

17-1224-cr

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-v-

JARRET EAGLIN, *aka* Jarret L. Eaglin,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

**BRIEF ON APPEAL FOR
DEFENDANT-APPELLANT, JARRET EAGLIN**

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JURISDICTIONAL STATEMENT

This appeal taken from a judgment on revocation in a criminal case imposed against the Defendant-Appellant, Jarret Eaglin, in the United States District Court for the Northern District of New York by the Honorable Mae A. D'Agostino, United States District Court Judge, on April 17, 2017 and entered April 20. A. 73-77.¹ The district court had subject matter jurisdiction, pursuant to 18 U.S.C. § 3231, because this was a criminal case alleging violations of Eaglin's terms and conditions of supervised release. A. 48-50. Jurisdiction in this appeal is invoked in this Court pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. A notice of appeal was timely filed on April 25, 2017. A. 87.

STATEMENT OF THE ISSUE PRESENTED

Whether the Special Conditions of Supervised Release Banning Eaglin's Access to Otherwise Legal Pornographic Materials and Access to the Internet Are Reasonably Related to the Relevant Sentencing Factors and Involve no Greater Deprivation of Liberty than Reasonably Necessary.

¹ Citations to the Appendix ("A. #") are to the page numbers inserted therein.

STATEMENT OF THE CASE

Jarret Eaglin appeals from a judgment of the Northern District of New York (D'Agostino, J.), revoking his supervised release and sentencing him to a 12-month term of imprisonment with 11 years of supervised release to follow. A. 74-75. The Office of the Federal Public Defender was continued by this Court as counsel to Eaglin on this appeal, pursuant to the Criminal Justice Act.

On December 20, 2012, Eaglin was sentenced to 21 months' imprisonment to be followed by a 15-year term of supervised release following a conviction for Failure to Register as a Sex Offender, in violation of 18 U.S.C. § 2250(a). A. 79-82. Eaglin commenced supervision on November 28, 2013. A. 17. His supervision was revoked on December 22, 2015 after he admitted five violations. A. 33-34. He was sentenced to 16 months' imprisonment followed by a 13 year-term of supervision. A. 34-35.

Eaglin was released to supervision on August 16, 2016. A. 43. A violation petition was filed on March 10, 2017 seeking revocation of supervised release. A. 43-44. Mr. Eaglin appeared on March 13, 2017 and pled not guilty to the two violations. An amended and a second amended

petition were filed on March 31, 2017. A. 45-47; 48-50. A hearing was held on April 17, 2017, during which Eaglin admitted two of the three violations of supervision. A. 69-70. The court proceeded to the final revocation hearing and sentenced Eaglin to 12 months' imprisonment followed by an 11-year term of supervised release. A. 75. The same standard and special conditions were imposed from the prior sentencing except for the addition of a prohibition on the use of the internet without prior court approval. A. 84-86. After the judgment was filed on April 20, 2017, Eaglin filed a timely notice of appeal on April 25, 2017. A. 82-86; 87.

STATEMENT OF FACTS

A. Mr. Eaglin's Background and State Court Convictions

Eaglin was born in Lafayette, Louisiana, to parents who divorced when he was very young. PSR p. 11, ¶41.² After the divorce, he lived with his abusive mother in Lowell, Massachusetts, where she beat him with household items including an extension cord, coat hanger, frying pan and wooden spoon. *Id.* As a young teenager he was diagnosed with Attention

²The Presentence Report ("PSR") is filed under separate cover pursuant to local rule.

Deficit Disorder and prescribed Ritalin. PSR p. 12, ¶46. He was hospitalized on multiple occasions between the ages of eleven and thirteen. Id. During the last hospitalization after he burned his room playing with cigarettes, his Ritalin dosage was increased. PSR p. 11, ¶41.

Upon discharge, he went back to his mother's but soon moved in with his father and stepmother in Walden, Massachusetts, after his mother continued her abuse. PSR p. 11, ¶41. His presence in the house caused a rift between his father and stepmother, which eventually led to him being asked to leave when he was seventeen. PSR p. 11, ¶42. After participating in a Job Corps program and living in Miami for a year, Eaglin returned to New England in 2002, moving in with his cousin in Manchester, New Hampshire.

In March of 2003, Eaglin was accused of sexually assaulting two thirteen year old girls. PSR pp.6- 7 ¶¶29, 30. After a report by a family friend, the first victim advised that she had sexual intercourse with Eaglin on four occasions between January 31 and March 6, 2003 after having smoked marijuana with him. PSR p. 7, ¶29. He had told her that he was seventeen years old (he was twenty-one). Id. During the investigation of the first offense, a second victim advised that Eaglin had

touched her breasts and inserted his finger into her vagina while they were at a movie on March 1, 2003. PSR p. 8 ¶30. A year after the disclosure, he was charged with felonious sexual assault. PSR pp. 7-8, a¶30.

