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
HONORABLE ROSEANN KETCHMARK, DISTRICT JUDGE

BRIEF FOR THE UNITED STATES

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SUMMARY OF THE CASE

The appellant, Kevin Carson, pleaded guilty to the four-count indictment that charged him with child pornography offenses, in violation of 18 U.S.C. § 2252(a)(2). At sentencing, the district court sentenced Carson to a below-Guidelines sentence of 240 months' imprisonment, and imposed a life term of supervised release with enumerated mandatory and special conditions. Carson did not object to his sentence or special conditions.

In his single issue on appeal, Carson argues the district court plainly erred in imposing the lifetime supervised release term and ordering Carson to abide by Special Condition Nos. 6, 14, and 16 that prohibited his possession of adult pornography or erotica, and imposed lifetime restrictions on computer and internet access. The record shows the district court imposed these special conditions of supervision after consideration of the 18 U.S.C. § 3553(a) sentencing factors, which embraced both the lifetime incarceration sentence and supervised release term. The court correctly imposed special conditions of supervised release based on those § 3553(a) factors and 18 U.S.C. § 3583 mandates that related to Carson's offense, and those restrictions did not deprive him of more liberty than reasonably necessary.

The Government does not believe oral argument is necessary. However, if set for argument, 10 minutes would be sufficient time to address the issue raised.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

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STATEMENT OF THE ISSUE

Whether the district court plainly erred in sentencing Carson to a life term of supervised release with enumerated special conditions, where the lifetime supervised release, as well as Special Condition Nos. 6, 14, and 16, rested on the nature and circumstances of Carson's case, his history and characteristics, the need to deter him from harming additional victims, to protect the public from further crimes based on his past possession of numerous still images depicting child pornography, with one showing a baby

being raped by an adult male, the fact that he engaged with underage females via social network and enticed them to send sexually explicit photos of themselves over the Internet, and his history of mental disorders that can be addressed while in custody and on supervised release, all of which did not involve a greater deprivation of his liberty than reasonably necessary.

Cases

United States v. Munjak, 669 F.3d 906 (8th Cir. 2012)

United States v. Mefford, 711 F.3d 923 (8th Cir. 2013)

United States v. Demers, 634 F.3d 982 (8th Cir. 2011)

STATEMENT OF THE CASE

A. Procedural History

On December 16, 2015, appellant Kevin Carson was charged in a four-count indictment in the Western District of Missouri, with attempted distribution of child pornography – Counts One and Two; receipt of child pornography– Count Three, all in violation of 18 U.S.C. § 2252(a)(2); and possession of child pornography – Count Four, in violation of 18 U.S.C. § 2252(a)(4). (DCD 1.)[1] Counts One, Two, and Three each carried a statutory minimum sentence of five years each and a maximum of 20 years, while Count Four had no statutory minimum sentence and a maximum of 10 years. (DCD 1.) On May 1, 2017, Carson appeared with counsel before the Honorable Roseann Ketchmark, United States District Judge for the Western District of Missouri, and entered a plea of guilty to all counts of the indictment without the benefit of a plea agreement. (DCD 26.)

The United States Probation Office prepared a presentence investigation report (PSR) for the district court, that found that Carson's base offense level was a 22, and after adding several specific offense characteristics under U.S.S.G. § 2G2.2, and subtracting three levels for acceptance of responsibility, he had a total offense level of 42. (PSR 7-9, ¶¶ 22-37.)

[1]"DCD" refers to the district court docket entries for Carson's underlying criminal case, No. 15-00399-01-CR-W-RK.

The PSR calculated an advisory Guidelines range of 360 months' to life imprisonment. (PSR 12, ¶ 64.) Further, the PSR noted that the Guidelines requirement for a term of supervised release was five years to life. (PSR 12, ¶ 68.) Carson filed no objections to the Guidelines calculations. (Sent. Tr. 5.)

On November 14, 2017, the district court, after considering the Government's filed sentencing memoranda asking for a sentence of 240 months, and hearing argument from both parties, varied downward from the Guidelines range and sentenced Carson to 240 months' imprisonment on Counts One, Two, and Three, and 120 months on Count Four, all to be served concurrently, and $400 in mandatory special assessments. (DCD 42.) The district court also placed Carson on supervised release for life on all counts. (DCD 42.) The judgment and commitment order was filed on November 15, 2017. (DCD 42.) Carson timely filed a notice of appeal on November 28, 2017. (DCD 43.)

B. Statement of the Facts

1. Unobjected-to Facts in the PSR Outlining Carson's Involvement in Child Pornography.

On February 28, 2013, and April 4, 2013, a task force officer with the FBI, downloaded child pornography files from two Internet Protocol (IP) addresses associated with Carson. (PSR 5, ¶¶ 3-4.) Among the files was a split image that depicted a prepubescent female straddling a nude adult male.

