19-10001 & 19-10068 (Consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EARLSON TULLIE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA (CR-16-08042-DJH-1)

DEFENDANT - APPELLANT'S OPENING BRIEF

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Introduction

Earlson Tullie is a 42-year-old Information Technology student and resident of the Navajo Indian Reservation in northern Arizona. In 2016 the government charged Mr. Tullie with nine counts of sexual abuse of a minor, based on his adult stepdaughter's allegation that he had repeatedly sexually abused her beginning when she was 12 years old. After two trials ended in hung juries, Mr. Tullie pleaded guilty to a single count of assault, involving an incident in which he slapped his stepdaughter in the face. The court sentenced Mr. Tullie to time served followed by two years of supervised release. In 2018 the court found that Mr. Tullie had violated a requirement – which had been imposed by the probation officer, using power delegated to him by the court – that he participate in sex offender treatment, as well as a condition requiring him to avoid being in the company of minors. The court revoked Mr. Tullie's supervised release, and sentenced him to four months in custody followed by two more years of supervised release. Mr. Tullie filed an appeal from that order. Later Mr. Tullie admitted to violating a supervised release condition requiring him to answer truthfully questions from the probation officer. In 2019 the court revoked his supervised release again, and sentenced him to five months in custody followed by two more years of supervised release. Mr. Tullie appealed that order. This Court consolidated the two appeals.

Statement of Bail Status

Mr. Tullie has completed the physical custody portion of his sentence and recently began serving his two-year term of supervised release.

Statement of Jurisdiction

The United States District Court for the District of Arizona (Humetewa, DJ) had jurisdiction over the United States' federal criminal charges against Mr. Tullie, and over the probation officer's petitions for warrant, pursuant to 18 U.S.C. §§ 3231 and 3583. The district court entered its first order revoking Mr. Tullie's supervised release and imposing a sentence of imprisonment and an additional term of supervised release on December 18, 2018.[1] (Footnotes in this brief contain only names and page and line numbers of cited documents.) Mr. Tullie filed a timely notice of appeal from that order on January 2, 2019.[2] FRAP 4(b)(1)(A)(i), 26(a)(1)(C), (a)(6)(A). That appeal was docketed in this Court as number 19-10001. The district court entered its second order revoking Mr. Tullie's supervised release on February 28, 2019.[3] Mr. Tullie filed a timely notice of appeal from that order later that same day.[4] FRAP 4(b)(1)(A)(i). That appeal was docketed in this

[1] Defendant-Appellant's Excerpts of Record (ER) Vol. 1 at 1-4.
[2] ER Vol. 3 at 243-44.
[3] ER Vol. 1 at 5-8.
[4] ER Vol. 3 at 330-31.

Court as number 19-10068. This Court *sua sponte* consolidated the two appeals.[5] This Court has jurisdiction over Mr. Tullie's appeals pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

Statement of the Issues

I. Improper delegation of sex offender treatment requirement. The requirement that Mr. Tullie participate in sex offender treatment was not originally imposed by the district court – instead, it was imposed by the probation officer, wielding power delegated to him by the court. Mr. Tullie's alleged violation of this requirement formed part of the basis for the first revocation of his supervised release, and while the court later reimposed the requirement, it did so in the mistaken belief that it had originally imposed the condition itself, rather than delegating the decision to the probation officer. That delegation was invalid, because the Sentencing Guidelines, the governing statute, and the Constitution all specify that only the *court* may exercise the fundamentally judicial power of imposing supervised release conditions on a defendant. This Court should accordingly strike this invalid condition.

II. Full-time employment condition deviating from version imposed orally. When it orally pronounced Mr. Tullie's sentence in connection with its

[5] DktEntry: 2 in No. 19-10001; DktEntry: 2 in No. 19-10068.

2019 revocation of his supervised release, the district court articulated a supervised release condition requiring him to maintain full-time employment "and/or schooling." But the written version of this condition contained in the 2019 revocation order omits the alternative of pursuing "schooling," and adds language empowering the probation officer to require Mr. Tullie to perform "up to 20 hours of community service per week." Because the only legally cognizable sentence is the one imposed orally by the judge in the defendant's presence, this Court should remand the case with instructions to conform the written condition to the version pronounced orally.

III. Occupational restriction breaching Sentencing Guidelines and governing statute. The district court imposed a supervised release condition barring Mr. Tullie from engaging in any occupation carrying the "potential" to be alone with children. This condition violates § 5F1.5 of the Sentencing Guidelines, which regulates occupational restrictions, because the court did not find a "reasonably direct relationship" between the restriction and Mr. Tullie's "offense of conviction," nor did it find that the condition was "reasonably necessary" to protect the public, and because the restriction extends well beyond the minimum time and extent "necessary to protect the public." In addition, in light of its extremely broad scope, this condition breaches the governing statute's requirement

that supervised release conditions result in "no greater deprivation of liberty than is reasonably necessary" to achieve the purposes of supervised release. This Court should accordingly strike this condition.

Statement of the Case

A. After the government twice tried and failed to convict Mr. Tullie of sexual abuse of a minor, he pleaded guilty to a single count of non-sexual assault.

