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

REPLY 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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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.

So that the jury would not learn that Mr. Bobal had a prior sex conviction, the district court conducted a bifurcated trial. Mr. Bobal proceeded to trial on Count 1 – attempted enticement of a minor, and the jury returned a guilty verdict. As to Count 2, the government had to prove two elements: (1) that Mr. Bobal committed an offense involving a minor, and (2) that at the time he committed the offense involving a minor, he was required to register as a sex offender.[1] *See* 18 U.S.C. § 2260A.

Mr. Bobal stipulated to "element 2" of Count 2, requiring the government to prove only that he had been convicted of an offense involving a minor. Count 1 is an offense involving a minor. However, § 2260A lists other offenses involving a minor, at least three of which

[1] Mr. Bobal was required to register as a result of his 2005 conviction for attempted enticement of a minor. As in the instant case, the "minor" was an undercover police officer. (DE 17).

might cover Mr. Bobal's conduct as well – sending an obscene picture of his penis to a minor, attempted transportation of a minor, and attempted sexual contact.

In her closing argument, the prosecutor told the jury that "the Defense" stipulated that the government had proven Count 2, and also, that because the jury found Mr. Bobal guilty of Count 1, "the only verdict as to Count 2 is a verdict of guilty." (DE 98:79). The government argues now that the statement concerning the defense stipulation to Count 2 was "an immediately cured stray slip of the tongue," and the statement that a guilty verdict was the only verdict the jury could return was "nothing more than a rhetorical flourish." (Govt. Brief at 24, 26).

Regardless of whether the government "attempted to convey" that the defendant stipulated to "element two" of Count 2, the prosecutor stated that the defendant "stipulate[s] that the government proves Count 2." (DE 98:79). Nor was the comment "immediately cured," as no curative instruction was given by the district court.

Next, the government contends that because this Court assumes the jury followed its instructions, having already convicted Mr. Bobal of

Count 1, a conviction on Count 2 "was a foregone conclusion." (Govt. Brief at 27-28). According to the government, a verdict of not guilty would have been "lawless." (Govt. Brief at 29).

While the offense listed in Count 1 – attempted enticement – is an offense involving a minor, there are "any number of reasons" why the jury might have returned a not guilty verdict on Count 2, including "an inclination to be merciful," even after concluding that the defendant was guilty of other related charges. *See United States v. Huyck,* 849 F.3d 432, 444 (8th Cir. 2017) ("We are reluctant to delve into the minds of jurors to determine the reasons for apparently inconsistent verdicts").

Because inconsistent verdicts are permitted, a guilty verdict was not the *only* verdict this jury could have returned as to Count 2. *See 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"). A conviction on Count 2 was therefore *not* "a foregone conclusion."

And, while the government maintains that "any putative improprieties" in the prosecutor's closing argument were "cured" by the district court's instructions to the jury (Govt. Brief at 27), the "naïve

assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction." *Krulewitch v. United States,* 336 U.S. 440, 443 (1949) (Jackson, J., concurring). The district court should have granted Mr. Bobal's motion for new trial.

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).

The Supreme Court's decision in *Packingham* renders the lifetime computer restriction in Mr. Bobal's case plainly unconstitutional and requires that it be vacated. In its brief, the government places great reliance on several of this Court's earlier decisions – *United States v. Zinn*, 321 F.3d 1084 (11th Cir. 2003), *United States v. Taylor,* 338 F.3d 1280 (11th Cir. 2003), *United States v. Moran,* 573 F.3d 1132 (11th Cir. 2009), and *United States v. Tome,* 611 F.3d 1371 (11th Cir. 2010) – all of which upheld computer and internet bans of limited duration, and are thus easily distinguishable. (Govt. Brief at 31-34). The government also improperly relies on *United States v. Carpenter,* 803 F.3d 1224 (11th

Cir. 2015), which declined to find plain error two years before *Packingham*. (Govt. Brief at 34).

Contrary to the government's assertion that "*Zinn* and *Taylor* resolve this appeal" (Govt. Brief at 34), a prohibition on using or possessing a computer with internet access for three years is not at all similar to the lifetime restriction imposed here. Moreover, *Carpenter* has no bearing on whether *Packingham* represents a subsequent change in constitutional law which establishes plain error.

The government argues that Mr. Bobal is allowed to use a computer and the internet for work purposes, so it is not a total ban. (Govt. Brief at 34). As the Presentence Investigation Report points out at PSI ¶¶ 53-54, Mr. Bobal has received monthly disability payments since 1997, and does not work, although in 2016, he washed cars, earning $2400 for the year. He was hospitalized for two years as a result of his mental illness, was deemed incompetent, but restored to competency after taking psychotropic medication, and is currently "low functioning" with an IQ score of 62. (PSI ¶¶ 47-49). Because Mr. Bobal does not have an employer – and is not likely to ever be able to work – he does not have access to a computer "in connection with authorized

employment." He is, in essence, precluded from accessing the internet for the rest of his life.

