NONPRECEDENTIAL DISPOSITION
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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued April 25, 2023
Decided July 21, 2023

Before

KENNETH F. RIPPLE, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

No. 22-2482

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,	Appeal from the United States District Court for the Western District of Wisconsin.
v.	No. 19-cr-99-jdp-1
MALCOLM WHITESIDE, *Defendant-Appellant*.	James D. Peterson, *Chief Judge*.

ORDER

Malcolm Whiteside was sentenced to prison after the district court revoked his supervised release for violating a condition that barred him from possessing a gun. The court based its sentence in part on evidence described in the petition for revocation (including a video recording and identification of Whiteside in it) showing that he used a weapon in violation of state law. On appeal, Whiteside argues that, because the government said that it did not intend to prove with live testimony that Whiteside violated state law, the court violated his due process rights by considering this evidence. This argument, which Whiteside waived on appeal, fails: The court could

consider reliable evidence in the petition showing that Whiteside committed a state crime and possessed a gun in violation of a condition of release, and the petition provided Whiteside with sufficient notice that the government was asking the court to consider this state crime. We therefore affirm the judgment.

Whiteside pleaded guilty in 2019 to unlawful possession of a firearm. 18 U.S.C. § 922(g)(1). The district court sentenced him to 21 months in prison, followed by three years of supervised release. Whiteside began serving his term of supervision in 2021. Under the conditions of his supervised release, he was prohibited from committing another federal, state, or local crime; possessing a controlled substance; and possessing a firearm. The conditions also required him to maintain lawful employment, notify his probation officer of any change in job, and participate in substance-abuse treatment.

Over the term of Whiteside's supervised release, his probation officer reported him three times to the court for various violations. First, in late 2021, the officer petitioned the court to require Whiteside to enter a residential reentry program because he had admitted to unlawful drug use and failed to appear for drug testing. The court granted the petition. Second, a few months later, the probation officer reported new violations. This petition explained that the residential reentry center had discharged Whiteside for violating its rules, Whiteside failed to submit monthly reports to the probation officer, he quit his job without permission, and he tested positive for illegal drug use. At the revocation hearing, the court said that Whiteside deserved revocation and a 12-to-18-month prison sentence. But it offered a "bit of lenience to see if [Whiteside could] correct himself." It continued the review of his supervised release for 90 days, warning that he would receive a sentence of "at least a year" if he committed any more violations and explaining that it was "looking to see … zero violations" in that period.

Two months later, the probation officer filed the third petition, the subject of this appeal, reporting that Whiteside had again violated his supervision terms. The petition, which the officer signed under penalty of perjury, stated that Whiteside had been charged in a Wisconsin state criminal complaint with two felony charges. These were recklessly endangering safety through use of a dangerous weapon and illegal possession of a firearm as a convicted felon. To support the petition's allegations about the state charges, the officer described a surveillance video that captured two people firing gunshots into the air, and the officer identified Whiteside in at least one of the still images from the video. The petition also asserted that, after arresting Whiteside, local police searched his home and found "a firearm, along with suspected marijuana and

ecstasy and some cash." Finally, the petition reported other violations of Whiteside's conditions of release: He had been fired from his job and had lied about his employment status on his monthly report to the probation officer.

The district court held a combined revocation and sentencing hearing. Near the start of the hearing, the government explained that it would not use live witnesses to support the pending state charges but was instead resting on the evidence "noted" in the petition for that charge:

> GOVERNMENT: Your Honor, there's also an allegation noted in [the petition] that the defendant committed a new crime. He's been charged in Dane County Circuit Case No. 22-CF-1151 with second-degree reckless endangering safety-use of a dangerous weapon and possession of a firearm as a convicted felon. The government is not going to be putting on any witnesses regarding that case or that allegation, but it is noted in the [petition]. …
>
> COURT: …[S]o if I understand correctly, you're really not pressing the violation based on the new criminal conduct.
>
> GOVERNMENT: No, Your Honor. It's a continued pattern of refusal to comply with the conditions.
>
> COURT: All right.

The court then asked Whiteside's counsel if Whiteside stipulated to the violations of the supervision conditions, and counsel replied that Whiteside did, except for the alleged state charges. Counsel acknowledged that, although the court's consideration of those charges could yield a higher sentence upon revocation, Whiteside would save his "powder" for the state trial:

> I guess there are two tracks you could take here. I think if you were including the new criminal conduct, I could see 18 months making sense. Although Mr. Whiteside doesn't have a lot to say about that, and we're saving our powder, I guess, for the actual state case, I guess I could understand the 18 months.

