. Comer sent M.K. several text messages to persuade her to come back. J.A. 125–126. When those efforts proved unsuccessful, Comer attempted to control M.K. "through extortion." J.A. 126.

Comer told M.K. that if she did not return, Comer "would publish explicit photos of M.K." on "Facebook," J.A. 126, another "social networking service," *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). Comer then "posted multiple photos of M.K. naked and in provocative positions to her Facebook page for her friends and family to see." J.A. 126. M.K. "attempted to access her Facebook account to shut it down." J.A. 126. "[T]he passwords," however, "had been changed." J.A. 126.

After police began investigating Comer and Delay's operation, Comer made "several attempts to obstruct justice and influence witnesses." J.A. 126. She directed a "developmentally delayed" minor to file a false police report "alleging M.K. sexually assaulted her," for example. J.A. 126. She further directed the minor "not to cooperate

with law enforcement." J.A. 126. She also "lied to authorities about her location" on multiple occasions. J.A. 126.

Comer and Delay were indicted in the Western District of Washington and charged "with various offenses related to sex trafficking by force, fraud, and coercion and transporting females for prostitution." J.A. 121. The Court released her on bond, but she violated a number of her release conditions including several relating to limits on internet and electronic-device use. J.A. 121–23, 149. Her bond was eventually revoked. J.A. 123, 149.

Comer pleaded guilty in the Western District of Washington to conspiracy to engage in sex trafficking by force, fraud, and coercion, 18 U.S.C. § 1591(a)(1), 1594(c). J.A. 121. That court sentenced Comer to a term of imprisonment of thirty-six months. J.A. 149. And it sentenced her to five years of supervised release. J.A. 149. In July of 2018, the relevant courts transferred jurisdiction of Comer's supervision to the Western District of North Carolina. J.A. 149.

B. Comer violates the terms of her supervised release multiple times.

Fewer than five months after her release from prison, Comer began violating the terms of her supervised release. J.A. 147. Those terms prohibited her from communicating with people she knew to be "engaged in criminal activity." J.A. 69, 147, 149. They required her to report all computer software she owned, used, or acquired during the course of supervision. J.A. 39, 70, 147, 149, 150. They required her to permit monitoring of her electronic devices, at her expense. J.A. 150. And they required her to attend mental-health treatment sessions. J.A. 150.

By July of 2018, five months after her release from prison, J.A. 147, Comer had brokered a cocaine transaction between two of her friends and a customer. J.A. 69, 75. The mother of the disabled customer called Comer's probation officer expressing concerns. J.A. 68–69, 74. In response to the call, the probation office paid Comer a "home inspection call." J.A. 69.

During her visit to Comer's home in July of 2018, Comer's probation officer, Chelsea Padilla, learned that Comer acquired a

second smart phone she had hidden from Officer Padilla. J.A. 70, 147, 149, 150. Comer specifically considered reporting the phone "to probation, but she decided against it because she figured probation wouldn't allow it." J.A. 70. Officer Padilla also found that Comer possessed marijuana buds and identification documents belonging to another woman. J.A. 70.

Comer consented to the modification of the terms of her supervised release. J.A. 63, 71, 174. She was advised she was entitled to a hearing and the assistance of counsel before any unfavorable modification. J.A. 63. She agreed to waive her right to a hearing and counsel and agreed to the modification of her supervised release to add two terms. J.A. 63. First, she agreed to a condition requiring her to submit to a term requiring twelve months of location monitoring. J.A. 63. Second, she agreed to a term stating, "The defendant shall not have any social networking accounts without the approval of the U.S. Probation Officer." J.A. 63. Comer and Officer Padilla both signed the form describing Comer's waiver and the agreed-upon conditions. J.A. 63.

The court granted Officer Padilla's petition requesting that Comer's supervised-release be modified, with Comer's consent, to include location monitoring. J.A. 71, 174. Neither the July 2018 petition nor the order included the social-networking-approval condition to which Comer had consented. J.A. 142. The petition for modification that the Court approved indicated that Comer would be enrolled in a program at the Charlotte Probation Office to develop a relapse prevention plan for her marijuana addiction "and to develop her social network awareness with an understanding that who she affiliates [with] is a direct risk factor for her reoffending." J.A. 147.

After the modification, in December of 2018, Officer Padilla visited Comer at her home for another inspection. J.A. 71. Officer Padilla conducted a standard check of Comer's phone to search for "encryption apps" that allow the user to "completely circumvent the monitoring program so that data is not relayed or monitored." J.A. 71. Officer Padilla found "an encryption app called Apollo" on Comer's phone. J.A. 72.

Comer informed Officer Padilla that she was communicating with an individual named Jordan who was "selling drugs." J.A. 72–73. Comer stated that the two "met on social media, Facebook." J.A. 72. She explained that she was pointing her friends who sought to buy drugs in the seller's direction. J.A. 72. She also told Officer Padilla that Jordan had felony fraud charges pending against him. J.A. 73, 77.

