IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 17-3589

UNITED STATES OF AMERICA,
Appellee,

v.

KEVIN CARSON,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

BRIEF FOR THE APPELLANT

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SUMMARY OF THE CASE

Kevin Carson pleaded guilty to two counts of attempted distribution of child pornography and one count of receipt of child pornography in violation of 18 U.S.C. § 2252(a)(2), and one count of possession of child pornography in violation of 18 U.S.C. § 2252(a)(4). The district court sentenced Mr. Carson to a total term of 240 months' imprisonment (DCD 42, Judgment at 2). The court imposed concurrent lifetime terms of supervised release on each count and numerous special conditions of release (DCD 42, Judgment at 3, 5-6).

Mr. Carson challenges the following special conditions of supervision imposed by the court: 1) special condition 6, which prohibits the possession of "any matter that is pornographic/erotic"; 2) special condition 14, which prohibits the possession or use of any computer or electronic device with access to any on-line computer service without the prior approval of the Probation Office; and 3) special condition 16, which prohibits Mr. Carson from maintaining or creating a user account on any social networking site that allows access to persons under the age of 18 (DCD 42, Judgement at 5).

Mr. Carson requests ten minutes for oral argument.

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JURISDICTIONAL STATEMENT

On December 16, 2015, Mr. Carson was indicted on two counts of attempted distribution of child pornography and one count of receipt of child pornography in violation of 18 U.S.C. § 2252(a)(2), and one count of possession of child pornography in violation of 18 U.S.C. § 2252(a)(4) (DCD 1, Indictment at 1-3). On January 5, 2017, Mr. Carson pleaded guilty to the charged offenses (DCD 46, Plea Tr. at 1, 16). On November 14, 2017, the district court sentenced Mr. Carson to a total term of 240 months' imprisonment and supervised release for life (DCD 42, Judgment at 2-3). The district court had jurisdiction pursuant to 18 U.S.C. § 3231, as Mr. Carson was charged with offenses against the United States.

On November 28, 2017, defense counsel timely filed a notice of appeal from the district court's final judgment, pursuant to Fed. R. App. P. 3 and 4(b)(1) (DCD 43, Notice of Appeal at 1). This Court has jurisdiction pursuant to 28 U.S.C. § 1291, which provides for jurisdiction over appeals from all final decisions of district courts of the United States.

STATEMENT OF THE ISSUE

I. Did the district court commit plain error: 1) in imposing a life term of supervised release without consideration of the pertinent sentencing factors in 18 U.S.C. § 3553 and without providing an adequate explanation for the length of the term chosen; and 2) in imposing special conditions that significantly infringe on Mr. Carson's constitutional rights and involve greater deprivations of liberty than reasonably necessary?

United States v. Kelly, 625 F.3d 516 (8th Cir. 2010);

United States v. Simons, 614 F.3d 475 (8th Cir. 2010);

United States v. Perazza-Mercado, 553 F.3d 65 (1st Cir. 2009);

United States v. Mark, 425 F.3d 505 (8th Cir. 2005).

STATEMENT OF THE CASE

On February 28, 2013, and April 4, 2013, a task force officer with the Federal Bureau of Investigation identified two Internet Protocol (IP) addresses that were sharing or possessing files suspected of containing child pornography (DCD 31, Presentence Investigation Report (PSR) at p. 5, ¶¶ 3-4). The officer was able to download images of child pornography from each IP address (DCD 31, PSR at p. 5, ¶¶ 3-4). The officer identified the IP address as assigned to an individual residence in Kansas City, Missouri (DCD 31, PSR at p. 5, ¶ 3).

On April 18, 2013, task force officers executed a search warrant at the residence (DCD 31, PSR at p. 5, ¶ 5). The officers interviewed the individuals present at the residence, including Kevin Carson, who admitted using a file sharing program to download and share child pornography (DCD 31, PSR at p. 5, ¶ 5). Mr. Carson also admitted using his cell phone to take photographs of himself and a 16-year-old girl having sex (DCD 31, PSR at p. 6, ¶ 5). The officers seized Mr. Carson's laptop computer, cell phone, and a hard drive (DCD 31, PSR at p. 6, ¶ 5). The officers found numerous images and videos depicting child pornography (DCD 31, PSR at p. 6, ¶ 6).

