NO. 19-10678-JJ

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/appellee,

v.

PETER ROBERT BOBAL,
Defendant/appellant.

On Appeal from the United States District Court
for the Southern District of Florida

INITIAL BRIEF OF THE APPELLANT PETER ROBERT BOBAL

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THIS CASE IS ENTITLED TO PREFERENCE
(CRIMINAL APPEAL)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

United States v. Peter Robert Bobal
Case No. 19-10678-JJ

Appellant, Peter Robert Bobal, files this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal, as required by 11th Cir. R. 26.1.

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Bloom, Beth, United States District Judge

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s/ Lori Barrist
Lori Barrist

STATEMENT REGARDING ORAL ARGUMENT

Appellant respectfully submits that oral argument is necessary to the just resolution of this appeal and will significantly enhance the decision-making process.

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had jurisdiction of this case pursuant to 18 U.S.C. § 3231 because the defendant was charged with an offense against the laws of the United States. The Court of Appeals has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which give the courts of appeal jurisdiction over all final decisions and sentences of the district courts of the United States. The appeal was timely filed on February 21, 2019 (DE 88), from the final judgment and commitment order entered on February 15, 2019 (DE 87), that disposes of all claims between the parties to this cause.

STATEMENT OF THE ISSUES

Issue I: Did the district court err in denying Mr. Bobal's motion for new trial as to Count 2, where the government improperly argued to the jury that Mr. Bobal "agreed" that the government had proven his guilt as to that count, and therefore, the only verdict as to Count 2 was a verdict of guilty?

Issue II: Was the lifetime computer restriction plainly unconstitutional in light of *Packingham v. North Carolina,* 582 U.S. ___, 137 S. Ct. 1730 (2017)?

STATEMENT OF THE CASE

The appellant was the defendant in the district court and will be referred to by name. The appellee, United States of America, will be referred to as the government. The record will be noted by reference to the document number, followed by the page number of the record on appeal.

Mr. Bobal is in custody, serving a 240-month sentence of imprisonment.

Course of Proceedings, Disposition in the District Court, and Statement of Facts

A. The Charges

On March 22, 2018, a federal grand jury sitting in the Southern District of Florida returned a two-count indictment against Peter Robert Bobal, charging him in Count 1 with using a computer to persuade, induce, entice, and coerce a minor to engage in sexual activity, and attempting[1] to do so, in violation of 18 U.S.C. § 2422(b), and in Count 2 with committing a felony offense involving a minor,

[1] Mr. Bobal was charged with attempted enticement because there was no actual minor; it was an undercover agent posing as a 14-year-old girl. (DE 97:101).

after being required to register as a sex offender, in violation of 18 U.S.C. § 2260A. (DE 5).

B. The Motion to Sever Count 2

In order to prove Count 2 – that Mr. Bobal committed an offense against a minor after being required to register as a sex offender – the jury would "necessarily hear that Mr. Bobal has been previously convicted as a sex offender." (DE 97:5). For that reason, in a pretrial hearing held just before the start of jury selection, Mr. Bobal moved to sever Count 1 from Count 2 so that "the jury wouldn't be tainted by knowing that he has a prior conviction for a sex offense." (DE 97:5-6,18-19). The government opposed the severance or "bifurcation" of the counts. (DE 97:10).

The district court had already precluded the government from introducing Mr. Bobal's prior sex offense conviction[2] during the trial.

[2] According to the government's Notice of Intent to Offer Evidence pursuant to Fed. R. Evid. 404(b), Mr. Bobal's prior Florida state sex offense also involved the attempted enticement of a minor, and again an undercover police officer was used. On December 14, 2005, Mr. Bobal pled guilty to child solicitation using a computer, and was sentenced to six months in jail followed by a five year term of probation. (DE 17:4-5). Mr. Bobal filed a Motion *in Limine* seeking to preclude introduction of this information. (DE 19). The district court granted Mr. Bobal's motion. (DE 32).

(DE 32; DE 97:9). Then, based upon Mr. Bobal's oral acknowledgment and his written stipulation[3] that from January 4, 2018 until March 14, 2018, he was a registered sex offender (element 2 of Count 2), the court bifurcated the trial. (DE 47; DE 97:20-22,25-26).

