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Branded for Life by the Modern Scarlet Letters

Do Convicted Sex Offenders Have Rights While on Parole, Probation, or Supervised Release?

When handling a federal criminal case, defense lawyers first primarily focus on guilt or innocence and second on the potential punishment and penalties, particularly on the U.S. Sentencing Guidelines and mitigation of the sentence under 18 U.S.C. § 3553(a). At sentencing, after imposition of the term of probation or months of imprisonment, defense lawyers often relax and fail to closely listen as the judge mechanically reads the list of standard and special conditions of supervision. As a result, lawyers frequently do not object to any special conditions.

Thus, when challenged on appeal, special conditions of supervised release are regularly reviewed under a plain error standard. More often than not, courts reject such challenges. However, recent case law, particularly in the Ninth Circuit, indicates that the time is ripe to object to, and litigate, special conditions of supervised release, particularly in sex offense cases.

For a very good general primer reviewing, and for challenging, special conditions in sex cases, read Jennifer Gilg's *The Fine Print and Convicted Sex Offenders: Strategies for Restrictive Conditions of Supervised Release*. Gilg is a federal defender research and writing attorney in the District of Nebraska.[1] Her article identifies cases in which appellate courts suggested that they may have reversed conditions of supervision had there been an objection below.[2]

Statutory Framework

For specified sex offenses, Congress requires a minimum supervised release term of five years and authorizes up to lifetime supervision.[3] The U.S. Sentencing Commission recommends the statutory maximum (i.e., lifetime) supervision for sex offenses.[4]

The conditions of supervised release are governed by 18 U.S.C. § 3583(d)(2). It details "explicit condition[s] of supervised release" the "court shall order."[5] The statute also permits a discretionary "further condition of supervised release, to the extent 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

BY JOHN RHODES AND DANIEL DONOVAN

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. § 994(a).[6]

Section 5D1.3(a) of the Sentencing Guidelines lists "mandatory conditions" of supervised release.[7] Subsection (c) of that guideline lists the "standard" conditions of supervised release, routinely imposed in almost every federal case,[8] and in fact, conveniently for the judges, preprinted on the Judgment in a Criminal Case.

Subsection (d) of the guideline identifies "special conditions" to impose in cases with particular facts, including subsection (d)(7), where "the instant offense of conviction is a sex offense." U.S.S.G. § 5D1.3(d)(7) recommends:

(A) A condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.

(B) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items.

(C) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects upon reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer's supervision functions.

The government "shoulders the burden of proving that a particular condition of supervised release involves no greater deprivation of liberty than is reasonably necessary to serve the goals of supervised release."[9] In other words, special conditions must be justified.

Conditions must be understandable; that is, conditions of supervised release cannot be unconstitutionally vague. There is a "due process right to conditions of supervised release that are sufficiently clear to inform [the defendant] of what conduct will result in his being returned to prison."[10] And because conditions must involve no greater deprivation of liberty than is reasonably necessary to serve the purposes of supervised release, they cannot be overbroad.[11]

This article focuses on federal special conditions of supervised release and the concern of some appellate courts, in particular the Ninth Circuit, for the liberty of sex offender clients while they serve their terms of supervised release.

Case Law

The courts have rejected special conditions that unduly limit use of home computers and access to the Internet in cases that did not involve any use of computers.[12] In a case involving the conviction of a defendant for sexual contact with a minor, because a computer was not part of the crime, the First Circuit rejected a categorical residential Internet ban, explaining, "[i]n light of the ubiquitous presence of the Internet and the all-encompassing nature of the information it contains, a total ban on [defendant's] Internet use at home seems inconsistent with the vocational and educational goals of supervised release."[13]

Conversely, when a computer was involved and particularly in child pornography cases, courts commonly have prohibited use of a computer with access to the Internet without prior approval of the probation office,[14] and then subject to monitoring by the probation office.[15] Under the facts of some cases, courts have approved absolute Internet bans.[16] Given society's increasing dependence on the Internet to conduct daily affairs, such bans are ripe for challenge and distinction, and many child pornography cases reject absolute bans.[17]