Earlson Tullie is a 42-year-old former college student and bus driver, and a resident of the Navajo Indian Reservation in northern Arizona.[6] In March of 2016, the government procured an indictment charging Mr. Tullie with two counts of aggravated sexual abuse of a child, four counts of abusive sexual contact of a minor, and three counts of sexual abuse of a minor.[7] The charges revolved around the government's allegation that Mr. Tullie had engaged in a course of sexual abuse against his stepdaughter V.L. that began when she was 12 years old and continued until she was 21.[8]

After two attempts to convict Mr. Tullie of these charges ended in deadlocked juries and mistrials on all counts,[9] Mr. Tullie entered into a plea

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[6] Presentence Report at 2, 3 (¶ 4), 11 (¶¶ 44-46).
[7] ER Vol. 2 at 9-13.
[8] Presentence Report at 3-4 (¶ 4).
[9] CR Docs. 90, 98, 120 at 26:17-27:23, 174, 182, 183.

agreement and pleaded guilty to one count of assault of a person under age 16 resulting in substantial bodily injury.[10] This count rested on the allegation that, on one instance in 2005 or 2006, Mr. Tullie had struck V.L. in the eye, causing her to suffer temporary injury to a blood vessel.[11] The plea agreement specified that Mr. Tullie would be sentenced to time served.[12] At a change of plea hearing, the district court accepted Mr. Tullie's plea of guilty to that offense.[13]

B. The district court sentenced Mr. Tullie to time served and two years of supervised release, delegating to the probation officer the power to determine whether he would be required to participate in sex offender treatment.

In the initial presentence report, the probation officer included an extended description of the sexual allegations underlying the indictment and two mistrials.[14] The report asserted that V.L. had produced an email Mr. Tullie had sent her in which he noted that she was pregnant, stated that he "did that to her," and claimed that he did so "because he did not want her with anyone else."[15] The report further stated that V.L. had terminated her pregnancy, and that a DNA

[10] ER Vol. 2 at 14, 28:9-31:5, 64-73.
[11] *Id.*
[12] ER Vol. 2 at 65.
[13] *Id.* at 31:6-10.
[14] CR Doc. 199 at 3-7 (¶¶ 4-14).
[15] *Id.* at 5 (¶ 7).

analysis "confirmed [Mr. Tullie] was the biological father."[16] Consistently with the plea agreement, the probation officer recommended that Mr. Tullie be sentenced to a prison sentence of time served, followed by a three-year term of supervised release.[17] Stressing the allegations underlying the indictment and two mistrials, the probation officer further recommended that during the supervised release term, Mr. Tullie be required to participate in sex offender treatment.[18]

Mr. Tullie filed objections challenging the portions of the report describing the alleged conduct underlying the two mistrials, the recommended supervised release term, and the recommended sex offender treatment condition.[19] Mr. Tullie noted that "[t]he government had two attempts to convict [him] of the charges alleged in the indictment and failed to do so," that there was "no credible evidence that [he] committed any of the alleged crimes in the indictment," and that his "only mistake was having a consensual affair with his adult aged step-daughter."[20]

At the June 9, 2017 sentencing hearing, the district court accepted the plea agreement.[21] Turning to Mr. Tullie's objections to the presentence report, the

[16] *Id*. at 4 (¶ 4).
[17] *Id*. at 15.
[18] *Id*. at 18.
[19] CR Doc. 201.
[20] *Id*. at 2.
[21] ER Vol. 2 at 42:18-20.

court cited §§ 6B1.1(c) and 6B1.2(a) of the United States Sentencing Guidelines (Guidelines) for the proposition that it could "consider, although charges may be dismissed . . . relevant information related to how we got to this point."[22] As it began to pronounce Mr. Tullie's sentence, the court acknowledged that it was "a difficult balance to strike in terms of setting aside the allegations and the testimony that was provided under oath at both trials."[23] In the following exchange with Mr. Tullie's counsel, the court explained that, in light of the evidence, it would require Mr. Tullie to be "screened for sex offender treatment" and, "if [he] need[s] it," to receive such treatment:

> [THE COURT:] And so I am going to, at least to the extent that I can work with probation, require that you at least be screened for sex offender treatment. And in that way there will be an alleviation of the potential for anything more to occur, Mr. Tullie, and potentially, if you need it, then you are going to receive the appropriate attention and treatment in order to address this particular type of issue.
>
> MR. WILLIAMS: Can I say something, Judge?
>
> THE COURT: You may.
>
> MR. WILLIAMS: I don't mean to interrupt, but I can tell you one of the problems that I foresee with sex offender treatment they are going to require –
>
> THE COURT: Well, I'm not ordering the treatment. I'm ordering that he be screened for it.

[22] *Id.* at 46:13-17.
[23] *Id.* at 55:2-4.

MR. WILLIAMS: Okay.

THE COURT: And if there is a finding that the probation office believes requires him to participate, then I think that's a separate issue.[24]

The court then sentenced Mr. Tullie to a prison sentence of time served, followed by a two-year term of supervised release.[25] The written judgment entered later that day included the following sex-offender-treatment "screening" condition:

> You shall be screened for sex offender treatment and if recommended as a result of screening, you shall participate in such treatment, and abide by the policies and procedures of all the treatment and evaluation providers. You shall contribute to the cost of such treatment and assessment not to exceed an amount determined to be reasonable by the probation officer based on ability to pay.[26]

On June 27, 2017, Mr. Tullie participated in a psychosexual evaluation with H&H Treatment Programs.[27] The evaluation classified Mr. Tullie as "Moderate-Low Risk to reoffend," characterizing him as "deceptive" in his account of "the instant offense" as well as "other deviant sexual behaviors."[28] The report

[24] *Id.* at 55:18-56:10.
[25] *Id.* at 57:14-22.
[26] *Id.* at 77.
[27] CR Doc. 211 at 6.
[28] *Id.* at 9.

