IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. **19-10678-JJ**

United States of America,

Appellee,

- versus -

Peter Robert Bobal,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES

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

Certificate of Interested Persons

If you have names to add, you can say: In compliance with Fed. R. App. P. 26.1 and 11th Circuit Rules 26.1 and 28-1, the undersigned certifies that the list set forth below is a complete list of the persons and entities previously included in the CIP included in the appellant's initial brief, and also includes additional persons and entities (designated in bold face) who have an interest in the outcome of this case and were omitted from the appellant's CIP.

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

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Statement Regarding Oral Argument

The United States of America respectfully suggests that the facts and legal arguments are adequately presented in the briefs and record before this Court and that the decisional process would not be significantly aided by oral argument.

Table of Contents

Page:

Table of Contents

(continued)

Page:

Table of Citations

Cases: **Page:**

Table of Citations

Cases: **Page:**

Table of Citations

Cases: **Page:**

Table of Citations

Cases: **Page:**

Table of Citations

Cases: **Page:**

Table of Citations

Statement of Jurisdiction

This is an appeal from a final judgment of the United States District Court for the Southern District of Florida in a criminal case. The district court entered judgment against Peter Bobal on February 15, 2019 (DE:87), and subsequently entered an amended judgment (DE:95). The district court had jurisdiction to enter the judgments pursuant to 18 U.S.C. § 3231. Bobal filed a timely notice of appeal on February 21, 2019 (DE:88); *see* Fed. R. App. P. 4(b). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and authority to examine Bobal's challenges to his sentence pursuant to 18 U.S.C. § 3742(a).

Statement of the Issues

I. Whether the district court correctly denied Bobal's motion for new trial.

II. Whether this Court's precedents in *United States v. Zinn*, 321 F.3d 1084 (11th Cir. 2003), and *United States v. Taylor*, 338 F.3d 1280 (11th Cir. 2003), foreclose Bobal's claim that it is unconstitutional for his supervised release to include a condition that bars him from possessing an internet-connected computer without prior approval.

Statement of the Case

1. Course of Proceedings and Disposition in the Court Below

A Southern District of Florida federal grand jury returned an indictment charging Peter Bobal with attempting to use a facility and means of interstate commerce to knowingly persuade, induce, entice, and coerce a minor to engage in sexual activity, in violation of 18 U.S.C. § 2422(b) (Count 1), and committing a felony offense involving a minor after being required to register as a sex offender, in violation of 18 U.S.C. § 2260A (DE:5).

Bobal proceeded to a bifurcated two-day jury trial, where he was convicted on both counts (DE:48, 50). The district court subsequently sentenced Bobal to 240 months' imprisonment, consisting of consecutive terms of 120 months on Counts 1 and 2, to be followed by a supervised release term of life (DE:87, 95). The district court imposed special conditions on Bobal's supervised release, including, in

relevant part, ordering that Bobal "shall not possess or use a computer that contains an internal, external or wireless modem without the prior approval of the Court," and that Bobal "shall not possess or use any computer; except that [he] may, with the prior approval of the Court, use a computer in connection with authorized employment" (DE:87; DE:95). Bobal did not object to these special conditions.

2. Statement of the Facts

A. Pretrial Proceedings

During a colloquy immediately before the start of trial, the government clarified the elements of Count 2 at the district court's request: "The first element is that the Defendant committed a felony offense involving a minor, which would be basically our Count 1. And second, that at the time that the Defendant committed a felony offense involving a minor the Defendant was required to register under the Sex Offender Registration and Notification Act" (DE:97:10). Bobal concurred with this recitation of the elements (DE:97:16). Bobal then stipulated to the following: "I admit that from on or about January 4th, 2018, continuing until on or about March 14th, 2018, I was a registered sex offender. I admit to element 2 of Count 2" (DE:97:25-26; DE:98:69). The district court and Bobal consequently agreed that, in light of his admission as to the second element of Count 2, the jury's verdict on Count 1 would be dispositive as a practical matter in assessing his guilt on Count 2:

> THE COURT: Well, it would appear to the Court that based on the Defendant admitting to the second element, that once the jury finds the Defendant either guilty or not guilty of Count 1, then that would determine Count 2. Because one of the necessary elements is the jury's finding as to Count 1.
>
> MR. SPIVACK: Right.

(DE:97:24).

To prevent the jury from hearing that Bobal was a registered sex offender during its consideration of Count 1, the district court sua sponte bifurcated trial on the two counts (DE:47; DE:97:22, 25-26).