(PSR 4, ¶ 3.) The male's penis was inserted into her vagina as he was using his hand to spread her labia. (PSR 4, ¶ 3.) The other half of the split image contained a young nude female kneeling on a table while two other clothed females were holding her. (PSR 4, ¶ 3.) One of the clothed females appeared to be inserting a strap-on dildo into the young female's vagina or anus. (PSR 4, ¶ 3.) The young female appear to be grimacing or crying. (PSR 4, ¶ 3.)

On April 18, 2013, law enforcement officers executed a search warrant at the identified address and conducted a search. (PSR 4, ¶ 5.) The officers interviewed the individuals present at the residence, including Carson, who admitted using a file sharing program to download and share child pornography. (PSR 5, ¶ 5.) Carson also admitted using his cellphone to take photographs of himself and a 16-year old girl having sex. (PSR 4, 5, ¶¶ 5, 6.) Following the interview, officers/agents seized Carson's laptop, cell phone, and Hitachi hard drive. (PSR 4, ¶ 5.) Located on the seized electronics were 593 still images and 99 videos, most of which contained child bondage and bestiality. (PSR 5, ¶ 6.)

On May 3, 2013, officers interviewed Carson a second time at this residence. (PSR 5, ¶ 7.) Carson admitted to using the file sharing program Addax on the Acer laptop. (PSR 4, ¶ 5.) Carson admitted exchanging sexually explicit photographs with five girls who he claimed were between the ages 14 and 17 years old at the time of the photographs. (PSR 5, ¶ 7.) One

of the girls had a sexual relationship with Carson when she was 16 years old. (PSR 5, ¶ 8.) Carson also sent child pornography to a sixth girl. (PSR 6, ¶ 13.)

2. Sentencing Guidelines Calculations As Noted In the PSR

The probation office prepared a PSR where the base offense level was noted as a 22. (PSR 8, ¶ 22.) The following specific offense enhancements were applied: (1) a two-level enhancement pursuant to § 2G2.2(b)(2) because the material possessed by Carson involved a prepubescent minor or a minor who had not attained the age of 12 years; (2) a five-level enhancement pursuant to § 2G2.2(b)(3)(C) because Carson distributed sexually explicit photographs to a minor; (3) a four-level enhancement pursuant to § 2G2.2(b)(4) because the material portrayed sadistic or masochistic conduct, sexual abuse or exploitation of an a infant or toddler; (4) a five-level enhancement pursuant to § 2G2.2(b)(5) because Carson engaged in a pattern of activity based on his sexual exploitation of minors; (5) a two-level enhancement pursuant to U.S.S.G. § 2G2.2(b)(6) because the offense involved use of a computer; and (6) a five-level enhancement pursuant to U.S.S.G. § 2G2.2(b)(7)(D) because the offense involved 600 images or more that contained child pornography. (PSR 7-8, ¶¶ 23-29.)

3. The § 3553(a) Factors Articulated in the Government's Sentencing Memorandum that the Court Considered Before Sentencing Carson

Carson did not file a sentencing memorandum, choosing instead to make arguments during the sentencing proceeding. The Government, did however, file a sentencing memorandum recommending a sentence of 240 months' (20 years) imprisonment, and a life term of supervised release (DCD 40, ¶ 7), which the district court acknowledged it had already reviewed. (Sent. Tr. 4.) In support of the recommended 240-month sentence, the Government detailed a number of 18 U.S.C. § 3553(a) factors, including the nature and circumstances of the offense, and Carson's history and characteristics pursuant to § 3553(a)(1). Specifically, the Government reminded the court of two complete movie files law enforcement downloaded from Carson's IP address that included some that were "particularly graphic." (DCD 40 at 2-3.) Furthermore, the number of images on Carson's videos equated to 8018 images total or "1259 if only images of identified victims are considered," and "[m]ost of the images depicted child bondage and bestiality" as well as one that "depicted the horror of a baby being raped by an adult male." (DCD 40 at 3.)

The Government also cited the need to promote respect for the law, the need to afford adequate deterrence to criminal conduct, the need to protect the public from Carson's further crimes, and provide him with needed educational

training and medical care if needed pursuant to 18 U.S.C. § 3553(a)(2)(A)-(D). (DCD 40.) The facts supporting the court's consideration of these sentencing factors includes Carson's history and characteristics of enticing minors to engage in sending elicit photos of themselves (DCD 40 at 2-3), the need for deter his behavior of exploiting minors by possessing, obtaining and sharing video images of sexual abuse of children (DCD 40 at 4), and protect the public from Carson possessing, obtaining and sharing video images of sexual abuse of children. (DCD 40 at 5.)