In relation to the first victim, Eaglin plead guilty to counts 1-3 charging felonious sexual assault. Counts 4 (felonious sexual assault) and 5 (possession of a controlled substance) were “nol prossed” or dismissed. PSR p. 6, ¶29.³ He received a 12-month sentence of imprisonment with 2 years’ probation. For the offense related to the second victim, Eaglin pled guilty to felonious sexual assault and was sentenced to 2 ½ to 5 years deferred sentence with 5 years’ probation. PSR pp. 7-8, ¶ 30. These offenses required Eaglin to register as a sex offender with New Hampshire authorities or any other local law enforcement authorities in the jurisdiction where he lived, worked or went to school. PSR p. 4, ¶10.

In December of 2004 Eaglin was arrested after a domestic dispute with his girlfriend. Numerous charges were filed against him including

³ “Nol Pros” is a dismissal by the prosecuting authorities. Glossary of Legal Terms, New Hampshire Legal Aid <http://nhlegalaid.org/self-help-guides/criminal-annulment/glossary-court-terms> (last visited August 7, 2017)

felonious sexual assault (Count 1), criminal threatening (Count 2), sexual assault (Counts 3 & 4), obstructing the report of crime or injury (Counts 5 & 6), resisting arrest or detention (Counts 7 & 8) and simple assault (Counts 9-13). PSR p. 8 ¶31. Eaglin's then girlfriend alleged that during an argument over his phone, he had grabbed her around the throat when she tried to leave and threw he back onto the bed. PSR pp. 8-9, ¶31. Eaglin was located at an address she gave and after a short chase was arrested. Id.

Two days after the initial report, his girlfriend changed her story reporting that after an argument she asked him to leave and he refused. PSR p. 9, ¶31. She picked up her cell phone and attempted to call the police but Eaglin threw her to the bed, grabbed a knife, and held it to her face just below her eye moving the knife from her face to her stomach, whereupon he lifted the knife up and motioned downward as if he were going to stab her. Id. She stated he then pulled her shirt down revealing her breast, which he kissed and licked. Id. He then pulled down her pajama bottoms and underwear and licked her clitoris. She was able to break free and ran to the bathroom where he followed her, grabbing her

throat causing a scratch. A few minutes later, he left the apartment. PSR p. 9, ¶31.

Eaglin went to trial on Count1 and the remaining charges and was acquitted on all counts except Count 7, charging resisting arrest and Count 11, alleging simply assault. PSR p. 8, ¶ 31. He was sentenced to six months' imprisonment. Id.; PSR p. 10, ¶39.

His probation on both previous convictions was violated on February 15, 2005 as a result of failing to report his arrest for the 2004 offense, failing to complete a sex offender counseling program and failing to get permission before changing his address, PSR pp. 6-8, ¶¶29-30. He was sentenced to 90 days and 2 ½ to 7 years' imprisonment to be served concurrently. Id.

During his imprisonment, Eaglin successfully completed the Intensive Sexual Offender Treatment program during his incarceration at the New Hampshire State Prison. According to records provided, he developed an understanding of "the cycle of thoughts, feelings, and behaviors that lead up to his offending ... [and was] able to develop a comprehensive relapse prevention plan to minimize his risk of reoffending in the future" as a result of his participation in the program.

He stated that he is doing as best as can be expected and he denied any need for mental health counseling. PSR p. 12, ¶46.

Eaglin was paroled on August 2, 2010. PSR pp. 7-8, ¶30. He completed his registration as a sex offender in New Hampshire on August 5, 2010. PSR p. 4, ¶10. Apparently sometime after August 31, 2010, Eaglin left his New Hampshire address. PSR p. 4, ¶12. In September he enrolled in Le Cordon Bleu College of Culinary Arts in Cambridge, MA, the defendant was enrolled in the school from September 27, 2010 until January 12, 2011. PSR p. 13 ¶48. In December of 2010 he began employment at Technique Restaurant in Cambridge, MA, the defendant was employed as a prep-cook making \$10 per hour. PSR p. 13, ¶53. Eaglin was then employed at a Kentucky Fried Chicken restaurant in Nashua, New Hampshire as a full-service team member making \$7.75 per hour from March to July of 2011. PSR p. 13, ¶52. He apparently relocated to the Glens Falls, New York in August of 2011 where he maintained employment in the food service industry until his arrest for the federal offense. PSR p. 13, ¶¶50-53; p. 11, ¶43.⁴

⁴ At the time of the federal charge his father and stepmother lived in Hudson Falls, New York (a town close to Glens Falls, New York). His siblings also lived in the area. PSR p. 11, ¶40. Eaglin intended on returning to Glens Falls upon his release. PSR p. 12, ¶44.