B. Trial on Count 1

The following evidence was introduced at Bobal's trial on Count 1, viewed in the light most favorable to the government.

In October 2017, James Spencer learned that a 62-year-old female friend had found a note on her door complimenting the appearance of the undisclosed intended recipient and leaving a phone number (DE:97:104, 130). Spencer's friend also lived with her 18-year-old daughter (DE:97:105). Speculating that the note might have come from Bobal, who also lived in her apartment building, Spencer's friend asked Spencer to call the number to investigate further (DE:97:104). On calling the number, Spencer was eventually routed to a voicemail recording that identified the speaker as "Peter" (DE:97:106). Spencer disconnected the call without leaving a message (*id.*).

Within hours, Bobal began texting Spencer via the Google Voice app and proceeded to send Spencer a series of texts between October 3 and 5 (DE:97:106-14; GX4). These texts ranged from messages imploring Spencer to text him back to messages of a sexual nature (e.g., DE:97:112 ("I'm a male, single. I bet you have a sexy voice")).

Having ignored Bobal's initial series of messages, Spencer resolved to respond if Bobal texted him again after the New Year (DE:97:114). Sure enough, Bobal re-initiated communication on January 4, 2018, telling Spencer to "[t]ext me back when you can" (DE:97:113-14). Spencer decided to pose as a 14-year-old girl to find out how Bobal would react, telling him, "I am 14. Most guys think that I'm at least 20, developed early for my age, lol" (DE:97:114-15). Bobal continued texting Spencer through January 6, asking if the fictitious 14-year-old's mother was also single (DE:97:115). On January 24, Bobal began texting Spencer from a different number, reiterating that he was single and following up with a barrage of additional text messages (DE:97:116-18). Bobal repeatedly asked Spencer to send him a picture, but Spencer made excuses for why he could not do so, including being at school (DE:97:119-20, 122, 128). On January 25, after having sent Spencer a picture of his face, Bobal texted him a nude picture (DE:97:124-25). Spencer, now alarmed, sought help from law enforcement (DE:97:125-26). After receiving no help from the City of Hallandale Police Department, Spencer contacted the FBI,

which put him in touch with Special Agent Matthew Fowler (DE:97:126). Special Agent Fowler took over the investigation, and Spencer stopped communicating with Bobal (DE:97:130).

After confirming that the pictures Bobal had sent Spencer matched driver's license photo, Special Agent Fowler assumed the identity of the fictitious 14-year-old girl and resumed the conversation with Bobal (DE:97:135, 137). Bobal sent Special Agent Fowler hundreds of texts, many of a sexually charged nature, between March 2 and March 14 (GX5). Bobal began by asking if he could call, but Special Agent Fowler said he was at school (DE:97:139). When Bobal asked when he could call, Special Agent Fowler responded, "Let's just text. I'm 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). After saying that he wanted the girl to "like" him, Bobal asked, "Would let [sic] guy play with your pussy?" (DE:97:140). Special Agent Fowler responded, "I'm only 14, though, and never done anything" (DE:97:140-41). Bobal said that he was 42 (DE:97:141).

Bobal asked "[w]hat color undies" she wore and repeatedly urged her to "slide of [sic] your undies" and then to "[r]uby [sic] your pussy . . . slowly with your hand" (DE:97:141-43). Although Special Agent Fowler told Bobal "[m]y mom will be upset if she knows I'm talking to you," Bobal initiated the idea of meeting (DE:97:143-44). Bobal asked for her breast size multiple times; Special Agent

Fowler finally responded, "[m]y boobs are small," at which point Bobal told her to "[r]uby [sic] your boobs" and "[t]ake off your shirt" (DE:97:146). When Bobal asked her mother's age, Special Agent Fowler said, "Forty. I'm only 14" (*id.*). Bobal responded, "That's cool" (*id.*).

Bobal continued to ask how they could meet, going so far as to send his address (DE:97:147-48). He again repeatedly asked the purported 14-year-old what color underwear she wore and directed her to rub her breasts and "take a pic of [her] pussy" (DE:97:147-48, 153, 157-60). Bobal said he wanted to "finger," "ruby" [sic], "lick," and "play with [her] pussy," and offered to put his "hand down [her] undies" and put his "dick in [her] mouth or pussy" (DE:97:148-52, 155, 158, 166-67). Bobal asked if she would "grab [his] dick" and if she "dream[s] of [him] even though I know you're young," and told her his "dick hard [sic] for you" (DE:97:155-56, 159-60). Bobal asked her to send him pictures at least 55 times and described sex acts in which he wanted to engage at least 70 times (GX4; GX5).