In this way, the government first presented the evidence as to Count 1 – attempted enticement. (DE 97:24). Only if the jury returned a guilty verdict as to that count, would it consider the evidence as to Count 2. (DE 97:24). As the district court explained to Mr. Bobal, if the jury returned a guilty verdict as to Count 1, the only additional evidence introduced in the second part of the bifurcated trial would be his stipulation to the second element of the offense charged in Count 2 – that from January 4, 2018 until March 14, 2018, he was required to register as a sex offender. (DE 97:24,26). As a result, then, "to the extent that the requirement of registering is not an element for the jury to answer either yes or no . . . I believe that that (prior) offense and the requirement of registering should not be part of the trial." (DE 97:22).

[3] In addition to admitting "that from on or about 1/4/2018 continuing until on or about 3/14/2018, I was a registered sex offender," the stipulation provided that "I admit to element 2 of Count 2." (DE 47).

Just prior to the start of the second day of trial, and having spoken with defense counsel, the government clarified the parties' positions:

> If the jury returns a verdict of guilty on Count 1, we believe at that point we should keep this jury and present the stipulation that we entered into, argue briefly Count 2 to them, and have them deliberate as to Count 2 . . .
>
> . . . if they've already found guilty on Count 1, we've then met the first element of Count 2. And we have a stipulation as to the second element, so we could – we would just have to present that to them and they would have to enter a verdict on Count 2. Because the Defendant is not pleading to Count 2. He's stipulating to that one fact that he's a registered sex offender. He could choose to plead guilty to Count 2 after they return a verdict on Count 1. But it doesn't seem that that's what he's willing to do. It seems he's only willing to stipulate as to the fact that he was required to register at that time.

(DE 98:3).

Because the government would be presenting no additional evidence as to Count 2 other than the stipulation, the district court determined that if the jury returned a guilty verdict as to Count 1, jurors would remain to answer two questions: (1) whether there was a violation of 18 U.S.C. § 2422 as charged in Count 1, and (2) whether Mr. Bobal was required by federal or other law to register as a sex offender. (DE 98:4-5).

C. The Bifurcated Trial

Count 1

James Spencer was the government's first witness. He testified that a female neighbor in his condominium building received a note on her door which said, "I think you're beautiful. I think you're pretty," with a phone number. (DE 97:104,130). Spencer called that number, and got a voice mail message stating, "This is Peter. Leave a message." (DE 97:196). Spencer did not leave a message, but "within hours" began receiving text messages from "Peter." (DE 97:106,108). Spencer "captured" the text messages with "screenshots," then printed them out. (DE 97:107). Those text messages, representing conversations Spencer had with Mr. Bobal, were introduced into evidence. (DE 97:109,112-113).

According to Spencer, Mr. Bobal began texting him on October 3, 2017, but Spencer "ignored him" until January 2018, when, as a result of a "New Year's resolution," Spencer began responding to the texts.[4]

[4] In a pretrial hearing, the government disclosed that at some point, and prior to responding to Mr. Bobal's texts, Spencer learned that Mr. Bobal was a registered sex offender, and that is why Spencer portrayed himself as a 14-year-old girl. (DE 97:10-13).

(DE 97:112-113). Spencer described himself in his texts as a 14-year-old girl "who developed early" to see how [Bobal], who stated that he was 42, "would react to the message." (DE 97:112,115). In response, Mr. Bobal asked if her mother was single. (DE 97:115).

A few weeks later, the text messages resumed with Mr. Bobal repeatedly asking Spencer for a "pic." (DE 97:119-121). Instead, Spencer asked Mr. Bobal to send "her" an "interesting" picture. (DE 97:121). Mr. Bobal responded, "what kind of pic, face or naked," and then sent a picture of his face. (DE 97:121,123). Spencer wrote, "you sent a face pic, instead of the other," to which Mr. Bobal replied, "you want the other Sweety?" (DE 97:124). After Spencer texted that she "won't get in trouble" if Mr. Bobal sent her "the other," on January 25, 2018, Mr. Bobal sent a picture of his penis, and again asked for her picture. (DE 97:124-125). Mr. Bobal continued texting Spencer's phone for several weeks, but received no response. Spencer said that he became concerned, "stopped responding," and contacted the FBI. (DE 97:125-126).

Matthew Fowler, a special agent with the FBI, assigned to the Violent Crimes Against Children Squad, testified that he was trained to

work in an undercover capacity conducting online investigations where he plays a child. (DE 97:133-135). Fowler said that he met with Spencer in mid-to-late February 2018 and read some of the chats that Spencer had conducted with Mr. Bobal. (DE 97:136). On March 2, 2018, Fowler began communicating with Mr. Bobal as that same 14-year-old girl, now named "Amy," explaining that she had "changed my number." (DE 97:137-139,145). These text messages were also introduced into evidence.[5] (DE 97:137-138).