Comer received permission for a new electronic device after she was found with the phone she had been hiding. J.A. 150. She violated the condition of her supervised release requiring her to pay the costs of monitoring, however, failing to make any of the payments she was required to make. J.A. 66, 150. And Comer failed to attend required mental-health treatment sessions on three different occasions, with no excused absence. J.A. 66, 150.

C. The district court revokes Comer's supervised release, sentences her to imprisonment for time served, and imposes a new term of supervised release.

Officer Padilla filed a petition alleging five different violations of the terms of Comer's supervised release and recommending that the district court revoke that release. J.A. 149–50. First, the petition

alleged that Comer violated the condition prohibiting her from interacting with a person she knew was engaged in criminal activity in July of 2018. J.A. 149. Second, the petition alleged that Comer violated the requirement that she report newly acquired software by using an unmonitored smartphone that she hid from her probation officer. J.A. 150. Third, the petition alleged that she violated the term requiring her to permit device monitoring at her expense by failing to make the payments required by the monitoring program. J.A. 150. Fourth, the petition alleged that she violated the condition prohibiting her from interacting with a person she knew was engaged in criminal activity again in December 2018, when she helped an individual she had met online sell drugs. J.A. 150. Finally, the petition alleged that Comer violated the requirement that she participate in a mental-health program by failing to attend. J.A. 150.

The district court held a revocation hearing at which Comer admitted the second, third, and fifth alleged violations and contested the remaining two. J.A. 66. Officer Padilla testified that Comer admitted brokering the cocaine deal involving her friends. J.A. 69.

She described finding Comer's unmonitored phone and Comer's statement that she decided against reporting it to probation because it would not be allowed. J.A. 70. She described finding an encryption app on Comer's phone that Comer had used to communicate with Jordan. J.A. 71–72. And she described Comer's admission that she had met Jordan on Facebook, that she knew Jordan sold drugs, that he faced charges for felony offenses, and that she was attempting to direct her drug-seeking friends to Jordan. J.A. 72. Comer did not present any evidence. J.A. 78.

The district court revoked Comer's supervised release after finding that she committed each of the five violations alleged in the petition. J.A. 79, 106. Both parties agreed that the court should impose a revocation prison sentence of time served, which was little over four months. J.A. 79–80, 87. The United States asked the court to impose five years' additional supervised release. J.A. 80. And it asked the court to impose twelve months of home detention and location monitoring. J.A. 80, 84. Comer opposed the request for home

detention, J.A. 89, and requested four years of supervised release, J.A. 98.

The United States asked the court to impose the same release conditions that were part of Comer's original judgment and to add one condition requiring Comer to "get approval from probation before she's involved in any social networking." J.A. 80, 96. The United States emphasized that Comer had recruited victims through social media, used social media to publish explicit photos of a victim as a means of controlling them, and was continuing to use social media to communicate with others about drug trafficking. J.A. 79–82. And the United States argued that the condition was reasonably related to the purposes of revocation sentencing and no more restrictive than necessary to further them. J.A. 81–82.

Comer stated that she "would object to the bans on internet or social media." J.A. 98. She said "there is a case out there called *Packingham* that found that a person should be able to, for example, read the *Washington Post* or even have an Amazon account without violating the terms of supervised release." J.A. 98. She also said that

a condition of "not being able to have social networking accounts" is "overbroad" and that the "same argument goes for social media as well as internet in general." J.A. 98.

In response to Comer's objection, the district court heard further from Comer's probation officer, Officer Padilla. J.A. 99. She explained that the condition required the "approval of the probation officer" for social networking. J.A. 99. Officer Padilla explained that she "would not keep" Comer "from reading the news or anything like that." J.A. 99. Nor would Officer Padilla prevent Comer "from going on LinkedIn to make herself . . . better for the job world." J.A. 99. Instead, she explained that the limitation "would be specific to these dating apps where she's meeting other women or recruiting other women. It would be very specific to what her charge was and the conduct that she is doing while on probation." J.A. 99. "It would just be very specific to what the issues on her supervision would be, Facebook, Tinder, and of those other dating apps like that." J.A. 99–100.

After Officer Padilla discussed the proposed condition, Comer added additional objections to it. J.A. 102–03. "[W]e believe it is a greater deprivation of liberty than necessary, the social media ban," said Comer, "and the effective ban is essentially still an impermissible delegation of authority to the probation [office]." J.A. 102–03.

The court sentenced Comer to a term of imprisonment of time served and five years' supervised release. J.A. 106. The sentence is within the range advised by the Sentencing Commission's policy statement, which advises a term of imprisonment in the range of 3–9 months, U.S.S.G. §§ 7B1.3(b), 7B1.4(a), and states that the court may impose a term of supervised release not to exceed, in the light of Comer's offense of conviction, life, U.S.S.G. § 7B1.3(g)(2); J.A. 151–52. For a period of 12 months, the court imposed a curfew and electronic monitoring. J.A. 106.

