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 REPLY BRIEF

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Introduction

In his opening brief, Mr. Tullie showed that the district court improperly delegated to the probation officer the power to require him to participate in sex offender treatment when it entered its initial judgment in this case. The government seeks to obscure this error by repeatedly referencing the district court's subsequent *re*imposition of this requirement, in connection with its two revocations of Mr. Tullie's supervised release. But as Mr. Tullie observed, the district court reimposed the treatment requirement in the mistaken belief that it had initially imposed the requirement *itself*, rather than delegating it to the probation officer. The upshot is that Mr. Tullie was subjected to – and incarcerated for violating – a condition imposed without the statutorily required judicial determination that it was appropriate and infringed upon his liberty no more than necessary. Mr. Tullie also showed that the district court breached both § 5F1.5 of the Sentencing Guidelines and the Constitution by barring him from engaging in any profession carrying the "potential" to be alone with minors. The government's attempt to defend this condition ignores the Guideline's reference to a supervisee's "profession," and fails to acknowledge the condition's extreme overbreadth. This Court should accordingly vacate both of these improper conditions.

Argument

I. The government fails to refute Mr. Tullie's showing that the district court improperly delegated to the probation officer the determination that he would be required to participate in sex offender treatment.

In his opening brief, Mr. Tullie showed that the district court erroneously delegated to the probation officer the essentially judicial function of determining whether he would be required to participate in sex offender treatment.[1] The government fails to refute this showing.

The government makes repeated references to the district court imposing the treatment requirement upon *revocation* of Mr. Tullie's supervised release.[2] But the government cannot dispute the fact that this requirement was *originally* imposed by the probation officer, using power delegated by the court. Nor can the government obscure the fact that when the district court decided to *re*impose this condition at Mr. Tullie's two revocations, its comments showed that it mistakenly believed it had originally imposed this condition itself. In effect, the court incorporated a judicial determination that had never actually occurred.

The government asserts that Mr. Tullie's challenge to this mandate is moot.[3] But the sex offender treatment condition to which Mr. Tullie is currently subject –

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[1] Op. Br. at 20-27.
[2] Gov. Br. at 3, 11, 14, 15-16.
[3] *Id.* at 14-15.

and which he may be imprisoned for breaching – is the product of the district court's confused ratification of the consequence of its improper delegation, rather than of the de novo judicial determination required by law. 18 U.S.C. § 3583(d). And Mr. Tullie plainly "has a personal stake in the outcome of this appeal," because this Court's agreement with his challenge could lead the Court to vacate the treatment condition. *United States v. Verdin*, 243 F.3d 1174, 1178 (9th Cir. 2001) (internal quotation marks omitted).

The government also proffers alternative arguments that acknowledge the fact that the district court delegated the initial imposition of this requirement to the probation officer, but seek to vindicate that delegation. These arguments are equally unavailing.

The government first posits that the court's action was not a delegation but rather a "conditional term," because it required Mr. Tullie to undergo an evaluation and "conditioned" the imposition of the treatment requirement on the probation officer's decision to "recommend[]" it.[4] But while the condition referred to treatment being "recommended,"[5] it did not merely authorize the probation officer to "recommend" treatment, leaving the final decision up to the court – nor

[4] Gov. Br. at 17.
[5] ER Vol. 2 at 77.

is that what actually happened. Instead, the condition empowered the probation officer to unilaterally *impose* the treatment condition, upon completion of the "screening," and that is precisely what he did.[6] The fact that the condition directed the probation officer to receive the result of the "screening" before making use of this delegation did not render it any less of a delegation.

The government next notes that the district court determined at the modification hearing that "additional sex offender conditions" were appropriate.[7] But the sex offender *treatment* condition was not before the court at the modification hearing. The modifications sought included periodic polygraph examinations, and bans on possessing sexually explicit materials, being in the company of minors, and engaging in occupations with the potential to be alone with minors.[8] They did *not* include sex offender treatment – which is understandable, because by that time the probation officer had already used his delegated power to impose that requirement unilaterally.

The government challenges the proposition that a district court may not "fashion terms of supervised release which permit the probation officer to

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[6] Op. Br. at 11.
[7] Gov. Br. at 17-18.
[8] ER Vol. 2 at 78-80.

'approve' the programs which satisfy the court's order."[9] The government attacks a straw man. Mr. Tullie does not challenge the district court's ability to order sex offender treatment while leaving the probation officer in charge of overseeing the details of implementing that mandate. "[I]t is permissible to delegate to the probation officer the details of where and when [a] condition will be satisfied." *United States v. Stephens*, 424 F.3d 876, 880 (9th Cir. 2005). But the district court's delegation here did more: It delegated the "determination of *whether*" Mr. Tullie would be required to undergo sex offender treatment at all. *Id.* This violates the "most important limitation" specifying "that a probation officer may not decide the nature or extent of the punishment imposed" upon a supervisee. *Id*. at 881 (internal quotation marks omitted).