When Bobal persisted in asking the fictitious 14-year-old to meet, Special Agent Fowler said, "I can't meet Saturday. I have to skip school and meet you so nobody will find out" (DE:97:154). Special Agent Fowler then said she could not meet the following Monday because she had "a test in history class" (DE:97:155). They finally agree to meet at an intersection on Wednesday, March 14 (DE:97:156). Bobal bemoaned the fact that he "may not have a phone after Wednesday" and

wondered "what happens if I don't have a phone and you like it" (DE:97:155-57). Bobal left the 14-year-old a voicemail, in which he said she should "[m]ake sure your parents shouldn't [sic] know about this" (DE:97:165; GX8).

On March 14, after law enforcement surveilled Bobal en route to the meeting (DE:98:9-15; GX16A-16G), Special Agent Fowler arrested Bobal as he arrived at the rendezvous location (DE:97:170, 172; GX9). After being arrested, Bobal spontaneously said, "It was a sting," and twice said, "Why am I so unlucky" (DE:98:20). Bobal's recovered cell phone contained that day's conversation with Special Agent Fowler, but Bobal had seemingly deleted their earlier texts (DE:97:174-76; GX12).

C. Trial on Count 2

The jury convicted Bobal on Count 1 (DE:98:66), and trial proceeded on Count 2. The government relied solely on Bobal's pre-trial stipulation (DE:98:69), and Bobal presented no defense case. The government then presented closing argument on Count 2, during which it argued the following:

> Remember the instruction that the Court gave you earlier regarding stipulations. A stipulation -- while statements and arguments of counsel are not generally 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 side 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. 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." So by you guys finding him guilty as to Count 1, element 1 is met because you already said he's

> guilty of Count 1, which was a violation against a child. And now the Defense agrees that he's guilty of the second element or we've proven the second element of that charge in Count 2 -- Count 2. So the only verdict as to Count 2 is a verdict of guilty.

(DE:98:79).

Bobal waived closing argument, and the jury convicted him on Count 2 (DE:98:82).

D. Motion for New Trial

Bobal then filed a motion for new trial, in which he maintained that the government's closing argument on Count 2 improperly "informed the jury that it had no choice but to return a verdict of guilty as to Count 2, given that the jury had just returned a verdict of guilty as to Count 1 and given the stipulation by the defense" (DE:42).[1] The government in turn filed a response (DE:57). It explained that its closing argument accurately stated the law because "[t]he first element of Count 2 requires the individual [to] commit a felony involving a minor which was proven by the conviction of Count 1," while "[t]he second element of Count 2 requires proof that the individual committed that offense while being a registered sex offender which was proven by [Bobal's] stipulation" (*id.*). The government finally noted that any error was harmless given the district court's instruction to the jury that argument

[1] The motion for new trial notably fails to challenge or even cite the government's reference to a stipulation as to proof on Count 2, which Bobal now contends was erroneous for the first time on appeal.

of counsel is not evidence, and in light of the overwhelming evidence against Bobal (*id*.).

The district court subsequently denied Bobal's motion (DE:71). It concluded that the two charged counts were "clearly intertwined," inasmuch as "a finding of guilt as to Count 1 necessarily established the first element of Count 2," and Bobal's stipulation established the second element. *Id*.

3. <u>Standards of Review</u>

This Court reviews the denial of a motion for new trial for abuse of discretion. *United States v. Lee*, 586 F.3d 859, 865 (11th Cir. 2009).

This Court reviews an unpreserved claim that the district court erred in imposing supervised release for plain error only, even when the claim is constitutional in nature. *United States v. Vandergrift*, 754 F.3d 1303, 1307 (11th Cir. 2014); *United States v. Nash*, 438 F.3d 1302, 1304 (11th Cir. 2006). Under that standard, the complaining party bears the burden of showing (1) an error, (2) that is plain, and (3) that affects the defendant's substantial rights. *United States v. Shelton*, 400 F.3d 1325, 1328-29 (11th Cir. 2005). Assuming those requirements are satisfied, this Court may exercise its discretion to recognize the forfeited error only if it seriously affects the fairness of the proceeding. *Id*.