At the hearing's end, the court revoked Whiteside's supervision. It explained that Whiteside's conduct "warrant[ed] revocation" because the petition included "very disturbing allegations about the new criminal activity[,]" alongside "the history of additional violations that continued[.]" The court reasoned that it could and would consider the petition's evidence supporting the state's firearm charges:

> [A]lthough the government isn't pressing it, I think it would really be dishonest for me to say that I'm not going to consider the new criminal conduct. Now, I'm always cautious about this, and I completely understand the defense perspective that you don't want to concede those charges, you don't want to say anything that would jeopardize another criminal prosecution. All very understandable. But, of course, I don't have to decide anything beyond a reasonable doubt that would establish a criminal conviction, and I can rely on hearsay. So I don't really need the government's witnesses on the point, and I have the probation … report. You know, Docket No. 34 has [the probation officer's] representation that he looked at the video and that he saw Mr. Whiteside there, and so I can find to a preponderance of the evidence that there was new criminal conduct committed by Mr. Whiteside.

The court concluded that the evidence in the petition showed "not only to a preponderance but really quite compelling[ly]" that Whiteside had possessed a firearm and discharged it, which violated his supervision conditions. In revoking Whiteside's supervised release, it sentenced him under the Sentencing Guidelines to 18 months in prison, as his counsel had anticipated, followed by an additional 18 months of supervised release. Before the court finished, it asked the parties if they had anything further they wanted the court to address, and Whiteside's counsel only requested prerelease placement in a residential reentry center and clarified his custody credits. He raised no further issues. Whiteside now appeals.

On appeal, Whiteside contends that the court's reliance on the evidence about state charges violated his right to due process in the Fifth Amendment. First, Whiteside argues, he lacked notice because the government's decision not to use live witnesses suggested that the court would not consider the state charges at all. Next, Whiteside adds, he did not receive a meaningful opportunity to be heard because he opted against contesting the state charges based on the government's statements. Finally, Whiteside asserts, the court denied him the chance to confront adverse witnesses when it relied on

the petition, which he considers unpersuasive hearsay evidence that he had committed a new crime.

The government responds that Whiteside waived his right to contest the court's consideration of the petition's evidence of the state charges when he decided as a matter of strategy to reserve his opposition to the charges for state trial. In the alternative, the government continues, the court did not err by considering the evidence supporting those allegations. In the government's view, Whiteside was on notice of the allegations and the supporting evidence because they were in the revocation petition, and the court could rely upon the probation officer's statements in the petition because they were sufficiently reliable.

We begin our analysis with waiver, which we conclude applies here. Waiver precludes appellate review, and it applies when a criminal defendant intentionally decides not to present an argument as a matter of strategy. *United States v. Falls*, 960 F.3d 442, 447 (7th Cir. 2020). We construe waiver principles liberally in favor of criminal defendants, *United States v. Canfield*, 2 F.4th 622, 626–27 (7th Cir. 2021), but even so, the record shows that Whiteside knowingly and intelligently decided not to contest in the district court the petition's evidence supporting its allegations about the state charges. At the revocation hearing, the government highlighted that the petition alleged state criminal charges, and it notified Whiteside that, although it would not support those charges with live witnesses, it would rely on the petition itself. After the court observed that the government was not "pressing" its proof of those charges with live testimony, Whiteside's counsel announced a strategic decision: Whiteside would be "saving [his] powder" for his forthcoming trial in state court by reserving substantive arguments about the state charges, in order to avoid revealing his defense strategy preemptively. That reveals a "calculated choice to stay silent" about the allegations, the hallmark of waiver. *See United States v. Butler*, 777 F.3d 382, 387 (7th Cir. 2015). The court even noted this strategic choice, acknowledging that Whiteside "[didn't] want to say anything that would jeopardize another criminal prosecution." Nor did Whiteside say anything about the court's consideration of the state charges at the hearing's conclusion, even after the court invited him to do so.