B. The Original Offense and Sentencing

Mr. Eaglin was arrested on February 3, 2012 for failing to register as a sex offender. PSR p. 10, ¶32.⁵ On May 30, 2012, he was charged by a federal grand jury in the District of New Hampshire in a one-count indictment alleging he violated 18 U.S.C. § 2250(a) for failing to register as a sex offender from August of 2010 to August or September of 2011. A. 79. At the time of his arrest, Eaglin was in a relationship and living in Queensbury, New York with his then girlfriend and two children. PSR p. 11, ¶43. He was employed as a manager at a local McDonald's restaurant.

Eaglin pled guilty to the federal charge brought in the District of New Hampshire. A. 13, Doc. No. 13; A. 89-90. The Presentence Report assigned a base offense level of 14 because Eaglin was a Tier II sex offender. PSR p. 5, ¶18. Application of a two-level reduction for acceptance of responsibility resulted in a Total Offense Level of 12. PSR p. 6, ¶26. With Eaglin's Criminal History Category of IV, the

⁵ Eaglin was charged by state law enforcement authorities with failing to register as a sex offender on February 3, 2012. PSR p. 9, ¶32. He pled guilty on February 8, 2012 and was sentenced to time served. *Id.*

corresponding advisory guideline range was 21 to 27 months. PSR p. 10, ¶35; p. 13, ¶ 56.

At the sentencing on December 20, 2012, Eaglin was sentenced to 21 months' imprisonment followed by a 15-year term of supervised release and was ordered to pay a \$100 special assessment. A. 81-82. The district court imposed fourteen standard conditions of supervision and one special condition. A. 91-92. The special condition prohibited the defendant from associating with persons under the age of eighteen, except in the presence of a responsible adult who is aware of the nature of the defendant's background and current offense. A. 92.

In early November of 2013, prior to his release from a half-way house where he was finishing his custodial sentence, Eaglin agreed to have his conditions modified. A. 95-97. The modification was part of an agreement for federal probation in the Northern District of New York to oversee his supervision so that Eaglin could return to Glens Falls, New York where he had been living prior to his arrest. *Id.* The modification added seven conditions. A. 95-96. One of which was a ban on the viewing, possessing, owning, subscribing to or purchasing of any material, including pictures, videotapes, films, magazines, books, telephone

services, electronic media, computer programs, or computer services that depict sexually explicit conduct, as defined in 18 U.S.C. § 2256(2). A. 96.

A second modification was sought and ordered on May 13, 2014. A. 11-12. The modification added a condition that Eaglin serve two months in home detention, commencing on a date and under conditions to be set by the probation officer with the possible use of location and/or monitoring technology to be paid for by the defendant according to his ability to pay. A. 11-12. The modification was made due to Eaglin's interactions with the five-year old son of a neighbor who supervised the contact. A. 11.

On July 18, 2014, a third modification was imposed. A. 14-15. Eaglin was subject to a curfew for two months, commencing on a date and under conditions to be set by the probation officer with the possible use of location and/or monitoring technology to insure the defendant's compliance. Id. Eaglin had failed to report incidental contact with a minor at his prior residence after trying to get alternative transportation to sex offender treatment because of a transportation issue and failed to report the transportation problem. A. 14.

C. The Previous Violations, Modifications and Sentence

After complying with the supervision and the multiple modifications for almost a year, a petition for violation was filed on June 2, 2015. The petition was amended on August 19, 2015. A. 17-18. The amended petition alleged five violations. Three of the five violations previously alleged in the original petition were for failing to complete mental health counseling (Violation 1), failing to advise probation of a change in residence or employment (Violation 2) and committing another criminal offense by failing to register with the state authorities (Violation 3). A. 17-18. Two violations were added for viewing adult pornography (Violation 4) and leaving the jurisdiction without permission (Violation 5). Id.