4. *The District Court's Sentencing Decision*

During the sentencing hearing before Judge Ketchmark, Carson cited the fact that he has no criminal history, has family support, has a high school diploma, has been employed, and was cooperative with law enforcement, in support of his request that the court consider a variance below the Guidelines range. (Sent. Tr. 5-7.) Carson further argued that "while the guidelines will provide for a three-level reduction, that is in effect meaningless given the extremely high guideline levels and the enhancement which are almost universal in these kind of cases, that the guidelines simply aren't helpful. (Sent. Tr. 6.) The Government referred to the arguments noted in its sentencing memorandum in support of its request for a total sentence of 20 years' (240 months) imprisonment. (Sent. Tr. 8.)

In analyzing the 18 U.S.C. § 3553(a) factors, the district court first discussed the nature and circumstances of Carson's offenses. (Sent. Tr. 10.) The court noted "[t]wo factors that do stand out in this case more so than in the typical child pornography case is the distribution to a minor in which he, Mr. Carson, received a five-level enhancement. That is somewhat unique to this case. Additionally, the five-level enhancement for pattern of activity. That is not a normal guideline application. So I do disagree in those two aspects with your comments, Mr. Schultz, that these are aggravating aspects of virtually every child exploitation case. (Sent. Tr. 9-10.) The court concluded by saying: "[A]nd based on the nature and circumstances of the offense and the history and characteristics of the defendant, in particular he has no prior criminal history, that he pled guilty, although that three-level reduction is applied, that is still a significant factor, the Court will vary down from the 360 to life and will not run the counts consecutively or stacked." (Sent. Tr. 22, 10-11.)

Carson was sentenced to total sentence of 240 months' imprisonment on Counts One, Two, and Three, and 120 months on Count Four, and placed on supervised release for life on all counts, under standard, mandatory, and special conditions of supervision adopted by the court and set forth in the PSR. (Sent. Tr. 11-13.) The specific special conditions in this child pornography case imposed that Carson now complains about are:

> 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 at 5.)

SUMMARY OF THE ARGUMENT

On this appeal, Carson raises one point, claiming that the district court plainly erred by imposing a life term of supervised release and ordering him to abide by special conditions that specifically prohibited his possession of adult pornography or erotica, and imposed lifetime restrictions on computer and internet access. (Carson Brf. 8.)

The record supports that the district court properly sentenced Carson to a life term of supervised release and imposed certain special conditions of supervision. The court, after it engaged in a single consideration of the 18 U.S.C. § 3553(a) sentencing factors that embraced both the incarceration sentence and the supervised release term, correctly imposed special conditions of supervised release based on those § 3553(a) factors and 18 U.S.C. § 3583 mandates. The lifetime supervised release was based on the nature and circumstances of Carson's case, and his history and characteristics. Carson possessed numerous still images depicting child pornography, including one showing a baby being raped by an adult male. He also engaged with underage females via social network and enticed them to send sexually explicit photos of themselves over the Internet. This shows that he is a sexual predator that needs a lifetime of supervision to not only to deter him from harming additional victims, but also to protect the public from further crimes. Additionally, Carson reports a history of mental disorders that can be

addressed while in custody and on supervised release. These same concerns were the basis for the imposition of special conditions Carson was to abide by while on supervised release. Special Condition Nos. 6, 14, and 16 – that specifically prohibited his possession of adult pornography or erotica, and imposed lifetime restrictions on computer and internet access – are reasonably related to his child pornography convictions, and do not unduly restrict his liberty more than reasonably necessary. Since the district court did not plainly err in imposing the lifetime supervision or the special conditions of supervised release for Carson, this Court should uphold.

ARGUMENT

The district court did not plainly err in imposing a life term of supervised release and Special Condition Nos. 6, 14, and 16 on Carson, because the court properly considered sentencing factors in 18 U.S.C. § 3553(a), including the nature of this child pornography offense, Carson's history and characteristics of enticing minors to engage in sending elicit photos of themselves, the need for deter his behavior and protect the public from Carson possessing, obtaining and sharing video images of sexual abuse of children, which adequately explained the lifetime supervision and the special conditions that restricted his possession of adult pornography and erotica, use computers and the Internet did not involve a greater deprivation of liberty than reasonably necessary.

Carson's raises one issue on appeal. He argues that the district court plainly erred when it imposed a life term of supervised release and certain special conditions of that supervised release. (Carson Brf. 8.) Specifically, Carson argues the district court plainly erred by failing to make an individualized assessment considering 18 U.S.C. § 3553(a) factors as they pertained to the supervised release (Carson Brf. 8); failing to provide an adequate explanation of the length of the supervised release term chosen (Carson Brf. 8); imposing Special Condition 6 regarding the possession of adult pornography and erotica (Carson Br. 13); and Special Conditions 14 and 16 regarding computers and the Internet. (Carson Brf. 18.)