Fowler explained that he began texting Mr. Bobal by telling him that he was "not supposed to talk to guys. My mom said I can't have a boyfriend until I'm 16, so two more years." (DE 97:140). Soon after, Mr. Bobal texted, "would you let guy play with your pussy?" (DE 97:140). "Amy" responded, "I'm only 14, though, and never done anything." (DE 97:140-141). These conversations continued for several days, and then Mr. Bobal asked to meet "Amy." (DE 97:142-153). When "Amy" again told Mr. Bobal that she was only 14, he said, "you told me that, Amy." (DE 97:146).

[5] Fowler testified that an examination of Mr. Bobal's cell phone after his arrest showed that many of these text messages had been deleted. (DE 97:174).

According to Fowler, Mr. Bobal continued to text Amy about sexual activity "on a daily basis," and asked her to "take a pic of your pussy and send it to me." (DE 97:152,158-159). "Amy" never sent the picture, but Mr. Bobal continued to ask for it. (DE 97:165-167). "Amy" finally agreed to meet Mr. Bobal on March 14, 2018. (DE 97:156,167). Mr. Bobal was arrested, wearing the navy-striped shirt he told "Amy" he would be wearing. (DE 97:169).

Also introduced into evidence was a voice mail message and a transcript of that message, in which Mr. Bobal told "Amy" to "make sure your parents shouldn't know about this," surveillance photos taken on March 14, 2018, and two "spontaneous" statements allegedly made by Mr. Bobal upon his arrest – "It was a sting" and "Why am I so unlucky?" (DE 97:162-165,167,176; DE 98:13,20).

Mr. Bobal did not testify and did not offer any evidence. (DE 98:23,26-27). He moved for a judgment of acquittal as to Count 1, arguing that the government failed to prove that he acted "knowingly." (DE 98:23). The district court denied the motion. (DE 98:25).

A redacted indictment was prepared, listing only Count 1. (DE 43; DE 98:63). The jury convicted Mr. Bobal of Count 1. (DE 48; DE 98:66).

Count 2

Explaining that their "responsibilities have not yet been concluded," the district court instructed the jurors that "there is a second count" that they needed to determine: whether Mr. Bobal committed a felony offense involving a minor while being required to register as a sex offender. (DE 98:68). The government thereupon introduced Mr. Bobal's signed stipulation, which provided: "I admit that from on or about January 4th, 2018, continuing until on or about March 14, 2018, I was a registered sex offender. I admit to element 2 of Count 2." (DE 47; DE 98:69).

The district court then instructed the jury as to Count 2. (DE 98:75). In its closing argument, the government stated that "for whatever reason, Mr. Bobal was already required to register as a sex offender for something before." (DE 98:78). The government continued:

> So he was required to register as a sex offender and then he committed this new enticement. That's it. That's Count 2. It's very simple, very straightforward. But you would still have to deliberate on that . . . So it makes sense to present Count 1 first because you don't need to know about Count 2 to determine if he committed that new crime . . .

> Because otherwise, if a juror heard that already, that he already had to register as a sex offender, that – they might be biased . . . So to prevent you guys from being biased on Count 1, we separated Count 2 . . .

(DE 98:78).

The government next addressed the stipulation that Mr. Bobal signed, arguing improperly:

> So, the Defense is telling you: "We stipulate that the government proves Count 2. I was a registered sex offender. I was required to register as a sex offender."

(DE 98:79). The stipulation, however, provided that Mr. Bobal admitted to element 2 of Count 2 – *not* that the government proved Count 2. (DE 47).

A "clean" indictment as to Count 2 was submitted to the jury. (DE 44; DE 98:80). The jury convicted Mr. Bobal of Count 2 as well. (DE 50; DE 98:82).

D. The Motion for New Trial as to Count 2

On the very day that the jury returned its verdict, Mr. Bobal filed a motion for new trial as to Count 2. (DE 42). He argued that the government presented an improper closing argument by informing the jury that because it had already returned a verdict of guilty as to Count 1, and given the stipulation in which Mr. Bobal admitted "to element 2

of Count 2," "it had no choice" but to return a guilty verdict as to Count 2 as well. (DE 42:2).

