FILED
United States Court of Appeals
Tenth Circuit

April 21, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee.

v.

ARTHUR RAY KRATZ,

Defendant - Appellant.

No. 22-5089
(D.C. No. 4:20-CR-00168-JFH-1)
(N.D. Okla.)

ORDER AND JUDGMENT*

Before **BACHARACH**, **KELLY**, and **MORITZ**, Circuit Judges.

In this appeal, we address a district court's revocation of supervised release and imposition of a new sentence. The appeal turns mainly on two issues[1]:

1. **The decision to revoke supervised release.** A defendant's violation of conditions can justify revocation of supervised

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* This order and judgment does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But the order and judgment may be cited for its persuasive value if otherwise appropriate. Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

[1] Mr. Kratz moved to expedite the decision and waived oral argument. *See* Fed. R. App. P. 34(f). We have expedited consideration, as requested, and concluded that oral argument would not help us decide the appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1. So we've decided the appeal based on the briefs and the appellate record.

release. Here the conditions required the defendant to respond truthfully to the probation officer's questions. The defendant reported false information to the probation office, but he had allegedly delegated the report to his wife. Did the district court clearly err by finding that the defendant had violated the condition? We answer *no*.

2. **The selection of a new sentence after revocation of supervised release.** The district court found violations of the conditions, revoked supervised release, and imposed a sentence for the revocation. In explaining the revocation and selection of a sentence, the court referred to the statutory objectives of rehabilitation and retribution.

   For example, the court observed that a prison term would provide opportunities for rehabilitation. But rehabilitation cannot serve as the basis to impose or lengthen a prison sentence. Did the district court commit an obvious error by mentioning the defendant's opportunity for rehabilitation? We answer *no*.

   The court mentioned not only rehabilitation but also retribution. Under federal law, a court can't base revocation or a resulting sentence on retribution. Did the court's mention of retribution affect the defendant's substantial rights? We answer *no*.

I. The district court revokes supervised release and imposes a sentence of time served.

Mr. Arthur Ray Kratz pleaded guilty to an assault in Indian country with an intent to cause serious bodily injury. The district court accepted the plea and imposed a prison sentence of time served and three years of supervised release. (At that point, the defendant had served roughly eighteen months in prison.)

The government sought revocation on grounds that Mr. Kratz had failed to take drug tests, failed to disclose that he had lost his job, and

reported false information to the probation office. Mr. Kratz admitted that he had not taken the pertinent drug tests and that he had given false information about his work. But he denied knowledge of the false information.

The court rejected Mr. Kratz's argument, revoked supervised release, and sentenced Mr. Kratz to a prison term of one year and supervised release for two years.

II. The district court didn't clearly err by finding that Mr. Kratz hadn't truthfully answered the probation officer's questions.

A court may revoke supervised release when the defendant violates a condition. 18 U.S.C. § 3583(e)(3). The court found multiple violations, including a failure to truthfully respond to the probation officer's questions.

In reviewing that finding, we consider whether the district court based the revocation "on a clearly erroneous finding of fact." *United States v. Muñoz*, 812 F.3d 809, 817 (10th Cir. 2016). This standard is "significantly deferential." *Concrete Pipe & Prod. of California, Inc. v. Constr. Laborers Pension Tr. for S. California*, 508 U.S. 602, 623 (1993). Under this standard, we reverse only if

- the finding lacks any evidentiary support or
- we have a definite, firm conviction that the district court erred.

United States v. Hernandez, 847 F.3d 1257, 1263 (10th Cir. 2017). When the district court's finding is plausible under the record as a whole, we can't reverse even if we would have reached a different finding. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573–74 (1985).

We've reviewed all of the evidence and conclude that the district court didn't clearly err.

A. Mr. Kratz's reports contain false information.

Mr. Kratz went on medical leave and lost his job the following month. Even though Mr. Kratz was not working, he submitted two monthly reports stating that he

- had worked 40 hours each week and
- had not missed any work.

And one of these reports listed his continued employment at the job that he had already lost.