On May 3, 2013, officers interviewed Mr. Carson for a second time (DCD 31, PSR at p. 6, ¶ 7). Mr. Carson admitted exchanging sexually explicit photographs with five girls who were between the ages of 14 and 17 (DCD 31,

PSR at p. 6, ¶ 7). One of the girls had a sexual relationship with Mr. Carson (DCD 31, PSR at p. 6, ¶ 8). Mr. Carson also exchanged child pornography images with a sixth girl (DCD 31, PSR at p. 7, ¶ 13).

On December 16, 2015, Mr. Carson was indicted on two counts of attempted distribution of child pornography and one count of receipt of child pornography in violation of 18 U.S.C. § 2252(a)(2), and one count of possession of child pornography in violation of 18 U.S.C. § 2252(a)(4) (DCD 1, Indictment at 1-3). On January 5, 2017, Mr. Carson pleaded guilty to the charged offenses (DCD 46, Plea Tr. at 1, 16). There was no plea agreement (DCD 46, Plea Tr. at 5; DCD 31, PSR at p. 13, ¶ 65).).

The Probation Office prepared a PSR applying enhancements for possessing images of prepubescent minors, distributing images to a minor, possessing images involving sexual abuse of an infant, engaging in a pattern of activity involving sexual exploitation of minors, use of a computer, and possessing over 600 images of child pornography (DCD 31, PSR at p. 8-9, ¶¶ 23-29). After receiving a 3-level reduction for acceptance of responsibility, Mr. Carson's total offense level was 42 (DCD 31, PSR at p. 9-10, ¶¶ 35-37). Mr. Carson had no criminal history and was in criminal history category I (DCD 31, PSR at p. 10, ¶¶ 40-42). The guideline imprisonment range was 360 months to life (DCD 31, PSR at p. 13, ¶ 64).

On November 14, 2017, Mr. Carson appeared before the Honorable Roseann Ketchmark, United States District Judge for sentencing (DCD 47, Sent. Tr. at 1). The government recommended a total sentence of 20 years imprisonment, while defense counsel asked the court to consider a variance below 20 years (DCD 47, Sent. Tr. at 6-8). The court sentenced Mr. Carson to 240 months' imprisonment on counts 1, 2, and 3 of the indictment and 120 months' imprisonment on count 4, to be served concurrently (DCD 47, Sent. Tr. at 11). The court ordered supervised release for life on each count to run concurrently (DCD 47, Sent. Tr. at 11).

The court ordered that Mr. Carson comply with the special conditions of supervision set forth in the PSR (DCD 47, Sent. Tr. at 12-13; DCD 31, PSR at p. 13-15, ¶ 71). The special conditions of release included the following provisions:

> 6. The defendant will neither possess nor have under his control any matter that is pornographic/erotic; or that describes sexually explicit conduct, violence toward children or child pornography [as described in 18 U.S.C. 2256(2) and (8)], including photographs, images, books, writings, drawings, videos, and electronic material.
>
> 14. The defendant shall not possess or use any computer or electronic device with access to any 'on-line computer service' without the prior approval of the Probation Office. This includes any public or private computer network.
>
> 16. The defendant shall not maintain or create a user account on any social networking site (i.e. Myspace, Facebook, Adultfriendfinder, etc.) that allows access to persons under the age of 18, or allows for the exchange

> of sexually explicit material, chat conversations, or instant messaging. The defendant shall not view and/or access any web profile users under the age of 18.

(DCD 42, Judgement at 5).

Defense counsel did not object to the imposition of a life term of supervised release or to the imposition of the above special conditions.

On November 28, 2017, Mr. Carson filed a timely notice of appeal (DCD 43, NOA).

SUMMARY OF THE ARGUMENT

The district court plainly erred in sentencing Mr. Carson to a supervised release term of life, because the court failed to consider the pertinent sentencing factors under 18 U.S.C. § 3553. The court also failed to offer any explanation for imposing the life term. The lack of an adequate explanation for the term imposed prevents this court from reviewing the reasonableness of the supervised release term and requires remand to the district court.

