C.A. No. 19-10001, 19-10068

D. Ct. No. CR-16-08042-PCT-DJH

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EARLSON TULLIE,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF OF APPELLEE

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III. STATEMENT OF JURISDICTION

A. District Court Jurisdiction

The district court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231 based on an information charging defendant-appellant, Earlson Tullie ("Tullie"), with a federal crime. (CR 190; ER 14.)[1] The district court had jurisdiction over Tullie's supervised release revocation proceedings pursuant to 18 U.S.C. §§ 3583 and 3606. (CR 245; ER 240-41.)

B. Appellate Court Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 based on the district court's February 28, 2019, order revoking Tullie's supervised release. (CR 263; ER 5-8.)

C. Timeliness of Appeal

Following the entry of the order of revocation on February 28, 2019, Tullie filed a notice of appeal the same day. (CR 264; ER 330-31.) The notice was timely pursuant to Fed. R. App. P. 4(b).

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[1] "CR" refers to the Clerk's Record, followed by the document number(s). "RT" refers to the Reporter's Transcript, followed by a date and page number(s). "ER" refers to the Excerpts of Record, followed by the page number(s). This Court's docket reflects that the PSR was provided by the defendant to the Clerk of the Court under seal via the Ninth Circuit Appellate ECF system. References to the PSR are followed by the appropriate paragraph numbers. "SMP" refers to the Sealed Modification Packet dated November 3, 2017, and is followed by the appropriate page number(s). Pursuant to Interim Circuit Rule 27-13(d), the SMP was filed under seal contemporaneously with the filing of this brief.

D. **Bail Status**

Tullie was released from Bureau of Prisons' custody on August 22, 2019, and is currently serving the supervised release portion of his sentence.

IV. ISSUES PRESENTED

A. Whether the district court impermissibly delegated authority to the probation officer to impose a condition requiring sexual offender treatment where the district court imposed the condition itself based on the defendant's own statements of sexual interest in adolescents.

B. Whether remand is necessary where the district court's written order did not comport with its oral imposition of supervised release terms at the disposition hearing.

C. Whether the imposition of an employment restriction that prohibits contacts with minors is erroneous or overbroad where the defendant never previously worked in the professions he discusses in the opening brief, admits sexual interest in adolescents and the condition only restricts unsupervised contact with children without prior approval.

V. STATEMENT OF THE CASE

A. Nature of the Case; Course of Proceedings

Tullie was indicted on nine counts relating to sexual abuse of a minor between the ages of 12 and 16. (CR 1; ER 9-13.) Tullie's case was presented to a jury twice. (CR 90, 174.) In each instance a mistrial was declared because neither jury was able to reach a unanimous verdict. (CR 90, 174.)

After the second mistrial, Tullie waived indictment and agreed to plead guilty to an information alleging Assault of a Person Under the Age of 16 Resulting in Serious Bodily Injury in violation of 18 U.S.C. §§ 1153 and 113(a)(7). (CR 189, 190, 205; ER 14, 64-73.) On June 9, 2017, Tullie was sentenced to time-served and a 24-month term of supervised release. (CR 206; ER 74-77.)

On November 3, 2017, a petition to modify the terms of supervised release was filed. (CR 209; ER 78-80.) On December 4, 2017, additional conditions of supervised release were imposed. (CR 216; ER 89-90.)

On July 13, 2018, a petition to revoke supervised release was filed. (CR 217; ER 91-93.) On November 16, 2018, Tullie was found in violation of his supervised release conditions. (CR 234.) On December 18, 2018, his supervised release was revoked and he was sentenced to four months of incarceration and a 24-month term of supervised release. (CR 243; ER 1-4.) Tullie appealed the order revoking

supervised release on January 2, 2019, and the matter was designated C.A. 19-10001. (CR 247; ER 243-44.)

Also on January 2, 2019, a second petition to revoke supervised release was filed. (CR 245; ER 240-42.) On January 24, 2019, Tullie admitted he violated supervised release. (CR 257.) On February 28, 2019, the district court revoked Tullie's supervised release, imposed a five-month term of incarceration and a 24-month term of supervised release. (CR 263; ER 5-8.) On the same day, Tullie filed a notice of appeal. (CR 264; ER 330-31.) The case was designated C.A. 19-10068 and consolidated, *sua sponte*, with the earlier appeal.