Although Whiteside now claims that the government *withdrew* the state charges from its sentencing arguments at the revocation hearing and thus deprived him of notice that the court might consider them, we disagree. The district court could rely on the factual findings in the petition, even if the government did not put on evidence to

support those findings. *See United States v. Armour*, 804 F.3d 859, 864–65 (7th Cir. 2015).[1] The government explained at the hearing that it viewed the state charges about gun possession as part of Whiteside's "continued pattern of refusal to comply with the conditions" of supervision, which required that he obey state laws and not possess guns. In doing so, the government invited the court to consider the petition's evidence about all the conditions of supervision that Whiteside had violated, including the state's allegations of criminal conduct. And even if the dissent is correct that we should interpret the government's mention of the pattern of noncompliance to exclude the state charges, the government still did not disavow those charges as a basis for revocation.[2] Despite the government's choice not to press the state charges, Whiteside's counsel understood that they remained in play. Indeed, counsel acknowledged that the court could take "two tracks" in sentencing, and if the court took the track of considering evidence of "the new criminal conduct," Whiteside could receive (as he did) an 18-month prison term. Thus, the state allegations were still live and proper for the court to consider.[3]

In the alternative, if Whiteside's acquiescence to the court's consideration of the evidence for the state charges was not strategic but merely a forfeiture, we would still

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[1] *Armour* held that in the absence of an objection by the defendant, the district court may rely on facts found in a probation officer's violation memorandum, not a revocation petition, 804 F.3d at 864–65, but that holding implies that the district court may also rely on allegations in the petition. The defendant in *Armour* argued that the district court erred by relying on the facts found in the memorandum *because* those allegations did not appear in the petition, suggesting if they had, then the court could rely on them. *See id.*

[2] The dissent emphasizes that revocation proceedings are adversarial, the government bears the burden of proof, and the probation officer is a "neutral information gatherer," *United States v. White*, 868 F.3d 598, 604 (7th Cir. 2017), not a "surrogate prosecutor[]." *United States v. Peterson*, 711 F.3d 770, 778 (7th Cir. 2013). We agree, but the district court may nevertheless rely on a probation officer's findings without additional input from the government, *Armour*, 804 F.3d at 863–65, and neither *White* nor *Peterson* indicates otherwise. *White* discussed a probation officer who improperly inserted himself into revocation proceedings in the role of an advocate, 868 F.3d at 603–04, while *Peterson* concerned the propriety of confidential recommendations by probation officers. 771 F.3d at 776–79. Neither is analogous to the situation here.

[3] Because we conclude that the state charges were in play when the district court ruled, we disagree with the dissent that the ruling itself created the grounds for appeal.

affirm the judgment. For a forfeiture, we review the district court's consideration of the evidence of state charges for plain error. *See United States v. Burns*, 843 F.3d 679, 687 (7th Cir. 2016). Under that standard, the district court's ruling is reversed only if there is "(1) an error or defect (2) that is clear or obvious (3) affecting the defendant's substantial rights (4) and seriously impugning the fairness, integrity, or public reputation of judicial proceedings." *Id.*

A district court may revoke supervision under 18 U.S.C. § 3583(e)(3) if it finds by a preponderance of the evidence a violation of the conditions of release. *United States v. Mosley*, 759 F.3d 664, 669 (7th Cir. 2014). Revocation hearings do not require "the full panoply of rights" provided at trial and sentencing. *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). But due process entitles defendants to written notice of the alleged violations, the chance to be heard, and the limited right to confront adverse witnesses unless the interest of justice does not require the witness to appear. *See id.* at 488–89; FED. R. CRIM. P. 32.1(b)(2)(C). Also, consistent with due process, district courts may consider "reliable hearsay at revocation hearings without a specific showing of good cause." *Mosley*, 759 F.3d at 667 (citation omitted). Hearsay is reliable if it "bears substantial guarantees of trust-worthiness[,]" which supplies "good cause" for not requiring the declarant's live testimony. *Id.*

The district court did not plainly violate any of these protections when it considered the petition's evidence that Whiteside unlawfully possessed a firearm. Whiteside received written notice of charges that he violated his supervision terms, and a hearing where he could contest them. The court found that the petition's evidence—which identified a surveillance video from the incident and the probation officer's identification of Whiteside as a person depicted in it possessing and discharging a firearm—was highly reliable, in fact "really quite compelling." The dissent raises reasonable concerns that the district court may have conflated the relevant standards of proof or not appreciated the hearsay-within-hearsay nature of the petition's findings, but to be plainly erroneous, an "error must be clear or obvious, rather than subject to reasonable dispute." *United States v. Foy*, 50 F.4th 616, 627 (7th Cir. 2022) (quoting *United States v. Hyatt*, 28 F.4th 776, 782 (7th Cir. 2022)). It was not obviously erroneous to conclude that the petition's hearsay evidence was "substantially trustworthy." Thus, we

will not disturb the district court's determination that Whiteside violated his conditions of supervision.[4]