Carson's argument fails. The record is replete with valid reasons that justify both the lifetime supervisions and the imposition of Special Condition

6, 14 and 16. Carson has engaged in child pornography where he has enticed minors to engage in sending elicit photos of themselves, and obtained and shared video images of sexual abuse of children, which adequately explained the lifetime supervision and the special conditions of supervised release restricting his possession of adult pornography and erotica (Special Condition 6), use computers and the Internet (Special Conditions 14 and 16) did not involve a greater deprivation of liberty than reasonably necessary. This Court should affirm the district court's ruling, and Carson's life term of supervised release and special conditions.

A. ***Standard of Review***

Because Carson failed to object at sentencing to imposition of the life term of supervised release or to any of the special conditions of supervised release, this Court reviews the district court's imposition of the conditions for plain error. *United States v. Gauld*, 833 F.3d 941, 943 (8th Cir. 2016) (citing *United States v. Ristine*, 335 F.3d 692, 694 (8th Cir. 2003)). "Plain error results 'if the district court deviates from a legal rule, the error is clear under current law, and the error affects substantial rights." *Gauld*, 833 F.3d at 945 (quoting *United States v. Alvarez*, 478 F.3d 864, 866 (8th Cir. 2007)). "'This final prong of plain-error review is formidable and requires a showing of more than simple prejudice.'" *Id.* (quoting *United States v. Poitra*, 648 F.3d 884, 889 (8th Cir. 2011)).

B. Discussion

1. The Supervised Release Terms Did Not Constitute "Plain Error"

It is undisputed that the statutes Carson pled guilty to in Counts One, Two, and Three, require a supervised release term of years of not less than five years to life. 18 U.S.C. § 3583(k). Further, the PSR set out that "the statute requires a term of supervised release of five years, therefore, the Guideline requirement for a term of supervised release is five years to life. U.S.S.G. § 5D1.2(b)(2)."[2] Section 5D1.2(b)'s policy statement states in pertinent part "[i]f the instant offense of conviction is a sex offense . . . the statutory maximum term of supervision is recommended."[3]

Carson concedes that he did not timely object to the term or the special conditions of supervised release imposed by the district court, even though he had been given significant opportunity to review them and make written objections prior to the sentencing hearing. (Carson Brf. 8.) The PSR, containing all the special conditions imposed by the Court, was filed on April 12, 2017. (DCD 31; PSR 12-14, ¶ 71(a)-(q).) Prior to the PSR being filed, both parties had been provided an opportunity to make corrections or

[2]Term of supervised release for Count Four has no minimum, but is up to life.

[3]"Sex offense" includes an offense perpetrated against a minor under chapter 110 of Title 18 which includes 18 U.S.C. § 2252. *See* Application Notes to U.S.S.G. § 5D1.2.

objections to the PSR. (PSR Adden.) Carson made zero objections to the content of the PSR. (PSR Adden.)

At the sentencing hearing, the district court confirmed that defense counsel had gone over the PSR with Carson. (Sent. Tr. 2.) Defense counsel also confirmed that Carson was well aware that as part of his sentence he would be on supervised release and would have to comply with its "stringent requirement." (Sent. Tr. 7.) Carson was given an opportunity to address the sentence, supervised term and special conditions on the record, and yet failed to object or complain at any time. (Sent. Tr. 10.)

2. The District Court Considered the Pertinent §3553(a) Factors and Made Individualized Findings to Support Its Sentence, Including Its Order Imposing a Life Term of Supervised Release and Special Conditions of Supervised Release.

A life term of supervision is not uncommon in cases such as this one. *See, i.e.*, *United States v. Demers*, 634 F.3d 982 (8th Cir. 2011); *United States v. Morais*, 670 F.3d 889 (8th Cir. 2012); *United States v. Munjak*, 669 F.3d 906, 907 (8th Cir. 2012). Further, in *United States v. Notman*, 831 F.3d 1084 (8th Cir. 2016), this Court recently stated "[a]s a general matter, courts have wide discretion when imposing supervised release terms." *Id.* at 1089 (citing *United States v. Smart*, 472 F.3d 556, 557 (8th Cir. 2006)). This Court then added:

> Nevertheless, release conditions must (1) be reasonably related to relevant § 3553(a) sentencing factors; (2) involve no greater

> liberty deprivation than reasonably necessary for the purposes set forth in § 3553(a); and (3) be consistent with the United States Sentencing Commission's policy statements. *United States v. James*, 792 F.3d 962, 969 (8th Cir. 2015) (quoting *United States v. Johnson*, 773 F.3d 905, 907-08 (8th Cir. 2014)).

Notman, 831 F.3d at 1089.

In order to fulfill these statutory requirements, sentencing courts must make particularized findings to ensure that special conditions are imposed on an individualized basis. *United States v. Curry*, 627 F.3d 312, 315 (8th Cir. 2010) (per curiam) (citing *United States v. Bender*, 566 F.3d 748, 752 (8th Cir. 2009)), vacated on other grounds, *Curry v. United States*, 565 U.S. 1189 (2012).