B. Statement of Facts

1. Tullie's Assault Conviction and Sentence

Tullie pleaded guilty to striking his stepdaughter, V.L., when she was a minor, causing a broken blood vessel in her eye. (CR 205; ER 64-73.) The incident came to light during the investigation of V.L.'s allegations of sexual abuse by Tullie. (PSR ¶ 9.) During the investigation, Tullie denied having sexual intercourse with V.L. while she was a minor. (PSR ¶ 12.) He said the first time they had intercourse was a week before she turned 19. (PSR ¶ 12.) Although Tullie stated that V.L. made sexual advances towards him, he admitted that they "both got curious as her body began to change." (PSR ¶¶ 12, 14.) Tullie also stated that when V.L. was 14, she watched him undress and later touched his penis through his clothes. (PSR ¶ 14.)

He also admitted that when V.L. was 16, Tullie touched her breast through her clothes. (PSR ¶ 14.) When V.L. was 22, she became pregnant with Tullie's child. (PSR ¶ 4.) Tullie sent V.L. an email where he admitted impregnating her because he did not want her to be with anybody else. (PSR ¶¶ 7, 13.)

At the June 6, 2017, sentencing hearing, the district court ruled that U.S.S.G. § 6B1.2(a) permitted it to consider the underlying conduct of the dismissed counts as relevant conduct. (RT 6/9/17 6; ER 46.) As such, the court considered Tullie's statements regarding the sexual abuse allegations in determining the appropriate sentence. (RT 6/9/17 6-8, 15, 18; ER 46-48, 55, 58.) The district court ordered that Tullie be screened to determine whether sexual offender treatment was necessary in light of the nature of the relationship with his stepdaughter and his comments about "curiosity [and] the physical touching that occurred." (RT 6/9/17 15; ER 55.) Specifically, the court ordered that Tullie "shall submit to a screening for sex offender treatment. And if recommended by your probation officer as a result of that screening, then you shall participate in such treatment." (RT 6/9/17 18; ER 58.)

2. Modification of Tullie's Supervised Release Terms

Five months later, on November 3, 2017, Tullie's probation officer filed a petition requesting the district court hold a hearing to consider modifying the release conditions. (SMP 1-8.) The petition recommended that Tullie be subject to the special conditions of undergoing routine polygraph examinations, and to the

prohibitions of viewing sexually explicit material, unsupervised contact with children, and engaging in any activities or work where he would have the potential to be alone with children. (SMP 3-4.)

On December 4, 2017, a hearing was held on the modification request. (CR 214; ER 81-88.) After hearing from the parties, the district court imposed the new conditions. (RT 12/4/17 4; ER 84.) In doing so, the court stated that the relevant conduct considered at sentencing, particularly L.V.'s pregnancy by Tullie, warranted the new conditions. (RT 12/4/17 3; ER 83.) The district court also referred to the psychosexual evaluation report that noted that Tullie had poor impulse control, used sex as a method for coping, failed to recognize that he is a risk to re-offend, and had no feasible plans to prevent re-offending. (SMP 9-10; RT 12/4/17 4; ER 84.) Tullie did not appeal the modification.

3. Tullie's First Violation of Supervised Release

About seven months later, the probation officer filed a petition to revoke Tullie's supervised release, alleging that he was unsuccessfully discharged from sex offender treatment and that he had had unsupervised contact with minors. (CR 217; ER 91-93.) After an evidentiary hearing on the matter, Tullie's supervised release was revoked. (CR 234, 243; ER 1-4.)

On December 17, 2018, the district court sentenced Tullie to four months in the custody of the Bureau of Prisons and a 24-month term of supervised release.

(RT 12/17/18 31; ER 234.) In doing so, the court reinstated the special sex offender conditions that were added at the modification hearing. (RT 12/17/18 32-33; ER 235-36.)

The court also ordered Tullie to "attend and participate in a sex offender treatment program and sex offense specific evaluations as approved by your probation officer." (RT 12/17/18 32; ER 235.) The court found those particular conditions warranted based on the relevant conduct considered at the original sentencing and the nature of the supervised release violations that led to the revocation. (RT 12/17/18 19-23; ER 222-26.) Specifically the district court stated, "here what I find very troubling is the circumstances under which the probation officer went to Mr. Tullie's residence, peered into the window, saw the children's clothing or toys, and then there was the bed that was pushed up against his." (RT 12/17/18 21; ER 224.) The court found that the special sex offender conditions comported with the 18 U.S.C. §§ 3553(a) and 3583(d) factors of deterrence, protection of the public and rehabilitation of the offender. (RT 12/17/18 21; ER 224.) On January 2, 2019, Tullie appealed the order revoking his supervised release. (CR 247; ER 243-44.)