recommended that Mr. Tullie receive sex offender treatment, and be subject to sex offense-related special conditions of supervision.[29]

Several months later, the probation officer filed a petition for a modification hearing.[30] The petition suggested that the court add supervised release conditions (1) requiring Mr. Tullie to participate in periodic polygraph examinations, (2) barring him from possessing material depicting "sexually explicit conduct," (3) barring him from being "in the company of" children under 18, and (4) barring him from engaging in any occupation carrying the "potential" to be alone with children under 18.[31]

In December of 2017, the district court conducted a hearing to address the probation officer's petition.[32] The government expressed its agreement with the probation officer's recommendations.[33] Mr. Tullie opposed them, stressing that they were not justified by "the charges for which he pled guilty and was sentenced."[34] The court acknowledged Mr. Tullie's argument but found that, in light of the circumstances surrounding V.L.'s pregnancy and the findings of the

[29] *Id.* at 33-35.
[30] ER Vol. 2 at 78-80.
[31] *Id.*
[32] *Id.* at 81-88.
[33] *Id.* at 83:3-4.
[34] *Id.* at 83:6-10.

psychosexual evaluation, the additional conditions were warranted.[35] The next day the court entered an order adding the four conditions that the probation officer had suggested.[36]

C. In 2018 the district court revoked Mr. Tullie's supervised release, finding that he had been expelled from the sex offender treatment mandated by the probation officer, as well as a condition barring him from being in the company of children.

The probation officer's petition for a modification hearing did not suggest, and the district court's modification order did not add, a requirement that Mr. Tullie participate in sex offender treatment. Instead, the record shows that at some point the probation officer imposed that requirement unilaterally, using the power delegated to him in the judgment. Thus, in July of 2018 the probation officer filed a petition for warrant alleging that Mr. Tullie had "failed to participate in sex offender treatment."[37] As the basis for this requirement, the petition cited the special condition in the judgment stating that Mr. Tullie would be "screened" for sex offender treatment, and participate in such treatment "if recommended as a result of screening."[38] The petition further alleged that Mr. Tullie had violated the condition added by the court barring him from being "in the company of"

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[35] *Id.* at 83:11-84:5.
[36] *Id.* at 89-90.
[37] *Id.* at 91-93.
[38] *Id.* at 91.

children.[39] Mr. Tullie denied the allegations, and an evidentiary hearing was scheduled before a magistrate judge.[40]

At the hearing, the probation officer testified that Mr. Tullie had admitted to having "verbal contact with minor nieces and nephews," to shaking the hand of his adult girlfriend's minor son, and to failing to report that his landlord's two minor children had slept adjacent to him "for approximately three days."[41] The probation officer reported Mr. Tullie's admissions to H&H Treatment Programs, which expelled him from the sex offender treatment program.[42] On cross-examination, the probation officer acknowledged that he had made the decision to require Mr. Tullie to participate in sex offender treatment, "[b]ased on the evaluation from the treatment provider."[43] The magistrate judge recommended that the court find Mr. Tullie guilty of both violations.[44]

At the final disposition hearing held in December of 2018, the court adopted the magistrate judge's findings.[45] Mr. Tullie's counsel verbally objected to the probation officer's recommendation that sex offense-related conditions – including

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[39] ER Vol. 2 at 92.
[40] CR Doc. 227.
[41] ER Vol. 2 at 103:24-107:22.
[42] *Id.* at 107:25-108:4.
[43] *Id.* at 109:18-110:7.
[44] CR Doc. 234.
[45] ER Vol. 3 at 193:9-11.

the requirement of sex offender treatment – be reimposed.[46] The court then suspended the hearing so that Mr. Tullie could make his objections in writing, and the government could respond.[47] Mr. Tullie filed written objections to the sex offense-related conditions, arguing that they related to "unproven allegations made by the government" that "the government failed to prove after two jury trials."[48]

At the continuation of the disposition hearing, the court stated that it had imposed "the sex offender conditions that are now at issue here" when it adopted the probation officer's recommended modifications of Mr. Tullie's supervised release conditions.[49] In fact, one of the conditions "at issue" was the requirement that Mr. Tullie participate in sex offender treatment, which the probation officer had imposed unilaterally.[50] Building on its mistaken premise, the court stated that "obviously" it had previously found "sufficient reason to impose those conditions."[51] The court reasoned that the "totality of the circumstances" confirmed that the sex offense-related conditions were appropriate.[52]

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[46] *Id.* at 201:9-16.
[47] *Id.* at 202:7-21.
[48] *Id.* at 206-11.
[49] *Id.* at 220:25-222:5.
[50] ER Vol. 2 at 109:18-110:7.
[51] ER Vol. 3 at 222:1-3.
[52] *Id.* at 224:16-225:23.

On December 18, 2018, the court entered an order revoking Mr. Tullie's supervised release and sentencing him to four months of imprisonment, followed by a two-year term of supervised release, during which he would be required to comply with the sex offense-related conditions.[53] Mr. Tullie filed an appeal from that order that was docketed in this Court as number 19-10001.[54]

D. In 2019 the district court again revoked Mr. Tullie's supervised release, after he admitted to violating the condition requiring him to answer truthfully questions from the probation officer.

Two weeks after the district court entered that revocation order, the probation officer filed a new petition for warrant.[55] The petition alleged that Mr. Tullie had falsely denied that minors were living at his residence, and also had been in the company of a minor.