AFFIRMED

[4] The dissent also argues that the district court violated Federal Rule of Criminal Procedure 32.1(b)(2)(C) by failing to balance Whiteside's interests in confrontation with the government's contrary interest. *See Mosley*, 759 F.3d at 668. But Rule 32.1(b)(2)(C) affords only an "opportunity" to confront witnesses, which Whiteside waived or forfeited. When we have analyzed whether the balance of interests favors admission of hearsay testimony under Rule 32.1(b)(2)(C), the defendant has objected to the testimony in the district court. *See United States v. Jordan*, 742 F.3d 276, 278 (7th Cir. 2014); *Mosley*, 759 F.3d at 667; *United States v. Moslavac*, 779 F.3d 661, 662 (7th Cir. 2015); *Falls*, 960 F.3d at 444.

PRYOR, *Circuit Judge*, dissenting. Without notice and an opportunity to be heard, there is no due process. These principles intertwine to form "the essence" of due process because an individual must know what he's up against in order to defend himself against it. *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976). I respectfully dissent from the decision of my colleagues because I disagree that Malcolm Whiteside knew what he was up against.

I

Consider the sequence of events one more time. A probation officer petitioned the district court to revoke Whiteside's supervised release on three occasions. What matters here are the second and third petitions. The second petition alleged that Whiteside committed several violations, including using illegal drugs, failing to maintain employment, getting removed from a residential reentry center, and refusing to submit monthly report forms. At a revocation hearing, the government asked the district court to revoke Whiteside's supervision and impose a sentence of 12 months with some supervised release to follow. After hearing argument from defense counsel, the district court decided to delay ruling on the revocation for ninety days to see if Whiteside could "correct" his behavior by staying clean, maintaining a job, and maintaining his stability. In doing so, the court warned Whiteside not to commit any more violations.

Within those ninety days, however, the probation officer submitted his third petition. This one alleged that Whiteside was repeating some of his previous violations. For instance, it reported that Whiteside had been fired from his job and failed to report his lack of employment to the probation officer. The petition also informed the court that the State of Wisconsin had recently charged Whiteside with the possession and discharge of a firearm. In support of this allegation, the probation officer wrote that, according to a criminal complaint, local police responded to a report informing them that gunshots had been fired in a parking lot. The police officers watched surveillance footage from the area and allegedly saw Whiteside firing shots into the air. The probation officer then stated that he had "reviewed still images of [that] surveillance video" and "identified Mr. Whiteside in at least one of the images."

Following the initial appearance on the third petition, the district court held a revocation hearing. The government began by recapping the previous hearing and bringing the court up to speed on the current status of the case. It recounted Whiteside's repeated violations and, at the tail end of its argument, "noted" that the final petition also alleged that Whiteside had committed a state crime while on release. Even so, the

government clarified that it was "not going to be putting on any witnesses regarding that … allegation."

Then the government asked the district court to sentence Whiteside to 18 months—rather than 12 months—in prison with no supervised release to follow. Whiteside, as the government put it, "was warned by the [c]ourt" yet "still continued to [violate the] conditions of his release." Seeking clarification on whether the government based its recommendation on the new firearm allegations, the court stated, "so if I understand correctly, you're really not pressing the violation based on the new criminal conduct." The government's response is important: "No, Your Honor. It's a continued pattern of refusal to comply with the conditions." "All right," replied the court.

After listening to this exchange, Whiteside's attorney spoke. He stated that Whiteside stipulated to all of the alleged violations, apart from the violations concerning the firearm. The attorney next identified what he saw as "two tracks"—the two ways of thinking about how much prison time Whiteside deserved. First, defense counsel admitted that if the new state allegations were factored into the calculus, the government's request for 18 months would make sense. He said nothing more on these charges, explaining that he was "saving [his] powder … for the actual state case." But counsel continued to argue that the request for 18 months was too high if Whiteside's conduct was understood as "a pattern of noncompliance" based on, among other things, the failed drug tests and misrepresentations about employment.