4. Tullie's Second Violation of Supervised Release

On the same day that Tullie appealed the revocation order, a second petition to revoke his supervised release was filed. (CR 245; ER 240-42.) Tullie admitted

that he had been living in a home with minor and had lied about that fact to his probation officer. (CR 257.)

On February 28, 2019, Tullie's supervised release was again revoked. (CR 263; ER 5-8.) Noting that the violation occurred within days of his previous disposition hearing, relating to similar allegations, the district court stated the "record was replete as to why these conditions are placed on Mr. Tullie" and a full recitation of the support for the sex offender conditions was not necessary. (RT 2/27/19 4-6; ER 308-10.) Nevertheless, the court stated that the sex offender conditions were warranted because "[t]he Court, who sat through the trial, two trials, found sufficient information by testimony and evidence that warrants Mr. Tullie to undergo some level of sex offender treatment. And that is because there were statements by Mr. Tullie that were made in the course of trial about his attraction to an adolescent child." (RT 2/27/19 5; ER 309.) The district court ordered, Tullie "must attend and participate in a sex offender treatment program and sex offense specific evaluations as approved by your probation officer." (RT 2/27/19 20; ER 324.)

In support of the polygraph condition, the district court stated that it was required as an aid to ensure Tullie remained compliant since he "has lost credibility with the Court" and "he repeatedly lies to the people who are supervising him." (RT 2/27/19 5; ER 309.) The court also found that the condition prohibiting contact

with minors was necessary because "there was sufficient evidence at trial that he poses a risk to children under the age of 18, primarily adolescent young females." (RT 2/27/19 5; ER 309.) The court determined that these conditions were necessary to aid in Tullie's rehabilitation and to protect the public. (RT 2/27/19 5; ER 309.) Tullie was sentenced to five months' incarceration and a 24-month term of supervised release. (RT 2/27/19 19; ER 323, 5-8.)

VI. SUMMARY OF ARGUMENTS

A. The imposition of the sexual offender treatment condition was supported by the record and should be affirmed. In setting forth the conditions of supervised release after Tullie's second revocation, the district court ordered sex offender treatment based on Tullie's previous statements about sexual attraction to an adolescent and based on his repeated lies about his contacts with minors while on release. The decision that Tullie was required to undergo treatment was not delegated by the court, but rather specifically imposed by it at both the first and second disposition hearings.

The improper delegation argument Tullie makes about the prior imposition of the treatment is unavailing. First, he is no longer serving that sentence, and, as such, his argument is moot. Second, the condition was premised on the results of a psychosexual evaluation and was not an unfettered delegation of authority. Even if this Court finds the earlier condition imposed relevant, any error was harmless as the record establishes that the district court considered the imposition of sex offender conditions after Tullie completed the psychosexual evaluation.

B. The government agrees that the case should be remanded for the limited purpose of conforming the written condition relating to full-time employment to the oral pronouncement of sentence.

C. The district court did not plainly err when it imposed a condition prohibiting Tullie from engaging in an occupation where he would have the potential to be alone with children. The condition was imposed based on Tullie's own statements of sexual interest in children and on the results of a psychosexual evaluation. The condition is not overbroad; he is only prohibited from engaging in *unsupervised* contact with minors without *preapproval*. The restriction is reasonable and does not prevent him from returning to his prior employment as a fast-food worker.

VII. ARGUMENTS

A. The District Court Did Not Improperly Delegate the Decision to Require Tullie to Undergo Sex Offender Treatment

1. Standard of Review

Whether a supervised release condition illegally exceeds the maximum statutory penalty or violates the Constitution is reviewed *de novo*. *United States v. Watson*, 582 F.3d 974, 981 (9th Cir. 2009). However, errors not raised in the district court are reviewed only for plain error, requiring a defendant to show (1) error; (2) that is plain; and (3) that affects substantial rights. *Id*. Even when a defendant meets all three conditions, this Court will only exercise its discretion to notice a forfeited error if "the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id*.