Indeed, a verdict of guilty as to one count does not require a guilty verdict as to a separate count because a jury can return inconsistent verdicts. (DE 42:2). Finally, while the jury may very well have convicted Mr. Bobal of Count 2, "legally the jury was free to re-evaluate the evidence as to element 1 of Count 2 and decide that the government had failed to prove" that element. (DE 42:2).

In response, the government argued that because evidence of the defendant's guilt was overwhelming, Mr. Bobal "was not prejudiced by the government's argument." (DE 57:3). Moreover, because Counts 1 and 2 of the indictment were "intertwined," the government's argument that "the only verdict as to Count 2 is a verdict of guilty" was not improper. (DE 57:3).

The district court denied Mr. Bobal's motion, finding that the government's closing argument was "consistent with the law," stating:

> The jury had already made a finding as to Count 1. Count 1 and Count 2 were clearly intertwined and a finding of guilt as to Count 1 necessarily established the first element of Count 2. Given the defendant's stipulation that he was a registered sex offender, the jury's verdict was consistent

> with the evidence and the interest of justice does not require a new trial.

(DE 71:4).

E. The Presentence Investigation Report (PSI)

A presentence report was prepared. Pursuant to U.S.S.G. § 2G1.3, Mr. Bobal's adjusted offense level for his conviction for attempted enticement of a minor was 32.[6] Because the offense of conviction was a covered sex crime and he committed the offense after a prior sex offense conviction, Mr. Bobal was considered a "repeat and dangerous sex offender against minors" pursuant to U.S.S.G. § 4B1.5. *See* PSI ¶ 23. His offense level was therefore increased to 37. *See* U.S.S.G. § 4B1.5(1)(B)(i). The "repeat and dangerous sex offender" classification also served to increase his criminal history category from II to V. *See* U.S.S.G. § 4B1.5(2) and PSI ¶¶ 30-31. Based upon a total offense level of 37 and a criminal history category of V, Mr. Bobal's advisory guideline range as to Count 1 was 324 to 405 months. As to Count 2, the court was required to impose a 10-year term of imprisonment

[6] Two levels had been added to Mr. Bobal's base offense level of 28 because the offense involved a participant who otherwise "unduly influenced" a minor to engage in prohibited sexual conduct. *See* U.S.S.G. § 2G1.3(b)(2)(B). Two more levels were added because the offense involved use of a computer. *See* U.S.S.G. § 2G1.3(b)(3)(A).

consecutive to Count 1. *See* PSI ¶¶ 60-61 and 18 U.S.C. § 2260A. No objections were lodged as to the PSI.

F. The Sentencing and Supervised Release Condition

Prior to his sentencing, Mr. Bobal filed a Motion for Downward Departure and/or *Booker*[7] Variance. (DE 84). Because of Mr. Bobal's "extreme mental illness" as well as the fact that "in this case, there was no actual child who was in danger [and] [t]here wasn't a child that was in danger before," the district court found that a variance or departure was "certainly warranted." (DE 99:16-17). The court thereupon sentenced Mr. Bobal to 120 months' imprisonment as to Count 1 and a consecutive 120 months' imprisonment as to Count 2, for a total sentence of 240 months. (DE 87; DE 99:18).[8]

A lifetime period of supervised release was also ordered. (DE 87; DE 95; DE 99:18). As a special condition of Mr. Bobal's term of supervised release, the district court imposed "a computer modem restriction, a computer possession restriction, and an employer computer restriction" with a "personal examination and a permissible

[7] *United States v. Booker,* 543 U.S. 220 (2005).

[8] An amended judgment was entered, correcting only the date sentence was imposed. (DE 95).

examination by the probation officer" of Mr. Bobal's computer. (DE 87; DE 95; DE 99:18-19). Specifically, Mr. Bobal was prohibited from possession of a computer or "other electronic communication or data storage devices or media" that contain an internal, external, or wireless modem without the prior approval of the court, although he may, with prior approval of the court, possess or use a computer "in connection with authorized employment" as long as he permits disclosure to any employer of his computer-related restrictions. (DE 87; DE 95). No objection was lodged to this special condition.

Standards of Review

Issue I: A motion for new trial is addressed to the sound discretion of the trial court. *United States v. Champion,* 813 F.2d 1154, 1170 (11th Cir. 1987). A district court abuses its discretion when it misapplies the law in reaching its decision or bases its decision on findings of fact that are clearly erroneous. *United States v. Scrushy,* 721 F.3d 1288, 1303 (11th Cir. 2013).