The court stated that it would include as a condition of Comer's supervised release that "[t]he defendant shall not have any social networking accounts without the approval of the U.S. probation officer."

J.A. 103–04, 108, 115. The condition is identical to the condition to which she had previously consented in writing. J.A. 63.

The court discussed on the record its decision to impose the condition. J.A. 115. The court explained that it had reviewed the presentence report and considered Comer's conduct in Washington in addition to "the activity that she's doing now." J.A. 104. It explained that, although the court did not have "evidence she's sex trafficking again," Comer was again "using social media to contact people to commit other crimes." J.A. 104. The court further noted that Comer did not merely ignore restrictions; she endeavored "to sneak around" and "get other phones." J.A. 104. The condition, in the words of the court, was "specifically related to the harms the Court has seen that occurred during her supervision violations." J.A. 108. The court also included without objection the conditions in her original judgment. J.A. 108–09.

SUMMARY OF THE ARGUMENT

I. The district court acted well within its broad discretion when it imposed on Comer a new supervised-release sentence requiring her to

obtain her probation officer's approval before using social-networking accounts. That condition, particularly in the light of Comer's history, is reasonably related to the statutory factors relevant to supervised-release sentences. Comer used social-networking sites as an instrumentality to recruit women into her sex-trafficking operation and to maintain control over them through extortion, placing nude photos of one of them on Facebook. And she used social-networking sites to violate her supervised release by communicating with a drug dealer whose transactions she was attempting to facilitate.

The court's reasonable limit on Comer's further use of social-networking accounts directly advances the statutory purposes of deterring misconduct and protecting the public from further crimes by Comer. The condition, moreover, involves no greater deprivation of liberty than is reasonably necessary. Less restrictive conditions proved ineffective at deterring her from facilitating crime, and the approval component of the condition ensures that Comer's probation officer can permit her to use accounts to read the news, seek a job, or undertake similar lawful activity.

Comer's other challenges to the condition are meritless. The condition gives the probation officer no greater authority than what Congress authorized probation officers to exercise, and courts have routinely upheld conditions requiring a probation officer's approval. The district court did not plainly err by declining to create a substantive-due-process right to locate and associate with a romantic partner, and the condition would remain appropriate in any event. And the term "social networking," which has a well-established meaning in contemporary English, provides Comer fair notice of what the condition requires.

II. The district court did not plainly err by declining on its own initiative to order the probation officer not to sit at counsel table or consult with the United States. The district court had ample discretion to permit Officer Padilla to sit where she did. Comer has identified no authority to the contrary. And no reasonable probability exists that the outcome of the proceedings would have been different if Officer Padilla had sat elsewhere.

ARGUMENT

I. The district court properly imposed the supervised-release condition requiring a probation officer's approval for Comer's use of social-networking accounts.

A. Standard of Review

This Court reviews deferentially revocation sentences such as Comer's, which fall within the applicable statutory maximum, J.A. 152, and reverses only if the sentence is "plainly unreasonable." *United States v. Crudup*, 461 F.3d 433, 439 (4th Cir. 2006). This standard, created by Congress in the statute governing appeals of supervised-release sentences, applies to the entire "supervised release revocation sentence," *id.* (brackets omitted) (quoting 18 U.S.C. § 3742(e)(4)), including conditions imposed by the court, *United States v. Shires*, 199 F. App'x 295, 295 (4th Cir. 2006) (unpublished decision) (explaining that the court "must determine whether the condition is plainly unreasonable").

To determine whether a revocation sentence is unreasonable, this Court follows "generally the procedural and substantive considerations that [it] employ[s] in [its] review of original sentences," *id.*, but

"strike[s] 'a more deferential appellate posture'" than it does "when reviewing original sentences," *United States v. Padgett*, 788 F.3d 370, 373 (4th Cir. 2015) (quoting *United States v. Moulden*, 478 F.3d 652, 656 (4th Cir. 2007)). A sentence, like Comer's, that falls within the range advised by the applicable policy statement is "presumed reasonable." *Id.* (quoting *United States v. Webb*, 738 F.3d 638, 641 (4th Cir. 2015)). And "the sentencing court retains broad discretion to impose a term of imprisonment up to the statutory maximum." *Id.* (quoting *Moulden*, 478 F.3d at 657 (ellipses omitted)).