2. Argument

Tullie argues that the district court improperly delegated its authority to require that he undergo sex offender treatment while on supervised release. (Op. Br. at 21.) This argument misapprehends the record. In the sentence Tullie is now serving, he was ordered to undergo sex offender treatment by the district court itself based on the results of a psychosexual exam, his prior incriminating statements and his repeated concealment of his contacts with minors while on release.

a. The Appeal From the First Order Revoking Release Should Be Dismissed As Moot

Tullie complains that the condition that he "shall submit to a screening for sex offender treatment. And if recommended by your probation officer as a result of that screening, then you shall participate in such treatment" (RT 6/9/17 18; ER 58) constitutes an impermissible delegation to the probation officer. (Op. Br. at 22.) As discussed in detail *infra*, the government disagrees with his contention. However, the Court need not reach the issue because the order containing that term is moot.

The term at issue was imposed upon conviction; Tullie did not appeal. [2] Later, the district court modified his terms of release, adding additional sex offender conditions upon the recommendation of the probation officer. (RT 12/4/17 4; ER 84.) Again, no appeal was taken.

Tullie was found in violation of his supervised release and the district court specifically ordered Tullie to undergo sex offender treatment. The term set forth in the order resulting from the first revocation required that Tullie "attend and participate in a sex offender treatment program . . ." (RT 12/17/18 32; ER 235.) Tullie filed a notice of appeal from that order on the same day that a second petition was filed. (CR 247; ER 243-44.)

[2] As a condition of his plea agreement, Tullie waived the right to appeal the original sentence. (CR 205.) Furthermore, any appeal relating to that sentence, which was imposed in 2017, would be untimely at this juncture. *See* Fed. R. App. P. 4(b).

Tullie was found in violation of the conditions alleged in the second petition. The district court revoked his supervised release and sentenced him anew, requiring him to "attend and participate in a sex offender treatment program." (RT 2/27/19 20; ER 324.) Because he is no longer serving the supervised release term imposed originally, nor the term imposed after the first revocation, but instead is serving the term imposed after the second revocation, no live case or controversy exists as to the previous orders. *See Spencer v. Kenma*, 523 U.S. 1, 4-17 (1998).

"A claim is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Alvarez v. Hill*, 667 F.3d 1061, 1064 (9th Cir. 2012) (internal citations omitted). Success on the appeal from the first revocation would not alter the length or conditions of Tullie's current sentence. Therefore the appeal is moot. *See United States v. Verdin*, 243 F.3d 1174, 1178 (9th Cir. 2001). Tullie is currently subject only to the conditions imposed as a result of the second revocation. The appeal taken from the first revocation order should be dismissed as moot.

b. Sex Offender Treatment Was Properly Imposed by the District Court

Tullie argues that the district court improperly delegated its authority and that the "probation officer then used this delegated power to unilaterally require [him] to participate in sex offender treatment." (Op. Br. at 22.) Contrary to that assertion, the record establishes that the district court, not the probation officer, ordered that

Tullie undergo sex offender treatment and that the condition was supported by the evidence and relevant conduct.

The district court correctly determined that the sex offender conditions were necessary to aid in Tullie's rehabilitation and to protect the public. A "condition of supervised release does not have to be related to the offense of conviction because the sentencing judge is statutorily required to look forward in time to crimes that may be committed in the future by the convicted defendant." *United States v. Blinkinsop*, 606 F.3d 1110, 1119 (9th Cir. 2010); *See also United States v. Johnson*, 998 F.2d 696, 699 (9th Cir. 1993) (a condition of supervised release need not relate to the offense as long as the condition satisfies goal of deterrence, protection of public or rehabilitation); *United States v. T.M.*, 330 F.3d 1235, 1240 (9th Cir. 2003) (same). A district court has discretion to order special conditions of supervised release pursuant to 18 U.S.C. § 3583(d) if the conditions are reasonably related to the factors set forth in 18 U.S.C. § 3553(a). *United States v. Gallaher*, 275 F.3d 784, 793 (9th Cir. 2001).

In revoking Tullie's release, both the first and second time, the district court ordered that Tullie "must attend and participate in a sex offender treatment program . . . as approved by the probation officer." (RT 12/17/18 32; ER 235; RT 2/27/19 20; ER 324.) The court did not delegate the decision about whether Tullie was required to attend treatment; it clearly ordered that he must.

The treatment condition was imposed upon first revocation based on the relevant conduct discussed at the original sentencing, the information discussed at the modification hearing, and the fact that Tullie had unsupervised contact with minors. (RT 12/17/18 18-23; ER 221-26.) Upon second revocation, the district court imposed this condition based on a "record [that] was replete as to why these conditions are placed on Mr. Tullie." (RT 2/27/19 6; ER 310.) The court further explained the conditions were warranted because Tullie made statements about being attracted to a child and "there was sufficient evidence at trial that he poses a risk to children under the age of 18, primarily adolescent young females." (RT 2/27/19 5; ER 309.)