The district court plainly erred in ordering Mr. Carson to comply with certain special conditions of supervised release. Special condition 6 prohibits Mr. Carson from possessing "any matter that is pornographic/erotic." The condition involves a greater deprivation of liberty than is reasonably necessary, is overbroad in violation of Mr. Carson's First Amendment rights, and is vague in violation of the Due Process Clause in that it fails to provide adequate notice of what constitutes prohibited material.

Special conditions 14 and 16 restrict Mr. Carson's use of a computer with an "on-line computer service" and prohibit Mr. Carson from maintaining or creating a user account on any social networking site. As with special condition 6, these conditions involve a greater deprivation of liberty than is reasonably necessary and prevent Mr. Carson from engaging in the legitimate exercise of his First Amendment rights.

ARGUMENT

Issue I: Did the district court commit plain error: 1) in imposing a life term of supervised release without consideration of the pertinent sentencing factors in 18 U.S.C. § 3553 and without providing an adequate explanation for the length of the term chosen; and 2) in imposing special conditions that significantly infringe on Mr. Carson's constitutional rights and involve greater deprivations of liberty than reasonably necessary?

A. Standard of Review

This Court reviews the district court's imposition of the terms and conditions of supervised release for plain error where the defendant fails to object to the terms at his sentencing hearing. *United States v. Goettsch*, 812 F.3d 1169, 1171 (8th Cir. 2016) (citing *United States v. Ristine*, 335 F.3d 692, 694 (8th Cir. 2003)). Plain error is "(1) an error, (2) that is plain, and (3) that affect[s] substantial rights, and the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Poe*, 764 F.3d 914, 916 (8th Cir. 2014). "Where a condition of supervised release would impose 'sweeping restrictions on important constitutional rights,'" an appellate court "review[s] the condition more closely." *United States v. Davis*, 452 F.3d 991, 995 (8th Cir. 2006), quoting *United States v. Crume*, 422 F.3d 728, 733 (8th Cir. 2005).

B. Applicable legal standards regarding terms and conditions of supervised release.

"Although a sentencing judge has wide discretion when imposing the terms of supervised release, the court's discretion is limited by the requirement that the conditions be reasonably related to § 3553(a) factors, involve no greater deprivation of liberty than is reasonably necessary, and are consistent with any pertinent policy statements issued by the United States Sentencing Commission." *Goettsch*, 812 F.3d at 1171 (citation omitted); 18 U.S.C. § 3583(d). "A condition is reasonably related if tailored to 'the nature and circumstances of the offense, the defendant's history and characteristics, the deterrence of criminal conduct, the protection of the public from further crimes of the defendant, and the defendant's educational, vocational, medicinal or other correctional needs."' *United States v. Bender*, 566 F.3d 748, 751 (8th Cir. 2009), quoting *United States v. Crume*, 422 F.3d 728, 733 (8th Cir. 2005).

In assessing the appropriateness of special conditions, it also is important to consider the rehabilitative objectives that supervised release serves. *United States v. Goodwin*, 717 F.3d 511, 522 (7th Cir. 2013). "Supervised release fulfills rehabilitative ends, distinct from those served by incarceration." *United States v. Johnson*, 529 U.S. 53, 59, 120 S.Ct. 1114, 146 L.Ed.2d 39 (2000). Placing "[u]nduly harsh conditions [on supervised release] would, instead of facilitating an offender's transition back into the everyday life of the community, be a significant

barrier to a full reentry into society." *United States v. Perazza–Mercado*, 553 F.3d 65, 71 (1st Cir. 2009).

A sentencing court "may not impose a special condition on all those found guilty of a particular offense." *Davis*, 452 F.3d at 995. Instead, the district court must "conduct an inquiry 'on an individualized basis,' looking at the specific facts of the defendant's criminal history and his particular offenses," and make "a particularized showing of the need for the condition in each case." *United States v. Kelly*, 625 F.3d 516, 520 (8th Cir. 2010) (holding it was error for the district court to simply follow the special conditions of supervised release set out in sentencing recommendation); *see also United States v. Bender*, 566 F.3d 748, 752 (8th Cir. 2009) (district court's imposition of special condition held improper based on generalized finding that "sex offenders need to have a very tight rein").

