

REVOCAION OF SUPERVISED RELEASE

1. [Establish that the probation officer is in the courtroom.]
2. [Explain the purpose of the hearing.]
3. **[To the defendant]** Do you understand that you have the right to be represented by a lawyer [and indeed that [attorney] is representing you]? [If no lawyer, the right to have a lawyer appointed]
4. **[To the defendant]** Did you receive written notice of the charged violation(s)?
5. **[To the defendant]** Have you discussed the charges with your lawyer?
6. **[To the defendant]** Do you understand the charges?

[If the court is informed in advance that the defendant wants to admit to one or more charges, explain: I understand that you want to waive your right to a hearing and admit to **[violation numbers ____]**. Is that correct? I want you to listen carefully to the evidence the prosecutor is about to describe because later I will ask you whether you agree that the events he/she describes actually happened.]

[If a nolo contendere plea, further explain: Your lawyer has told me that you want to waive your right to a hearing and that you do not want to contest the allegations, but that you also do not want to admit the conduct—Is that correct? I want you to listen carefully to the evidence the government is about to describe because later I will ask you whether you contest—not whether you admit—any of that evidence.]

7. [Ask the prosecutor to disclose the evidence against the defendant.]
8. **[To the defendant]** Do you understand that at a hearing you would have the opportunity to present evidence on your own behalf?
9. **[To the defendant]** Do you understand that at a hearing you would have the right to question any adverse witnesses?
10. **[To the defendant]** Do you wish to have a hearing on whether you committed the violation(s) or do you wish to concede that you committed them? Understand that if you concede that you committed them, the only issue remaining will be what punishment to impose.

[If a nolo contendere plea: Do you wish to have a hearing on whether you committed the violation(s) or do you want to go forward without a hearing and simply choose not to contest them? Understand that if you choose not to contest them, if I find a factual basis for the revocation, the only issue remaining will be what punishment to impose.]

11. **[If the decision is not to waive the hearing, ask the prosecutor to present the evidence and proceed as in a bench trial. The Rules of Evidence do not strictly apply. The standard of proof is preponderance. So far as hearsay is concerned, Fed R. Crim P. 32.1(b)(2)(C) “entitle[s]” a defendant to “an opportunity to . . . question any adverse witness unless the court determines that the interest of justice does not require the witness to appear. . . .” The 2002 Advisory Committee Note states that “the court should apply a balancing test at the hearing itself when considering the releasee’s asserted right to cross-examine adverse witnesses. The court is to balance the person’s**

interest in the constitutionally guaranteed right to confrontation against the government’s good cause for denying it.” Id.

According to the First Circuit:

What this means is that hearsay testimony can get in. But the judge should balance “the releasee’s right to confront witnesses with the government’s good cause for denying confrontation.” In doing that, the judge should consider the hearsay testimony’s reliability and the government’s rationale for not producing the declarant (with “declarant” being legalese for the person who made the statement).

On the reliability front, caselaw holds (so far as relevant here) that “conventional substitutes for live testimony,” like “affidavits, depositions, and documentary evidence,” ordinarily possess sufficient indicia of reliability—as does hearsay testimony about statements that are corroborated by other evidence, are detailed, or were repeated by the declarant without any material changes. This is a nonexhaustive catalog, as particular cases vary. Anyway, on the explanation front, caselaw recognizes that “concern . . . with the difficulty and expense of procuring witnesses from perhaps thousands of miles away” is a paradigmatic example of the type of situation that might call for the admission of hearsay evidence at a revocation proceeding.

United States v. Marino, No. 15-1998, 2016 WL 4191497, at *2 (1st Cir. Aug. 9, 2016) (citations omitted); see also United States v. Mulero-Díaz, 812 F.3d 92, 95 (1st Cir. 2016) (“a defendant who faces revocation of his term of supervised release does have a ‘limited confrontation right’ under Federal Rule of Criminal Procedure 32.1(b)(2)(C). And, under that Rule, Mulero was entitled