Issue II: Whether an action taken by a district court amounts to a constitutional violation is a question of law subject to *de novo* review. *United States v. Rodriguez*, 751 F.3d 1244, 1260 (11th Cir. 2014). Errors

not raised at trial may be reviewed for plain error. *See United States v. Heath,* 419 F.3d 1312, 1314 (11th Cir. 2005).

Before an appellate court can correct a plain error not brought to the district court's attention, there must be an error (1) that has not been intentionally relinquished or abandoned, (2) that is plain, that is to say, "clear and obvious," and (3) that has affected the defendant's substantial rights. *Rosales-Mireles v. United States,* 585 U.S. ___, 138 S. Ct. 1897, 1905 (2018). An appellate court may then exercise its discretion to correct the error if it "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* The "risk of unnecessary deprivation of liberty particularly undermines the fairness, integrity or public reputation of judicial proceedings." *Id.* at 1908.

SUMMARY OF THE ARGUMENTS

It was error for the prosecutor to argue that Mr. Bobal "agreed" that he was guilty of Count 2 as Mr. Bobal only stipulated that he was guilty of element 2 of Count 2. And even though the jury had already returned a guilty verdict as to Count 1, a guilty verdict as to Count 2 was *not* the "only verdict" the jury could return because the law permits inconsistent verdicts. The district court should have granted Mr. Bobal's motion for new trial.

It was also error for the district court to impose a lifetime ban on Mr. Bobal's use of a computer except for work purposes, and only with the prior approval of the court. Such lifetime restriction on the use of a computer or a cell phone with internet access for personal purposes is plainly unconstitutional in light of *Packingham v. North Carolina*, 582 U.S. ___, 137 S. Ct. 1730 (2017).

ARGUMENTS AND CITATIONS OF AUTHORITY

Issue I

The district court erred in denying Mr. Bobal's motion for new trial as to Count 2, where the government improperly argued to the jury that Mr. Bobal "agreed" that the government had proven his guilt as to that count, and therefore, the only verdict as to Count 2 was a verdict of guilty.

Federal Rule of Criminal Procedure 33 provides that upon the defendant's motion, the court may vacate any judgment and grant a new trial "if the interest of justice so requires." *See* Fed. R. Crim. P. 33(a). In his closing argument, the prosecutor stated that Mr. Bobal had "agreed" that he was guilty of Count 2, and therefore, "the only verdict as to Count 2 is a verdict of guilty." But, Mr. Bobal only "agreed" that he was guilty of element 2 of Count 2 – that he was a registered sex offender. Nor was the "only verdict" a guilty one. Because the government's argument removed an element of proof from the jury's consideration, and then misstated the law, the district court should have granted Mr. Bobal's motion for a new trial. Its failure to do so requires reversal of Mr. Bobal's conviction on Count 2.

In this case, the district court conducted a bifurcated trial. First, the jury heard evidence as to Mr. Bobal's attempted enticement of a

minor (Count 1), and returned a guilty verdict. Then it was presented with Mr. Bobal's stipulation that from January 4, 2018 until March 14, 2018, he was a registered sex offender, and asked to determine Mr. Bobal's guilt as to Count 2 – whether he committed an offense involving a minor after being required to register as a sex offender.

As to Count 2, the government had to prove two elements – (1) that Mr. Bobal committed a felony offense involving a minor and (2) that at the time he committed the felony offense involving the minor, he was required to register as a sex offender. *See* 18 U.S.C. § 2260A. The jury was instructed that "a violation of Title 18 U.S.C. § 2422(b), as charged in Count 1 of the Indictment, is an enumerated felony violation involving a minor." (DE 40:2). They were also instructed that "while statements and arguments of counsel are generally not evidence in the case, if a statement is made as an admission or a stipulation of fact, it is evidence. When the attorneys on both sides stipulate or agree as to the existence of a fact, you must, unless otherwise instructed, accept that stipulation as evidence and regard that fact as proven." (DE 39:7).

Because Mr. Bobal stipulated to "element 2 of Count 2" (DE 47), the only issue for the jury's determination was whether the government

proved element 1 of Count 2 – that Mr. Bobal committed a felony offense involving a minor. Yet, the government argued, "the Defense is telling you: 'we stipulate that the Government proves Count 2.'" (DE 98:79). And, "by you guys finding him guilty as to Count 1, the only verdict as to Count 2 is guilty." (DE 98:79).