Even if a revocation sentence is procedurally or substantively unreasonable, it is not subject to reversal unless it is "*plainly* unreasonable." *Crudup*, 461 F.3d at 439 (emphasis in original). "Plain" has the same meaning under this standard as it does under the plain-error standard of review. *Id.* To warrant reversal, therefore, any unreasonableness "must be clear or obvious, rather than subject to reasonable dispute." *Puckett v. United States*, 556 U.S. 129, 135 (2009). Arguments raised for the first time on appeal — such as Comer's arguments that the condition the court imposed is

unconstitutionally vague and that it violates her substantive due process rights — are subject to all four elements of the plain-error standard of review. *See United States v. Davis*, 855 F.3d 587, 595 (4th Cir. 2017) (holding that a request for a lower sentence is not sufficient to preserve a "technical legal argument").

B. Discussion

The district court acted well within its broad discretion when it required Comer, as part of her revocation supervised-release sentence, to obtain the permission of her probation officer before using social-media accounts — instrumentalities of the kind she had used to recruit and extort sex-trafficking victims and communicate with individuals whose drug transactions she sought to facilitate. Applying the supervised-release statute, 18 U.S.C. § 3583(d), this Court has explained that a "sentencing court may impose any condition that is reasonably related to the relevant statutory sentencing factors," is "consistent with the Sentencing Commission policy statements,"[2] and

[2] By endorsing the imposition of conditions that are reasonably related to the same factors that appear in the statute and involve no greater deprivation of liberty than is reasonably necessary, the United States

"involve[s] no greater deprivation of liberty than is reasonably necessary." *United States v. Worley*, 685 F.3d 404, 407–08 (4th Cir. 2012).

The condition Comer challenges is "reasonably related to the relevant statutory sentencing factors." *Id.* Those factors include "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). They include "the need for the sentence imposed" to "afford adequate deterrence to criminal conduct," § 3553(a)(2)(B), and "to protect the public from further crimes of the defendant," § 3553(a)(2)(C). And they include the need for the sentence imposed "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner," 18 U.S.C. § 3553(a)(2)(D). *See* 18 U.S.C. § 3583(d)(1).

Sentencing Guidelines ensure that conditions that otherwise meet the requirements of 18 U.S.C. § 3583(d)(1) are ordinarily consistent with the applicable policy statement. U.S.S.G. § 5D1.3(b); U.S.S.G. § 7B1.3(g)(1).

The condition requiring Comer to obtain approval from her probation officer to use social-networking accounts relates directly to the relevant statutory purposes of sentencing as applied to her. Comer's criminal offense involved her use of social-networking sites to recruit young women into a sex-trafficking operation. J.A. 125. In addition to using physical violence against her victims, J.A. 125, she used social-networking accounts to control and extort her victims, placing nude photos of one of them on Facebook to humiliate her, J.A. 126. Only a few months after her release from prison, Comer used social-networking sites to violate the terms of her supervised release and communicate with drug dealers whose transactions she was attempting to facilitate. J.A. 72–73.

Comer has used social-networking accounts as an instrumentality of both her sex-trafficking crime and her efforts while on supervised release to facilitate drug trafficking. In the light of "the nature and circumstances" of Comer's offense and her "history and characteristics," 18 U.S.C. § 3553(a)(1), the requirement that Comer obtain her probation officer's approval to use the same kinds of instrumentalities

relates directly to the court's need to "afford adequate deterrence to criminal conduct," 18 U.S.C. § 3553(a)(2)(B), and "to protect the public from further crimes of the defendant." § 3553(a)(2)(C). The need to obtain her probation officer's approval before using social-media accounts will limit Comer's ability to continue to use them to commit or facilitate criminal activity. At the same time, the approval component of the condition accommodates Comer's rehabilitative needs. Comer's probation officer is obligated by statute "to aid" Comer consistently with the conditions "to bring about improvements in" her "conduct and condition." 18 U.S.C. § 3603(2).

Contrary to what Comer seems to suggest, *Br. of Appellant* 17–18, the court properly considered both Comer's criminal conduct in Washington *and* her conduct while on supervised release. J.A. 104, 108. A revocation sentence is a "sanction[] for the defendant's 'breach of trust' — his 'failure to follow the court-imposed conditions.'" *United States v. Haymond*, 139 S. Ct. 2369, 2386 (2019) (Breyer, J., concurring in the judgment); *United States v. Webb*, 738 F.3d 638, 641 (4th Cir. 2013). But revocation is also properly "understood as 'part of the

penalty for the initial offense.'" *Id.* Comer's recent use of social-networking sites to exploit victims for her sex-trafficking operation is a statutorily required consideration, 18 U.S.C. § 3553(a)(1), and it is well relevant to the need for a social-media limitation to deter further misconduct and protect the public.

The approval condition, moreover, involves "no greater deprivation of liberty than is reasonably necessary." *Worley*, 685 F.3d at 407–08; *Cf. Br. of Appellant* 14–23. The condition is limited to the kinds of accounts that can easily be used to commit the offenses that Comer committed or facilitate the kinds of crimes that she sought to facilitate. And, contrary to Comer's rhetoric, the condition does not impose a "blanket ban on all social networking sites and apps." *Br. of Appellant* 19, 20; *compare* J.A. 115. The condition permits her to have social-networking accounts with the probation officer's approval, making it less restrictive than a blanket prohibition barring specific websites, like the ban Comer proposes, J.A. 19–20. Comer's probation officer can permit Comer to obtain social-networking accounts to read the news, shop, seek a job, or the like; Officer Padilla represented to the

court that she would do so, J.A. 99–100; and she is obligated to apply the conditions to Comer's benefit, 18 U.S.C. § 3603(2).