The district court must engage in an individualized analysis, regardless of whether an objection is made by the defendant, because blanket orders "undermine the fairness and integrity of our judicial proceedings." *Davis*, 452 F.3d at 995-96; *see also Kelly*, 625 F.3d at 520 ("The lack of *ad hoc* findings in this case violates the principle of individualized fact-finding. . . .Deficient in these respects, the condition fails the requirement of reasonable relationship to the sentencing factors").

C. The district court plainly erred in imposing a life term of supervised release without explaining its basis for the length of the term.

In determining the length of a term of supervised release, the sentencing court "shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)." 18 U.S.C. § 3583(c). These statutory provisions require consideration of the nature and circumstances of the offense and the history and characteristics of the defendant; the need for the sentence imposed to afford adequate deterrence, to protect the public from future crimes, and provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; the sentencing range established for the offense; any pertinent policy statement issued by the Sentencing Commission; the need to avoid unwarranted sentencing disparities; and the need to provide restitution to any victims of the offense.

In arguing for a downward variance, defense counsel observed that in most child pornography cases, as in Mr. Carson's case, the applicable guideline typically results in a guideline range at or above the statutory maximum sentence (DCD 47, Sent. Tr. at 5-6). In imposing the term of imprisonment, the court disagreed with defense counsel's argument, saying that the enhancements for distributing child pornography to a minor and for a pattern of activity involving the sexual

exploitation of minors were unique aggravating aspects not seen in the typical child pornography case (DCD 47, Sent. Tr. at 10).

The court stated that based on the nature and circumstances of the offense and the history and characteristics of the defendant, including his lack of any prior criminal history and the fact that he pleaded guilty, it would vary downward from the range of 360 months to life imprisonment and not run the counts consecutively (DCD 47, Sent. Tr. at 10-11). The court imposed a total sentence of 240 months' imprisonment (DCD 47, Sent. Tr. at 11).

With respect to supervised release, the court simply stated that the term was for life and that Mr. Carson must comply with the mandatory and standard conditions as well as the special conditions set forth in the PSR (DCD 47, Sent. Tr. at 11-13). The court did not explain the basis for the length of the term of supervised release or for the imposition of the numerous special conditions. Defense counsel did not object to the lack of an explanation or to any of the special conditions.

The record does not demonstrate that the court considered any of the pertinent § 3553 factors in imposing the life term of supervised release. "Without proper analysis and an explanation for the length of the supervised release term chosen," an appellate court cannot review the reasonableness of the sentence. *United States v. Inman*, 666 F.3d 1001, 1004 (6th Cir. 2012). The inability to

review the reasonableness of the sentence requires remand—even under a plain error standard of review—so that the district court can provide a more thorough analysis of the sentencing factors and an explanation for the lifetime term of supervised release. *Id*.

D. Special condition six which prohibits the possession of adult pornography and erotica involves a greater deprivation of liberty than is reasonably necessary, is overbroad, and vague.

Special condition six provides that "[t]he defendant will neither possess nor have under his control any matter that is pornographic/erotic; or that describes sexually explicit conduct, violence toward children or child pornography [as described in 18 U.S.C. 2256(2) and (8)], including photographs, images, books, writings, drawings, videos, and electronic material" (DCD 42, Judgment at 5). Mr. Carson does not challenge the second clause of the condition prohibiting the possession of material describing sexually explicit conduct, violence toward children or child pornography as defined in 18 U.S.C. § 2256(2) and (8). He does challenge, however, the first clause of the condition banning the possession of any matter that is pornographic or erotic. With respect to those materials, the condition involves a greater deprivation of liberty than is reasonably necessary, is overbroad in violation of Mr. Carson's First Amendment rights, and is vague in violation of

the Due Process Clause in that it fails to provide adequate notice of what constitutes prohibited material.