to ‘an opportunity to . . . question any adverse witness unless the court determines that the interest of justice does not require the witness to appear.’ Fed. R. Crim. P. 32.1(b)(2)(C). We have said, moreover, that ‘[i]n conducting this analysis, a court should consider the reliability of the hearsay testimony and the government’s reason for declining to produce the declarant.’ United States v. Rondeau, 430 F.3d 44, 48 (1st Cir. 2005)); United States v. Taveras, 380 F.3d 532, 536 & n.7 (1st Cir. 2004) (“An important element of the good cause analysis is the reliability of the evidence that the Government seeks to introduce,” and “[t]he Government’s burden in producing the witness for cross-examination is also frequently cited as part of the ‘good cause’ analysis.”) (quotation marks omitted). On justification, the Marino court said “We wish the government had [explained why it relied on hearsay testimony]: such an explanation would undoubtedly help in working through the balancing test. *And we expect the government to have an explanation of this sort at the ready in future cases (prosecutors would do well to remember that warning, obviously)*” Marino, 2016 WL 4191497 at *4. (emphasis added). The Marino court also was troubled “that the government did not secure an affidavit [from a witness in Texas with whom an investigator had talked by phone]. . . . [S]uch a failure might in many cases tip the balance against the government Id.

Crawford v. Washington, 541 U.S. 36 (2004), does not apply in revocation proceedings. Rondeau, 430 F.3d at 47.

12. **[If one or more of the charges are conceded**, make a finding that the waiver was knowing and voluntary, and that there is a factual basis for the admission, then inquire whether the prosecutor and the defense lawyer have received the revocation report and whether there are any challenges to its contents.]

- [If a nolo contendere plea,** make a finding that the waiver was knowing and voluntary, and then find a factual basis for revocation based on preponderance of the evidence with the defendant choosing not to contest the allegations. Then inquire whether the prosecutor and the defense lawyer have received the revocation report and whether there are any challenges to its contents]
13. [If there are no challenges, adopt the Guideline calculations of the revocation report.]
 14. [Invite the lawyers to address the court on what the sentence should be.]
 15. [Invite the defendant to speak on his/her own behalf.]
 16. [Impose sentence.] [Note that section 3583(e) lists only some of the section 3553(a) sentencing factors as relevant. The First Circuit, however, has said that “it does not forbid consideration of other pertinent section 3553(a) factors.” United States v. Vargas-Davila, 649 F.3d 129, 132 (1st Cir. 2011).]
 17. [Advise defendant of the right to appeal and to proceed *in forma pauperis*.]

NOTE: I have based this script almost entirely on Fed. R. Crim. P. 32.1(b)(2) and United States v. Correa-Torres, 326 F.3d 18, 22-23 (1st Cir. 2003); see also United States v. Tapia-Escalera, 356 F.3d 181, 184 (1st Cir. 2004) (“The principal requirements laid down by Rule 32.1 for the merits hearing are notice of the alleged violation, right to counsel, an opportunity to appear and present evidence and a (qualified) right on request to question adverse witnesses. . . . [T]his court has insisted that before the defendant forgoes the opportunity in a revocation case to contest the charges, the defendant must understand his procedural rights and choose not to exercise them.”) It is a different format than that used in the Bench Book for U.S. District Court Judges. See Federal Judicial Center, Benchbook for U.S. District Court Judges 139-43. (6th ed. 2013). Note also that the treatment of the Guidelines

is in ch. 7 of the Manual. The authority for waiving a hearing is contained in Rule 32.1(c)(2)(A) and Correa-Torres.

Rule 32.1 does not mention nolo contendere pleas. The alternate script portions for a nolo contendere plea are adapted from Rule 11 requirements, although the First Circuit has noted that “a revocation proceeding is of a more informal character” than a Rule 11 proceeding. Tapia-Escalera, 356 F.3d at 184. The text of Rule 11 does not require a factual basis for a nolo contendere plea; however, the Seventh Circuit and Wright & Miller have recognized that “the better practice would be for courts to find a factual basis even when a defendant pleads nolo contendere.” 1A Charles Alan Wright & Andrew D. Leipold, Federal Practice & Procedure § 175 (4th ed. 2008) (citing Ranke v. United States, 873 F.2d 1033, 1037 (7th Cir. 1989)). Accordingly, this script provides for a finding of factual basis under the preponderance of the evidence standard used in revocation hearings pursuant to 18 U.S.C. § 3583(e)(3).