A "computer monitoring condition," *Br. of Appellant* 18, the evidence before the court shows, is *not* sufficient to deter Comer or protect the public from her efforts to facilitate criminal activity. Comer was subject to such a condition during her earlier supervised-release term, yet she violated that condition itself and circumvented the probation office's monitoring program to commit other violations. J.A. 66, 69–73. The record flatly contradicts Comer's assertion that the monitoring condition was "successfully employed," *Br. of Appellant* 19. Officer Padilla's undisputed testimony established that Comer used hidden phones and encryption applications to circumvent that condition, brokered a cocaine transaction, and sought to broker at least one other drug transaction. J.A. 69–73. She was, in other words, not deterred.

The court was well within its authority to conclude that more than a "restriction solely of Ms. Comer's access to Facebook," which Comer proposes, *Br. of Appellant* 18, is "reasonably necessary" to protect the

public and deter further misconduct, *Worley*, 685 F.3d at 407–08. As Comer's own brief makes clear, *Br. of Appellant* 11–14, 21–22, countless social-networking alternatives to Facebook exist. Comer could use any one of them to facilitate sex trafficking, drug trafficking, or other criminal conduct with no more effort than she used to violate the conditions of her first term of supervised release. *See Id.* at 21 (explaining that "[s]ocial media" offers "relatively unlimited, low-cost capacity for communication of all kinds"). Comer used another social-networking site, "Meetmee.com," for example, to recruit M.K. into her sex-trafficking operation. J.A. 125. A specific list of prohibited accounts — particularly if the list contained only one account — would not afford the kind of public protection or deterrence that Comer's conduct has revealed to be necessary.

The condition is also narrowly tailored because it is no more extensive than the condition to which Comer had voluntarily agreed only a few months earlier. J.A. 63. Even before she had been caught circumventing the probation office's monitoring software and using a social network to communicate with a drug dealer, Comer had agreed to

a condition prohibiting her from having "any social networking accounts without the approval of the U.S. Probation Officer." J.A. 63. By imposing this same condition — making her supervised release only slightly more restrictive than it was before — after finding multiple, significant violations, the court acted well within its authority.

The district court did not violate Article III of the Constitution by imposing a condition requiring "the approval of the U.S. Probation Officer," J.A. 63. *Cf. Br. of Appellant* 23–26. United States Probation Officers are professionals "authorized to manage aspects of sentences and to supervise . . . persons on supervised release with respect to all conditions imposed by the court." *United States v. Johnson*, 48 F.3d 806, 809 (4th Cir. 1995).[3] Promoting compliance with supervised-release conditions that require some measure of the officer's discretion is a routine part of the supervised-release program prescribed by Congress. The relevant statutes, 18 U.S.C. §§ 3563(b), 3583(d), and

[3] *See also United States Courts*, Probation and Pretrial Services — Supervision, *available at* https://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-services-supervision.

the Sentencing Guidelines, U.S.S.G. § 5D1.3(c)(3), endorse conditions that leave comparable discretion to probation officers, such as requirements that a convict truthfully answer questions asked by the probation officer, live at a place approved by the probation officer, not interact with a person convicted of a felony without permission from the probation officer, and follow the instructions of a probation officer related to the conditions of supervision. And the conditions imposed by the court do not delegate to the probation officer any "core judicial function" or "duty" that Congress has reserved exclusively to the Court. *Johnson*, 48 F.3d at 808. *Cf. Br. of Appellant* 23.

Comer's argument misreads the condition she challenges as allowing the probation officer to "determine" what "constitute[s] social networking." *Br. of Appellant* 23. The term "[s]ocial networking accounts" appears in the district court's order, J.A. 115, and, as discussed below, it has an established meaning. Responsibility for interpreting that term rests with the "district court." *See JTH Tax, Inc. v. H & R Block E. Tax Servs., Inc.*, 359 F.3d 699, 705 (4th Cir. 2004). Although the probation officer has authority to approve Comer's

use of social-networking accounts, she has no authority to change the scope or meaning of the term "social networking accounts." J.A. 115.