Yet, that was not what "the Defense [was] telling" the jury. Mr. Bobal was telling the jury – by only admitting the second element of Count 2 – that they still had to decide whether he committed element 1 of Count 2. And, while the jury's guilty verdict as to Count 1 *may* have established Mr. Bobal's guilt as to element 1 of Count 2 because "a violation of 18 U.S.C. § 2422(b) as charged in Count 1 of the Indictment is an enumerated felony involving a minor" (DE 40:2), it was for the jury to determine that fact, particularly since Mr. Bobal did not stipulate that the government proved Count 2.

In denying Mr. Bobal's motion for new trial, the district court appeared to adopt the argument set forth in the government's response in opposition to a new trial that "Count 1 and Count 2 of the indictment were intertwined. An individual could not be convicted of Count 2 of the indictment without being convicted of Count 1." (DE 57:2-3; DE 71:4).

But whether a conviction on Count 1 "necessarily established the first element of Count 2," (DE 71:4), was a jury determination. And, the prosecutor's improper statement that Mr. Bobal agreed that "the government prove[d] Count 2" (DE 98:79), only served to confuse the jury.

As this Court held in *United States v. Scrushy,* 721 F.3d 1288, 1303 (11th Cir. 2013), a district court abuses its discretion in denying a motion for new trial when it misapplies the law in reaching its decision. Indeed, an individual *could* be convicted of Count 2 without being convicted of Count 1, even though the violation alleged in Count 1 – attempted enticement – is an "enumerated felony involving a minor."

Title 18 U.S.C. § 2260A lists numerous *other* offenses "involving a minor" that qualify for the consecutive 10-year sentence: kidnapping; production/distribution/possession of a visual depiction of a minor engaging in sexually explicit conduct; transferring obscene material to a minor; recruiting, harboring, transporting, or maintaining a minor to engage in a commercial sex act; sexual abuse; sexual contact; sexual exploitation; buying or selling of a minor for use in the production of a visual depiction of sexually explicit conduct; transporting a minor for

prostitution or other sexual activity; using the mail or internet to transmit information about a minor for sexual activity; and murder of a minor while engaged in several of the above offenses. *See* 18 U.S.C. § 2260A.

At least three of these offenses might cover Mr. Bobal's conduct in the instant case – sending an "obscene" picture of his penis to "Amy," attempted transportation of a minor; or attempted sexual contact. So, while the violation alleged in Count 1 is an "offense involving a minor," Counts 1 and 2 are not necessarily "intertwined." Because an individual *could* be convicted of Count 2 without being convicted of Count 1, the district court misapplied the law in denying Mr. Bobal's motion for new trial.

Nor was a guilty verdict the *only* verdict the jury could return as to Count 2. Inconsistent verdicts are permitted. *See United States v. Powell,* 469 U.S. 57, 62 (1984), quoting *Dunn v. United States,* 284 U.S. 390, 393 (1932) ("Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment"); *United States v. Schlaen,* 300 F.3d 1313, 1317 (11th Cir. 2002) ("Even where conviction on one count and acquittal on another count is a logical

impossibility, the conviction will stand"). And, that is particularly true in the instant case where the district court bifurcated the trial and presented separate indictments to the jury, and the jury returned separate verdicts. (DE 43; DE 44; DE 48; DE 50; DE 98:66,80,82).

In its response in opposition to Mr. Bobal's motion for new trial, the government argued that "the jury is presumed to have followed [the court's] instructions." (DE 57:3). While the district court may have instructed the jury that the argument of the attorneys is not evidence (DE 39:7), and that "a violation of 18 U.S.C. § 2422(b) as charged in Count 1 of the Indictment is an enumerated felony involving a minor" (DE 40:2), the jury may *not* have followed its instructions. As Justice Jackson stated in *Krulewitch v. United States,* 336 U.S. 440 (1949), the "naïve assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction." *Id.* at 453 (Jackson, J., concurring).

The district court should have granted Mr. Bobal's motion for new trial. Its failure to do so requires reversal of his conviction on Count 2.

Issue II

The district court's imposition of a lifetime ban on Mr. Bobal's use of a computer is plainly unconstitutional in light of *Packingham v. North Carolina,* 582 U.S. ___, 137 S. Ct. 1730 (2017).

