# United States Court of Appeals
## For the Eighth Circuit

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No. 23-2402

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United States of America

*Plaintiff - Appellee*

v.

Shawn Michael Scherer

*Defendant - Appellant*

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Appeal from United States District Court
for the District of North Dakota - Eastern

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Submitted: February 14, 2024
Filed: August 29, 2024

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Before SMITH, Chief Judge,[1] BENTON and STRAS, Circuit Judges.

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SMITH, Chief Judge.

Shawn Scherer appeals his sentence upon the revocation of his supervised release. We affirm.

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[1]Judge Smith completed his term as chief judge of the circuit on March 10, 2024. *See* 28 U.S.C. § 45(a)(3)(A).

## I. *Background*

In 2011, Scherer was convicted of possessing a firearm as a felon. He was sentenced to 120 months' imprisonment and three years of supervised release. Two days into his supervised-release term, he tested positive for methamphetamine. After testing positive a second time, he absconded. The district court revoked his supervised release in June 2020 and sentenced him to 10 months' imprisonment and 3 years of supervised release.

Scherer began serving his second supervised-release term but again violated its conditions, testing positive for methamphetamine and absconding from a reentry center. In April 2021, the court revoked his supervised release and sentenced him to 14 months' imprisonment and 24 months of supervised release.

Scherer began serving his third term of supervised release; once again, he violated its conditions. He was terminated from an inpatient treatment program, was terminated from a reentry center because of drug use, tested positive for methamphetamine four times, failed to report to the probation office, and committed state-law drug crimes. This conduct led to state charges for felony possession of drug paraphernalia and misdemeanor possession of methamphetamine. Scherer was again subject to federal revocation proceedings. He pleaded guilty to two state misdemeanor charges while his revocation proceedings were pending.

At his revocation hearing, Scherer admitted to the above violations. The government requested a sentence at the top of the Guidelines' range, which was 8 to 14 months' imprisonment. Scherer's counsel spoke about Scherer's completion of numerous classes while incarcerated. The following exchange then took place between the district court[2] and Scherer's counsel:

[2]The Honorable Peter D. Welte, Chief Judge, United States District Court for the District of North Dakota.

> [MS. GORHAM:] Additionally, while he was incarcerated my client had the state charge that he was able to communicate with his attorney and he was able to resolve that case, which sets him up for I think more success once this case is concluded so that he can—
>
> THE COURT: Ms. Gorham, I'm going to interrupt you and I mean no disrespect, but we resolved that with a Rule 43.
>
> MS. GORHAM: Yes.
>
> THE COURT: He didn't even have the inconvenience of appearing in court on a felony.
>
> MS. GORHAM: Yes.
>
> THE COURT: So don't gild the lil[]y on this one. You can skip over that argument. I'm not buying what you're selling.
>
> MS. GORHAM: Your Honor, if I may respond?
>
> THE COURT: You know what, I don't want to hear it.

R. Doc. 207, at 19–20 (spacing altered). Scherer's counsel then highlighted Scherer's volunteer work within the jail and his positive relationships with corrections officers. Scherer's counsel also requested a 14-month sentence.

The district court noted that over the course of three terms of supervised release, Scherer had complied with the court's conditions for, at best, a total of 17 days before committing violations. The court then sentenced Scherer to 36 months' imprisonment and no supervised release. Scherer appeals.

## II. *Discussion*

Scherer raises two challenges to his sentence. First, he argues that the district court abused its discretion in prohibiting his counsel from describing the resolution of his state charges as mitigation information for his federal sentencing. Second, he argues that the court imposed a substantively unreasonable sentence.

"We review the district court's revocation sentencing decision under the same deferential-abuse-of-discretion standard that applies to initial sentencing proceedings." *United States v. Clark*, 998 F.3d 363, 367 (8th Cir. 2021) (cleaned up).

A. *Limitation on Counsel's Argument*

Scherer argues that the district court abused its discretion in limiting his counsel's argument at the revocation hearing. Scherer acknowledges that Federal Rule of Criminal Procedure 32.1(b)(2) "does not *explicitly* say that counsel has a right to speak on the defendant's behalf at a revocation sentencing." Appellant's Br. at 10. But he argues that the right is implicit in "the right to counsel, the right to allocution, or the complementary rights provided by Rule 32." *Id.* (internal quotation marks omitted).