Finally, the government proffers a conclusory, three-sentence argument that the district court's unlawful delegation was harmless because "[t]he record amply supports the need for sex offender treatment."[10] This argument suffers from two independently fatal flaws.

First, it is far too brief and conclusory to preserve the question of harmlessness. *United States v. Murguia-Rodriguez*, 815 F.3d 566, 573 (9th Cir. 2016)

[9] Gov. Br. at 18.
[10] Gov. Br. at 18-19.

(noting that Court generally declines to address harmlessness when the government "fails to advance a developed theory about how the errors were harmless").

Second, the government is effectively asking this Court to decide in the first instance whether sex offender treatment may be imposed consistently with 18 U.S.C. § 3583, the Guidelines, and the Constitution. But "it is the prerogative of the district court, not the court of appeals, to determine, in the first instance, the sentence that should be imposed in light of certain factors properly considered under the Guidelines" (*Williams v. United States*, 503 U.S. 193, 205 (1992)), and Section 3583 requires the district court, rather than this Court, to determine whether supervised release conditions are appropriate and necessary. Because the district court never properly made that initial determination here, this Court should vacate the condition.

II. The parties agree that the full-time-employment condition must be revised to conform to the version imposed orally.

In his opening brief, Mr. Tullie showed that the full-time employment condition set forth in the revocation order must be revised to conform to the wording of the condition as imposed orally at Mr. Tullie's (most recent)

disposition hearing. *United States v. Hicks*, 997 F.2d 594, 597 (9th Cir. 1993).[11] He noted that the revision must correct two modifications reflected in the written order: (1) the omission of the phrase "and/or schooling," and (2) the addition of language authorizing the probation officer to require Mr. Tullie to perform community service.[12]

The government in its answering brief agrees that "the written order of revocation should be corrected to comport with the oral pronouncement of sentence" (boldface and capitalization omitted).[13] The government expressly acknowledges the need to delete "[t]he term requiring community service," but does not specifically mention the need to add in the language permitting Mr. Tullie to pursue "schooling" as an alternative to full-time employment.[14] But the government does not challenge the need to make the second modification as well, and both are required to make the written order conform to the actual, orally imposed sentence. This Court should accordingly direct the district court to make both of these modifications.

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[11] Op. Br. at 27-31.
[12] *Id.*
[13] Gov. Br. at 19.
[14] *Id.* at 19-20.

III. The government fails to refute Mr. Tullie's showing that the condition barring employment carrying the "potential" of being alone with children conflicts with the applicable Guidelines provision and is overbroad.

Finally, Mr. Tullie showed in his opening brief that the district court erred in imposing a condition barring him from engaging in any occupation with the "potential" to be alone with minors without prior written permission, because this restriction conflicts with § 5F1.5 of the Guidelines and is overbroad.[15] The government fails to obscure either of these flaws.

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

Section 5F1.5 provides that a district court may prohibit a defendant from engaging in a "specified occupation" "only if it determines" that (1) there is a "reasonably direct relationship" between the defendant's occupation and "the conduct relevant to the offense of conviction," (2) the restriction is reasonably necessary to protect the public because without it the defendant will continue to engage in unlawful conduct "similar to that for which [he] was convicted," and (3) the condition will be in place "for the minimum time and to the minimum extent necessary to protect the public." Yet in imposing this condition, the court made no finding of a "reasonably direct relationship" between Mr. Tullie's

[15] Op. Br. at 31-36.

information technology profession and the isolated, non-sexual assault of which he was convicted. Nor did the court find that the condition was "reasonably necessary to protect the public" or tailor the condition to the minimum time and extent necessary to provide that protection.[16]

The government disputes Mr. Tullie's assertion that Information Technology is a "specified occupation" for purposes of Section 5F1.5, asserting that his actual "specified occupation" is determined by his four-month stint in 2015 as shift manager at "a fast-food restaurant."[17] This assertion suffers from three independently fatal flaws.

First, assuming it were true, it would not vindicate this condition. Apart from nursery school teacher, there are few work environments that present a greater "potential" to be alone with minors than a fast-food restaurant. The government speculates that "[p]resumably" there would always be people other than Mr. Tullie and minors at a fast-food restaurant, and thus his interactions with minors would not be "unsupervised" (emphasis removed).[18] But there clearly would be a "potential" for Mr. Tullie to be alone with minors in a fast-food

[16] Op. Br. at 32-34.
[17] Gov. Br. at 23; Presentence Report at 11 (¶ 46).
[18] Gov. Br. at 23.

restaurant – for example if he were to be managing a shift on his own, or if cooks or managers were present, but in other parts of the building.