The record shows the district court stated it had considered the § 3553(a) factors before announcing the total sentence it was going to impose on Carson. Specifically, the district court stated it considered the nature and circumstances of the offense and the history and characteristics of Carson. (Sent. Tr. 22, 10-11.) The district court also heard Carson's argument that he has no criminal history, has family support, has a high school degree, has been employed, and was cooperative with law enforcement. (Sent. Tr. 5-6.) The district court took issue only with Carson's argument that "while the guidelines will provide for a three-level reduction, that is in effect meaningless given the extremely high guideline levels and the enhancements

which are almost universal in these kind of cases, that the guidelines simply aren't helpful. (Sent. Tr. 6-7.) In response, the district court noted,

> [t]wo factors that do stand out in this case more so than in the typical child pornography case is the distribution to a minor in which he, Mr. Carson, received a five-level enhancement. That is somewhat unique to this case. Additionally, the five-level enhancement for pattern of activity. That is not a normal guideline application. I do disagree in those two aspects with your comments, Mr. Schultz, that these are aggravating aspects of virtually every child exploitation case.

(Sent. Tr. 10.)

The district court's imposition of a life term of supervised release is consistent with both congressional mandate and the Sentencing Commission recommendations. *See United States v. Kennedy*, 499 F.3d 547, 553 (6th Cir. 2007) ("Congress insists that lifetime supervision be available to courts in sentencing sexual offenders" in light of concerns regarding the inadequacy of more limited supervision); *see also* U.S.S.G. § 5D1.2(b)(2), Policy Statement (2016). Since the life term of supervised release was consistent with Guidelines recommendations, an extensive explanation was not required in this case. *See Rita v. United States*, 551 U.S. 338, 346 (2007).

Carson relies on the Sixth Circuit case *United States v. Inman*, 666 F.3d 1001, 1004 (6th Cir. 2012), for the proposition that the district court should have analyzed the § 3553(a) factors twice, once as they pertained to the term of imprisonment to be imposed, and a second time when considering the

length of the supervised release term chosen. (Carson Brf. 12.) Subsequent Sixth Circuit decisions addressing the *Inman* finding have held that where the district court's discussion of the 18 U.S.C. § 3583 sentencing factors were not restricted to a term of imprisonment exclusively, the explanation for ordering a life term of supervised release was sufficient. *See United States v. Harmon,* 593 Fed.Appx. 455 (6th Cir. 2014).

18 U.S.C. § 3583 grants a sentencing court authority to "include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment. . . ." 18 U.S.C. § 3583(a). Accordingly, the district court's discussion of the 18 U.S.C. § 3553(a) sentencing factors, which were not restricted to a term of imprisonment exclusively, was sufficient explanation for ordering a life term of supervised release. *See United States v. Presto,* 498 F.3d 415, 419 (6th Cir. 2007) (The district court in this case engaged in a single consideration of the sentencing factors, which embraced both the incarceration sentence and the supervised release term").

The record in Carson's case is clear that the court made an individualized assessment in imposing its sentence. In light of Carson's involvement with child pornography and deviant sexual conduct, the reasons for the imposition of the special conditions of supervision are discernable

from the record. *See United States v. Poitra*, 648 F.3d 884, 890 (8th Cir. 2011).

Even if the district court had not made its individualized assessment of Carson and the conditions of supervision appropriate to his case, in *United States v. Thompson*, 653 F.3d 688 (8th Cir. 2011), this Court held "that reversal is not required by a lack of individualized findings if the basis for the imposed condition can be discerned from the record." *Id.* at 694. (cited cases omitted).

Similarly, in *United States v. Munjak*, 669 F.3d 906 (8th Cir. 2012), this Court determined there was no plain error in imposing a special condition of supervision where "[t]he reasons for imposing the Internet condition are evidence from the record, so any error did not affect [defendant's] substantial rights." *Munjak*, 669 F.3d at 908. This Court went on to state:

> The record established that [defendant] possessed 600 or more images of child pornography, including material that portrayed sadistic of masochistic conduct or other depictions of violence. These images were possessed on a computer connected to the Internet, and [defendant] distributed child pornography by using a peer-to-peer file-sharing program. *See* PSR ¶¶ 4, 8. We have upheld a similar Internet restriction based on nearly identical facts [citation omitted] and we likewise conclude that the condition here was reasonably related to the § 3553(a) factors and reasonably necessary to further the purposes of sentencing, including adequate deterrence and protection of the public from future crimes by the defendant.

Id.