The district court revoked Whiteside's supervision and imposed 18 months of prison time, followed by another 18 months of supervised release. In doing so, the court, while acknowledging that "the government [wasn't] pressing" the firearm allegations, took into account the probation officer's statements in the petition about those allegations. At no point did the court stop to inform Whiteside that it was considering this violation. Nor did it ask him whether, given that revelation, he had anything more to say about the state charge or the alleged evidence.

II

Based on these facts, the majority concludes that Whiteside waived his appellate arguments and that, in any event, no error occurred. I respectfully see both points in another light.

Beginning with waiver, my colleagues and I agree on the law. A defendant waives an argument when he "intentionally relinquishes a known right." *United States*

v. Barnes, 883 F.3d 955, 957 (7th Cir. 2018) (citation omitted). We construe waiver "liberally in favor of the defendant" and are "cautious about interpreting a defendant's behavior as intentional relinquishment." *Id.*

Where my colleagues and I differ is on how the law applies to these facts. As the majority reads the transcript, the government "notified Whiteside that, although it would not support [the state] charges with live witnesses, it would rely on the petition itself." The opinion likewise understands the government's comment about Whiteside's continued pattern of non-compliance with the conditions of release as "invit[ing] the court to consider" all of the petition's evidence—including the state charge. And, in the majority's view, the government merely stated that it "was not 'pressing' its proof of those charges with live testimony." Accordingly, the majority concludes that Whiteside "intentionally," "knowingly," and "intelligently" waived any objection to the district court's reliance on the allegation about the state charge.

I read the transcript differently. All the government said about the state allegations was that they were "noted" in the petition—which was crafted not by the government but by the probation officer. The government never asserted that it would rely on those allegations. To the contrary, it stated that it would not present any evidence about them. After that, the government never said that it would not press the charges *with live testimony*. Rather, it said that it would not press the charges *at all*. Nor did the government invite the court to consider the state charge through its reference to Whiteside's "pattern" of non-compliance. For starters, the comment about non-compliance came directly after the government confirmed that, "[n]o," it was not pressing the state charge. More to the point, the "pattern" referenced by the government involved Whiteside repeatedly failing to hold down a job or tell the truth to his probation officer—not the one-off firearm allegation.

When Whiteside's attorney got up to speak, he had just heard the government say that it was *not* seeking to revoke Whiteside's supervised release because of the firearm charge. Naturally, the attorney did not think that he had to defend against the violations based on that charge. Whiteside therefore could not have knowingly and intelligently waived his arguments regarding the new state charge.

While I recognize that Whiteside was aware of the new allegation in the third petition regarding the state charge, it is not clear from the transcript that this violation was being considered by the court. Revocation proceedings are adversarial. The government, not the probation officer, bore the burden of proving to the district court

that Whiteside violated his terms of supervised release. *United States v. Golden*, 843 F.3d 1162, 1165 (7th Cir. 2016). The probation officer—an employee of the judiciary—is a "neutral information gatherer." *United States v. White*, 868 F.3d 598, 604 (7th Cir. 2017). For this reason, we have warned that probation officers are not "surrogate prosecutors." *United States v. Peterson*, 711 F.3d 770, 778 (7th Cir. 2013) (citation and quotation marks omitted). So Whiteside's attorney no doubt expected the revocation hearing to follow its usual, adversarial course. The government submits evidence, makes arguments, and requests a sentence. Then the defendant tries to combat those arguments and convince the court that his own request is more appropriate.

What happened here was far different. The probation officer submitted in his petition to the court that Whiteside had been charged by the State with firearm violations. Despite knowing about that claim, the government chose not to submit any evidence on the allegation, made no argument about the allegation, stated in front of Whiteside that it was not pressing the allegation, and requested a certain sentence because of other violations contained in the petitions. After Whiteside predictably did not focus on the state charge, but still confirmed that he did not stipulate to it, the district court relied on that same charge to impose the government's requested sentence—plus an additional term of supervised release. During an adversarial hearing like this one, no reasonable defense attorney would have suspected that the court would, without warning, resurrect allegations that the government had the burden of proving yet chose not to pursue.

Whiteside's comment about "saving [his] powder" must be understood in the context of this unusual hearing. True, a strategic decision not to present an argument is typically a telltale sign of waiver. *United States v. Flores*, 929 F.3d 443, 448 (7th Cir. 2019). Here, however, Whiteside's decision to remain silent on the state allegations was the result of the government's own decision not to press the allegations. By speaking about the state charge, Whiteside risked a great deal. Anything that he or his attorney said could have been used against him in the state proceeding. Saving their powder was the only sensible course of action after the government took the state charge off the table. Put another way, Whiteside did not make an informed and calculated choice to forego a line of argument while taking into account the risk that the district court would accept the government's version of events. He reasonably thought that the district court was not considering those allegations, so he decided not to either.