Although the judgment containing the complained-of wording is now moot, if this Court finds that the term imposed at the original sentencing is relevant, the government maintains that the district court did not err. First, the order was specifically conditioned upon undergoing a psychosexual evaluation and only then "if recommended by the probation officer as a result." (RT 6/9/17 18; ER 58.) Because the district court established the terms under which Tullie would be subject to treatment – an evaluation and a recommendation – this was a conditional term, not an unrestricted delegation of authority.

Second, the modification hearing established that the district court reviewed the results of the psychosexual evaluation and determined that additional sex offender

conditions were appropriate. At the hearing, the district court found that L.V.'s pregnancy by Tullie and the evaluation findings that Tullie had poor impulse control, used sex as a method for coping, failed to recognize that he is a risk to re-offend, and had no feasible plans to prevent re-offending all supported imposing sex offender conditions. (RT 12/4/17 4; ER 84.)

Although the specific sex offender treatment condition imposed at the original sentencing was not discussed at the modification hearing, there was ample evidence to support its imposition and it is clear from the record that the district court believed – at modification, at first revocation and at second revocation – that Tullie should be subject to sex offender conditions. The decision to impose those conditions on Tullie was not improperly delegated.

To the extent that Tullie is claiming that the court may not fashion terms of supervised release which permit the probation officer to "approve" the programs which satisfy the court's order, he is mistaken. Probation officers "are mandated to supervise offenders and to enforce a sentencing court's terms and conditions of supervised release and probation." *United States v. Reardon*, 349 F.3d 608, 619 (9th Cir. 2003) (rejecting vagueness challenge to condition which defers type and extent of treatment to probation officer).

Any error in the wording of the original condition is harmless. Tullie cannot show that his substantial rights were violated even if the Court finds that the decision

to impose treatment was improperly delegated. The record amply supports the need for sex offender treatment.

B. The Written Order of Revocation Should Be Corrected to Comport With the Oral Pronouncement of Sentence

1. Factual Background

At the disposition hearing on the second revocation of Tullie's supervised release, the district court orally stated,

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

(RT 2/27/19 20; ER 324.)

In the written order following the disposition hearing, the court ordered,

> 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.

(CR 263; ER 6.)

2. Argument

The government agrees that a term contained in the written judgment conflicts with the district court's oral pronouncement of sentence. The term requiring community service must be stricken. *See United States v. Davis*, 463 F. App'x 619, 621 (9th Cir. 2011). On affirming this appeal, this Court should therefore remand

to the district court to allow it to correct the written judgment. *See, e.g.*, *United States v. Sabree*, 633 F. App'x 484 (9th Cir. 2016) (dismissing appeal but remanding to correct the written judgment).

C. The District Court Did Not Err When It Imposed a Condition Prohibiting Unsupervised Contact with Minors in an Employment Setting

1. Standard of Review

Whether a supervised release condition illegally exceeds the maximum statutory penalty or violates the Constitution is reviewed *de novo*. *United States v. Watson*, 582 F.3d 974, 981 (9th Cir. 2009). However, errors not raised in the district court are reviewed only for plain error, requiring a defendant to show (1) error; (2) that is plain; and (3) that affects substantial rights. *Id*. Even when a defendant meets all three conditions, this Court will only exercise its discretion to notice a forfeited error if "the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id*.

2. Factual Background

At the time of his original sentencing, Tullie reported that he had large periods of unemployment due to rheumatoid arthritis. (PSR ¶ 46.) He was also unemployed for approximately one year due to being a full-time student. (PSR ¶ 46.) His last employment prior to his arrest was at a fast-food restaurant. (PSR ¶ 46.) Approximately 10 years prior to the instant offense, Tullie worked as a school bus

driver for five years, and as a school security guard for one year. (PSR ¶ 46.) He reported no other employment as an adult. (PSR ¶ 46.)

Tullie reported that he has a certificate in Information Technology from the Navajo Technical University. (PSR ¶ 44.) He received the certificate prior to obtaining the fast-food job. (PSR ¶ ¶ 44, 46.) He also reports having attended college for a year, completing three months of firefighter training and being a licensed minister. (PSR ¶ 45.)