During the pendency of the original petition, the probation officer learned that Eaglin had traveled to Fitchburg, Massachusetts where he had been arrested on an accusation of rape. That charge was later dismissed when the accuser recanted her claims. *Addendum to Confidential Probation Letter dated June 2, 2015.*⁶ The probation officer

⁶ The Confidential Letter dated June 2, 2015 and Addendum are filed under separate cover noted as “Confidential Probation Letters” they are part of federal probation’s confidential sentencing materials.

advised that Eaglin had “arranged to meet the alleged victim via an internet data (sic.) site.” *Addendum to Confidential Probation Letter dated June 2, 2015.*

Eaglin’s supervision was revoked by Judge D’Agostino on December 22, 2015. He was sentenced on five violations to 16 months’ imprisonment and 13 years of supervision. Eighteen standard conditions and seven special conditions were imposed. A. 26-27. The condition prohibiting viewing and possessing materials related to depictions of sexually explicit conduct, as defined in 18 U.S.C. § 2256(2), was re-imposed. A. 36, ¶7. A new condition prohibiting the use or possession of any computer, data storage device or any internet capable device unless the defendant participates in the Computer and Internet Monitoring Program (CIMP), or unless authorized by the Court or the U.S. Probation Office and limiting Eaglin to one such device was imposed. *Id.* at ¶6.

His supervision was modified on June 30, 2016 just before his release to include a four-month term in a residential re-entry facility. A. 37. Eaglin had been denied placement for Residential Re-Entry because of a history of RRC failure, refusing to participate in the Financial Responsibility Plan, refusing to go to general population, and for not

having the proper identification documents ready for re-entry. A. 37-38. After commencing release on August 16, 2016, his supervision was modified six months later on February 14, 2017. A. 40. During a home visit on January 17, 2017, an Xbox Edge, an internet capable device, was found and the web browsing history included videos of adult pornography. A. 40. Eaglin was ordered to serve three months of home detention, commencing on a date and with conditions set by the probation officer. A. 40

D. The Present Violations and Revocation Hearing

During Eaglin's service of home detention, the Probation Office filed a petition on March 10, 2017, alleging violations of two special conditions for possession of an internet capable device without authorization and for viewing sexually explicit images. A. 34-35; *Confidential Probation Letter dated March 10, 2017*.⁷ Mr. Eaglin was prepared to admit both violations as he had previously done as part of his agreement to the modification of his supervision that resulted in his home detention. A. 51-52.

⁷ The letter is filed under separate cover noted as "Confidential Probation Letters"

In his sentencing memorandum, counsel for Mr. Eaglin acknowledged the advisory guidelines range of 6-12 months imprisonment under U.S.S.G. §7B1.4 for a grade C violation with criminal history category IV. A. 53. Counsel reminded the court that Mr. Eaglin had previously admitted to the possession of internet capable devices and the possession of adult pornography as part of a modification of his supervision, imposing three months of home detention with electronic monitoring. A. 40-42; 53. Counsel argued that a sentence of one-month imprisonment with six months of home detention with electronic monitoring would be an appropriate sentence for the present violations. A. 53.

Counsel also objected to the re-imposition of Special Conditions 6 and 7, prohibiting use or possession of internet capable devices without monitoring and prohibiting the possession of adult pornography. A. 54-58. The special conditions bore no relation to the nature and circumstances of Eaglin's federal offense, were not based on evidence connecting them to any of the §3553(a) factors, had no connection to adult or child pornography and the prior sex offenses had occurred more than 12 years ago. A. 57.

The government submitted a sentencing memorandum advising the court that a guidelines sentence should be imposed. A. 59. The government also argued that Special Condition 6 prohibiting the use or possession of an internet capable device without registration in the Probation Department's Computer and Internet Monitoring Program was appropriate and requested the addition of a prohibition on accessing the Internet. A. 59. The government further requested re-imposition of Special Condition 7. Id.

According to the government, the special conditions were justified because the use of a smart phone to find sexual partners and accessing pornography were considered by the government to be risk factors in view of the defendant's criminal background involving sexual assault of minors and adults (one of which involved a knife) and multiple failures on community supervision. A. 60. The government stated that the internet ban and ban on adult pornography was necessary to protect the public, to deter the defendant from committing future violations, and to promote the rehabilitation of the defendant. Id. The defendant's use of the internet and consumption of adult pornography may lead to high-risk behavior rather than otherwise healthy sexual behavior. Id. The

government argued that expecting the defendant to show a good faith effort to comply with the most basic conditions and expectations of the Court, and to focus more on his personal recovery from what appears to be a preoccupation with sex was reasonable as evidenced by his history.