A similar special condition was vacated in *United States v. Kelly,* 625 F.3d 516, 522 (8th Cir. 2010) and *United States v. Simons*, 614 F.3d 475, 485 (8th Cir. 2010). In *Kelly* and *Simons*, the defendants were prohibited from possessing or having under their control "any material, legal or illegal, that contains nudity or that depicts or alludes to sexual activity or depicts sexually arousing material." *Kelly*, 625 F.3d at 519; *Simons*, 614 F.3d at 483. In *Simons*, the Court focused on the fact that the special condition prohibited the possession of any material that depicted nudity, which would violate Simons' right to view non-obscene material protected by the First Amendment, such as works of art depicting nudity. *Simons*, 614 F.3d at 483.

In *Kelly*, the Court agreed with *Simons* that a prohibition on possessing materials depicting nudity is overbroad and went on to conclude that prohibiting materials that merely alluded to sexual activity encompassed an even broader swath of materials. 625 F.3d at 521. The Court said that materials alluding to sexual activity would encompass certain portions of the Bible and numerous works of classic literature. *Id*. at 521-22. The Court vacated the special condition, saying that convicted individuals do not forfeit all constitutional protections by reason of their conviction. *Id*. at 522.

Other opinions, however, have upheld narrower special conditions of supervised release prohibiting the possession of pornography. In *United States v. Thompson*, a panel of this Court upheld a condition that prohibited the possession of "pornography which includes any sexually explicit materials." 653 F.3d 688, 695 (8th Cir. 2011). The Court rejected the defendant's overbreadth challenge, saying that the special condition was narrower than a general prohibition of possessing pornography, because it only prohibited sexually explicit pornographic materials. *Id*. at 695.

The Court also rejected the defendant's claim that the condition was unconstitutionally vague. *Id*. at 695-96. The Court acknowledged that it had "concerns with the uncertainty of what constitutes 'pornography' because the term lacks a precise legal definition." *Id*. at 695. Because the condition only prohibited sexually explicit pornography and the term "sexually explicit conduct" was defined in 18 U.S.C. § 2256(2), the Court concluded that the condition was not unconstitutionally vague. *Id*. The Court excused the district court's failure to make individualized findings on the record to support the imposition of the condition as harmless error. *Id*. at 693-94.

In *Thompson*, the Court said that it had "consistently rejected overbreadth arguments where the special condition at issue precluded the defendant from possessing pornography or sexually explicit material." *Id*. at 695. The Court cited

United States v. Wiedower, 634 F.3d 490, 497 (8th Cir. 2011), and *United States v. Ristine*, 335 F.3d 692, 694 (8th Cir. 2003), in support of this proposition. In *Wiedower*, a panel of this Court upheld a special condition that restricted the defendant from possessing any form of pornography or sexually explicit material. 634 F.3d 490, 497 (8th Cir. 2011). In *Ristine*, the Court upheld a special condition that prohibited the defendant from possessing "any pornographic materials." 335 F.3d 692, 694 (8th Cir. 2003).

Mr. Carson disputes the assertion that *Wiedower* and *Ristine* represent a consistent rejection of overbreadth arguments. In *Wiedower*, the defendant challenged the special condition on the grounds that "such a ban [was] unnecessary because it [would] neither promote his rehabilitation nor protect the community" and that "the district court failed to make any individualized findings supporting the imposition of the ban." *Wiedower*, 634 F.3d at 496. Neither argument challenged the special condition as overly broad or vague.

In *Ristine*, the defendant challenged that portion of the special condition that prohibited the possession of pornography as overbroad and vague, but the Court specifically noted that he did not "argue that the restrictions concerning 'erotica' [were] overbroad and vague. 335 F.3d at 694, n. 2.

In Mr. Carson's case, the special condition prohibits "matter that is pornographic/erotic" (DCD 42, Judgment at 5). Unlike the defendant in *Ristine*,

Mr. Carson specifically challenges the prohibition on pornography *and erotica* as overbroad and vague. Rather than narrowing the uncertainty of what constitutes pornography, as in *Thompson*, the condition broadens the prohibition to include materials that are not pornographic, but are merely erotic. As written, the condition would prohibit possession of adult erotica and pornography, not just child pornography or child erotica. The prohibition on all pornography and erotica is overly broad, because it would include material that depicts adult nudity as well as movies and books that may be sexually titillating, depending on the subjective opinion of the viewer or reader, thus conflicting with *Kelly* and *Simons*.