Defense counsel admitted that these reports were inaccurate, but characterized the errors as inadvertent. Mr. Kratz knew, of course, that he had not been working. But defense counsel said that (1) Mr. Kratz had allowed his wife to submit the reports and (2) she had misread the questions.

On appeal, Mr. Kratz insists that the government needed to prove that he had knowingly provided false information to the probation office. For the sake of argument, we can assume that the government needed to prove

knowledge. *Cf. United States v. Llantada*, 815 F.3d 679, 685 (10th Cir. 2016) (interpreting a prohibition against association with convicted felons to require knowledge of a person's status as a felon); *United States v. Muñoz*, 812 F.3d 809, 822–23 (10th Cir. 2016) (interpreting a prohibition against being at a place where drugs are sold or used to require knowledge of the sale or use).

B. The district court did not clearly err.

Though the clear-error standard applies, we must consider the burden in district court. There the government bore the burden to show the violation by a preponderance of the evidence. 18 U.S.C. § 3583(e)(3).

In deciding whether the government had satisfied its burden, the district court needed to consider the parties' versions of events. The government's version was straightforward: The defendant reported that he hadn't missed any days even though he had not been working. Mr. Kratz's version was that he had asked his wife to complete the reports and she misread the questions.

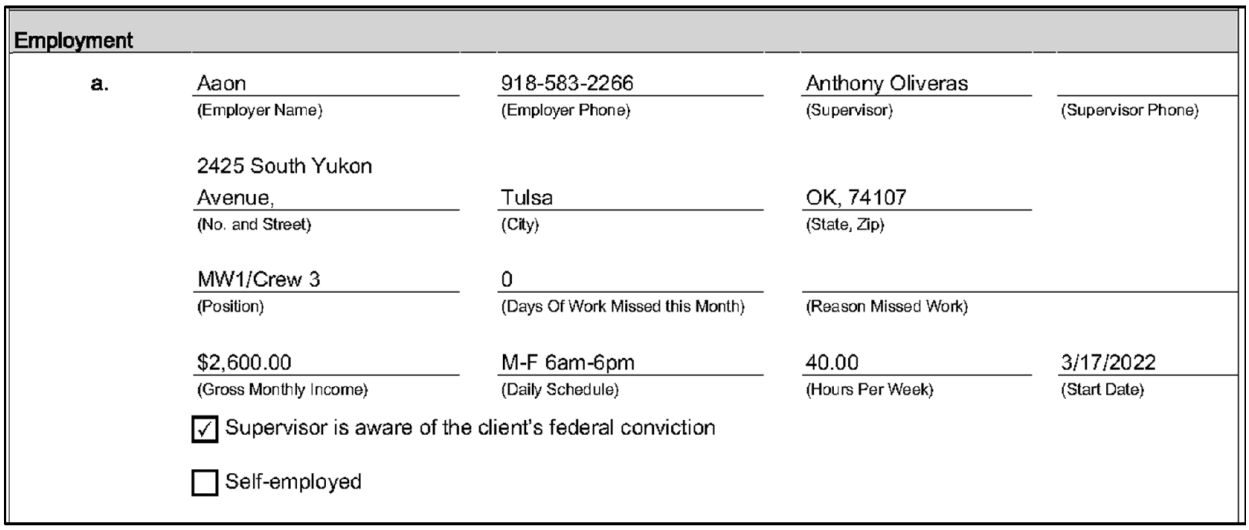
In urging adoption of his own version, Mr. Kratz argues that

- the government presented no evidence that Mr. Kratz had lied to the probation office and
- the district court couldn't reject defense counsel's characterization because it hadn't constituted evidence.

These arguments are misguided because the court could reasonably infer knowledge of the false reports from

- the reports themselves, which stated that Mr. Kratz had not missed any work and was still employed, and
- a stipulation that the reports contained false information because Mr. Kratz had not been working.

The reports were false because they specified the work schedule (40 hours per week) and said that Mr. Kratz had missed "0" "Days of Work" in the preceding month. R. vol. 1, at 108, 110.