Likewise, Whiteside's comment about the "two tracks" does not show that he thought the court was about to consider the state charge. When we hold this statement

up against the backdrop of what had happened moments earlier—the government abandoning any reliance on those charges—we can see that Whiteside referenced the two analytical tracks as a tool of argument. His point was that the government might have been right that an 18-month sentence was warranted *if* it had proven by a preponderance of the evidence that Whiteside had used a firearm. If, however, the new conduct alleged in the state allegation was out of the question, then the government's requested sentence was too lengthy. Because the government had not attempted to prove that Whiteside used a gun, he understandably imagined that everyone in the courtroom was driving down this second track.

We must not forget in the midst of these details that the court must read the transcript liberally in favor of Whiteside. Or that the court must exercise caution before interpreting any of his actions as a deliberate choice to forgo an argument. In light of these standards, I cannot conclude that Whiteside made the sort of fully-informed choice that would result in waiver.

There is also another reason that waiver—or even forfeiture—does not apply. When the "grounds for appeal existed prior to and separate from the district court's ultimate ruling," a litigant must raise the claim of error in the district court to avoid waiving it on appeal. *United States v. Wood*, 31 F.4th 593, 598 (7th Cir. 2022). When, however, the error is "created by the district court's ruling itself," a litigant does not waive or forfeit a claim of error by staying quiet. *Id.* at 598–99. In those circumstances, a party need not even protest the ruling when the court asks at the end of the hearing if it should address anything else. *Id.* at 597–99. The rationale underlying this rule is intuitive: we cannot expect litigants to come up with arguments on the fly or interrupt judges mid-ruling. *Id.* at 598.

Although Whiteside walked into the hearing with the petition in hand, the grounds for appeal did not exist at that point. Nothing in the petition was itself an error. The errors arose from how the district court utilized the petition during the hearing, after each party had already spoken. As I explain next, the court improperly resurrected allegations that the government had taken off the table and relied on hearsay within hearsay evidence. So even though Whiteside knew what the petition said, he had no reason to be on guard for these errors—both of which cropped up in the middle of the district court's explanation. *See Wood*, 31 F.4th at 597 ("A district court's explanation of its sentencing decision … is a ruling to which an exception is not required."). Whiteside therefore had no duty to protest the errors at the time, meaning we should review de novo.

This transcript, especially when construed liberally in favor of Whiteside, shows that no waiver occurred.

III

I turn now to the two errors created by the district court's ruling. The first relates to Whiteside's opportunity to defend himself and the second relates to the hearsay evidence.

A.

During a revocation hearing, a criminal defendant has a constitutional due process right to several things, including notice of the alleged violations, an opportunity to be heard, and the right to confront witnesses. *Morrissey v. Brewer*, 408 U.S. 471, 488 (1972) (outlining these requirements in the context of parole revocation hearings); *United States v. Kelley*, 446 F.3d 688, 691 (7th Cir. 2006) (confirming that *Morrissey* applies to supervised release revocation hearings).

The "cornerstone" of due process is notice and the opportunity to be heard "at a meaningful time and in a meaningful manner." *Knutson v. Vill. of Lakemoor*, 932 F.3d 572, 576 (7th Cir. 2019) (citations and quotation marks omitted). The majority is right that Whiteside received both written notice of the allegations and a hearing. And in many situations, this would be sufficient. "Due process," however, "is flexible … and calls for such procedural protections as the particular situation demands." *Jennings v. Rodriguez*, 200 L. Ed. 2d 122, 138 S. Ct. 830, 852 (2018) (citation and quotation marks omitted).

The analysis here dovetails with the analysis of waiver and forfeiture. As discussed, revocation proceedings are adversarial. The *government* must prove the violations. So once the government refused to support allegations put forth by a probation officer, and explicitly stated that it would not press the allegations, Whiteside could not have expected the district court to take them into account. To put it in the language of due process, he did not have adequate notice that the charges were still up for consideration.