We first consider whether any error was preserved. The government, relying on *United States v. Thurmond*, 914 F.3d 612 (8th Cir. 2019), argues that Scherer did not preserve his argument and so plain error review applies. We disagree. Federal Rule of Criminal Procedure 51(b) states that "[a] party may preserve 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." In *Thurmond*, the defendant asked if he could speak about a topic, the court said "[n]o," and neither the defendant nor his counsel objected. 914 F.3d at 614. We held that the defendant had not preserved an objection. *Id.* By contrast, here, Scherer's counsel began making an argument, and the district court interrupted her. She then specifically requested permission to respond. The court denied her the opportunity. The combination of defense counsel's initial attempt at argument and her later request for permission to respond to the court's limitation sufficiently informed the court of the action that Scherer wished the court to take. Scherer's counsel clearly sought to address potentially mitigating aspects of the resolution of Scherer's state charges. *Cf. United States v. Camp*, 410 F.3d 1042, 1044–45 (8th Cir. 2005) (declining to decide whether an issue was preserved but noting that "the hallmarks of preserving an issue for appeal" were present when

defense counsel questioned the court's ruling and the court understood, responded, and clearly indicated that it would not reconsider). Scherer thus preserved his argument.

The Federal Rules of Criminal Procedure prescribe one set of procedures to govern sentencing hearings generally and another set of procedures to govern revocation hearings. *See* Fed. R. Crim. P. 32, 32.1. At an initial sentencing, Rule 32(i)(4)(A) applies and explicitly provides that "the court must[] (i) provide *the defendant's attorney an opportunity to speak on the defendant's behalf* [and] (ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence." (spacing altered) (emphasis added). At a revocation hearing, "[a] person is entitled to . . . (D) notice of the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel[] and (E) an opportunity to make a statement and present any information in mitigation." Fed. R. Crim. P. 32.1(b)(2)(D)–(E) (spacing altered). Thus, Rule 32(i)(4)(A) more explicitly provides for argument of counsel than does Rule 32.1(b)(2).

There is some question as to whether Rule 32's procedures also apply to revocation proceedings. We have held that

> Rule 32 is not expressly limited to sentencing immediately following conviction. . . . Rules 32 and 32.1 are complementing rather than conflicting, and . . . Rule 32 applies to sentencing upon revocation of supervised release when the court imposes a new sentence based on conduct that occurred during supervised release.

*United States v. Patterson*, 128 F.3d 1259, 1261 (8th Cir. 1997) (per curiam) (internal quotation marks omitted). But we decided *Patterson* prior to the amendment to Rule 32.1 that explicitly gave defendants a right to personal allocution. *See* Rule 32.1 advisory committee's note to 2005 amendments. The amendment did not identify a right to have counsel present argument. It is unclear how many of Rule 32's rights apply to defendants at revocation hearings now that

Rule 32.1(b)(2)(E) provides a right to allocution. *See United States v. Robertson*, 537 F.3d 859, 862 (8th Cir. 2008) (noting that a prior decision had applied *Patterson* to an appeal of a revocation sentence but that, in the case before the court, Rule 32.1(b)(2)(E) controlled allocution); *United States v. Richey*, 758 F.3d 999, 1002 n.3 (8th Cir. 2014) ("Does *Patterson's* logic mean a revocation 'sentence' is 'impose[d]' within the meaning of Rule 32, such that an additional report must be prepared and disclosed with an opportunity to object? We need not answer this difficult question here, so we leave it open for a future case.").

We need not decide today whether all of Rule 32(i)(4)(A) applies at revocations. We assume that at least when, as here, the court allows the government to present argument at sentencing, it must also give the defendant the opportunity to present argument through counsel. We note, too, that "[i]t is well established that a district court must generally consider the parties' nonfrivolous arguments before it." *Concepcion v. United States*, 597 U.S. 481, 501 (2022).

This case does not require us to define the precise boundary where the defendant's right to have counsel argue on his behalf ends and the court's power to limit argument begins. Here, any error in limiting counsel's statement about the resolution of Scherer's state charges was harmless. Under Federal Rule of Criminal Procedure 52(a), "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."[3] Under harmless error review, the government must "show that the district court's procedural error did not

[3]It is unclear whether harmless-error analysis applies when a defendant is deprived of the right of personal allocution. *See United States v. Griggs*, 431 F.3d 1110, 1114 n.4 (8th Cir. 2005). But we hold that when, as here, the court *limits* the defendant's counsel's argument and does not entirely *forbid* argument, Rule 52(a) applies. *See United States v. Henson*, 550 F.3d 739, 741 (8th Cir. 2008) ("We see nothing in [*Gall v. United States*, 552 U.S. 38 (2007),] that . . . makes harmless-error analysis inapplicable to procedural sentencing errors.").

substantially influence the outcome of the sentencing proceeding." *Henson*, 550 F.3d at 741 (8th Cir. 2008).[4]

Scherer argues that his precluded argument would have shown "his clear, recent ability to work with authority figures, maintain his composure, and navigate the complexities of his personal and legal struggles in a more positive manner." Appellant's Br. at 17. And Scherer points out that his plea to the state charges served judicial economy, avoiding both transportation and paperwork. Scherer argues that his counsel would have "explain[ed] that the efforts the system has put into Scherer ha[ve] borne significant fruit" and that he is rehabilitating and "taking responsibility for himself." Reply Br. at 6. His counsel "would have argued that a prolonged period of incarceration would be detrimental to" Scherer's progress. *Id.* at 7.