Employment

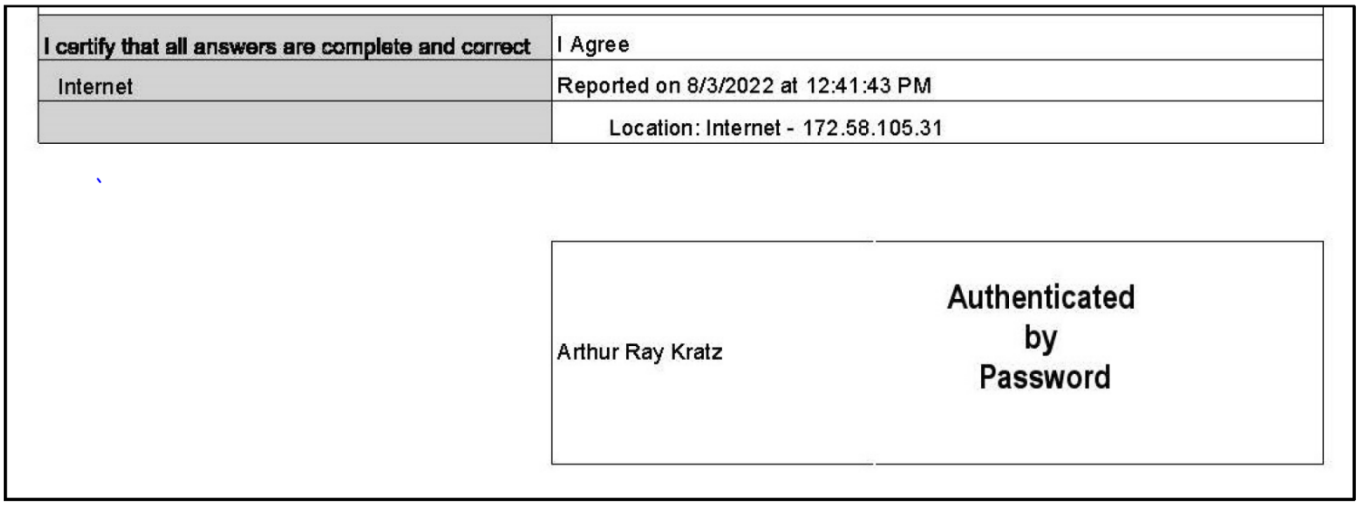
a.

Aaon (Employer Name)	918-583-2266 (Employer Phone)	Anthony Oliveras (Supervisor)	(Supervisor Phone)
2425 South Yukon Avenue, (No. and Street)	Tulsa (City)	OK, 74107 (State, Zip)	
MW1/Crew 3 (Position)	0 (Days Of Work Missed this Month)	(Reason Missed Work)	
$2,600.00 (Gross Monthly Income)	M-F 6am-6pm (Daily Schedule)	40.00 (Hours Per Week)	3/17/2022 (Start Date)

☑ Supervisor is aware of the client's federal conviction

☐ Self-employed

Id. And the reports contain Mr. Kratz's electronic signatures, certifying that the answers are "complete and correct." *Id.* at 109, 111.



I certify that all answers are complete and correct	I Agree
Internet	Reported on 8/3/2022 at 12:41:43 PM
	Location: Internet - 172.58.105.31

Arthur Ray Kratz	Authenticated by Password

Id.

Despite the admitted falsity of the reports, Mr. Kratz didn't present any evidence to support his attorney's claim of inadvertence. For that claim, the attorney said that Mr. Kratz's wife had misread the questions, inserted the false information, and submitted the reports. But Mr. Kratz lacked any support for this account, and he argues that his "[c]ounsel's explanation for his client's not-guilty plea was not evidence, much less evidence the district court could simply cho[o]se to disbelieve." Appellant's Reply Br. at 3. Given this failure to present any evidence, the district court could reasonably infer that Mr. Kratz had personally reported the false information or had known that his wife would make a false report.