Here, Carson agreed that his offense involved "a minor who had not yet attained the age of 12" (DCD 31 at 7, ¶ 23), that "some of the material contained sadistic or other violent sexual abuse of children" (DCD 31 at 7, ¶ 25), and that one video "depicted a prepubescent female straddling a nude adult male. The male's penis was inserted into her vagina as he was using his hands to spread her labia." (DCD 31 at 4, ¶ 3.) These facts of Carson's case specifically show that his child pornography offense conduct directly relates to the court's decision to impose a life term of supervised release with special conditions that would further restrict his illegal and horrific behavior.

Carson relies in part on *United States v. Kelly*, 625 F.3d 516 (8th Cir. 2010), and *United States v. Bender*, 566 F.3d 748 (8th Cir. 2009), for the proposition that the district court did not engage in a an individualized analysis of the special conditions it imposed on Carson. (Carson Brf. 10.) However, in *Thompson*, this Court noted that "in both *Kelly* and *Bender*, the district court not only failed to make individualized findings, but actually affirmatively indicated that it was considering the defendant as part of a class of defendants rather that individually." *Thompson*, 653 F.3d at 694 (citing *Kelly*, 625 F.3d at 520); *Bender*, 566 F.3d at 752.

Irrespective of the adequacy of the district court's explanation, Carson has not shown that the district court committed an error that infringed his substantial rights. In *Inman*, an inadequate explanation for a life term of

supervised release was held to have affected substantial rights and integrity of proceedings, only after the court found that "both the length of supervised release and the conditions imposed are likely more severe than if the district court had followed the correct procedures." *Inman*, 666 F.3d at 1006-07. In Carson's case, the district court demonstrated familiarity with the PSR and the "record makes clear that the sentencing judge listened to each argument,' 'considered the supporting evidence,' ' was 'fully aware' of the defendant's circumstances and took 'them into account' in sentencing." *United States v. Vonner*, 516 F.3d 382, 387 (6th Cir. 2008) (quoting *Rita*, 551 U.S. at 358). Therefore, Carson's substantial rights were not affected and the district court committed no error.

3. *Special Condition 6 – Prohibiting Possession or Control of Any Matter that is Pornographic/Erotic*

Carson contends the district court plainly erred in imposing the first clause of Special Condition 6 "[t]he defendant will neither possess nor have under his control any matter that is pornographic/erotic." (Carson Brf. 13.) Carson argues that Special Condition 6 is overbroad and vague. He claims that the condition 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 . . ." and that "the terms 'pornographic' and erotic' are not sufficiently clear to inform a probationer of the what conduct

will result in his return to prison." (Carson Brf. 17.) The record shows that this condition is not overbroad and vague, and, given Carson's conduct, the record shows that the condition was reasonably related to the factors under 18 U.S.C. § 3553(a). Thus, his argument is without merit. This Court has upheld conditions of supervised release similar to the conditions at issue here.

In *United States v. Schultz*, 845 F.3d 879 (8th Cir. 2017), after the district court revoked a SORNA defendant's supervised release, he appealed the reimposition of a condition that this Court described as prohibiting him "'from owning or having in his possession any pornographic materials' or from 'enter[ing] any establishment where pornography or erotica can be obtained or viewed.'" *Id.* at 881. In *Schultz*, the conditions of supervised release stated that the defendant is prohibited from owning or having in his possession any pornographic materials and shall neither use any form of pornography or erotica nor enter any establishment where pornography or erotica can be obtained or viewed. *Id.* While this Court did not address the language prohibiting the defendant from using "any form of pornography or erotica," it upheld the challenged condition. 845 F.3d at 882. The defendant argued that "the provisions are overbroad and vague, such that he has no clear notice as to what he can view or what businesses he can enter without violating his supervised release." *Id.* at 881-82. This Court held that the district court did not plainly err in reimposing the condition. *Id.* at 882. It stated, "As we

have previously held, 'the need to protect children from future exploitation' justifies banning a defendant 'from possessing any pornography.'" *Id.* (quoting *United States v. Mefford*, 711 F.3d 923, 927 (8th Cir. 2013), in turn citing *United States v. Ristine*, 335 F.3d 692, 694-95 (8th Cir. 2003)). *See United States v. Muhlenbruch*, 682 F.3d 1096, 1105 (8th Cir. 2012) (finding district court did not abuse its discretion in imposing pornography restrictions for defendant who received and possessed child pornography) (citing *United States v. Wiedower*, 634 F.3d 490, 496 (8th Cir. 2011); *Ristine*, 335 F.3d at 694).

A similar condition was also upheld by this Court in *United States v. Mefford*, 711 F.3d 923 (8th Cir. 2013). As with this case and *Schultz*, above, *Mefford* addressed two special conditions, and only the second involved "erotica." This court stated, "Special condition one bans Mefford from possessing 'any pornography.' This language is similar to that in many conditions we have previously upheld." *Mefford*, 711 F.3d at 927 (citations omitted).