A. 60.

An amended petition was filed on March 31, 2017 alleging an additional violation of a standard condition for Eaglin's failing to provide a PIN for a Samsung cellphone confiscated during the home contact visit on March 10, 2017 (Violation 1). A. 48-50. The petition charged that Eaglin failed to comply with submitting his property to a search. A. 45. The amended petition re-alleged violations of the two special conditions for his possession of internet capable devices and adult pornography. Specifically on January 18, 2017, Probation officers confiscated an Xbox Edge game console during a home contact to which Eaglin admitted ownership and use to access the internet. A. 46. During another home contact on March 10, 2017, a Playstation 2, Playstation 4, Samsung smartphone, and Amazon firestick were confiscated (Violation #2). Id. The amended petition also alleged a violation of the prohibition against possessing, owning, subscribing or purchasing any sexually explicit

material (Violation #3). Id. The petition further charged that during a home contact on January 18, 2017, Eaglin admitted to viewing pornography on the web-browsing portion of the Xbox Edge game console. A. 46. A forensic review of the game console also depicted sexually explicit still images. An additional limited and incomplete forensic review of a Samsung smartphone confiscated on March 10, 2017, revealed still images of male genitalia and exposed female breasts. A. 45-46. All were Grade C violations. Id.

A second amended petition was filed the same day. A. 48-50. The second amended petition substituted an allegation of new criminal conduct as the first violation (Violation 1). The petition charged that on January 27, 2017, Eaglin admitted during an office appointment that he used his email account (blu8212@gmail.com) to activate a Microsoft account for the Xbox confiscated on January 18, 2017. A forensic search of the Samsung Smartphone confiscated on March 10, 2017, revealed two additional email accounts associated with the phone. Eaglin had not reported any email accounts as required under the New York State Sex Offender Registration Act. The alleged criminal conduct was based on the failure to comply with the New York State Sex Offender Registration Act

requirements, a Class E Felony. The allegation of new criminal conduct constituted a Grade B Violation.

A revocation hearing was held on April 17, 2017. A. 62-64; 66-81. Counsel for Mr. Eaglin advised the court that Eaglin was prepared to admit Violation Nos. 1 (New criminal conduct) and 3 (Possession of sexually explicit material). A. 67. The clerk read the Violation Nos. 1 and 3 as alleged in the second amended petition. A. 49, 69-70. Eaglin admitted both violations. A. 70.

The court proceeded to sentencing. A. 71. The government requested a sentence of 12 months, at the low end of the guidelines, while maintaining that special conditions 6 and 7 should be re-imposed. A. 72. Defense counsel reiterated the argument in the previous letter memorandum arguing that Mr. Eaglin's general performance on supervision had improved and he was on the way to further improvement with the stabilizing force of his girlfriend. A. 72. Counsel maintained the objections to the re-imposition of Special Conditions 6 and 7 as stated in the sentencing submission. A. 72. Mr. Eaglin had nothing to add.

Proceeding to sentencing, the district court advised that Mr, Eaglin was well known to the court because of his previous supervision issues.

The court believed the challenged conditions were necessary because of an arrest in December of 2015. The court states that the use of an internet capable device to look for sexual partners and pornography appeared to be significant risk factors for Eaglin's conduct. A. 73-74. The court believed that when Eaglin lied about getting internet-capable devices and viewed pornography the community was at risk. A. 74. The court made no comment on the dismissal of the charges underlying the arrest.

The court found that Eaglin admitted a Grade B violation with a Criminal History Category IV. A. 74. The advisory guidelines range was 12 to 18 months. *Id.* The court sentenced Eaglin to 12 months' imprisonment followed by 11 years of supervised release. A. 75. In doing so the court noted that Eaglin's criminal history included:

prior sexual assaults with both minor and adult female victims, prior probation and parole failures, prior failures to comply with state and federal sex offender notification requirements, and one prior revocation of supervised release for conduct that included absconding from supervision and using the internet to find sexual partners and seek pornography.

A. 75;86.

The court added a special condition requiring Eaglin reside in a residential re-entry center or other suitable facility for four months after release. A. 75. The court also re-imposed variations of the objected to Special Conditions Nos. 6 and 7. A. 77-78; 86. Special Conditions Nos. 8 and 9 state:

8. While in treatment and for the remainder of the term of supervision following completion of treatment, you must not view, possess, own, subscribe to or purchase any material, including pictures, videotapes, films, magazines, books, telephone services, electronic media, computer programs, or computer services that depict sexually explicit conduct, as defined in 18 U.S.C. § 2256(2).

9. You must not access the internet from any computer or internet capable device at any location unless authorized by the Court, or as directed by the U.S. Probation Office upon approval of the Court. This ban on internet access shall remain in effect until such time the Court determines such ban is no longer necessary, based upon the Court's evaluation of your risk and needs, along with consideration of the factors outlined in 18 U.S.C. § 3553(a).

Id. Defense counsel reiterated his objection to the previously challenged conditions. A. 79. The court restated its belief that the condition were necessary to protect the public. A. 79-80. Violation No. 2 was dismissed upon the motion of the government. A. 80.