At the preliminary revocation hearing, the probation officer testified that Mr. Tullie had moved in with his sister in Phoenix, initially assuring the probation officer that his sister had children, but eventually admitting that she had a 4-year-old daughter.[56] Mr. Tullie subsequently admitted to violating the condition requiring him to answer truthfully questions put to him by his probation officer.[57]

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[53] ER Vol. 1 at 1-4.
[54] ER Vol. 3 at 243-44.
[55] *Id*. at 240-42.
[56] *Id*. at 248:18-252:16.
[57] *Id*. at 290:22-291:18.

The probation officer's disposition report recommended that the court revoke his supervised release and sentence him to seven months of custody followed by a new two-year term of supervised release, during which he would once again be required to comply with sex offense-related conditions.[58] Mr. Tullie filed objections arguing, again, that those conditions were not related to the conduct underlying his conviction.[59]

At the final disposition hearing, the court accepted Mr. Tullie's admission, and found that he had violated the conditions of his supervised release.[60] The court acknowledged Mr. Tullie's objections, but stated that the record was "fully developed as to why the Court had previously – had previously placed these conditions on Mr. Tullie."[61] The court stated that, having "sat through the trial, two trials," it had found sufficient evidence to "warrant[] Mr. Tullie to undergo some level of sex offender treatment."[62] The court revoked Mr. Tullie's supervised release, and sentenced him to five months of imprisonment followed by a new two-year term of supervised release.[63]

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[58] CR 259.
[59] ER Vol. 3 at 295-97.
[60] *Id.* at 306:15-307:10.
[61] *Id.* at 308:13-18.
[62] *Id.* at 309:8-11.
[63] *Id.* at 323:13-18.

The court imposed a number of special supervised release conditions. With respect to the requirement that Mr. Tullie participate in sex offender treatment, the court articulated the following language and justification:

> You must attend and participate in a sex offender treatment program and sex offense specific evaluations as approved by your probation officer.
>
> You must abide by the policies and procedures of all the treatment and evaluation providers. You must contribute to the cost of treatment and assessment not to exceed an amount determined to be reasonable by your probation officer based on your ability to pay.
>
> This condition is as discussed in the final – in the previous final disposition back in December, and it is based on the fact that the offense conduct detailed some of the information that was brought out in the trial proceeding in this case.[64]

Among the other special conditions that the court imposed were a condition requiring Mr. Tullie to maintain full-time employment, and another barring him from engaging in any occupation with the "potential" to be alone with children without prior written permission.[65] The following day the court entered its order revoking Mr. Tullie's supervised release, imposing the five-month prison term, and reciting the supervised release conditions – in some instances phrasing them differently than it had when imposing sentence orally.[66] Mr. Tullie filed an appeal

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[64] *Id*. at 324:5-17.
[65] *Id*. at 324:3-4, 327:1-7.
[66] ER Vol. 1 at 5-8.

of that order,[67] which this Court docketed as number 19-10068. This Court *sua sponte* consolidated that appeal with Mr. Tullie's prior appeal, number 19-10001.[68]

Summary of Argument

I. Improper delegation of sex offender treatment requirement. When it entered the initial judgment in this case, the district court included a special supervised release condition directing Mr. Tullie to "be screened for sex offender treatment" and, "if recommended as a result of screening," to participate in such treatment. The condition thus delegated to the probation officer the power to decide, following the "screening," whether Mr. Tullie would be required to participate in sex offender treatment. The probation officer exercised this delegated power, unilaterally requiring Mr. Tullie to participate in sex offender treatment – and then successfully petitioned to revoke his supervised release when he was expelled from treatment. The district court later reimposed the treatment requirement, but did so in the mistaken belief that it had originally imposed the requirement itself, rather than delegating the decision to the probation officer. That delegation was invalid, because the Sentencing Guidelines, the governing statute, and the Constitution all specify that only the *court* may exercise the essentially

[67] ER Vol. 3 at 330-31.
[68] DktEntry: 2 in No. 19-10001; DktEntry: 2 in No. 19-10068.

judicial power of imposing supervised release conditions on a defendant. Because the district court plainly erred in delegating this authority to a non-judicial officer, this Court should strike the condition.

II. Full-time employment condition deviating from version imposed orally. When it orally pronounced Mr. Tullie's sentence in connection with its 2019 revocation of his supervised release, the district court articulated the full-time-employment condition as follows: "You must maintain full-time employment and/or schooling as directed by your probation officer." The inclusion of the "schooling" alternative was consistent with the fact that Mr. Tullie has made substantial progress toward earning a Bachelor of Arts degree in Information Technology, and intends to earn a Master's degree in the subject as well. But as it appears in the written revocation order, this condition fails to include the option of "schooling" as an alternative to full-time employment. In addition, the written version of the condition adds: "If not in compliance with the condition of supervision, [Mr. Tullie] may be required to perform up to 20 hours of community service per week until employed as approved or directed by the probation officer." Both of these deviations from the orally-imposed condition are invalid, because "[t]he only sentence that is legally cognizable is the actual oral pronouncement in the presence of the defendant." *United States v. Munoz-Dela Rosa*, 495 F.2d 253,

256 (9th Cir. 1974). This Court should accordingly remand the case with instructions to conform the written condition to the version imposed orally.