Summary of the Argument

The district court correctly denied Bobal's motion for new trial because the challenged remarks from the government's closing argument on which the motion was predicated were proper or immediately cured. Although the government referred to a defense stipulation that "the Government prove[d] Count 2," the remainder of the closing argument left no doubt that the defense stipulation referred to element 2 of Count 2. The government's comment that "the only verdict as to Count 2 is a verdict of guilty" served merely as an innocuous and permissible commentary on the weight of the evidence. Moreover, any putative error was harmless given the district court's instructions to the jury that arguments of counsel are not evidence, the isolated nature of the challenged remarks, and the overwhelming nature of the evidence against Bobal.

The district court also properly imposed a bar on using an internet-connected computer without prior approval during Bobal's term of supervised release. This Court has repeatedly upheld the First Amendment constitutionality of this precise condition of supervised release when imposed on defendants like Bobal who have been convicted of a child sex offense. Bobal thus cannot establish error, plain or otherwise.

Argument

I. The District Court Correctly Denied Bobal's Motion For New Trial.

Bobal claims that the district court erroneously denied his motion for new trial, premised on an immediately cured stray slip of the tongue in the government's closing argument (Br. at 19-24). This argument falls far short.

Federal Rule of Criminal Procedure 33 allows the district court to "grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). The decision of whether to grant a new trial "falls within the sound discretion of the trial court," and this Court will reverse the denial of such a motion only where the evidence "preponderates heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand." *United States v. Albury*, 782 F.3d 1285, 1295 (11th Cir. 2015) (quotation marks and brackets omitted).

A conviction on Count 2 required proof that Bobal (1) committed a felony offense involving a minor, and (2) was required to register as a sex offender at the time he committed the felony offense involving the minor. 18 U.S.C. § 2260A. During its closing following trial on Count 2, the government argued, in relevant part:

> Remember the instruction that the Court gave you earlier regarding stipulations. A stipulation -- while statements and arguments of counsel are not generally 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 side 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. 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." So by you guys finding him guilty as to Count 1, element 1 is met because you already said he's guilty of Count 1, which was a violation against a child. And now the Defense agrees that he's guilty of the second element or we've proven the second element of that charge in Count 2 -- Count 2. So the only verdict as to Count 2 is a verdict of guilty.

(DE:98:79).

Bobal argues that the government's reference to a defense stipulation that "the Government prove[d] Count 2" and its argument that "the only verdict as to Count 2 is a verdict of guilty" were so prejudicial as to warrant a new trial. But a reasonable reading of the record defeats both of these arguments. As to the first challenged statement, the record demonstrates that the government attempted to convey that the defense had stipulated to proof of "element two" of Count 2 (i.e., that Bobal was required to register as a sex offender), rather than to Count 2 as a whole. The government immediately followed its reference to the defense's stipulation by citing the requirement that Bobal register as a sex offender, which satisfied the second element of Count 2: "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 government then explained that the jury "already said he's guilty of Count 1, which was a violation against a child," and underscored the fact that "the Defense agrees that he's guilty of the second element or we've proven the second element of that charge in Count 2 -- Count 2" (*id.*).

Having heard that the defense stipulated to the second element of Count 2, both during the government's evidentiary presentation and during the government's closing argument, the jury reasonably would have inferred that the defense had not stipulated to the first element of that count and that the government's proof of that element consisted only of the jury's verdict on Count 1. Significantly, the government's reference to the defense's stipulation was so unremarkable that the defense not only failed to object, but also waived closing argument and even neglected to cite the stray comment in its post-trial motion for new trial (DE:42; DE:98:79). By accurately characterizing the legal and procedural posture of the case immediately after its characterization of the stipulation, the government cured its isolated slip of the tongue when it said the defense had stipulated that "the Government prove[d] Count 2."

Bobal also makes much of the government's comment that "the only verdict as to Count 2 is a verdict of guilty" (DE:98:79). This unremarkable conclusion to the government's closing amounted to nothing more than a rhetorical flourish that the government frequently and properly uses in arguing its cases to the jury.[2] The

[2] *See, e.g., United States v. Fancutt*, 491 F.2d 312, 313 (10th Cir. 1974) ("I submit to you that the only verdict you can arrive at is guilty as to all three defendants"); *United States v. Telfair*, 507 F. App'x 164, 178 (3d Cir. 2012) ("the Government is confident that you will return the only verdict that can be reached based on the law"); *United States v. Brown*, 393 F. App'x 686, 699 (11th Cir. 2010) (arguing to the jury

government may use closing argument to "argue the weight of the evidence," *United States v. Tisdale*, 817 F.2d 1552, 1556 (11th Cir. 1987), and "there is no prohibition on colorful and perhaps flamboyant remarks if they relate to the evidence adduced at trial," *United States v. Bailey*, 123 F.3d 1381, 1400 (11th Cir. 1997) (internal quotation marks omitted). The government merely urged the jury to convict Bobal on Count 2 based on the evidence before it; the district court acted well within its broad discretion in denying a new trial based on this innocuous remark.