Furthermore, the condition is unconstitutionally vague, because the terms "pornographic" and "erotic" are not sufficiently clear to inform a probationer of what conduct will result in his return to prison. See, *United States v. Guagliardo*, 278 F.3d 868, 872 (9th Cir. 2002) (a supervised release condition prohibiting the possession of "any pornography" was unconstitutionally vague, because the term is entirely subjective and lacks any recognized legal definition); *United States v. Shannon*, 743 F.3d 496, 500-01 (7th Cir. 2014); *United States v. Loy*, 237 F.3d 251, 264 (3rd Cir. 2001); *United States v. Perazza-Mercado*, 553 F.3d 65, 74-76 (1st Cir. 2009). While 18 U.S.C. § 2256(8) contains a definition of child pornography, it does not purport to define what would constitute adult pornography or erotica.

The district court did not offer any explanation as to why a prohibition on possession of adult pornography and erotica for the rest of Mr. Carson's life is reasonably related to the factors set forth in § 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D). The court did not explain why the condition did not involve a greater deprivation of liberty than is reasonably necessary for the purposes of the above statutory subsections. For these reasons, Mr. Carsons asserts that special condition six should be vacated.

E. Special conditions 14 and 16 impose lifetime restrictions on Mr. Carson's use of a computer and internet access that involve a greater deprivation of liberty than is reasonably necessary to achieve the purposes of the § 3553 sentencing factors.

Special condition 14 provides that "[t]he defendant shall not possess or use any computer or electronic device with access to any 'on-line computer service' without the prior approval of the Probation Office. This includes any public or private computer network" (DCD 42, Judgment at 5). Special condition 16 provides that "[t]he defendant shall not maintain or create a user account on any social networking site (i.e. Myspace, Facebook, Adultfriendfinder, etc.) that allows access to persons under the age of 18, or allows for the exchange of sexually explicit material, chat conversations, or instant messaging. The defendant shall not view and/or access any web profile users under the age of 18" (DCD 42, Judgment

at 5). Mr. Carson contends that these lifetime restrictions are greater than reasonably necessary to afford adequate deterrence and protect the public from further crimes.

Some Eighth Circuit opinions have upheld restrictions on using or possessing a computer with internet access without prior approval by the Probation Office finding that the restrictions did not involve a greater deprivation of liberty than is reasonably necessary to advance deterrence and protect the public. See e.g., *United States v. Lacy*, 877 F.3d 790, 794 (8th Cir. 2017); *United States v. Durham*, 618 F.3d 921, 944 (8th Cir. 2010); *United States v. Ristine*, 335 F.3d 692, 696 (8th Cir. 2003); *United States v. Bender*, 566 F.3d 748, 751-52 (8th Cir. 2009). These opinions upheld such restrictions, because they did not impose a complete ban on internet access and the defendants' offenses involved the use of a computer to distribute pornography, not merely possess it. *Lacy*, 877 F.3d at 794; *Durham*, 618 F.3d at 944-45; *Ristine*, 335 F.3d at 696; *Bender*, 566 F.3d at 751-52. These cases are distinguishable and do not control the result in Mr. Carson's case.

The defendants in these cases were restricted from using computers and other devices with internet access for limited periods of time. In *Lacy*, the defendant was sentenced to 60 months' imprisonment and five years of supervised release. 877 F.3d at 791. The defendant in *Durham* was sentenced to 151 months' imprisonment and ten years of supervised release. 618 F.3d at 924. In *Ristine*, the

court sentenced the defendant to 27 months' imprisonment and three years of supervised release. 335 F.3d at 693. In *Bender*, the defendant was sentenced to 18 months' imprisonment and ten years of supervised release. 566 F.3d at 750.

Mr. Carson, on the other hand, was sentenced to 240 months' imprisonment with supervised release for *life*. Both the term of imprisonment and the term of supervised release are far greater than the sentences imposed in the above cases. In determining whether a supervised release condition imposes a greater deprivation of liberty than is reasonably necessary for the purposes of deterrence and protection of the public, a court must consider the scope of the condition, "including both its duration and its substantive breadth." *United States v. Miller*, 594 F.3d 172, 187 (3rd Cir. 2010).