In upholding the lifetime computer ban in *Carpenter,* this Court found first that Carpenter "invited" the district court to impose a life term of supervised release, and "may not disavow that decision on appeal." 803 F.3d at 1239. Mr. Bobal did not ask that the district court place him on supervised release "for life." The *Carpenter* Court also distinguished the Third Circuit's decision in *United States v. Voelker,* 489 F.3d 139, 144-145 (3rd Cir. 2007), which invalidated a condition barring computer access for life with "no exceptions," stating that the condition imposed upon Carpenter was "meaningfully different, because it allows an exception for work." 803 F.3d at 1240. While the condition in the instant case arguably allows an exception for work, because Mr. Bobal is not likely to be able to work due to his disabilities, he is actually barred from accessing the internet "for life." And, it will be "harder and harder in the future for an offender to rebuild his life when disconnected from the computer at home." *United States v. Ramos,* 763 F.3d 45, 60 (1st Cir. 2014).

Finally, in *Carpenter,* this Court held that "no case of the Supreme Court or this Court says that a condition like this one cannot be imposed." 803 F.3d at 1239. But now, the Supreme Court has stated that such a condition is a greater deprivation of liberty than is reasonably necessary. *Packingham,* 137 S. Ct. at 1740. Indeed, the condition in the instant case is broader than the condition struck down in *Packingham* because it is not just limited to social networking sites, but bars access to websites as varied as Amazon.com, Washingtonpost.com, and Webmd.com.

It is true that the restriction here takes the form of a condition of supervised release rather than as in *Packingham,* a restriction on a sex offender who has already completed his sentence and is no longer subject to supervision. As a result, several courts have found that *Packingham* does not "plainly" apply in the supervised release context. *See United States v. Rock,* 863 F.3d 827, 831 (D.C. Cir. 2017) (10 year computer/internet ban); *United States v. Halverson,* 897 F.3d 645, 658 (5th Cir. 2018) (lifetime ban); *United States v. Perrin,* 926 F.3d 1044, 1049 (8th Cir. 2019) (20 year ban).

But an internet ban for a defendant on a lifetime period of supervised release was held violative of *Packingham* in *United States v. Holena,* 906 F.3d 288 (3rd Cir. 2018). As here, the defendant in *Holena* had been convicted of using the internet to entice a minor (also an undercover agent), and was sentenced to jail time, followed by supervised release for life, with a lifetime computer and internet ban. Holena, however, was permitted to use the internet with his probation officer's approval. *Id.* at 291. Stating that it was "troubled" that Holena's "restrictions will last as long as he does," the Third Circuit found that the lifetime duration of the ban was "presumptively excessive" in light of *Packingham*. *Id.* at 292. While it was "certainly appropriate" to prevent Holena from using social media, chat rooms, peer-to-peer file-sharing services, and any site where he could interact with a child, the Court held it was "not appropriate" to restrict his access to websites where he is unlikely to encounter a child:

> The court may not prevent Holena from doing everyday tasks that have migrated to the internet, like shopping, or searching for jobs or housing. The same is true for his use of websites conveying essential information like news, maps, traffic, or weather.

Id. at 293-294.

Recognizing that in *United States v. Knights,* 534 U.S. 112, 119 (2001), the Supreme Court found that defendants on supervised release enjoy less freedom than those who have finished serving their sentences, the Third Circuit nevertheless held that *Packingham* still "informs the shaping of supervised release conditions." *Holena,* 906 F.3d at 294-295 ("Conditions of supervised release may not restrict more liberty than reasonably necessary, including constitutional liberty . . . The district court can limit [a defendant's] First Amendment rights with appropriately tailored conditions of supervised release . . . but these restrictions must be tailored to deterring crime, protecting the public, or rehabilitating the defendant"). Finally, the Court held that "under *Packingham,* blanket internet restrictions will rarely be tailored enough to pass constitutional muster." *Id.* at 295.

The question remains, then, whether the restrictions imposed on Mr. Bobal involve a "greater deprivation of liberty than is reasonably necessary for the purposes set forth" in 18 U.S.C. § 3553(a). *See Tome,* 611 F.3d at 1376 (considering length of restriction). In *Carpenter,* this Court found that Circuit precedent allows such a restriction "under appropriate circumstances." *Carpenter*, 803 F.3d at 1237-1240. Due to

Mr. Bobal's particular "circumstances," the lifetime ban on *his* computer and internet use involves a far greater restriction of liberty than necessary and is plainly unconstitutional under *Packingham*. The prohibition on the use of a computer must be stricken from the terms of Mr. Bobal's supervised release.

CONCLUSION

Based upon the foregoing argument and citations of authority, as well as that set forth in the Initial Brief, the Court should vacate Mr. Bobal's conviction and remand this case for a new trial on Count 2, and remove the lifetime ban on computer and internet access from his conditions of supervised release.

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this reply brief complies with the type-volume limitation and typeface requirements of Fed. R. App. P. 32(a)(7)(B), because it contains 1,931 words, excluding the parts of the reply brief exempted by Fed. R. App. P. 32(f).

This reply 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
Attorney for Bobal
Dated: October 18, 2019

CERTIFICATE OF SERVICE

I HEREBY certify that on this 18th day of October, 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