The Judgment in a Criminal Case was filed on April 20, 2017. A. 82. Mr. Eaglin filed a timely notice of appeal on April 25, 2017. A. 87.

SUMMARY OF THE ARGUMENT

This appeal arises from the district court's imposition of the 11-year term of supervised release and the inclusion of two special conditions of supervised release. After Eaglin admitted Violations 1 and 3 of the second amended petition, the district court erred by re-imposing the blanket ban on pornography and imposing a new prohibition on all Internet use without the court's approval.

The special conditions bear no relation to any relevant sentencing factor and deprive Eaglin of more liberty than is reasonably necessary for adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant and to provide the defendant with needed educational or vocational training, medical care or other correctional treatment in the most cost effective manner. 18 U.S.C. §3583(d); 18 U.S.C. §3553(a)(2)(B)-(D).

ARGUMENT

The District Court Erred by Imposing Two Special Conditions of Supervised Release Banning Access to Otherwise Legal Depictions of “Sexually Explicit Conduct” and Prohibiting All Internet Access Without Court Approval.

A. Standard of review

Sentences imposed for violating terms of supervised release are reviewed under “the same standard as for sentencing generally: whether the sentence imposed is reasonable.” *United States v. McNeil*, 415 F.3d 273, 277 (2d Cir. 2005). “Reasonableness” has two components: procedural and substantive. *United States v. Aldeen*, 792 F.3d 247, 251 (2d Cir. 2015). Generally, this Court reviews sentencing decisions under a “deferential abuse-of-discretion standard.” *Gall v. United States*, 552 U.S. 38, 41 (2007).

B. Discussion

Sentencing judges have discretion to impose special conditions of supervised release so long as the conditions are reasonably related to the sentencing factors enumerated in 18 U.S.C. § 3553(a), involve no greater deprivation of liberty than is reasonably necessary, and are consistent with the Sentencing Commission's pertinent policy statements. *See* 18 U.S.C. § 3583(d). The district court erroneously imposed Special

Conditions No. 8 and 9 in the face of objections raised prior to and maintained during the sentencing.

The two special conditions objected to by Mr. Eaglin were imposed in violation of 18 U.S.C. §3583(d) and deprive him of protected First Amendment rights without support in the record for the breadth of prohibition upon those constitutionally protected interests. Special Condition No. 8 prohibits viewing, possessing, owning, subscribing to or purchasing any material, including pictures, videotapes, films, magazines, books, telephone services, electronic media, computer programs, or computer services that depict sexually explicit conduct, as defined in 18 U.S.C. 2256(2). A. 86. Special Condition No. 9 completely banned all internet access without authorization or approval by the court. A. 86. The viewing of adult pornography and access to the internet are liberties protected by the First Amendment. See *United States v. Adkins*, 743 F.3d 176, 193-94 (7th Cir. 2014). See also *Packingham v. North Carolina*, 582 U.S. ___, 137 S.Ct. 1730, 1737 (2017). First Amendment rights are also fundamental rights protected by the due process clause of the Fourteenth Amendment. *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936).

The special conditions are not reasonably related to the nature and circumstances of the offense and the history and characteristics of Mr. Eaglin, the need to deter criminal conduct, the need to protect the public from further crimes of Eaglin, or the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. Eaglin’s state-court convictions, which triggered his registration requirement, did not involve any type of pornography or acts related to pornography. Nor did the prior convictions involve the use of the internet. Moreover, Eaglin’s underlying federal offense, his failure to register as a sex offender, also was unrelated to pornography or the internet. In fact, the failure to register as a sex offender by definition is not a “sex offense”. U.S.S.G. § 5D1.2 comment. n. 1. (“Such term does not include an offense under 18 U.S.C. 2250 (Failure to register)”).

Courts have upheld a special condition banning all forms of pornography only where the trial court hears evidence or makes findings demonstrating that the defendant’s conduct warranted imposing a broad ban on all sexually explicit conduct, even that involving only adults. *See United States v. Lombardo*, 546 F. App’x 49 (2d Cir. 2013) (upholding

prohibition of access to “sexually explicit conduct” because “ample evidence” supported the district court’s conclusion that the defendant’s “problem with pornography addiction” influenced his criminal acts, which included receipt and possession of child pornography); *United States v. Brigham*, 569 F.3d 220 (5th Cir. 2009) (upholding three-year ban on possession of “pornographic sexually oriented or sexually stimulating materials” where the defendant had been convicted of receipt of child pornography and the defendant’s sex-offender treatment counselor testified that even sexually explicit images of adults would reinforce the defendant’s previous behavior); *United States v. Boston*, 494 F.3d 660 (8th Cir. 2007) (upholding ban where court found that it served deterrent effect on the defendant, who was convicted of producing child pornography); *United States v. Simmons*, 343 F.3d 72, 82 (2d Cir. 2003) (upholding ban on “pornographic material” where the district court judge found a connection between the defendant’s viewing and possessing sexually explicit material and his criminal behavior, noting that the defendant made videotapes of sexual attacks).

