NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. EARLSON TULLIE, Defendant-Appellant.	No. 19-10001 19-10068 D.C. No. 3:16-cr-08042-DJH-1 MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Diane J. Humetewa, District Judge, Presiding

Submitted April 17, 2020**
San Francisco, California

Before: HAWKINS and PAEZ, Circuit Judges, and RESTANI,*** Judge.

In this consolidated appeal, Earlson Tullie challenges three conditions of supervised release that were imposed after he pled guilty to assaulting a child

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.

under the age of sixteen. We affirm in part, vacate in part, and remand for further proceedings consistent with this disposition.

1. We agree that the district court initially erred when it delegated to the probation officer the authority to decide whether Tullie should participate in a sex offender treatment program but conclude that the error was not plain. As we and other courts have held, only a district court can impose such requirements. *See United States v. Esparza*, 552 F.3d 1088, 1091 (9th Cir. 2009) (striking language from special condition requiring sex offender treatment, "which may include inpatient treatment, as approved and directed by the Probation Officer").

Nonetheless, the district court itself later imposed sex offender treatment after Tullie's first and second revocation hearings, after considering the results of Tullie's psychosexual exam, his prior incriminating statements, and his concealment of his contacts with minors while on supervised release. Thus, although the initial delegation of authority to the probation officer was improper, the district court eventually determined on its own that sex offender treatment was necessary. We thus cannot say that "the condition would not have been imposed had the error not occurred." *United States v. Barsumyan*, 517 F.3d 1154, 1162 (9th Cir. 2008).

2. We agree, and the government concedes, the district court erred when its written revocation order diverged from an "unambiguous" oral pronouncement.

United States v. Hicks, 997 F.2d 594, 597 (9th Cir. 1993). At the hearing, the district court ordered Tullie to "maintain full-time employment and/or schooling as directed by your probation officer," but the district court's written revocation order dropped the reference to "schooling" and added language authorizing the probation officer to require Tullie to perform "up to 20 hours of community service per week" if he was not employed full-time. The oral pronouncement "must control." *Hicks*, 997 F.2d at 597.

3. We agree that the district court plainly erred by imposing special condition number nine, which restricts Tullie from "engaging in any occupation, business, volunteer activity or profession" carrying "the *potential* to be alone with children," because the condition is overbroad. (Emphasis added.) Compliance with this condition would leave only professions in industries that rigidly prohibit the presence of minors, such as a bar, casino, or adult-entertainment venue. Nothing in the record suggests Tullie had an ongoing propensity to harm children, particularly *random* children he might "potentially" encounter on the job. And we have rejected similarly broad conditions, even when the defendant was convicted of more serious crimes. *See, e.g.*, *United States v. Wolf Child*, 699 F.3d 1082, 1087 (9th Cir. 2012) (striking condition prohibiting defendant from dating anyone who has minor children).

Further, the error was plain because it was "clear" that the condition

contained no qualifying or limiting principle and thus prohibited far more liberty than was reasonably necessary to accomplish the goals of deterrence, protection of the public, or rehabilitation. *See* 18 U.S.C. § 3583(d); *Wolf Child*, 699 F.3d at 1087. The error also affected substantial rights because "the condition would not have been imposed had the error not occurred." *Barsumyan*, 517 F.3d at 1162. Last, a legally void condition that carries with it the threat of punishment seriously affects the fairness, integrity, or public reputation of judicial proceedings.

AFFIRMED in part, VACATED in part, and REMANDED.

United States Court of Appeals for the Ninth Circuit

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Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

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- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

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- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 10. Bill of Costs

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