Although no direct evidence existed on Mr. Kratz's state of mind, the district court didn't commit clear error by inferring knowledge. After all, "judges can and often must reach conclusions about a defendant's *mens rea* based on inferences from known facts about his conduct." *United States v.*

Manatau, 647 F.3d 1048, 1055 (10th Cir. 2011). Here, for example, the district court had no definitive way to determine whose account to believe. But the court could assess Mr. Kratz's credibility based on two circumstances. *See United States v. Rahseparian*, 231 F.3d 1257, 1262 (10th Cir. 2000) ("[W]e have repeatedly held that circumstantial evidence may support a jury's reasonable inference of guilty knowledge by the defendant.").

The first circumstance involved the reports themselves, which could have alerted Mr. Kratz to the need to personally certify the truth of the information. And the court could reasonably infer that Mr. Kratz had known that (1) he had not been working and (2) the reports contained questions about his work status.

The reports clearly require Mr. Kratz to report where he was employed, who his supervisor was, how much his income was, what his schedule was, how many hours he worked each week, and whether he missed any days of work. Despite these clear requirements, Mr. Kratz presented no evidence to support his attorney's version of events.

The second circumstance involved the presence of Mr. Kratz's electronic signature on his reports. Those signatures permit a reasonable inference that Mr. Kratz knew what the reports had said. *See Robinson v. United States*, 345 F.2d 1007, 1011 (10th Cir. 1965) (finding no error in a

jury instruction that allowed the jury to infer the defendant's knowledge of information in a document that he had signed).

Based on these two circumstances, the district court could reasonably infer that Mr. Kratz had known that the reports were false, either because he had inserted the false information or had known what his wife reported.[2] *See, e.g.*, *United States v. Powers*, 996 F.2d 312 (10th Cir. 1993) (unpublished) (concluding that sufficient evidence existed for the court to find a violation when reports to the probation office had contained false information); *accord United States v. Lamberti*, 847 F.2d 1531, 1536 (11th Cir. 1988) (concluding that "ample evidence [existed] to sustain [defendant's] convictions on the false statement charges" when the defendant's monthly reports to parole officer had contained false information). We thus conclude that the district court didn't commit a clear error.

III. The district court didn't plainly err when imposing Mr. Kratz's revocation sentence.

On appeal, Mr. Kratz also challenges his revocation sentence, arguing that the district court improperly considered rehabilitation and

[2] Granted, the district court didn't specify whether it believed that Mr. Kratz had prepared the reports himself or knew what his wife had reported. The court instead said that the reason for the false information hadn't mattered very much. But either reason would have allowed a finding of knowledge, so the district court's statement doesn't suggest clear error.

retribution. For these challenges, Mr. Kratz needs to show that the errors were plain and affected his substantial rights. But he hasn't made that showing.

A. The plain-error standard applies.

Mr. Kratz admits that he didn't present these challenges in district court, so the plain-error standard applies. *United States v. Thornton*, 846 F.3d 1110, 1112–13 (10th Cir. 2017). Under this standard, Mr. Kratz must show that "(1) the district court erred, (2) the error was plain, (3) the error prejudiced his substantial rights, and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 1114. All of the elements are required; so if one element is missing, we need not consider the others. *See United States v. Gantt*, 679 F.3d 1240, 1246 (10th Cir. 2012).

B. The court's reference to rehabilitation wasn't plainly erroneous.

Mr. Kratz argues that the court improperly considered rehabilitation. But we reject this argument because any error wouldn't have been plain.

An error can be considered "plain" only when it's "clear under current law." *United States v. Cordery*, 656 F.3d 1103, 1106 (10th Cir. 2011) (quoting *United States v. Olano*, 507 U.S. 725, 734 (1993)). Our precedents prohibit district courts from "imposing or lengthening a sentence for the purpose of promoting rehabilitation." *United States v.*

Tidzump, 841 F.3d 844, 845 (10th Cir. 2016); *see Tapia v. United States*, 564 U.S. 319, 335 (2011) ("[A] court may not impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation."). But a court doesn't necessarily err by mentioning rehabilitation. *See United States v. Del Valle-Rodríguez*, 761 F.3d 171, 175 (1st Cir. 2014) ("[T]he mere mention of rehabilitative needs, without any indication that those needs influenced the length of the sentence imposed, is not *Tapia* error."). For example, a court doesn't commit plain error by making "stray remarks" about the value of rehabilitative programs in prison. *United States v. Naramor*, 726 F.3d 1160, 1170–71 (10th Cir. 2013); *see also Tapia*, 564 U.S. at 334 ("A court commits no error by discussing the opportunities for rehabilitation within prison or the benefits of specific treatment or training programs.").