At the modification hearing, Tullie informed the district court that he was employed as a driver, transporting patients to medical appointments. (RT 12/4/17 4-5; ER 84-85.) Although the patients were occasionally minors, they were always accompanied by a parent. (RT 12/4/17 4; ER 84.) At the first disposition hearing, Tullie stated that he was considering returning to school in New Mexico. (RT 12/17/18 29; ER 232.)

Upon Tullie's second revocation, the district court ordered that he was "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." (RT 2/27/19 23; ER 327.)

3. Argument

Tullie argues that the condition barring him from employment in which he could have unsupervised, unapproved contact with minors is improper and

overbroad. (Op. Br. at 32-33.) To the contrary, the condition was properly imposed based on both Tullie's employment record and the nature and circumstances of his violation of supervised release and does not impact his ability to return to work in his chosen field.

Special conditions relating to occupational restrictions must comport with the requirements of 18 U.S.C. § 3583(d). Additionally, the sentencing guidelines "provide for heightened scrutiny of occupational restrictions which impinge upon a defendant's 'specified occupation, business or profession.'" *United States v. Stoterau*, 524 F.3d 988, 1009 (9th Cir. 2008) quoting U.S.S.G. § 5F1.5. "Specified occupation" has been determined to mean "the defendant's profession or occupation prior to the instant conviction." *Id.* Although Tullie claims "the Information Technology profession fits the bill" (Op. Br. at 32), his claim runs contrary to the record and the law. It is clear that "a district court must consider the specific occupation or occupations held by the defendant subject to the sentencing proceeding . . ." in analyzing the applicability of U.S.S.G. § 5F1.5. Tullie has never worked in the information technology field.

Considering a term similar to the one at issue here, this Court in *Reardon* determined that heightened scrutiny did not apply where the restriction did not prohibit the defendant from working in his previous profession. *Reardon*, 349 F.3d at 622; *see also United States v. Paul*, 274 F.3d 155, 171 n. 18 (5th Cir. 2001)

(heightened scrutiny only applies where a defendant's "primary means of supporting himself" is involved).

Here, Tullie's primary means of supporting himself is not impacted in the least. First, if he chose to return to his employment at a fast-food restaurant, it is unlikely that he would have *unsupervised* contact with minors. Presumably there would always be other people at the restaurant – cooks, cashiers, janitors, patrons – and his opportunity to be alone with a minor would be limited. Second, he informed the district court that in his current employment, medical transport, he did not encounter minors outside of the presence of their guardians. Tullie's ability to support himself is not unduly restricted and the district court was not required to make the heightened scrutiny findings Tullie suggests.

Tullie also claims that the condition is overbroad and not narrowly tailored. (Op. Br. at 34.) "[E]ven very broad conditions are reasonable if they are intended to promote the probationer's rehabilitation and to protect the public." *Stoterau,* 524 F.3d at 1010, citing *United States v. Bee*, 162 F.3d 1232, 1236 (9th Cir. 1998). In *Bee*, this Court upheld a similar condition prohibiting a defendant who had abused a minor from having contact with children under the age of 18 without approval from his probation officer. *Bee*, 162 F.3d 1235. The employment condition imposed on Tullie serves to protect the public from contact with a man who has admitted sexually touching an adolescent and who has been found to have poor impulse

control. Nevertheless, the district court properly balanced this concern for public safety with Tullie's rights and limited the restriction to apply only in situations where Tullie has *unsupervised* or *unapproved* contact with minors. The condition, which allows Tullie to seek permission for such contact, does not involve a greater deprivation of liberty than is reasonably necessary to protect the public. The condition should be affirmed.

VIII. CONCLUSION

For the foregoing reasons, the appeal of the first order of revocation should be dismissed. In the appeal of the second order of revocation, the case should be remanded for a correction of the written judgement only and otherwise should be affirmed.

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s/ Rachel C. Hernandez
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IX. STATEMENT OF RELATED CASES

To the knowledge of counsel, there are no related cases pending.

X. CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NOS. 19-10001, 19-10068

I certify that: (check appropriate option(s))

☐ 1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

☐ Proportionately spaced, has a typeface of 14 points or more and contains __ words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words), or is

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☒ 2. The attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

☒ This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

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October 30, 2019
Date

s/ Rachel C. Hernandez
RACHEL C. HERNANDEZ
Assistant U.S. Attorney

XI. CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of October, 2019, I electronically filed the Brief of Appellee with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Rachel C. Hernandez
RACHEL C. HERNANDEZ
Assistant U.S. Attorney