III. Occupational restriction breaching Sentencing Guidelines and governing statute. The district court included in the 2019 revocation order a condition barring Mr. Tullie from "engaging in any occupation, business, volunteer activity or profession where [he has] the potential to be alone with children under the age of 18 without prior written permission." The court's imposition of this condition breached two provisions governing supervised release conditions. First, § 5F1.5 of the Sentencing Guidelines requires a court imposing an occupational restriction to (1) find a "reasonably direct relationship" between the occupation affected and the "offense of conviction," (2) find that the condition is "reasonably necessary" to protect the public, and (3) ensure that the restriction constrains the supervisee's employment "for the minimum time and to the minimum extent necessary to protect the public." Second, the governing statute, 18 U.S.C. § 3583(d), requires that supervised release conditions impose "no greater deprivation of liberty than is reasonably necessary." The court made no finding of a "reasonably direct relationship" between this restriction and the non-sexual assault of which Mr. Tullie was convicted, and the restriction's scope is breathtakingly broad. It is difficult to imagine any occupation – particularly in the

Information Technology field – that is devoid of even the "potential" for Mr. Tullie to be alone, even momentarily, with a person under 18. Because the district court therefore plainly erred in imposing this condition, this Court should strike it.

Argument

I. The district court improperly delegated to the probation officer the determination that Mr. Tullie would be required to participate in sex offender treatment.

A. Standard of Review

This Court generally reviews conditions of supervised release for abuse of discretion, but reviews *de novo* claims that such conditions violate the Constitution. *United States v. Evans*, 883 F.3d 1154, 1159-60 (9th Cir.), *cert. denied*, 139 S. Ct. 133 (2018). Challenges to supervised release conditions that were not raised below are generally reviewed for plain error, which requires an (1) error, that (2) was clear or obvious, (3) affected substantial rights, and (4) seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *United States v. Wolf Child*, 699 F.3d 1082, 1089, 1095 (9th Cir. 2012). However, the failure to object does not trigger plain-error review when trial counsel had no opportunity to object to the error below. Fed. R. Crim. P. 51(b), *Evans*, 883 F.3d at 1160 n.3.

B. A district court cannot delegate to a probation officer the essentially judicial function of determining a defendant's supervised release conditions.

The district court included the following sex-offender treatment condition in both of the revocation orders underlying these consolidated appeals:

> You must attend and participate in a sex offender treatment program and sex offense specific evaluations as approved by the probation officer. You must abide by the policies and procedures of all the treatment and evaluation providers. You must contribute to the cost of such treatment and assessment not to exceed an amount determined to be reasonable by the probation officer based on ability to pay.[69]

Mr. Tullie's expulsion from sex offender treatment was one of the justifications for the court's first revocation of his supervised release.[70] But the record shows that the court never actually made an initial determination that sex offender treatment was "reasonably related" to the pertinent factors, involved "no greater deprivation of liberty" than was "reasonably necessary" to achieve the purposes of supervised release, and was consistent with the Sentencing Commission's pertinent policy statements, as required by the governing statute. 18 U.S.C. § 3583(d).

Instead, the court initially directed Mr. Tullie to submit to a sex offender "screening," and delegated to the probation officer the determination of whether,

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[69] ER Vol. 1 at 2, 6.
[70] ER Vol. 2 at 91.

in light of that "screening," he would be required to participate in sex offender treatment.[71] The probation officer then used this delegated power to unilaterally require Mr. Tullie to participate in sex offender treatment.[72] Then the probation officer successfully petitioned the court to punish Mr. Tullie when he failed to comply with that requirement.[73] The district court – mistakenly believing that it had initially imposed that requirement itself – proceeded to reimpose the condition in both of the revocation orders at issue in this appeal.[74]

This condition must be stricken, because it violates the applicable provisions of the Guidelines, the governing statute, and Article III of the Constitution.

Section 5D1.3(b) of the Guidelines specifies that "*[t]he court*" may impose discretionary conditions of supervised release. U.S. Sentencing Guidelines Manual § 5D1.3(b) (U.S. Sentencing Comm'n 2018) (emphasis added); *see United States v. Matta*, 777 F.3d 116, 122 (2d Cir. 2015) ("The power to impose special conditions of supervised release, including participation in a substance abuse program, is vested exclusively in the district court." (*citing* 18 U.S.C. § 3583 and U.S.S.G. § 5D1.3(b), (d)(4)); *United States v. Kent*, 209 F.3d 1073, 1079 (8th Cir. 2000)

[71] ER Vol. 2 at 58:8-14.
[72] *Id.* at 109:18-110:7.
[73] ER Vol. 2 at 91-93.
[74] ER Vol. 3 at 220:25-222:5; ER Vol. 1 at 2, 6.

(noting that § 5D1.3(b) "specifically provides that the *court* may impose special conditions of supervised release").

The statute governing supervised release, 18 U.S.C. § 3583, likewise specifies that "*[t]he court*" may order discretionary conditions of supervised release that are reasonably related to the pertinent sentencing factors, involve no greater deprivation of liberty than is reasonably necessary to achieve the purposes of supervised release, and are consistent with the pertinent policy statements of the Sentencing Commission. 18 U.S.C. § 3583(d) (emphasis added); *Matta*, 777 F.3d at 122.

Finally, the imposition of a sentence represents an exercise of "Article III's grant to the *courts* of power over 'cases and controversies.'" *United States v. Stephens*, 424 F.3d 876, 881 (9th Cir. 2005) (emphasis added). Because the determination of "*whether* a defendant must abide by a condition" is an essentially judicial function, and in light of "the 'probation officer's status as a nonjudicial officer,'" a court cannot delegate this determination to a probation officer. *Id.* (*quoting Kent*, 209 F.3d at 1078)). A court is free to delegate to the probation officer such "ministerial tasks" as "choosing the appropriate program" and "facilitating [the supervisee's] attendance" – but it may not delegate its "Article III judicial power regarding the primary decision" of whether the supervisee will be subject to

a requirement at all. *Id*. at 882. Thus in *Stephens*, this Court vacated a condition delegating to the probation officer the power to determine the number of drug tests that the supervisee would be required to complete. *Id*. at 883.