The *Mefford* court then addressed the second special condition:

> We next turn to special condition two which prohibits Mefford from "enter[ing] any location where pornography, erotica, or adult entertainment can be obtained or viewed." This language is virtually identical to wording we have previously upheld. *See [United States v.] Ristine*, 335 F.3d [692] at 694-95 [(8th Cir. 2002)](defendant prohibited from entering "any establishment where pornography or erotica can be obtained or viewed").

> Some of our more recent cases have upheld bans on sex offenders' entering certain locations where the "primary" product or service being offered is pornography, erotica, or adult entertainment. *See, e.g.*, *United States v. Muhlenbruch*, 682 F.3d 1096, 1105 (8th Cir. 2012); [*United States v.*] *Boston*, 494 F.3d [660,] 664, 667-68 [(8th Cir. 2007)]. While such limiting terms might have been useful here, we nevertheless conclude that special condition two is constitutional.

Id. at 928.

In support of his argument, Carson cites the decisions in *United States v. Simons*, 614 F.3d 475, 485 (8th Cir. 2010), and *United States v. Kelly*, 625 F.3d 516, 522 (8th Cir. 2010). In *Simons*, this Court vacated a special condition prohibiting the defendant from possessing "any material, legal or illegal, that contains nudity or that depicts or alludes to sexual activity or depicts sexually arousing material." 614 F.3d at 483. However, the only part of this condition that the court found unconstitutional was its prohibition on possessing material containing "nudity," not its prohibition on possessing material that "depicts or alludes to sexual activity or depicts sexually arousing material." *Id.* This Court stated:

> The portion of special condition 13 that prohibits Simons from possessing or viewing material that depicts or alludes to sexual activity or depicts sexually arousing material is very similar to the conditions we upheld in [*United States v.*] *Stults* [,575 F.3d 834 (8th Cir. 2009)] and *Boston*. As a whole, however, special condition 13 goes beyond those cases, prohibiting Simons from possessing any material that depicts nudity. By its terms, it would prohibit Simons from viewing a biology textbook or purchasing an art book that contained pictures of the Venus de

> Milo, Michelangelo's David, or Botticelli's Birth of Venus, all of which depict nudity.

Id. In *Kelly*, addressing a special condition that was virtually identical to the condition in *Simons*, this Court found that the prohibition on material "alluding to sexual activity" was overbroad, explaining that such material could include the Bible, Anne Frank's *Diary of a Young Girl*, and other works of classical literature. *Kelly*, 625 F.3d at 521-22. In contrast to the special conditions in *Simons* and *Kelly*, the special condition in this case does not contain language referencing "nudity" or materials merely "alluding to sexual activity."

This Court's past decisions do not support Caron's argument. The special condition in this case prohibits Carson from the possession or control of any matter that is pornographic/erotic. (DCD 31 at 6.) It does not contain prohibitions on his possession of material containing "nudity," *Simons*, 614 F.3d at 483, or material merely "alluding to sexual activity," *Kelly*, 625 F.3d at 521. Rather, the reference to "pornographic or erotic" materials used in this special condition is similar to the references is similar to the special conditions upheld in *Mefford*. The Government has found no cases where this Court has found such special conditions to be overbroad and vague.

4. *Special Conditions 14 and 16 Regarding Computers and the Internet*

Carson asserts the district court plainly erred in imposing Special Condition 14 that states, "[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"; and Special Condition 16 that states, "[t]he defendant shall not maintain or create a user account on any social networking site . . . that allows access to persons under the age of 18, or allows for the exchange of sexually explicit material, chat conversations, on instant messaging. The defendant shall not view and/or access any web profile users under the age of 18." These conditions are reasonable necessary to afford adequate deterrence and protect the public from further crimes.

Carson appears to rely on *United States v. Mark*, 425 F.3d 505, 510 (8th Cir. 2005), for the proposition that Special Condition No. 14 results in plain error. (Carson Brf. 20, 21.) However, Carson's reliance on *Mark* is misplaced for a number of reasons. The special condition at issue in *Mark* was a complete ban which prevented the defendant from "using or having access to any online computer program, and from using or possessing a computer, except under supervised work conditions and on a computer with no Internet connection. The condition at issue here is not a complete ban. Further, the

court's decision in *Mark* rested on the insufficiency of the record through which to justify the condition, not on § 3553 grounds. However, if the defendant in *Mark* had made the § 3553(a) argument Carson makes here, he would have surely lost since the court noted that "[g]iven Mark's repeated offenses of viewing child pornography over the Internet, a complete ban on Internet access is reasonably related to the statutory purposes of deterring criminal conduct and protecting the public from further crimes of the defendant," *Mark*, 425 F.3d at 509, and 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. (Carson Brf. 21.) Carson also had a consensual sexual relationship with one of the girls. (Carson Brf. 21.)