Second, fast-food worker is *not* Mr. Tullie's last full-time job: The record reflects that in December of 2017 he was working as a non-medical transport driver.[19] The government acknowledges this, but posits that this condition does not interfere with his ability to return to that profession, because "he informed the district court" that in that job "he did not encounter minors outside of the presence of their guardians."[20] The probation officer did indicate that the condition would permit this employment provided that "there would be another adult present" where children were being transported.[21] But as a medical transport driver, Mr. Tullie would not *know*, before picking up a patient, whether an adult guardian intended to ride with the minor or not – and at that point he could not obtain "prior written permission" before taking the minor to his or her appointment. Thus, assuming that non-medical transport driver were deemed Mr. Tullie's "specified occupation" for purposes of Section 5F1.5, the occupational restriction could not be reconciled with that Guideline.

[19] ER Vol. 2 at 85:1-4.
[20] Gov. Br. at 23.
[21] ER Vol. 2 at 85:12-16.

Third, the plain language of Section 5F1.5 refers not only to a defendant's "specified occupation," but also to his "business, *or profession*." U.S.S.G. § 5F1.5 (emphasis added). The inclusion of "profession" is significant, because unlike an occupation, which can be any "principal business,"[22] a "profession" is "a calling requiring specialized knowledge and often long and intensive academic preparation."[23] The latter definition clearly fits Information Technology, which Mr. Tullie has been studying intensively for years.[24]

The government correctly notes that the panel in *United States v. Stoterau*, 524 F.3d 988 (9th Cir. 2008), characterized a "specified occupation" under Section 5F1.5 as "the specific occupation or occupations held by the defendant prior to conviction." *Id.* at 1009.[25] But there is no indication that Mr. Stoterau, like Mr. Tullie, had been studying full-time to earn a degree that would enable him to enter into a specialized field such as Information Technology. Indeed, Mr. Stoterau's presentence report described only "numerous unspecified brief periods

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[22] https://www.merriam-webster.com/dictionary/occupation?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (last visited Nov. 20, 2019).
[23] https://www.merriam-webster.com/dictionary/profession?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (last visited Nov. 20, 2019).
[24] Presentence Report at 10 (¶ 40), 11 (¶ 44).
[25] Gov. Br. at 22.

of employment in the customer service field" and some "work as a singer." *Stoterau*, 524 F.3d at 1009. The *Stoterau* panel had no occasion to address § 5F1.5's reference to a supervisee's "profession," because Mr. Stoterau *had* no "profession." Because "cases are not precedential for propositions not considered" (*United States v. Pepe*, 895 F.3d 679, 688 (9th Cir. 2018)), *Stoterau* should not be deemed to bar Mr. Tullie from invoking Section 5F1.5 to protect his ability to pursue the "profession" that he has been diligently working toward for years.

B. The occupational restriction is fatally overbroad.

Mr. Tullie also showed in his opening brief that this condition is fatally overbroad because it is doubtful that any occupation is free from even the "potential" to be alone with children.[26] The government disagrees, positing that the condition's validity is confirmed by *United States v. Bee*, 162 F.3d 1232 (9th Cir. 1998), and by its language permitting Mr. Tullie to "seek permission for such contact."[27]

But the condition at issue in *Bee* was not similar to the condition at issue here. Indeed, it was not an occupational restriction at all, but rather a condition

[26] Op. Br. at 34-35.
[27] Gov. Br. at 23-24.

barring the supervisee from having "contact with children under the age of 18 unless approved by [his] probation officer." *Bee*, 162 F.3d at 1235. Pursuant to this Court's precedent, such a condition is construed to prohibit only *knowing* contacts with minors. *United States v. Wolf Child*, 699 F.3d 1082, 1100 n.9 (9th Cir. 2012). Such a condition bears little resemblance to the condition at issue here, which bars Mr. Tullie from engaging in any "occupation, business, volunteer activity or profession" carrying the "*potential*" to be "*alone with*" – even if he does not "contact" – children.[28] And, contrary to the government's suggestion, Mr. Tullie's ability to "seek permission" to engage in an occupation carrying the "potential" to be alone with children does not save this unlawful condition. *Wolf Child*, 699 F.3d at 1095-96 ("If the record does not justify imposing a supervised release condition that infringes on a defendant's liberty interests, the limiting condition may not be imposed simply because a probation officer has the authority to mitigate the severity of the improper deprivation of liberty.").

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

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 November 20, 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 Reply Brief is proportionately spaced, has a typeface of 14 points, and contains 2,627 words.

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