Conversely, special conditions of supervised release banning access to otherwise legal pornography have been routinely overturned where the

trial court heard no evidence and made no findings demonstrating a connection between the ban and the § 3553(a) factors. *See Shannon*, 743 F.3d 496 (vacating special condition barring the defendant, who had been convicted of possessing child pornography, from possessing any material containing “sexually explicit conduct” where district court failed to explain why it was imposing the ban or make any findings justifying the ban); *United States v. Perazza-Mercado*, 553 F.3d 65 (1st Cir. 2009) (vacating condition of supervised release banning defendant from possessing any pornographic material where there was no suggestion in PSR or at sentencing that the defendant, who was convicted of sexual contact with a minor, had abused or even possessed pornography in the past, or that it contributed to his offense or would be likely to do so in the future, and trial court gave no explanation for imposing the prohibition); *United States v. Armel*, 585 F.3d 182 (4th Cir. 2009) (referring to special condition prohibiting defendant convicted of threatening federal officials from possessing any pornography as “particularly inexplicable” and vacating it because the district court offered no explanation for the necessity of the condition); *United States v. Voelker*, 489 F.3d 139 (3d Cir. 2007) (vacating ban on materials depicting “sexually explicit

conduct” where the trial court failed to give any reasons for imposing the ban and nothing in the record suggested that viewing such materials would cause the defendant, who was convicted of possessing child pornography, to reoffend); *United States v. Loy*, 191 F.3d 360 (3d Cir. 1999) (remanding where trial court failed to explain reasons for imposing pornography ban on defendant convicted of receipt of child pornography).

The special conditions of supervision banning access to all sexually explicit content and to the internet absent court approval bear no relation to the nature and circumstances of Eaglin’s underlying federal offense, which is failure to register under SORNA. As discussed above, failing to register is not a sex offense. These two special conditions of supervision bear no relation to the history and characteristics of Eaglin, who has never been charged with or convicted of any offenses involving pornography or used the internet in a criminal act or to somehow facilitate that act. There is no indication in the record that accessing otherwise legal adult pornography would make Eaglin more likely to commit a crime in the future.

Although the district court pointed to these two conditions as necessary because of the risk factors they presented. There is no support

in the record indicating the acts prohibited by these conditions presage additional criminal conduct. In fact, Eaglin has completed a sex offender treatment program during which he developed an understanding of "the cycle of thoughts, feelings, and behaviors that lead up to his offending ... [and was] able to develop a comprehensive relapse prevention plan to minimize his risk of reoffending in the future." PSR p. 12, ¶46. The imposition of these conditions without a reasonable relation to the purposes for the sentence is unreasonable. See *United States v. Taylor*, 796 F.3d 788, 793 (7th Cir. 2015) (Special condition barring defendant from viewing adult pornography was unwarranted where the condition was unrelated to the crime of conviction and there no showing that the viewing of adult pornography contributed to the offense or would cause the defendant to reoffend).

There is no indication that this special condition of supervision has any deterrent value or protects the public from further crimes by Mr. Eaglin. There is certainly no indication that Eaglin was provided with opportunities to educational or vocational training, medical care, or other correctional treatment with the addition of the special conditions. In fact

barring his access to the internet eliminates a significant means of communication and education.

Finally these conditions involve a greater deprivation of liberty than is reasonably necessary to fulfill the purposes of sentencing. To protect the First Amendment courts are prohibited from enforcing regulations that prevent a substantial amount of protected First Amendment activity, even if the particular conduct which violated the regulation was not protected by the First Amendment. *New York v. Ferber*, 458 U.S. 747, 769 (1982).

The definition of sexually explicit conduct in 2256(2) encompasses otherwise legal adult pornography. *Shannon*, 743 F.3d at 500. Descriptions and depictions of sexual conduct by adults is fully protected by the First Amendment. *Reno v. A.C.L.U.*, 521 U.S. 844, 858-859 (1997). *See United States v. Adkins*, 743 F.3d 176, 193–94 (7th Cir. 2014)(Because pornographic materials enjoy First Amendment protections courts must be sensitive to the possible overbreadth of the supervised release condition)(citations omitted). The inclusion of ban on adult pornography was error without a reasonable relation and demonstrated reasonable necessity to the purposes for the sentence.