In any event, Bobal cannot establish that the challenged comments prejudicially affected his substantial rights. First, the district court twice instructed the jury that statements of counsel are not evidence (DE:97:92; DE:98:35). Because this Court assumes the jury followed its instructions, *United States v. Butler*, 102 F.3d 1191, 1196 (11th Cir. 1997), the district court presumptively cured any putative improprieties in the government's closing argument. *See United States v. Smith*, 918 F.2d 1551, 1562 (11th Cir. 1990) ("Because statements and arguments of counsel are not evidence, improper statements can be rectified by the district court's instruction to the jury that only the evidence in the case be considered.").

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that the defendant "committed the acts in this case and the only verdict ... that's just in this case is guilty").

Second, the challenged comments' isolated nature also militates against a finding of prejudice. The remarks occupy only several lines of the trial transcript and therefore were not so "pronounced and persistent that [they] permeate[d] the entire atmosphere of the trial." *United States v. Woods*, 684 F.3d 1045, 1065 (11th Cir. 2012).

Finally, overwhelming evidence of Bobal's guilt on Count 2 establishes that the challenged statements did not prejudicially affect his substantial rights, inasmuch as he cannot demonstrate a reasonable probability that the result of the trial would have been different in their absence. *United States v. Smyth*, 556 F.2d 1179, 1185 (5th Cir. 1977).[3] As explained above, the jury's conviction of Bobal on Count 1 undisputedly qualified as a felony offense involving a minor that satisfied the first element of Count 2, and Bobal stipulated to his guilt as to the second element. Under these circumstances, Bobal's conviction on Count 2 was a foregone conclusion.

Bobal argues that linking his conviction on Count 2 with his earlier conviction on Count 1 was erroneous "[b]ecause an individual could be convicted of Count 2 without being convicted of Count 1" (Br. at 23). But Bobal's analysis runs backwards. The relevant inquiry is not whether the jury could have convicted him

[3] Pre-October 1, 1981 Fifth Circuit decisions are binding precedent in this Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

of Count 2 even if it had not convicted him of Count 1; the pertinent question instead is whether a reasonable jury would have convicted him of Count 2 after it already convicted him of Count 1 (thus satisfying the first element) and after Bobal himself stipulated to the second element. As explained above, the answer to that question is yes.

Bobal also suggests that, despite the conviction on Count 1, the jury could have returned inconsistent verdicts as a matter of compromise. However, if the jury refused to convict on Count 2 after finding guilt on Count 1 and after Bobal stipulated to the only other element, that decision would be contrary to the evidence and the law. In essence, Bobal argues that he should have a second chance at asking for jury nullification. As this Court has emphasized, such verdicts "are lawless . . . and constitute an exercise of erroneously seized power." *United States v. Rushin*, 844 F.3d 933, 939 (11th Cir. 2016). Although Bobal characterizes inconsistent verdicts as permissible (Br. at 23), it is more accurate to say that the government has no remedy when a jury erroneously returns a nullification verdict. That feature of our criminal justice system is no reason to allow a defendant another opportunity to seek an incorrect and irremediable decision.

The district court's denial of Bobal's motion for new trial should be affirmed.

II. This Court's Binding Precedent Forecloses Bobal's First Amendment Challenge To His Supervised Release Conditions.

Bobal contends that the computer restrictions imposed as special conditions of his supervised release violate the First Amendment and the Supreme Court's recent decision in *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017). As he concedes in his brief, his failure to object to these conditions below leaves him with the burden of satisfying plain error review (Br. at 16-17). However, he cannot demonstrate that there was any error, much less plain error, here. This Court has determined in several binding precedents that analogous computer restrictions are constitutional when imposed on individuals subject to supervised release. *Packingham*, which addressed restrictions placed upon sex offenders who have completed their sentences, did not abrogate those precedents. Thus, this Court should affirm.