This Court and many others have held that these principles invalidate any condition that delegates to a probation officer the power to determine whether a supervisee will be required to participate in treatment – including sex offender treatment. *United States v. Esparza*, 552 F.3d 1088, 1091-92 (9th Cir. 2009) (vacating condition delegating to probation officer determination of whether supervisee would be required to participate in inpatient sex offender treatment); *United States v. Franklin*, 838 F.3d 564, 567-68 (5th Cir. 2016) (vacating condition requiring defendant to participate in a mental health program "as deemed necessary and approved by the probation officer"); *Matta*, 777 F.3d at 122-23 (vacating condition empowering probation officer to require defendant to participate in inpatient drug treatment); *United States v. Heath*, 419 F.3d 1312, 1314-16 (11th Cir. 2005) (vacating condition requiring defendant to participate "if and as directed by the probation office" in mental health programs); *United States v. Pruden*, 398 F.3d 241, 250-51 (3d Cir. 2005) (vacating condition requiring defendant to "participate in a mental health treatment program at the discretion of the probation officer"); *United States v. Peterson*, 248 F.3d 79, 84-85 (2d Cir. 2001)

(vacating condition requiring defendant to participate in mental health program designed for sexual predators "as directed by the U.S. Probation Office" because it could be construed as delegating treatment mandate to probation officer); *Kent*, 209 F.3d at 1078-79 (vacating condition delegating to probation officer power to determine whether defendant would be required to undergo psychiatric treatment); *cf. United States v. Soltero*, 510 F.3d 858, 864 (9th Cir. 2007) (leaving intact condition that "d[id] not delegate to the probation officer the power to order substance abuse treatment in the first place").

It is thus clear that the district court erred in delegating to Mr. Tullie's probation officer the power to determine whether he would be required to participate in sex offender treatment.

C. The court's improper delegation constitutes reversible plain error.

The court's improper delegation touches all the bases of the reversible plain error standard.

(1 & 2) "Given the wealth and unanimity of the precedents" barring delegations of this sort, the district court's error was clear or obvious. *Pruden*, 398 F.3d at 251.

(3) "Since the condition would not have been imposed had the error not occurred, it necessarily affected substantial rights." *United States v. Barsumyan*, 517

F.3d 1154, 1162 (9th Cir. 2008); *accord Heath*, 419 F.3d at 1316 (improper delegation affected substantial rights because defendant's sentence "certainly would have been different but for the error"); *see also Pruden*, 398 F.3d at 251 ("A plainly erroneous condition of supervised release will inevitably affect substantial rights, as a defendant who fails to meet that condition will be subject to further incarceration."). Indeed, the effect on Mr. Tullie's substantial rights is plain, because one of the revocation orders challenged in these consolidated appeals punishes Mr. Tullie for breaching this unlawful condition.

(4) Finally, errors of this sort have repeatedly been found to impair the fairness, integrity, or public reputation of judicial proceedings, by threatening the defendant with punishment for the violation of a legally void mandate. *Heath*, 419 F.3d at 1316 ("A violation of Article III through the improper delegation of a judicial function" meets the fourth prong of the plain error standard); *Pruden*, 398 F.3d at 251 ("imposing a sentence not authorized by law seriously affects the fairness, integrity, and reputation of the proceedings") (internal quotation marks omitted); *cf. United States v. Tapia*, 665 F.3d 1059, 1063 (9th Cir. 2011) ("We have regularly deemed the fourth prong of the plain error standard to have been satisfied where, as here, the sentencing court committed a legal error that may have increased the length of a defendant's sentence.").

It is thus evident that the court's improper delegation meets the reversible plain error test. *Wolf Child*, 699 F.3d at 1095. And the district court's decision to reimpose the condition after it was initially imposed unilaterally by the probation officer does not purge this plain error, for two reasons. First, one of the two orders on review in these consolidated appeals punishes Mr. Tullie for breaching the condition as originally imposed by the probation officer, using the power improperly delegated by the district court. Second, the record shows that when the district court reimposed the condition, it did so in reliance on the mistaken premise that it had originally imposed the condition itself. In effect, the district court incorporated by reference an earlier judicial determination that never actually happened. The court's reimposition of this condition thus perpetuated, rather than expunging, the unlawful delegation. This Court should accordingly vacate this unlawful condition. *Esparza*, 552 F.3d at 1091-92; *Stephens*, 424 F.3d at 883.

II. The full-time-employment condition set forth in the revocation order conflicts with the version that the district court imposed orally.

A. Standards of Review

See supra part I.A. A discrepancy between the orally imposed sentence and the written judgment or order does not arise until the judgment or order is entered, at which point the defendant is unable to "object." Thus, this Court has ordered such errors corrected without discussing the plain error standard of review, without

reference to whether an objection was made. *See*, *e.g.*, *United States v. Hernandez*, 795 F.3d 1159, 1169 (9th Cir. 2015); *Evans*, 883 F.3d at 1160 n.3; Fed. R. Crim. P. 51(b).

B. Because the only "legally cognizable" sentence is the one imposed orally, the written order must be corrected to conform this condition with the version that the court imposed orally.