To determine whether the district court's statements constituted stray remarks, we consider the context. *See United States v. Burrows*, 905 F.3d 1061, 1067 (7th Cir. 2018) (reviewing the context of the sentencing judge's statements to determine that the court had not lengthened the sentence to promote rehabilitation); *United States v. Occhiuto*, 784 F.3d 862, 870 (1st Cir. 2015) (considering the context to determine that the judge hadn't intended the statements to justify the sentence); *United States v. Gillard*, 671 F.3d 255, 260 (2d Cir. 2012) (assessing the context of the sentencing judge's statements to determine that the court had discussed

rehabilitation only in the context of making recommendations to the Bureau of Prisons).

The context includes what the district court had said before imposing the sentence. At that stage, the court explained that Mr. Kratz had failed to take advantage of earlier opportunities. For example, the court pointed out that it had earlier given Mr. Kratz time served; and in a hearing on a prior petition for revocation, the court had ordered drug treatment rather than revoke supervised release. Now that the court was revoking supervised release, the court explained that it needed to take a new approach because leniency hadn't worked. R. vol. 3, at 25.

The court then sentenced Mr. Kratz to a prison term of one year and explained the selection of this term:

> I've considered the nature and circumstances of the violation of the conduct, the history and characteristics of the defendant. Mr. Kratz was convicted in 2021 for assault resulting in serious bodily injury in Indian country.
>
> The defendant has shown disregard for his conditions of release . . . .
>
> Based upon these factors a sentence within the Advisory Guideline Range will serve as an adequate deterrent to this defendant as well as others, promote respect for the law and provide just punishment for the offense.

Id. at 28. This explanation contained no mention of rehabilitation or a need for treatment.

After explaining the reasons for the sentence, the court later commented that it hoped Mr. Kratz would get off drugs and turn his life around:

- "I'm trying to do this to turn your life around."
- "I want you to get well."
- "I don't know that it matters but I'm not trying to harm you, sir, I'm trying to turn your life around. And I know you're trying to do it as well but you cannot do it on your own."
- "I don't know if you saw the gentleman here earlier that was in his sixties and is still struggling with the drugs. I just don't want that to be you."

Id. at 30–31. Mr. Kratz characterizes these comments as an impermissible effort to promote rehabilitation through a substantial prison term.

We may assume, without deciding, that the court erred. *See United States v. Gantt*, 679 F.3d 1240, 1246 (10th Cir. 2012) ("Because all four requirements [of plain error] must be met, the failure of any one will foreclose relief and the others need not be addressed."). But even if the court had erred, the error wouldn't have been plain.

The court explained its selection of a one-year prison term without saying anything about rehabilitation. After imposing the sentence, the court expressed hope that Mr. Kratz would jettison his drug habit and turn his life around. The court's hopeful expressions didn't plainly link rehabilitation to the selection of a one-year prison term.

Mr. Kratz relies primarily on *United States v. Thornton*, 846 F.3d 1110 (10th Cir. 2017). In *Thornton*, the district court denied a downward variance motion based on the defendant's need for treatment:

> The [district] court began by saying the "overriding reason" for denying the variance motion was that it was not in Thornton's "best interest" because he "*needs all kinds of services that he can get and will get in prison*[.]" Then, after discussing community safety and Thornton's criminal history, the court concluded its explanation by stating "I am firmly convinced that [Thornton] needs *enough time in prison to get treatment and vocational benefits*."

Thornton, 846 F.3d at 1114–15 (citations omitted) (emphasis added). We noted that a sentence is erroneous if it "is based even partially on rehabilitation," *id.* at 1116, and there the district court had denied a variance in order to facilitate rehabilitation. Here, though, the hopeful comments about rehabilitation came only after the district court had explained the sentence. *See id.* at 1119 n.5 ("A district court does not violate *Tapia* merely by discussing the benefits of in-prison treatment when such discussion did not actually motivate a longer sentence, but was merely incidental thereto.").