For that reason, he did not have a meaningful opportunity to defend against the charges either. Consider for a moment how Whiteside might have attempted to do so. Because the government did not make any arguments about the state charge, Whiteside's attorney—in the time it took him to approach to the bench—would have had to imagine the arguments the government could have made. Then he would have

had to shadowbox against those arguments. All while weighing the good that each word could do at that moment against the bad each word could bring to his client's later criminal prosecution in state court. "We have an adversarial system of justice, not an inquisitorial one, and to proceed along the path described above would … blur the line between the two systems." *United States v. Neal*, 512 F.3d 427, 439 n.11 (7th Cir. 2008) (citation and quotation marks omitted).

In making this point, I wish to clarify one thing. The majority, relying on *United States v. Armour*, 804 F.3d 859 (7th Cir. 2015), concludes that district courts have the power to rely on findings in revocation petitions even when the government does not support those findings. I agree with my colleagues. The problem here is not what the district court could do in the abstract, but the lack of notice. In *Armour*, the district court asked the defendant if he had any objections to the violation memorandum, and the defendant responded that he objected only to the conditions of supervised release. *Id.* at 864. As a result, the district court "adopted the factual findings of the violation memorandum as its own," confirming its intent to rely on those findings. *Id.* In this case, Whiteside stated that he did not stipulate to the state allegations, and the district court never informed him that it planned to adopt the findings in the petition. In fact, the court did not put Whiteside on notice that it was about to consider the allegations until the middle of the ruling. My point is that, even though the district court could rely on the firearm charge, due process required the court to warn Whiteside of its intent take the charge into account.

Whiteside's opportunity to defend himself against the state allegations was therefore not a meaningful one in my book.

B.

A second error arose out of the district court's reliance on the probation officer's statement. Remember what the officer said. State prosecutors determined that they had probable cause to charge Whiteside. Police told the probation officer that *they* had seen Whiteside firing a gun in a surveillance video. And the probation officer identified Whiteside in a still image plucked from some point in that surveillance footage. What the probation officer did not say is just as important. He never stated that he watched the video or that he saw Whiteside holding a gun in any of the images police forwarded to him.

The probation officer's statement about identifying Whiteside was therefore hearsay. It was an out of court statement offered to prove the truth of the matter

asserted. *United States v. Graham*, 47 F.4th 561, 567 (7th Cir. 2022). The probation officer's other statements—about what police told him—were hearsay-within-hearsay.

I have doubts over the majority's conclusion that the district court did not commit a constitutional error by relying on this hearsay evidence. As the opinion explains, a defendant has only a limited right to confront witnesses at a revocation hearing. The practical upshot is that, if hearsay evidence is reliable, a district court can consider it without explaining why an opportunity for cross examination is unnecessary. *United States v. Mosley*, 759 F.3d 664, 667 (7th Cir. 2014). Hearsay is reliable, in turn, only if it "bears substantial guarantees of trust-worthiness." *Id.* (citation and quotation marks omitted).

To conclude that Whiteside wielded a gun, the district court had to patch together both the probation officer's statement *and* what the probation officer said that police told him about the rest of the video. All the probation officer confirmed was that he saw Whiteside in an image taken at the supposed scene of the crime. The police officers were the only ones who claimed to see Whiteside use a gun. I am not sure how the court could have determined that the second-hand and untested statements of these unnamed police officers were substantially trustworthy. I worry as well about conflating the two standards of proof at play. The district court had to conclude by a *preponderance of the evidence* that Whiteside possessed a gun. Yet, in making that determination, the court seems to have relied on the police's belief that they had *probable cause* to arrest Whiteside.

Either way, the district court erred by considering the hearsay evidence because doing so ran afoul of Federal Rule of Criminal Procedure 32.1(b)(2)(C). That rule entitles a supervisee to "an opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear." In contrast to our Fifth Amendment jurisprudence, we have interpreted this rule to require a district court to "explicitly balance" the supervisee's interest in confrontation against the government's contrary interest. *Mosley*, 759 F.3d at 668 (quoting *United States v. Jordan*, 742 F.3d 276, 280 (7th Cir. 2014)). By failing to conduct that balancing here, the district court committed an error. *See Mosley*, 759 F.3d at 668 (concluding the same). As discussed, Whiteside did not need to object to the district court's reliance on the hearsay statements because this error arose during the ruling.

IV

For these reasons, I would remand this case for a new revocation hearing so that the district court could give Whiteside an opportunity to defend himself against allegations that he used a firearm while on supervised release. Accordingly, I respectfully dissent from the decision to the contrary.