Title 18, United States Code, Section 3583 gives district courts wide latitude to impose special supervised release conditions:

> The court may order, as a further condition of supervised release, to the extent that such condition—
>
> (1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);
>
> (2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

> (3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. § 994(a);
>
> any condition set forth as a discretionary condition of probation in section 3563(b) and any other condition it considers to be appropriate . . .

18 U.S.C. § 3583(d).

Pursuant to § 3583(d)(1), a special supervised release condition should bear a reasonable relation to "the nature and circumstances of the offense and the history and characteristics of the defendant," along with "the need for the sentence imposed . . . to afford adequate deterrence to criminal conduct[,] to protect the public from further crimes of the defendant[,] and to provide the defendant with needed . . . training, medical care, or other correctional treatment." 18 U.S.C. § 3553(a)(1), (a)(2)(B)-(D). Bobal does not argue that the challenged computer restrictions bear no reasonable relation to these factors or that they are otherwise inconsistent with the Sentencing Commission's policy statements. Bobal argues only that these conditions are unconstitutional under the First Amendment because they restrict his access to the internet (Br. at 26). However, this is not the first time that a defendant has asked this Court to address the constitutional propriety of such supervised release conditions. Fifteen years ago, this Court established in two binding precedents that these restrictions do not run afoul of the First Amendment. *See Zinn*, 321 F.3d 1084; *Taylor*, 338 F.3d 1280. "Under the well-established prior panel precedent

rule of this Circuit, the holding of the first panel to address an issue is the law of this Circuit, thereby binding all subsequent panels unless and until the first panel's holding is overruled by the Court sitting *en banc* or the Supreme Court." *Smith v. GTE Corp.*, 236 F.3d 1292, 1300 n.8 (11th Cir. 2001); *see also Tippitt v. Reliance Standard Life Ins. Co.*, 457 F.3d 1227, 1234 (11th Cir. 2006) (explaining that "a prior panel precedent cannot be circumvented or ignored on the basis of arguments not made to or considered by the prior panel"); *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1076 (11th Cir. 2000) (stating that the precedential value of a prior decision does not turn on "a subsequent panel's appraisal of the initial decision's correctness").

In *Zinn*, a similarly situated defendant pleaded guilty to possession of child pornography. 321 F.3d at 1086. In addition to a 33-month term of imprisonment, the trial court sentenced Zinn to a 3-year term of supervised release and required him to refrain from "possess[ing] or us[ing] a computer with access to any on-line service at any location, including employment, without written approval from the probation officer," including "access through any Internet service provider, bulletin board system, or any public or private computer network system." *Id.* at 1086-87. The defendant challenged this restriction both at sentencing and on appeal as a violation of his First Amendment rights. *See id.* at 1087.

The panel in *Zinn* explained that, "while . . . a condition of supervised release should not unduly restrict a defendant's liberty, a condition is not invalid simply because it affects a probationer's ability to exercise constitutionally protected rights." *Id.* at 1089. Citing decisions from the Fifth and Tenth Circuits that upheld similar restrictions, this Court upheld the constitutionality of the condition. *Id.* at 1092-93 (citing *United States v. Paul*, 274 F.3d 155 (5th Cir. 2001), and *United States v. Walser*, 275 F.3d 981 (10th Cir. 2001)).

This Court found those opinions persuasive because of "the strong link between child pornography and the Internet, and the need to protect the public, particularly children, from sex offenders." *Id.* at 1092. Although acknowledging that "the Internet has become an important resource for information, communication, commerce, and other legitimate uses, all of which may be potentially limited to [the defendant] as a result of our decision," this Court noted that the "facts of this case highlight[ed] the concomitant dangers of the Internet and the need to protect both the public and sex offenders themselves from its potential abuses." *Id.* at 1093. This Court concluded that the restrictions were "not overly broad in that [the defendant] may still use the Internet for valid purposes by obtaining his probation officer's prior permission." *Id.*

Several months later, this Court reaffirmed *Zinn*'s holding and reasoning in *Taylor*, a case concerning a conviction under 18 U.S.C. § 2425 for use of interstate

facilities to encourage or solicit criminal sexual activity with a minor. 338 F.3d at 1282. A prohibition on using or possessing a computer with internet access accompanied his 3-year term of supervised release. *Id.* at 1284-85. This Court again upheld that condition in the face of the defendant's claim that it "impinge[d] upon his First Amendment right to use computers for legitimate purposes." *Id.* at 1285. Relying on *Zinn*, this Court held that the computer restriction was not constitutionally overbroad and reiterated that, although it "recogniz[ed] the value of the internet for legitimate purposes," the "[r]estrictions on Taylor's internet access [we]re undeniably related to the factors listed in 18 U.S.C. § 3553(a)." *Id.*