Access to the Internet is an equally protected liberty interest under the First Amendment. *Packingham*, 137 S.Ct. 1730, 1737 (“With one broad stroke, North Carolina bar[red] access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.”). In *Packingham v. North Carolina*, the United States Supreme Court unanimously held that a North Carolina statute making it a criminal offense for convicted sex offenders to access social media web sites was unconstitutionally overbroad and violated the First Amendment. 137 S. Ct. 1730, 1737 (2017). While acknowledging the state's interest in preventing the sexual abuse of minors, the Court reasoned that the law was not narrowly tailored to advance a legitimate government interest. *Packingham* recognized the breadth of impact an untailored internet ban could have. *Id.* at 1737. The present condition imposed by the district court is even broader. The condition bars all use of the internet absent the court’s approval. In *Packingham*, the bar was only to social media sites but allowed other internet access to excepted areas. *Id.* at 1734 (the statutory bar did not apply to websites that “[p]rovid[e] only one of the

following discrete services: photosharing, electronic mail, instant messenger, or chat room or message board platform” and did not include websites that have as their “primary purpose the facilitation of commercial transactions involving goods or services between [their] members or visitors.”) (statutory citations omitted).

In the present case, Mr. Eaglin is convicted of failing to register as a sex offender sentenced to an 11- year term of supervised release with a special condition prohibiting him from accessing the internet in any way without the approval of the Court. As the Supreme Court has made clear, the internet is a vital outlet for free expression, a critical mode of communication and information. Eaglin must solicit the court’s approval over the next eleven years or depend upon probation to fashion a court-approved place before he can access the internet. Similar to the ban in North Carolina, his lawful speech is suppressed but without a rational basis in the record that such suppression would in any way advance a legitimate government interest. See *Packingham* at 1737 (Rejecting the primary response from the State that the law must be broad to serve its preventative purpose of keeping convicted sex offenders away from vulnerable victims).

Prior to *Packingham*, a consensus had developed in the circuits that the prohibition on internet access is unconstitutionally overbroad for defendants who had never used computers in their federal offenses even if the condition allowed a probation officer to approve its use. *United States v. Sofsky*, 287 F.3d 122, 126–27 (2d Cir. 2002); *United States v. Albertson*, 645 F.3d 191, 200 (3d Cir. 2011); *United States v. Scott*, 316 F.3d 733 (7th Cir. 2003); *United States v. Holm*, 326 F.3d 872, 877 (7th Cir. 2003); *United States v. Wiedower*, 634 F.3d 490, 494–96 (8th Cir. 2011); *United States v. Gnirke*, 773 F.3d 1155, 1163 (9th Cir. 2015); *United States v. White*, 244 F.3d 1199, 1206 (10th Cir. 2001); cf. *United States v. Love*, 593 F.3d 1, 12 D.C.Cir. 2010) (upholding a no-Internet ban only if the defendant has history of contact with minors and noting circuit courts consensus that such bans were not permitted for defendants with a record of only illegal possession of images). In the wake of *Packingham*, the application of such a far-reaching condition is even more egregious given that in addition to the lack of the use of the internet or a computer in Mr. Eaglin’s federal offense, his recorded criminal history has no such use or involvement.

The imposition of these two special condition are thus unsupported by 18 U.S.C. § 3583(d) and unconstitutional infringements on protected First Amendment rights. Given this total lack of relation between the special condition and the relevant sentence factors and necessity, the special conditions involve a greater deprivation of liberty than is reasonably necessary.

CONCLUSION

Mr. Eaglin respectfully requests that this Court of Appeals for the Second Circuit vacate the violations of supervised release and remand for further district court proceedings consistent with this Court's decision.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to 2ND CIR. R. 32 (a)(7), undersigned counsel certifies that this brief complies with the type-volume limitations, typeface requirements and type style requirements of Fed. R. App. P. 32 (a)(7).

1. This brief contains 6,474,words within the type volume limitation of Fed.R. App. P. 32 (a)(7)(B) exclusive of the portions exempted by Fed. R. App. P. 32 (a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word 2013 software in Century, 14 point font in text and Century, 12 point font in footnotes.
3. Undersigned counsel understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Fed. R. App. P. 32 (a)(7), may result in the Court striking this brief and imposing sanctions against the person using the brief.

/s/

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CERTIFICATE OF SERVICE

I, Molly Corbett, certify that today, August 18, 2017, one copy of the Appellant's Brief, Appendix and sealed materials, were served upon Mr. Grant Jacquith, Acting United States Attorney, through Steven Clymer, AUSA, 100 South Clinton Street, Syracuse, New York 13261, by ECF and with delivery by First Class mail to follow.

/s/

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