Mr. Kratz also points to three other precedents:

1. *United States v. Mendiola*, 696 F.3d 1033 (10th Cir. 2012),
2. *United States v. Tidzump*, 841 F.3d 844 (10th Cir. 2016), and
3. *United States v. Cordery*, 656 F.3d 1103 (10th Cir. 2011).

In each case, however, the district court had expressly chosen the prison term to qualify the defendant for programs to treat addiction. In *Mendiola*, for example, the district court increased the prison term "for the express purpose" of rendering the defendant eligible for a treatment program offered to addicts. 696 F.3d at 1042. In *Tidzump*, the district court refused to vary downward because the variance would have prevented the defendant from participating in a program for drug abuse. 841 F.3d at 845–46. And in *Cordery*, the district court explained that the defendant needed at least 56 more months in prison in order to complete a program for drug abuse and obtain mental-health counseling. 656 F.3d at 1105. Here, the district court didn't say anything to suggest that it had chosen the one-year term to qualify Mr. Kratz for a treatment program.

Mr. Kratz also relies on three out-of-circuit opinions:

1. *United States v. Shaw*, 39 F.4th 450, 457 (7th Cir. 2022),
2. *United States v. Vandergrift*, 754 F.3d 1303 (11th Cir. 2014), and
3. *United States v. Culbertson*, 712 F.3d 235 (5th Cir. 2013).

In each case, though, the district court had expressly linked the prison term to the defendant's rehabilitation. *Shaw*, 39 F.4th at 457 ("That period of time will give you a chance, hopefully, to enjoy some—to look at the programs you're gonna be offered in prison in a totally different light."); *Vandergrift*, 754 F.3d at 1306 (district court's statement that it considered

the availability in prison for vocational training and treatment for bipolar disorder because they "could . . . help save the defendant's life"); *Culbertson*, 712 F.3d at 241 (district court's statement that it was trying to give the defendant time to become sober and complete rehabilitation). Here the district court didn't make any similar statements about the need for prison time to facilitate participation in treatment or vocational programs.

Though Mr. Kratz has cited many cases, none provides an obvious fit. The district court expressed hope that Mr. Kratz would be able to get off drugs and turn his life around. But the court didn't say or suggest that it was incarcerating Mr. Kratz to allow him to participate in prison programs or obtain treatment. So if the district court had erred, the error wouldn't have been plain.

C. The district court's error in considering retribution didn't affect Mr. Kratz's substantial rights.

Mr. Kratz also argues that the court erred by considering retribution when imposing his revocation sentence. Although the court did err by considering retribution, the error did not affect Mr. Kratz's substantial rights.

1. In considering retribution, the district court erred.

When imposing the initial sentence for an offense, the district court must consider certain factors. 28 U.S.C. § 3553(a). Among these factors is "the need for the sentence imposed . . . to reflect the seriousness of the

offense, to promote respect for the law, and to provide just punishment for the offense." 28 U.S.C. § 3553(a)(2)(A). This factor involves retribution. *United States v. Booker*, No. 22-7000, slip op. at 6, 2023 WL 2657004 (10th Cir. Mar. 28, 2023) (to be published).

But when the court decides whether to revoke supervised release, federal law requires consideration of a different set of factors. 28 U.S.C. § 3583(e)(3). Those factors do not include retribution.

When sentencing Mr. Kratz, the district court explained that it had issued the sentence in part to "promote respect for the law and provide just punishment for the offense." R. vol. 3, at 28. The court didn't need to consider this factor. But did the court err in considering it?

We recently answered *yes* in *United States v. Booker*, where we reasoned that "the omission in § 3583(e) of the retribution factor . . . preclude[s] a sentencing court from relying on the need for retribution when modifying or revoking a term of supervised release and imposing a new prison sentence for violations of supervised release." No. 22-7000, slip op. at 7, 2023 WL 2657004 (10th Cir. Mar. 28, 2023) (to be published). Because § 3583(e) specifies what the court must consider, we concluded that the district court can't consider "any other § 3553(a) factors when modifying or revoking a term of supervised release." *Id.* at 8 (quoting *United States v. Smart*, 518 F.3d 800, 803–04 (10th Cir. 2008)).