At the 2019 disposition hearing, the district court articulated the following condition relating to Mr. Tullie's obligation to maintain full-time employment:

> You must maintain full-time employment and/or schooling as directed by your probation officer.[75]

But in the written revocation order entered the following day, the court substantially rephrased this condition, dropping the reference to "schooling" and adding language empowering the probation officer to require Mr. Tullie to perform community service:

> You must comply with the standard condition of supervision requiring full-time employment at a lawful occupation. This may include participation in training, counseling, and/or daily job searching as directed by the probation officer. If not in compliance with the condition of supervision, the defendant may be required to perform up to 20 hours of community service per week until employed as approved or directed by the probation officer.[76]

[75] ER Vol. 3 at 324:3-4.
[76] ER Vol. 1 at 6.

These two modifications must be struck, because they conflict with the version that the district court imposed orally.

"The only sentence that is legally cognizable is the actual oral pronouncement in the presence of the defendant." *Munoz-Dela Rosa*, 495 F.2d at 256. Thus, "'[i]n cases where there is a direct conflict between an unambiguous oral pronouncement of sentence and the written judgment and commitment, this Court has uniformly held that the oral pronouncement, as correctly reported, must control.'" *United States v. Hicks*, 997 F.2d 594, 597 (9th Cir. 1993) (*quoting Munoz-Dela Rosa*, 495 F.2d at 256).

The "legally cognizable" oral version of this condition provides that Mr. Tullie may comply by participating in "schooling," as an alternative to "full-time employment" or "training." *Munoz-Dela Rosa*, 495 F.2d at 256.[77] And the record confirms that permitting Mr. Tullie to receive "schooling" as an alternative to full-time employment makes good sense. The presentence report indicated that Mr. Tullie had graduated from high school, earned a certificate in Information Technology from Navajo Technical University, spent fourteen months working toward a Bachelor of Arts degree in Information Technology, and "would like to go back to school for a Bachelor of Arts degree in Information Technology, then

[77] ER Vol. 3 at 324:3-4.

continue on to obtain a Masters."[78] Indeed, in imposing Mr. Tullie's original sentence, the court approvingly noted that, "to [his] credit," Mr. Tullie had been "trying to obtain education."[79] Mr. Tullie's long-term prospects for succeeding in the workplace and successfully reintegrating into society will plainly be enhanced by permitting him to earn Information Technology degrees before reentering the workforce, which presumably is why the court phrased this condition in a manner that would ensure that he may do so. Correcting the written order to reflect the condition as imposed orally will effectuate this wise decision.

The orally imposed sentence did not, however, authorize the probation officer to require Mr. Tullie to perform community service.[80] Because that provision of the written order conflicts with, and goes beyond, the version imposed orally, authorizing a burden on Mr. Tullie's liberty that is not part of his "legally cognizable" sentence, this language must be struck from the order. *Munoz-Dela Rosa*, 495 F.2d at 256; *see Hernandez*, 795 F.3d at 1169 (remanding for district court to remove mandates in supervised release conditions that the district court did not impose orally).

[78] Presentence Report at 10 (¶ 40), 11 (¶ 44).
[79] ER Vol. 2 at 57:1-4.
[80] ER Vol. 3 at 324:3-4.

This Court should accordingly remand this case with instructions that the district court: (1) revise the full-time-employment condition to provide that Mr. Tullie may participate in "schooling" as an alternative to full-time employment, and (2) delete the final sentence of this condition, which purports to authorize the probation officer to require Mr. Tullie to perform community service.

III. The condition barring employment carrying the "potential" of being alone with children conflicts with the applicable Guidelines provision and is overbroad.

A. Standard of Review

See supra part I.A. Because Mr. Tullie did not raise the claim pressed here in the district court, it is reviewed for plain error. *Wolf Child*, 699 F.3d at 1089.

B. This occupational restriction fails to comply with § 5F1.5 of the Guidelines.

The district court included the following employment restriction condition in both of the revocation orders underlying these consolidated appeals:

> You are restricted from engaging in any occupation, business, volunteer activity or profession where you have the potential to be alone with children under the age of 18 without prior written permission. Acceptable employment shall include a stable, verifiable work location and the probation officer must be granted access to your work site.[81]

[81] ER Vol. 1 at 3, 7.

This condition suffers from two independently fatal flaws. First, it fails to comply with § 5F1.5 of the Guidelines, which provides as follows:

> **(a)** The court may impose a condition of probation or supervised release prohibiting the defendant from engaging in a specified occupation, business, or profession, or limiting the terms on which the defendant may do so, only if it determines that:
>
> > **(1)** a reasonably direct relationship existed between the defendant's occupation, business, or profession and the conduct relevant to the offense of conviction; and
> >
> > **(2)** imposition of such a restriction is reasonably necessary to protect the public because there is reason to believe that, absent such restriction, the defendant will continue to engage in unlawful conduct similar to that for which the defendant was convicted.
>
> **(b)** If the court decides to impose a condition of probation or supervised release restricting a defendant's engagement in a specified occupation, business, or profession, the court shall impose the condition for the minimum time and to the minimum extent necessary to protect the public.

U.S. Sentencing Guidelines Manual § 5F1.5 (U.S. Sentencing Comm'n 2018).