As a special condition of Mr. Bobal's lifetime period of supervised release, the district court ordered that he have no access to a computer or cell phone with internet access for personal purposes. He was, however, permitted access to a computer for work purposes, but only with the prior approval of the court and only if he informed his employer of his computer-related restrictions. While U.S.S.G. § 5D1.3(d)(7)(B) recommends a special condition *limiting* the use of a computer or interactive computer service where a defendant used such items in the commission of a sex offense, here the lifetime ban is unduly restrictive.

And, while this Court has upheld computer and internet bans in such cases, they have usually been of limited duration. *See United States v. Tome,* 611 F.3d 1371 (11th Cir. 2010) (one year); *United States v. Moran,* 573 F.3d 1132 (11th Cir. 2009) (three years); *United States v. Taylor,* 338 F.3d 1280 (11th Cir. 2003) (three years); *United States v. Zinn,* 321 F.3d 1084 (11th Cir. 2003) (three years). The absolute ban on

the use of a personal computer *for life* is wholly unreasonable. *See United States v. Ramos,* 763 F.3d 45, 60 (1st Cir. 2014) ("There is ample reason to believe that it will be harder and harder in the future for an offender to rebuild his life when disconnected from the computer at home").

And, as the Supreme Court recently held, such lifetime ban on the use of a computer or cell phone with internet access for personal purposes is plainly unconstitutional. *See Packingham v. North Carolina,* 582 U.S. ___, 137 S. Ct. 1730, 1734 (2017) (striking down a North Carolina law that made it a felony for any registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members," because it violated the First Amendment).

In *Packingham,* the Court assumed that the restriction was content-neutral, and subjected it to intermediate scrutiny. In order to survive intermediate scrutiny, the Court held, "a law must be 'narrowly tailored to serve a significant governmental interest.'" *Id* at 1736. Because the North Carolina law restricted far more speech than necessary to protect children, it violated that standard.

In invalidating the law, the Court held that "[a] fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak, and listen once more." *Id* at 1735. That place, the Court recognized, is "cyberspace – the 'vast democratic forums of the Internet,'" where "seven in ten Americans use at least one Internet social networking service." *Id*.

Finding that "[t]his case is one of the first this Court has taken to address the relationship between the First Amendment and the modern Internet," *id*. at 1736, the Court held that:

> By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to 'become a town crier with a voice that resonates farther than it could from any soapbox.'

Id. at 1737.

The Court found it "instructive that no case or holding of this Court has approved a statute as broad in its reach," and described the

North Carolina law as "unprecedented in the scope of First Amendment speech it burdens." *Id.* at 1737-1738. But the restriction struck down in *Packingham* was far more limited than the computer restriction in this case. While allowing Mr. Bobal to use a computer exclusively for employment purposes and only with prior permission from the court, this restriction encompasses a total prohibition on access to the internet for personal purposes, and thus plainly violates the First Amendment.

If there is any distinction between *Packingham* and the instant case, it is that the law in *Packingham* applied to offenders regardless of whether they were on court-ordered supervision or not. The Court made clear, however, that this "troubling fact" was not pertinent to its analysis. *See Packingham, Id.* at 1737 ("Of importance, the troubling fact that the law imposes severe restrictions on persons who have already served their sentence and are no longer subject to the supervision of the criminal justice system" was "not an issue before the Court").

The constitutional ruling of *Packingham* applies in full to this case, and renders the computer restriction plainly unconstitutional.

The prohibition on the use of a computer for non-work purposes must be stricken from the terms of Mr. Bobal's supervised release.

CONCLUSION

Based upon the foregoing argument and citations of authority, the Court should vacate Mr. Bobal's conviction and remand this case for a new trial on Count 2, and vacate the lifetime ban on computer access for personal uses from his conditions of supervised release.

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief complies with the type-volume limitation and typeface requirements of Fed. R. App. P. 32(a)(7)(B), because it contains 5,642 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief also complies with the requirements of Fed. R. App. P. 32(a)(5) and (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point, Century Schoolbook font.

s/Lori Barrist
Lori Barrist
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Dated: July 12, 2019

CERTIFICATE OF SERVICE

I HEREBY certify that on this 12th day of July 2019, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and sent seven copies to the Clerk of the Court via third party commercial carrier for delivery within three days. I also certify that the foregoing document is being served this day via CM/ECF on Emily M. Smachetti, Chief, Appellate Division, United States Attorney's Office, 99 N.E. 4th Street, Miami, Florida 33132.

s/Lori Barrist
Lori Barrist