So when revoking a term of supervised release, a court cannot consider the need for a revocation sentence to

- "reflect the seriousness of the offense,"
- "promote respect for the law," or
- "provide just punishment for the offense."

Id. at 10–11; *see* 18 U.S.C. § 3553(a)(2)(A).

In *Booker*, the district court concluded that "a sentence outside the advisory guideline range [was] necessary to . . . promote respect for the law, and provide just punishment for the offense." No. 22-7000, slip op. at 11 (internal quotation marks omitted). We thus held that the district court had erred. *Id.*

The same error occurred here. The district court explained that "a sentence within the Advisory Guideline Range will serve as an adequate deterrent to this defendant as well as others, *promote respect for the law* and *provide just punishment for the offense*." R. vol. 3, at 28 (emphasis added). So the district court erred by considering retribution as a reason to revoke Mr. Kratz's supervised release.

2. That error did not affect Mr. Kratz's substantial rights.

Though the court erred, the error didn't affect Mr. Kratz's substantial rights.[3] Substantial rights are affected "when the defendant demonstrates 'that there is a reasonable probability that, but for the error claimed, the result of the proceeding would have been different.'" *United States v. Rosales-Miranda*, 755 F.3d 1253, 1258 (10th Cir. 2014) (quoting *United States v. Mendoza*, 698 F.3d 1303, 1310 (10th Cir. 2012)). A reasonable probability exists if there "is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *United States v. Hasan*, 526 F.3d 653, 665 (10th Cir. 2008)).

Here we have little reason to expect a milder sentence if the district court hadn't considered the goal of retribution, for the district court mentioned retribution only once. We addressed similar circumstances in *United States v. Booker*, No. 22-7000, slip op. at 14, 2023 WL 2657004 (10th Cir. Mar. 28, 2023) (to be published). There we explained that "a formulaic recitation of [a] statutorily enumerated sentencing factor[] supplies little indication that a court lengthened a sentence for [retributive]

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[3] Because every prong of plain error must be met, we need not consider whether the error was plain. *See United States v. Gantt*, 679 F.3d 1240, 1246 (10th Cir. 2012); *see also United States v. Booker*, No. 22-7000, slip op. at 2, 2023 WL 2657004 (10th Cir. Mar. 28, 2023) (to be published) (assuming that this error had been plain); *see generally* Part III(A) above.

purposes." *Booker*, No. 22-7000, slip op. at 14 (quoting *United States v. Collins*, 461 F. App'x 807, 810 (10th Cir. 2012) (unpublished)) (alterations in original). Given that formulaic recitation, we predicted that if the defendant had objected, "the district court would have clarified its remarks and excised the erroneous quotation before imposing the same sentence." *Id.* at 17. We have no reason here to predict anything more.

Mr. Kratz suggests that the district court relied on retribution. For this suggestion, he points out that the district court acknowledged consideration of "all the factors set forth in Title 18 U.S.C. Sections 3553(a) to reach what the Court believe[d] [was] an appropriate and reasonable sentence in this case." R. vol. 3, at 28.

Mr. Kratz reads too much into the court's statement. Section 3553(a) contains the factors that a court can consider when deciding on the new sentence following a revocation. *See* 18 U.S.C. § 3583(e). For example, courts can consider "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1); 18 U.S.C. § 3583(e) (incorporating § 3553(a)(1)). And the court did so here. *See* R. vol. 3, at 28 (statement of the district court that it "considered the nature and circumstances of the violation of the conduct, the history and characteristics of the defendant"). The court's only reference to retribution occurred at the end of its discussion.

The reference to retribution was similar in *Booker*, where the district court had made two comments about the goal of retribution:

1. "[T]he Court has considered the sentencing guidelines along with all the factors set forth in Title 18, U.S.C., Sections 3553(a), which are applicable in the revocation context pursuant to Title 18, U.S.C. 3583(e), and I've done this to reach an appropriate and reasonable sentence in this case."