Before imposing a lifetime restriction on computer use and internet access, a district court should also consider potential less restrictive alternatives and provide an adequate explanation as to why the less restrictive alternatives are inadequate. *United States v. Mark*, 425 F.3d 505, 510 (8th Cir. 2005). In *Mark*, the defendant pleaded guilty to possession of child pornography and the court sentenced him to 30 months' imprisonment to be followed by three years of supervised release. *Id*. at 506. The district court imposed a special condition of supervised release that prohibited the defendant "from using or having access to any online computer

programs, and from using or possessing a computer, except under supervised work conditions and on a computer with no Internet connection." *Id*. at 509.

The Court said that a complete ban on internet access is difficult to justify in cases involving simple possession of pornography and should not be imposed without first considering less restrictive alternatives:

> At a minimum, such a condition should be imposed only on a record that permits a thorough evaluation of other alternatives that might be sufficient to serve the statutory purposes of protecting the public and deterring future crimes. In this case, we believe the record is not sufficient to demonstrate that the complete prohibition on Internet access is reasonably necessary. The potential efficacy of a filtering program, for example, has not been explored. Whether such a program would likely be effective in preventing Mark from accessing illegal content cannot be judged on this record. Nor does the record show why the district court apparently believed that restrictions on time and place of Internet access, combined with regular monitoring and inspections by the probation office, would be inadequate to protect the public and deter future violations.

Id. at 510.

Mr. Carson acknowledges that he, unlike the defendant in *Mark*, did not merely possess child pornography but also used the internet to send sexually explicit photographs of himself and to receive sexually explicit photographs from teenage girls (DCD 31, PSR at p. 6, ¶¶ 7-13). Mr. Carson also had a consensual sexual relationship with one of the girls (DCD 31, PSR at p. 6, ¶ 8). These facts may justify restrictive conditions on computer usage and internet access, but they

do not justify restricted access for life without any consideration of potential alternatives.

The district court offered no explanation for its imposition of lifetime supervised release, nor did it indicate that it had considered a shorter duration or less restrictive alternatives. Because computers and internet access "have become virtually indispensable in the modern world," it is critical that a district court fulfill its obligation to consider less restrictive alternatives and to provide an explanation as to why less restrictive alternatives are inadequate. *Mark*, 425 F.3d at 509, quoting *United States v. Sofsky*, 287 F.3d 122, 126 (2d Cir. 2002).

The fact that special condition 14 permits the use of a computer with access to an on-line computer service if Mr. Carson's probation officer gives prior approval does not save the condition from being overly restrictive. "[A] district court may not shift to the probation office its responsibility to ensure that a supervised release condition is consistent with the goals of sentencing." *United States v. Maxson*, ---F.Supp.3d ---, 2017 WL 6206044 at *4 (D. Maryland 2017), citing *United States v. LaCoste*, 821 F.3d 1187, 1192 (9th Cir. 2016) ("If a total ban on Internet use is improper but a more narrowly tailored restriction would be justified, the solution is to have the district court itself fashion the terms of that narrower restriction. Imposing a total ban and transferring open-ended discretion to

the probation officer to authorize needed exceptions is not a permissible alternative").

Special condition 16, which prohibits Mr. Carson from maintaining or creating a user account on any social networking site that allows access to persons under the age of 18, is also overly broad. The Supreme Court recently found unconstitutional a North Carolina statute making it a felony for a registered sex offender to access social networking websites knowing that the site permits minors to be members. *Packingham v. North Carolina*, 137 S.Ct, 1730 (2017). The Court said that the state failed to meet its burden to show that the broad scope of the statute was necessary or legitimate to serve the purpose of keeping convicted sex offenders away from vulnerable victims. *Id*. at 1737. The Court said that the statute "with one broad stroke bars 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." *Id*. By foreclosing access to social media to convicted sex offenders, the statute prevented offenders from engaging in the legitimate exercise of their First Amendment rights. *Id*.

Special condition 16 suffers the same flaws as the North Carolina statute held to be unconstitutional in *Packingham*. It prohibits Mr. Carson from maintaining or creating a user account on any social networking site and therefore

involves a greater deprivation of liberty than is reasonably necessary for the purposes of providing adequate deterrence and protection of the public from future crimes.