As this Court has recognized, appropriate conditions that "subject the defendant to the 'approval' or 'direction' of a probation officer" ordinarily "are permissible." *United States v. Miller*, 341 F. App'x 931, 933 (4th Cir. 2009) (unpublished decision); *United States v. Dallman*, 886 F.3d 1277, 1279 (8th Cir. 2018) (upholding condition prohibiting defendant "from possessing or using any electronic device with internet access without the prior approval of his probation officer"); *United States v. Rodriguez*, 558 F.3d 408, 411 (5th Cir. 2009) (upholding requirement that defendant obtain "prior approval of the probation office" before residing in certain locations); *United States v. Jeremiah*, 493 F.3d 1042, 1046 (9th Cir. 2007) (upholding condition requiring that defendant "incur no credit charges without prior approval of the probation officer"); *United States v. Nash*, 438 F.3d 1302, 1306 (11th Cir. 2006) (upholding condition requiring approval before opening a checking account); *United States v. Crandon*, 173 F.3d 122, 128 (3d Cir. 1999) (upholding condition prohibiting the defendant "from accessing

the Internet or other similar computer networks without prior approval from the U.S. Probation Office."). And the condition the Court imposed on Comer gives the probation officer no greater authority than what Congress authorized probation officers to exercise. 18 U.S.C. §§ 3563(b), § 3603.

Nor did the condition violate what Comer calls for the first time on appeal her substantive-due-process right "to locate and associate with a romantic partner." *Br. of Appellant* 17. The text of the Constitution does not describe such a right. And Comer cites no precedent recognizing it. *Id.* at 17. The district court did not plainly err by declining on its own initiative to create such a right. To the contrary, this Court's precedent precluded it from doing so. *Reyna as next friend of J.F.G. v. Hott*, 921 F.3d 204, 211 (4th Cir. 2019) ("[W]e are hardly free to create a new substantive due process right in view of Supreme Court decisions cautioning courts from innovating in this area."). In any event, the district court imposed the condition as part of a "criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty." *United States v. Knights*, 534 U.S. 112, 119 (2001).

"Just as other punishments for criminal convictions curtail an offender's freedoms," a court imposing supervised release "may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." *Id.*

Supervised release "restrictions affecting constitutional rights are valid if directly related to advancing the individual's rehabilitation and to protecting the public from recidivism." *United States v. Henson*, 22 F. App'x 107, 111–12 (4th Cir. 2001) (unpublished decision) (cleaned up). It was "online dating sites" that Comer and her coconspirator used to find sex-trafficking victims. J.A. 124. The approval condition, even to the extent it limits Comer's use of "*dating apps*," was well within the court's authority to impose. *Cf. Br. of Appellant* 17 (emphasis supplied by Comer).

Nor did the court plainly err by declining to hold the condition — "The defendant shall not have any social networking accounts without the approval of the U.S. Probation Officer," J.A. 115 — to be unconstitutionally vague. *Cf. Br. of Appellant* 10–14. This Court has held in an unpublished decision, *United States v. Versher*, that

supervised-release provisions must provide "'fair notice' of the prohibited conduct." 629 F. App'x 528, 530 (4th Cir. 2015) (unpublished decision). Comer cites no *binding* precedent from this Court or the Supreme Court holding that a court violates a defendant's rights by imposing vague conditions of supervised release or describing the standards for assessing such rights. This absence of binding authority is fatal to Comer's theory under the plain-error standard of review. *See Davis*, 855 F.3d at 595–96. But the condition imposed by the court complied with the unpublished *Versher* standard in any event. A provision does not violate that standard unless 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 and differ as to its application." *Versher*, 629 F. App'x at 530 (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

"[C]onditions of supervised release" should "be read in a commonsense way." *United States v. Ellis*, 720 F.3d 220, 226–27 (5th Cir. 2013) (quoting *United States v. Phipps*, 319 F.3d 177, 193 (5th Cir. 2003)). "[F]air warning is not to be confused with the fullest, or most

pertinacious, warning imaginable." *United States v. Gallo*, 20 F.3d 7, 12 (1st Cir. 1994). "Generally, supervised release provisions are read to exclude inadvertent violations." *United States v. Johnson*, 446 F.3d 272, 281 (2d Cir. 2006). Little risk therefore exists that uncertainty in a term will trap an unwary supervisee.

When defendant challenges for vagueness a supervised-release condition she has not been charged with violating, moreover, it should be considered in the light of the district court's ample authority to modify the condition. A supervised-release condition is not like a statute; a court "may modify" the conditions "at any time prior to the expiration or termination of the term." 18 U.S.C. § 3583(d). Even a statute, however, is ordinarily not impermissibly vague "if persons of reasonable intelligence" can "derive a core meaning" from it. *Indigo Room, Inc. v. City of Fort Myers*, 710 F.3d 1294, 1302 (11th Cir. 2013).