This Court has held that the phrase "a 'specified occupation' as used in § 5F1.5 refers to the defendant's profession or occupation prior to the instant conviction." *United States v. Stoterau*, 524 F.3d 988, 1009 (9th Cir. 2008). For Mr. Tullie, the Information Technology profession fits the bill, because he has earned a certificate in that field, made substantial progress toward earning a Bachelor's degree in that field, and plans after that to earn a Master's degree in that field, all

with the clear intent of making a career in Information Technology.[82] *Cf. United States v. Paul*, 274 F.3d 155, 171 n.18 (5th Cir. 2001) (holding that if defendant's "primary means of supporting himself" is involved, he is entitled to the higher level of scrutiny for occupational restrictions under § 5F1.5) (*cited in Stoterau*, 524 F.3d at 1009). And the fact that this condition does not expressly single out the Information Technology profession is immaterial, because the condition's application by its nature severely constrains Mr. Tullie's ability to work in that field. *See Stoterau*, 524 F.3d at 1009-10 (discussing § 5F1.5's application to condition barring supervisee's engagement in "any business or organization that causes him to regularly contact persons under the age of 18" in reference to defendant's professions of customer service and performance); *United States v. Britt*, 332 F.3d 1229 (9th Cir. 2003) (applying § 5F1.5 to condition requiring supervisee to notify clients providing financial information of "third party risks").

The district court did not comply with § 5F1.5 when it imposed this condition. The court made no finding of a "reasonably direct relationship" between Mr. Tullie's Information Technology profession and the "offense of conviction" – a non-sexual assault involving a slap to the face. Guidelines § 5F1.5(a)(1). Nor did the court make any finding that this restriction was

[82] Presentence Report at 10 (¶ 40), 11 (¶ 44).

"reasonably necessary to protect the public." *Id.* § 5F1.5(a)(2). And the court did not narrowly tailor this condition to restrict Mr. Tullie's liberty "for the minimum time and to the minimum extent necessary to protect the public." *Id.* § 5F1.5(b). To the contrary, the condition spans the entire two-year term of Mr. Tullie's supervised release term, and its scope is breathtakingly broad, covering any profession with even the "potential" for being alone – apparently for any length of time – with persons, female or male, under 18. As discussed further below, such an all-encompassing constraint would be virtually impossible to comply with even for a supervisee whose profession is in a field or factory – but it is still more patently unrealistic as applied to the Information Technology profession, which generally entails working in offices, where workers' children "potentially" could be present on any given day.

In sum, the district court plainly breached Guidelines § 5F1.5 in imposing this condition.

C. This condition is fatally overbroad.

Second, even if § 5F1.5 did not apply, this condition would be fatally overbroad. It is doubtful that *any* occupation is free of the "potential to be alone with children" – particularly when "children" is defined to cover people up to seventeen years old. A door-to-door salesman may find himself in that position

when a teenager answers the doorbell. A groundskeeper may find himself alone in a park with teenagers. A convenience store clerk may face a store full of under-eighteen-year-olds. And anyone who works in an office may find himself alone in a hallway or elevator with a teenager who may be interning, visiting employees, or soliciting donations.

In short, this condition "encompass[es] a wide array of activities and deprive[s] [Mr. Tullie] of far more liberty than is reasonably necessary to accomplish the goals of sentencing." *United States v. Wright*, 596 F. App'x 555, 557 (9th Cir. 2015) (striking condition that prohibited, *inter alia*, "engaging in any business or volunteer activity in which [the defendant] has even the potential to be alone with children"); *see* 18 U.S.C. § 3583(d) (supervised release condition must impose "no greater deprivation of liberty than is reasonably necessary" to achieve the purposes of supervised release). Indeed, this condition affirmatively undermines the purpose of supervised release, which is to "improve the odds of a successful transition from the prison to liberty," by making the task of finding employment virtually impossible, even for a supervisee with a certification and degrees in Information Technology. *Johnson v. United States*, 529 U.S. 694, 708-09 (2000).

D. The district court's imposition of this condition constitutes reversible plain error.

The district court's error in imposing this condition was plain, because it is "clear or obvious" that such a staggeringly broad occupational restriction could not be reconciled with the strict constraints on occupational restrictions imposed by Guidelines § 5F1.5 and 18 U.S.C. § 3583(d). *Wolf Child*, 699 F.3d at 1095. The error affected substantial rights, because "the condition would not have been imposed had the error not occurred." *Barsumyan*, 517 F.3d at 1162. And by threatening Mr. Tullie with punishment for the violation of a legally void condition, the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Pruden*, 398 F.3d at 251; *Tapia*, 665 F.3d at 1063.

In short, because the district court breached Guidelines § 5F1.5 in imposing this condition, and/or because the condition is fatally overbroad, this Court should remand the case with instructions to strike it from the 2019 revocation order.

Conclusion

Because the district erred by delegating to the probation officer the decision to require Mr. Tullie to participate in sex offender treatment, by imposing a full-time employment supervised release condition that deviated substantially from the version that it imposed orally, and by imposing a fatally overbroad occupational restriction that violates the governing statute and applicable Guideline, this Court

should remand the case with instructions to strike these invalid mandates from Mr. Tullie's supervised release conditions.

Respectfully submitted on August 30, 2019.

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)(B)

I hereby certify that, pursuant to FRAP 32(a)(7)(B), the foregoing Defendant-Appellant's Opening Brief is proportionately spaced, has a typeface of 14 points, and contains 7,687 words.

s/*Daniel L. Kaplan*
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STATEMENT REGARDING RELATED CASES

I hereby certify that I am not aware of any related cases within the meaning of Circuit Rule 28-2.6.

s/*Daniel L. Kaplan*
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