2. "Based upon these factors, a sentence outside the advisory guideline range is necessary to serve as an adequate deterrent to this defendant as well as others, promote respect for the law, and provide just punishment for the offense, and provide protection for the public."

United States v. Booker, No. 22-7000, slip op. at 4–5, 2023 WL 2657004 (10th Cir. Mar. 28, 2023) (to be published) (emphasis deleted). We concluded that (1) the first statement wasn't erroneous[4] and (2) the second statement didn't affect the defendant's substantial rights. *Id.* at 14, 16.

Mr. Kratz adds that the court chastised him for disregarding his conditions of supervised release by stating he was "to be given a timeout so to speak." R. vol. 3, at 26. But this statement didn't concern retribution. The court had just finished discussing the prior petitions for revocation and

[4] In *Booker*, we pointed out that the district court had referred to § 3583(e), making it "especially true" that the court did not lengthen the defendant's sentence based on retribution. *United States v. Booker*, No. 22-7000, slip op. at 14, 2023 WL 2657004 (10th Cir. Mar. 28, 2023) (to be published). The district court here didn't refer to § 3583(e). But the district court's reference to the sentencing factors in § 3553(a) ("considered all the factors set forth in Title 18 U.S.C. Section [] 3553(a)") was formulaic like the language in *Booker*.

the need for a different approach. *Id.* at 25. At that point, the court could properly consider the ineffectiveness of prior conditions. *See United States v. Booker*, No. 22-7000, slip op. at 12, 2023 WL 2657004 (10th Cir. Mar. 28, 2023) (to be published) (stating that the district court can assess "the likelihood that [the defendant] would successfully abide by any future supervised release conditions").

Lastly, Mr. Kratz urges an impact from the court's reference to an impermissible consideration. For this argument, he points to *United States v. Cordery*, where we found that "[t]here [was] no way for us to know exactly what sentence the court would have chosen in the absence of the . . . impermissible factor." 656 F.3d 1103, 1108 (10th Cir. 2011).

We reject this argument. In *Cordery*, the court sentenced the defendant to 56 months so that the defendant could qualify for a prison treatment program. *Id.* at 1105; *see also* p. 15, above. The district court in *Cordery* had emphasized reliance on an impermissible factor; here the district court made only a single glancing reference to retribution. *United States v. Booker*, No. 22-7000, slip op. at 16, 2023 WL 2657004 (10th Cir. Mar. 28, 2023) (to be published) (distinguishing *Cordery*).

Because the court made only a single glancing reference to retribution, the error didn't affect a substantial right.

D. There is no cumulative prejudice.

Mr. Kratz also claims cumulative prejudice. When we consider cumulative error, we "aggregate[] all the errors that individually have been found to be harmless, and therefore not reversible, and [] analyze[] whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless." *United States v. Lopez-Medina*, 596 F.3d 716, 740–41 (10th Cir. 2010) (quoting *Hooper v. Mullin*, 314 F.3d 1162, 1178 (10th Cir. 2002)). But we can aggregate unpreserved errors only if the errors are plain. *United States v. Cristerna-Gonzalez*, 962 F.3d 1253, 1268 (10th Cir. 2020) ("[O]n plain-error review all four prongs must be satisfied; no matter how strong the showing of prejudice to satisfy the third prong, relief is not available unless the other three prongs are also satisfied."). So without a plain error, we cannot aggregate the prejudice.

We've concluded that the district court did not plainly err by mentioning rehabilitation, so there wasn't a second error to aggregate with the district court's reference to retribution. Given the absence of a second error to aggregate, we reject the claim of cumulative prejudice.

IV. Conclusion

We conclude that the district court didn't

- clearly err by finding that Mr. Kratz had failed to truthfully respond to the probation officer's questions or

- commit plain error by referring to rehabilitation or retribution.

So we affirm the revocation of supervised release and imposition of a one-year prison term.

Entered for the Court

Robert E. Bacharach
Circuit Judge