Scherer did, in fact, present both arguments and evidence to demonstrate most of these mitigating factors. At the hearing, defense counsel addressed Scherer's work while in jail and his participation in classes and programming. Scherer submitted letters from jail personnel commenting on his positive work ethic and efforts to wax floors and clean at the jail facility, including one letter stating that "Scherer has shown the ability to take initiative, work very hard, be respectful, learn new things and adjust to his environment and make the most of his time here." R. Doc. 199-10, at 2. Scherer also submitted documentation showing that he had participated in individual therapy, completed group therapy programs, and completed 375 hours of educational coursework. We think it highly unlikely that counsel's statements regarding Sherer's guilty plea to state charges would have provided meaningful additional impact to the evidence and argument already before the court.

[4]The government does not argue in its brief that any error was harmless, though it does argue that any error did not affect Scherer's substantial rights. We still consider whether any error was harmless, as "[w]e may always affirm on any ground supported by the district court record." *United States v. Hansen*, 944 F.3d 718, 724 n.3 (8th Cir. 2019).

Furthermore, the district court did consider Scherer's resolution of his state charges. In Scherer's sentencing memorandum supplement, Scherer discussed his guilty plea to the state charges. In its ruling, the court noted that it had "considered the entire record." R. Doc. 207, at 28; *see also United States v. Keating*, 579 F.3d 891, 893 (8th Cir. 2009) ("[W]here the district court heard argument from counsel about specific [18 U.S.C.] § 3553(a) factors, we may presume that the court considered those factors."). And it is reasonable to assume that the court understood that Scherer's plea to the state charges avoided the expenditure of state resources on his prosecution.

Finally, nothing prevented Scherer's counsel from arguing that a lengthy sentence "would be detrimental to" Scherer's progress. Reply Br. at 7.

Thus, any error in cutting off Scherer's counsel's argument "did not substantially influence the outcome of the sentencing proceeding," *Henson*, 550 F.3d at 741, and so was harmless.

B. *Substantive Reasonableness*

Scherer also argues that his 36-month sentence is substantively unreasonable considering his improvements while in custody. He points to his completion of classes, participation in therapy, health challenges, work while in jail, and ability "to work under authority figures" to show that his sentence is excessive. Appellant's Br. at 21.

Our review of a district court's sentencing decision is deferential. *Clark*, 998 F.3d at 367 (affirming a 24-month sentence upon a second revocation). We have said that

> [a] sentence is substantively unreasonable if the district court fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only the appropriate factors but commits a clear error of judgment in weighing those factors. We afford the court wide latitude to weigh the

> § 3553(a) factors in each case and assign some factors greater weight than others in determining an appropriate sentence. . . . [I]t is an unusual case when we reverse a district court sentence—whether within, above, or below the applicable Guidelines range—as substantively unreasonable.

*Id.* at 369 (internal quotation marks omitted). "[A] defendant's disagreement with the district court's balancing of relevant considerations does not show that the court abused its discretion." *United States v. Hogue*, 66 F.4th 756, 766 (8th Cir. 2023) (internal quotation marks omitted). Before imposing a sentence, the court must consider most of the factors in § 3553(a), including "(1) the nature and circumstances of the offense and the history and characteristics of the defendant" and "(2) the need for the sentence imposed . . . to afford adequate deterrence to criminal conduct." 18 U.S.C. § 3553(a)(1), (a)(2)(B); *see also id.* § 3583(e)(3).

Here, the district court stated that it had considered "the entire record," the § 3553(a) factors, and "the statements of counsel." R. Doc. 207, at 28. The court noted that over the course of three supervised-release terms, Scherer had complied with his supervised-release conditions for only 17 days before violating them. Addressing Scherer, the court said, "I think it's very, very, very clear from the record that supervision is not working for you and remaining law-abiding isn't working for you as well." *Id.* The court weighed the relevant information differently than Scherer would have hoped—placing more emphasis on Scherer's record while on supervised release and less emphasis on his more recent efforts at rehabilitation—but there was no "clear error of judgment." *Clark*, 998 F.3d at 369; *see also Hogue*, 66 F.4th at 766 (deferring to the district court's weighing of the relevant factors). Scherer's sentence was substantively reasonable. *See United States v. Rollins*, 105 F.4th 1115 (8th Cir. 2024) (per curiam) (affirming a 40-month sentence upon a third revocation of supervised release).

## III. *Conclusion*

On this record, any error in limiting defense counsel's argument at sentencing was harmless. And Scherer's sentence is substantively reasonable. Therefore, we affirm.

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