F. The district court's failure to make individualized findings, failure to explain the basis for the length of the supervised release term, and failure to ensure that the special conditions did not involve greater deprivations of liberty than reasonably necessary resulted in plain error.

The district court plainly erred in imposing special conditions 6, 14, and 16 without making individualized findings as to why the special conditions should be imposed on Mr. Carson. *United States v. Poitra*, 648 F.3d 884, 889 (8th Cir. 2011) ("The parties agree that the district court failed to make the necessary individualized findings, and this error was plain under current law from this Court"). While individualized findings are required, this Court has declined to find plain error where the reasons for imposing a condition are discernable from the record. *Id*. at 890.

Mr. Carson's case is different. Here, the district court committed an error that is plain by imposing a lifetime ban on access to computers and the internet that is not narrowly tailored and by failing to provide an adequate explanation as to why less restrictive alternatives are inadequate. See, *United States v. Mayo*, 642 F.3d 628, 632 (8th Cir. 2011) (it was plain error to impose a condition prohibiting

the possession of a computer or computer-enabling equipment); but see *United States v. Fields*, 324 F.3d 1025, 1027 (8th Cir. 2003) (it was not plain error to impose a three year term of supervised release with the condition that the defendant not possess a computer or have internet service unless granted permission by his probation officer).

While it may be discernible from the record that Mr. Carson's use of a computer and internet access should be restricted and monitored to *some* extent, the record does not dictate the parameters of those restrictions. It is not an all or nothing proposition. There are various technologies available to monitor the computer usage of sex offenders, some more comprehensive than others. *United States v. Parazza-Mercado*, 553 F.3d 65, 73-74 (1st Cir. 2009); *United States v. Lifshitz*, 369 F.3d 173, 191-93 (2nd Cir. 2004). The district court's failure to explain why it imposed the special conditions of release suggests that the court did not consider any less restrictive alternatives, but simply imposed the conditions because they were suggested in the PSR.

With respect to special condition 6, it is discernable from the record why the district court would prohibit the possession of child pornography, but it is not discernable as to why the court prohibited the possession of legal adult pornography and erotica. The imposition of a ban on the possession of adult pornography without explanation and without an apparent basis in the record

constitutes an error that is plain. *Parazza-Mercado*, 553 F.3d at 78. The prohibition on all erotica is overbroad and rises to the level of plain error. *Simons*, 614 F.3d at 483-85.

The district court's error affected Mr. Carson's substantial rights. An error affects substantial rights when it is prejudicial, meaning it affects the outcome of the proceedings. *United States v. Olano*, 507 U.S. 725, 734 (1993). Had the court fulfilled its obligation to explain the basis for the restrictions on Mr. Carson's computer usage and internet access, there is a reasonable probability that the court might have considered less restrictive alternatives and restrictions of a shorter duration.

There is a reasonable probability that the court would not have prohibited the possession of adult pornography and erotica had it attempted to explain the basis for applying such a restriction. *Parazza-Mercado*, 553 F.3d at 78 (finding plain error because district court did not articulate a basis for prohibiting the possession of adult pornography); *United States v. Inman*, 666 F.3d 1001, 1006-07 (6th Cir. 2012) (finding plain error where the district court did not explain why it imposed a life term of supervised release or why it imposed certain conditions).

Finally, the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. "Because both the length of supervised release and the conditions imposed are likely more severe than if the court had followed the

correct procedures, the district court's errors seriously affect the fairness, integrity, or public reputation of the proceedings." *Inman*, 666 F.3d at 1007. When a court imposes supervised release for life and imposes special conditions of release that are not narrowly tailored, the fairness and integrity of the proceedings are seriously affected.

CONCLUSION

Mr. Carson asks this Court to vacate special conditions 6, 14, and 16 and remand this case to the district court for resentencing as to the duration of supervised release.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,860 words. I further certify 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010, Times New Roman Font Face in Font size 14.

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CERTIFICATE OF SERVICE

It is hereby CERTIFIED that on this 23rd day of January, 2017, the foregoing was electronically submitted with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system.

I hereby certify that one copy of the appellant's filed, bound brief and addendum were mailed on this _____ day of January, 2018 to:

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