Here, Carson is not prevented from possessing or accessing a computer, but rather he is required to obtain the consent of the probation office prior to possessing or accessing such device. (DCD 41 at 14, Special Condition No. 14.) Further, there is nothing to prevent Carson from possessing or accessing a computer or cell phone that does not have access to "any on-line computer service." This Court has previously upheld such conditions of release for similarly situated defendants. *See*, *e.g.*, *United States v. Goettsch*, 812 F.3d 1169 (8th Cir. 2016); *United States v. Lacy*, 877 F.3d 790, 794 (8th Cir. 2017);

United States v. Bender, 566 F.3d at 751-52; *United States v. Durham*, 618 F.3d 921, 944 (8th Cir. 2010).

Despite the plethora of cases in which this Court has upheld conditions similar to those at issue here, Carson seeks to distinguish his case on the basis that his supervised release term was for life, and not some lower number. This argument is meritless.

In *United States v. Demers*, 634 F.3d 982 (8th Cir. 2011), the district court sentenced the defendant to 150 months' imprisonment and a lifetime of supervised release, subject to 13 standard and seven special conditions. Demers had been convicted of possession of child pornography after public library staff observed him accessing and viewing child pornography on a library's public-access computers. When the library staff approached Demers to have him move away from the computer until the police arrived, he discarded a piece of paper containing 12 images of child pornography he had printed from the computer. *Demers*, 634 F.3d at 983. Demers challenged a number of conditions, specifically, Special Condition No. 5, which forbad Demers to "have access to an internet-connected computer" or to "access the internet from any location without prior approval by the probation office and for a justified reason." *Id.* at 983.

This Court held that the special condition did not constitute a greater deprivation of liberty than necessary, citing *United States v. Boston*, 494 F.3d

660, 668 (8th Cir. 2007), for its conclusion that the fact "Demers was arrested at a public library after having printed images of child pornography, which, as in Boston, could very well have been done for the purpose of distributing those images" was determinative of the issue. *Demers*, 634 F.3d at 984.

In the instant case, Carson used the internet to send sexually explicit photographs of himself and to receive sexually explicit photographs from teenage girls. The condition was narrowly tailored to meet the threat posed by Carson. The district court did not plainly err in imposing Special Condition No. 14.

Likewise, Special Condition No. 14 is not a greater deprivation of liberty than reasonably necessary. Special Condition No. 14 is not a total ban on Carson's ability to use a social networking site. Instead, this special condition simply limits Carson's access to social networking sites that "allows access to persons under the age of 18, or allows for the exchange of sexually explicit material, chat conversations, on instant messaging" and "his viewing or access of any web profile users under the age of 18." As noted above, the Eighth Circuit has consistently upheld similar supervised release conditions for similarly situated defendants.

In support of his argument, Carson does not cite any circuit court opinions. Instead, Carson relies on the opinion issued in *Packingham v. North Carolina*, 582 U.S. —, 137 S.Ct. 1730 (2017). *Packingham* can be

distinguished from this case. First, the issue in *Packingham* was whether a state law which made it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages, impermissibly restricted lawful speech in violation of the First Amendment. *Packingham*, 137 S.Ct. at 1731. In Carson's case here, the issue is whether imposition of a special condition with similar limitations on social networking sites, is no greater deprivation of liberty than reasonably necessary. Two very different questions, that employ very different analyses.

As noted above, the district court is statutorily empowered to impose supervised release conditions. 18 U.S.C. § 3583(d). So long, as here, the conditions do not run afoul of the statute, this Court will uphold the condition. In *Packingham*, the Supreme Court found that the North Carolina law violated the First Amendment in that it is not " narrowly tailored to serve a significant governmental interest." 137 S.Ct. at 1736. However, the Court seemed to acknowledge that it would have held differently if the law would have been a condition of supervised release, "Of importance, the troubling fact that the law imposes severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system is also not an issue before the Court." *Id.* at 1737.

Packingham is not helpful to Carson's cause. The district court here did not plainly err in imposing Special Condition No. 14, and this Court should uphold the district court's ruling.

CONCLUSION

Wherefore, based upon the foregoing reasons and authorities, the Government respectfully requests this Court to affirm the district court's rulings and uphold Carson's sentence, including his life term of supervised release that contains the special conditions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C), that this brief complies with the type-volume limitations in Fed. R. App. P. 32(a)(7)(B) and contains 8,150 words. The brief was prepared using Microsoft Word 2016 software. In making this certification I have relied upon the word-count feature of Microsoft Word 2016. Furthermore, the brief has been determined to be virus-free in compliance with Eighth Circuit Rule 28A(h).

/s/ Catherine A. Connelly
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CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2018, the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. A paper copy will be served on participants in the case by U.S. Mail, postage prepaid, within five days of the Court's notice that the brief has been reviewed and filed.

I hereby certify that a copy of the Government's brief was mailed on April___, 2018, to:

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