Indeed, in the Eighth Circuit, a broad computer and Internet ban, even if subject to written pre-approval by a probation officer, is not permitted if the defendant used a computer in the typical child pornography offense conduct, i.e., to receive and access child pornography.[18] The court summarized the offense conduct "as devoid of evidence that he has ever used his computer for anything beyond simply possessing child pornography."[19] The court stated the obvious: Absent evidence "for anything beyond simply possessing child pornography," such a broad prohibition is not justified on "an important medium of communication, commerce, and information-gathering."[20] The court suggested a more narrowly tailored restriction "through a prohibition on accessing certain categories of websites and Internet content" coupled with random computer searches and filters.[21] Similarly, in a child pornography case, the Third Circuit reversed a lifetime ban on using computers and computer equipment as a greater deprivation of liberty than necessary, deeming such a prohibition "the antithesis of a 'narrowly tailored' sanction[,]" and emphasizing its lifetime duration.[22]

More recently, the Ninth Circuit and other circuits have called into question, and in some circumstances limited or rejected, several special conditions of supervision for sex offenders. The subject conditions include staying away from places frequented by children,[23] prohibiting possession or use of a camera phone,[24] banning possession or use of a computer capable of accessing the Internet,[25] ordering that the defendant not patronize any place where sexually explicit materials are available,[26] imposing residency restrictions,[27] prohibiting contact with persons under the age of 18 years (including the defendant's own children),[28] and ordering that the defendant not date or socialize with anyone with children under the age of 18 years.[29]

In *United States v. Wolf Child*, the defendant was convicted of attempted sexual abuse by attempting to have sex with a 16-year-old girl who was intoxicated and unconscious.[30] At sentencing, the district court imposed special condition 9, "which ordered in relevant part that Wolf Child 'shall not be allowed to do the following without prior written approval of United States Probation: (1) reside in the home, residence, or be in the company of any child under the age of 18; (2) go to or loiter near school yards, parks, playgrounds, arcades, or other places primarily used by children under the age of 18; or (3) date or socialize with anybody who has children under the age of 18.'"[31]

After this special condition had been announced, defense counsel sought to clarify whether it barred Wolf Child from residing with or being in the company of his own daughters.[32] The judge responded: "Absolutely. … This man is now a convicted sex offender. And I will not allow him to have contact with children under the age of 18 without the approval of probation, as stated in the disposition. This man cannot be trusted with minor children, in the view of this court. And he will not be."[33] After defense counsel objected, "the judge replied, 'I understand. You may take that

issue to the circuit if you wish to do so, counsel.'"[34] Wolf Child appealed.

The Ninth Circuit ruled that "it is clear from the record that the parts of special condition 9 that prohibit Wolf Child from residing with or being in the company of his children and socializing with or dating his fiancée are substantively unreasonable and may not be reimposed. Nothing in the record would support a finding that these restrictions on his fundamental liberties involve no greater deprivation of liberty than is reasonably necessary to accomplish the goals of deterrence, protection of the public, or rehabilitation."[35] In addition, the court deemed the special condition overbroad because it imposed "significant restrictions on Wolf Child's right to free association by prohibiting him from 'dat[ing] or socializ[ing] with *anybody* who has children under the age of 18' and from being '*in the company* of any child under the age of 18' without prior written permission from his probation officer."[36]

The Ninth Circuit held that "because the fundamental right to familial association is a particularly significant liberty interest, the district court was required to follow enhanced procedural requirements before imposing parts 1 and 3 of special condition 9" and, by failing to do so, the district court committed procedural error.[37] Second, the court held that "the imposition of parts 1 and 3 of special condition 9, as applied to Wolf Child's association with his daughters and fiancée, was substantively unreasonable and may not be reimposed upon remand" because there was no evidence to support limiting Wolf Child's "fundamental liberty interest in residing with and socializing with his intimate family members."[38] Third, due to overbreadth, the court vacated and remanded parts 1 and 3 of special condition 9 "to the district court to consider whether it still concludes that it is necessary to impose similar but more narrowly drawn restrictions."[39]

In *United States v. Plumage*, after the filing of an *Anders* brief, the Ninth Circuit ordered new appellate counsel to brief the following three issues:

1. Did the district court plainly err in imposing special condition of supervised release number six in the written judgment, which requires Plumage to receive advance written permission to "date or socialize with anybody who has children under the age of 18"? *See United States v. Soltero*, 510 F.3d 858, 865-67 (9th Cir. 2007) (per curiam) (conditions of supervised release may not be overly vague or drawn so broadly that they unnecessarily restrict otherwise lawful activities).