The term "social networking" in Comer's judgment is not further defined, J.A. 115, so the court affords the "term its ordinary meaning." *See Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). The Oxford English Dictionary — a publication relied on by the Supreme

Court that was "in use when" the district court imposed the condition, *id.* — defines "social networking" in its contemporary sense as "the use of websites which enable users to interact with one another, find and contact people with common interests, etc." Oxford English Dictionary (Online 3d ed. 2009) (s.v. "social networking"). Comer's supervised-release condition by its terms is limited only to the possession of "accounts." J.A. 115. "[S]ocial networking accounts" in Comer's supervised-release revocation judgment has a core ordinary meaning: Accounts to utilize "websites that enable users to interact with one another, find and contact people with common interests, etc.," *id.*

The term "social-networking accounts," in its ordinary meaning, does not come close to forcing "men of common intelligence" to "necessarily guess at its meaning and differ as to its application." *Versher*, 629 F. App'x at 530. This Court and the Supreme Court routinely use the term "social networking" in its dictionary sense. *See, e.g.*, *Packingham v. North Carolina*, 137 S. Ct. 1730, 1734 (2017); *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 690 (2010); *Grutzmacher v.*

Howard Cty., 851 F.3d 332, 344 (4th Cir. 2017); *Liverman v. City of Petersburg*, 844 F.3d 400, 408 (4th Cir. 2016). Neither court appears to find the term "unclear as written." *Br. of Appellant* 12.

Although decisions from other circuits suggest supervised-release conditions referring to "social networking" accounts or sites are not uncommon, *see, e.g.*, *United States v. Carson*, 924 F.3d 467, 472 (8th Cir. 2019); *United States v. Terry*, 692 F. App'x 318, 319 (8th Cir. 2017) (unpublished decision), Comer has not identified any decision holding that the term is "hopelessly vague," or anything close to it. *Br. of Appellant* 11. Comer identifies nothing that suggests the contours of the term at its margins are subject to materially more disagreement than those of any other modern English term. *Id.* at 12. And her consent to a modification of her supervised release to include the term, J.A. 63, provides a strong indication that the term was clear enough to her.

In any event, Comer's argument does not come close to meeting the plain-error or even the plainly unreasonable standard of review. An "error is plain" only if "the explicit language of a statute or rule

resolves the question" or "at the time of appellate consideration, the settled law of the Supreme Court or this Court establishes that an error has occurred." *Davis*, 855 F.3d at 595. No explicit language holds Comer's condition unconstitutionally vague, nor does any settled precedent identified by Comer in this circuit or elsewhere.

II. The district court did not plainly err by declining on its own initiative to order the probation officer not to sit at counsel table or consult with the United States.

A. Standard of Review

Contrary to what she asserts, Comer did not "object[] to the probation officer['s] sitting at the table with the prosecutor and whispering with the prosecutor throughout the hearing." *Cf. Br. of Appellant* 27. Comer's attorney told the court only, "I am not privy to the same information probation is currently adding to the prosecutor because they don't sit at our table." J.A. 87. A party "preserve[s] a claim of error by informing the court — when the court ruling or order is made or sought — of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection." Fed. R. Crim. P. 51(b). Comer's bare factual assertion did

not inform the court that she "wish[ed] the court" to order the probation officer to sit elsewhere or refuse to consult with the parties. *Id.* Comer did not object to any "action" by the Court. *Id.* And Comer did not state any grounds whatsoever. *Id.* Comer did not preserve the argument she makes on appeal about the probation officer's conduct. *Br. of Appellant* 26–29.

Because Comer did not preserve her argument, it is subject to the plain-error standard of review. That standard requires her to prove "(1) there is in fact an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected" her "substantial rights, which in the ordinary case means it affected the outcome of the district court proceedings; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Davis*, 855 F.3d at 595.

B. Discussion

The district court acted well within its discretion when it declined on its own initiative to direct Officer Padilla not to sit at the counsel table used by and consult with the United States. Decisions "allowing"

persons "to sit at the prosecution's table" are committed to the discretion of the district court even during a criminal jury trial. *United States v. Valencia-Riascos*, 696 F.3d 938, 941 (9th Cir. 2012). A supervised-release-revocation hearing does not require the "full panoply of constitutional protections afforded a criminal defendant" during trial. *United States v. Riley*, 920 F.3d 200, 206 (4th Cir. 2019). The district court's discretion to decide who may sit where is, accordingly, even greater in such proceedings.

The district court had ample authority to allow Officer Padilla to sit at the table with the attorney for the United States. Comer did not object to the seating arrangement. She has identified no prejudice from it. And she has identified no authority for removing this basic component of courtroom management from the discretion of the district court. To the contrary, the lone decision Comer cites involving a probation officer sitting at counsel table explicitly found "no error." *United States v. Turner*, 203 F.3d 1010, 1014 (7th Cir. 2000) ("We do not see in this case that the probation officer acted other than as an arm of the court. There is no separation of powers problem.").