Zinn and *Taylor* resolve this appeal. Just as in those cases, Bobal asserts that prohibiting him from accessing the internet for personal purposes violates the First Amendment. But as was the case in both *Zinn* and *Taylor*, Bobal remains able to use a computer and the internet; he simply must do so in connection with authorized employment and request approval from the court. Under these circumstances, these conditions do not violate the diminished First Amendment rights that he possesses as a person subject to a criminal sentence of supervised release.

This Court has applied or extended *Zinn* and *Taylor* in several subsequent decisions. In *United States v. Carpenter*, 803 F.3d 1224, 1239-40 (11th Cir. 2015), this Court found no plain error in a lifetime restriction identical to one of the two that Bobal challenges, which prohibited a defendant from using a computer except

for authorized employment and with prior approval of the district court. *Id.* at 1239. *See also United States v. Tome*, 611 F.3d 1371, 1375-78 (11th Cir. 2010); *United States v. Moran*, 573 F.3d 1132, 1140-41 (11th Cir. 2009); *United States v. Washington*, 763 F. App'x 870, 871-72 (11th Cir. 2019) (concluding defendant could not establish plain error in imposition of lifetime computer restriction as condition of supervised release); *United States v. Antczak*, 753 F. App'x 705, 714-15 (11th Cir. 2018) (same).

Bobal argues that this Court should treat as controlling the Supreme Court's decision in *Packingham* and decline to follow *Zinn* and its progeny here. In *Packingham*, the Supreme Court addressed the constitutionality of a North Carolina statute that made it a felony for a registered sex offender to gain access to social media websites such as Facebook. 137 S. Ct. at 1733. Assuming that the statute was a content-neutral law and applying intermediate scrutiny, the Supreme Court concluded that it violated the First Amendment because it was not sufficiently narrowly tailored to serve the government's interest in protecting children and the public from sex offenders. *Id.* at 1736-37 (concluding that "the statute here enacts a prohibition unprecedented in the scope of First Amendment speech it burdens").

Nothing in *Packingham* suggests that the Constitution compels the same outcome in the context of probationers, persons on supervised release, or convicts still incarcerated and serving a sentence of imprisonment. The facts of the case do

not concern such individuals, and the opinion does not mention them. As this Court's precedent teaches, a "decision can hold nothing beyond the facts of that case." *United States v. Birge*, 830 F.3d 1229, 1233 (11th Cir. 2016) (internal quotation marks omitted). In *Packingham*, one particularly significant fact was the petitioner's status as a person who no longer was subject to any criminal sentence. The Court described it as "unsettling to suggest that only a limited set of websites can be used even by persons who have completed their sentences." *Id.* at 1737 (emphasis added). Similarly, the majority opinion clarified in a parenthetical comment that "the troubling fact that the law imposes severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system is also not an issue before the Court." *Id.* (emphasis added).

Bobal misreads that parenthetical comment to suggest that *Packingham's* holding should extend to those currently serving criminal sentences or still subject to supervision. It would be a surprise if the Court were to draw such a sweeping conclusion in an aside. In context, it is obvious that the Court did not do so. Instead, that statement merely notes that the parties had not raised any claim that there was a separate constitutional infirmity with the statute—for example, an Ex Post Facto Clause problem arising from the statute imposing conditions on registered sex offenders that arguably amounted to additional, post-sentence punishment. In

Packingham, the parties framed the issue, and the Supreme Court addressed it, solely as a First Amendment claim. Thus, while the Court suggested that this situation might present other potentially "troubling" issues, it did not need to consider them because it was able to resolve the case on First Amendment grounds.

Bobal's interpretation of that sentence runs headlong into the well-established principle that the constitutional rights of persons subject to the supervision of the criminal justice system are diminished compared to ordinary citizens. The Supreme Court has held repeatedly that, although prisoners and probationers do not relinquish all constitutional rights, their rights are diminished (to varying degrees in different contexts) while passing through the criminal justice system. *See United_States v. Knights*, 534 U.S. 112, 119 (2001) ("Inherent in the very nature of probation is that probationers do not enjoy the absolute liberty to which every citizen is entitled. Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." (internal quotation marks and citation omitted)); *Griffin v. Wisconsin*, 483 U.S. 868, 875 (1987) (observing that probation status "justif[ies] the exercise of supervision" and creates a special governmental need that "permit[s] a degree of impingement upon privacy that would not be constitutional if applied to the public at large").

Both the First and Fourth Amendments have diminished vitality in the context of incarcerated individuals, probationers, or persons subject to supervised release. *See, e.g.*, *Knights*, 534 U.S. at 119-20 (upholding warrantless search condition for probationer because "probation . . . significantly diminished Knights' reasonable expectation of privacy"); *Prison Legal News v. Sec'y, Fla. Dep't of Corrs.*, 890 F.3d 954, 965 (11th Cir. 2018) (explaining that First Amendment rights are "more limited . . . in the penal context" (internal quotation marks omitted)); *Padgett v. Donald*, 401 F.3d 1273, 1278-79 (11th Cir. 2005) (upholding a Georgia statute requiring convicted felons to provide a DNA sample in large part because prisoners "do not enjoy the same Fourth Amendment rights as free persons"); *United States v. Kriesel*, 508 F.3d 941, 950 (9th Cir. 2007) (upholding federal statute requiring individuals in custody or on supervised release to provide DNA samples because government's significant interests "outweigh[ed] the diminished privacy interests that may be advanced by a convicted felon currently serving a term of supervised release"); *United States v. Castillo-Lagos*, 147 F. App'x 71, 75 (11th Cir. 2005) (relying on *Padgett* to reject a challenge to the same statute). For example, then-Judge Sotomayor upheld the constitutionality of a special condition of parole that prohibited individuals convicted of sexual crimes involving minors from possessing any "pornographic material" based in part on the principle that "the First Amendment rights of parolees are circumscribed," such that material that "receive[s]

full First Amendment protection when in the possession of ordinary adults . . . may be regulated in the hands of parolees to a much greater extent." *Farrell v. Burke* 449 F.3d 470, 497 (2d Cir. 2006). *Cf. Knights*, 534 U.S. at 119 (characterizing probation, a similar or lesser punishment compared to supervised release, as "a form of criminal sanction" and describing it as "one point on a continuum of possible punishments ranging from solitary confinement . . . to a few hours of mandatory community service" (internal quotation marks and alteration omitted)).

In short, Bobal and the petitioner in *Packingham* are differently situated. Bobal's effort to extend the constitutional analysis in *Packingham* requires that this Court ignore or erase the distinction between a person subject to a criminal justice sentence and an ordinary citizen. Yet that distinction has deep roots in constitutional law, where it often plays a decisive role in defining the scope of the constitutional right at issue. There is no reason to believe that *Packingham* disposed of that distinction *sub silentio* or in a single, off-hand remark concerning what was "not an issue" in that case. *Id.* at 1737.[4]

[4] Indeed, at the outset, the majority opinion in *Packingham* recognized that "the Court must exercise extreme caution" because "[t]his case is one of the first this Court has taken to address the relationship between the First Amendment and the modern Internet," and "[t]he forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow." 137 S. Ct. at 1736. That cautionary note renders it all the more implausible that *Packingham* could decide the issue presented in this appeal.

Binding circuit precedent can be overruled only by this Court sitting *en banc* or by a Supreme Court decision that is "clearly on point." *United States v. White*, 837 F.3d 1225, 1230 (11th Cir. 2016) (quoting *Garrett v. Univ. of Ala. at Birmingham Bd. of Trustees*, 344 F.3d 1288, 1292 (11th Cir. 2003). "To meet that standard, the intervening Supreme Court decision must 'actually abrogate or directly conflict with, as opposed to merely weaken,' the prior panel's holding." *Id.* at 1230-31 (quoting *United States v. Kaley*, 579 F.3d 1246, 1255 (11th Cir. 2009)). Because *Packingham* does not abrogate or directly conflict with *Zinn* or its progeny, this Court should apply that line of precedent and reject Bobal's claim.

Conclusion

For the foregoing reasons, Bobal's conviction and sentence should be affirmed.

Respectfully submitted,

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Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,477 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Certificate of Service

I hereby certify that seven copies of the foregoing Brief for the United States were mailed to the Court of Appeals via Federal Express this 2nd day of August, 2019, and that, on the same day, the foregoing brief was filed using CM/ECF and served via CM/ECF on Lori E. Barrist, Assistant Federal Public Defender, counsel for Peter Robert Bobal.

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