The probation officer's decision to sit at the counsel table with the United States was entirely sensible. Although "a probation officer is not supposed to take an adversarial role in a sentencing or revocation hearing" by, for example, making "inflammatory and unprofessional statements" against the defendant, *United States v. White*, 868 F.3d 598, 601–02, 604 (7th Cir. 2017), it is firmly within the officer's role both to communicate with the United States and to take positions on issues before the court that a defendant may dispute. The probation officer is obligated to "immediately report any violation of the conditions of release to the court *and the Attorney General or his designee*." 18 U.S.C. § 3603(B). Her role includes filing petitions seeking revocation of release and executing arrest warrants. 3 Charles Alan Wright et al., *Federal Practice & Procedure* § 572 (4th ed.); *United States v. Ahlemeier*, 391 F.3d 915, 923–24 (8th Cir. 2004).

Officer Padilla had taken the appropriate steps of filing a petition for revocation of Comer's supervised release and reporting multiple violations of its conditions. J.A. 149–50. Comer disputed Officer Padilla's report, placing herself opposite Officer Padilla's position on

disputed issues before the court. J.A. 66. Officer Padilla's decision to sit at the table opposite Comer in the courtroom was consistent with her entirely appropriate position in the proceeding. She did not become "an arm of the executive branch" or a "surrogate prosecutor." *Cf. Br. of Appellant* 26–27.

Comer cites nothing in the record or elsewhere in support of her conclusory assertions that the "probation officer provided the government with information without sharing that information with the defense" and was, in some unspecified way, "withholding information." *Br. of Appellant* 28. The basis for this complaint appears to be that Officer Padilla's testimony during the revocation hearing included some information that was not included in "the violation petition." *Br. of Appellant* 27–28. But Officer Padilla was a fact witness at the hearing, and Comer identifies no authority that would confine her testimony — much of which was received without objection — to the violation petition. The United States, moreover, stated in court without dispute that it had provided discovery to Comer, including Officer Padilla's notes. J.A. 67.

Comer has not identified any information that Officer Padilla withheld from Comer, let alone improperly withheld. And she has not identified any way in which the district court abused its discretion.

If the Court should have acted differently on its own initiative, its omission to do so was not plain. Comer has identified no settled law of the Supreme Court or this Court," *Davis*, 855 F.3d at 595, compelling a district court to forbid a probation officer from "sitting at the table with the prosecutor" or "whispering," *Br. of Appellant* 17. Indeed, she has identified no authority for her proposition that the district court erred. *Cf. Turner*, 203 F.3d at 1014 (finding "no error.").

Even if the court had somehow committed an obvious error despite the lack of authority identifying it, Comer cannot show that Officer Padilla's presence at counsel table or discussions with the prosecutor affected her "substantial rights." *Davis*, 855 F.3d at 595. Comer has identified no way in which the evidence would have been different. And the district court — the decisionmaker in Comer's revocation proceeding — well understood Officer Padilla's role as a United States Probation Officer. No "reasonable probability" exists that the outcome

of Comer's revocation proceeding would have been different if the court had ordered Officer Padilla to sit elsewhere. *United States v. Marcus*, 560 U.S. 258, 262 (2010); *see White*, 868 F.3d at 600 (holding that a probation officer's "misguided advocacy" did not "affect[] the outcome of the proceeding").

Nor would the error Comer alleges fall within the category of those that "seriously affect[] the fairness, integrity, or public reputation of judicial proceedings." *Davis*, 855 F.3d at 595. The evidence establishing Comer's violations was uncontradicted; Comer admitted violations supporting revocation of her supervised release; and she received the revocation prison sentence that both parties requested. Reversal of the district court's decision because of the seating arrangements that were uncontested at her revocation hearing would do nothing to promote the fairness, integrity or public reputation of judicial proceedings. *Id.*

Finally, Comer's request on behalf of those who might appear in the "Western District of North Carolina" in "future cases," *Br. of Appellant* 28, is baseless. Comer has no standing to challenge the

procedures employed by the court in cases other than hers. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (holding that standing requires the party claiming it to have suffered an injury fairly traceable to the challenged action).

CONCLUSION

The district court imposed a reasonable sentence after revoking Comer's supervised release. The United States, therefore, respectfully requests that this Court affirm the judgment of the district court.

REQUEST FOR DECISION ON THE BRIEFS WITHOUT ORAL ARGUMENT

The United States does not believe that oral argument will assist the Court in any material way and requests that this appeal be decided on the briefs.

Respectfully submitted, this 16th day of January, 2020.

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CERTIFICATE OF COMPLIANCE

1. This brief has been prepared using Microsoft Word 2010, Century Schoolbook, 14 point typeface.

2. EXCLUSIVE of the corporate disclosure statement; table of contents; table of citations; statement with respect to oral argument; any addendum containing statutes, rules, or regulations, and the certificate of service, the brief contains 7681 words.

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s/ Anthony J. Enright
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CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the above upon Defendant herein by serving his attorney of record, Megan Hoffman, through electronic case filing.

This 16th day of January, 2020.

s/ Anthony J. Enright
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USAO Charlotte, NC