2. Did the district court plainly err in imposing special condition of supervised release number seven in the written judgment, which prohibits Plumage from patronizing "any place where [sexually explicit] material or entertainment is available"? *See Weber*, 451 F.3d at 558 (nonmandatory supervised release condition must "involve no greater deprivation of liberty than is reasonably necessary for the purposes of supervised release") (internal quotation marks omitted).

3. Did the district court plainly err in imposing special condition of supervised release number eight in the written judgment, when Plumage's offense did not involve use of a computer? *See United States v. Blinkinsop*, 606 F.3d 1110, 1123 (9th Cir. 2010); U.S.S.G. § 5D1.3(d)(7)(B)."[40]

In *Plumage*, the government conceded the error inherently identified in the first question, primarily based on *Wolf Child* and *United States v. Preston*, and invalidated the last clause (in italics below): "Defendant shall not be allowed to do the following without prior written approval of United States Probation following consultation with defendant's sex offender treatment provider: reside in the home, residence, or be in the company of any child under the age of 18; go to or loiter near school yards, parks, playgrounds, arcades, or other places primarily used by children under the age of 18; *or date or socialize with anybody who has children under the age of 18*." The court of appeals remanded *Plumage* to the district court for reconsideration of the problematic special conditions of supervised release identified above by the Ninth Circuit.[41] On remand, the court did not reimpose the challenged conditions.[42]

In *Preston,* the Ninth Circuit also reviewed a condition of release seemingly unique to sex offenders — penile plethysmograph testing. The Ninth Circuit previously reviewed such testing as a condition of supervision in *United States v. Weber*.[43] In *Weber*, the court detailed the testing procedure, explaining "the male places on his penis a device that measures its circumference and thus the level of the subject's arousal as he is shown sexually explicit slides or listens to sexually explicit audio scenes."[44] Amplifying statutory language, the court ruled this level of intrusiveness triggered a particularly significant liberty interest, requiring "a thorough, on-the-record inquiry into whether the degree of intrusion caused by such testing is reasonably necessary to accomplish one or more of the factors in § 3583(d)(1) and involves no greater deprivation of liberty than is necessary, given the available alternatives."[45] In *Preston,* the government conceded error on this issue because the district court failed to make specific findings justifying such intrusion.[46]

Weber touched upon another supervised release condition largely unique to sex offense cases — polygraph testing. In *United States v. Antelope*, the defendant objected to release conditions requiring sex offender treatment including polygraph testing.[47] The court in *Weber* succinctly explained the mixed-bag ruling in *Antelope*:

> While we acknowledged the rehabilitative purpose behind the polygraph questioning, we held that requiring, as a condition of supervised release, that a defendant answer questions about potential criminal activity in a polygraph examination was significantly incriminating and coercive to violate the Fifth Amendment. That conclusion, however, did not doom the condition. Rather, we held that a defendant retains his right against self-incrimination during the required polygraph testing and can refuse to answer any incriminating questions unless he is granted use-and-derivative-use immunity under *Kastigar v. United States*. After *Antelope*, then, a district court may require, as a term of supervised release, that a defendant submit to polygraph testing, provided such a condition comports with the requirements of § 3583(d), but a defendant retains his Fifth Amendment rights during any such testing.[48]

Waiting until a client is on the precipice of self-incrimination to challenge a condition of release raises the issue of ripeness. The government seemingly, almost reflexively, invokes ripeness to supervised release challenges. Of

course, whether a condition is justified, vague, or overbroad is not contingent on future events. Moreover, a challenge may be waived if not appealed immediately following judgment. And practically, an immediate challenge, even if deemed unripe by the appellate court, may remind the client to contact counsel when later implementation of the condition threatens his liberty.

Indeed, as a special condition of supervision, courts will typically order a convicted sex offender to enroll in, and complete, a sex offender treatment program. The Ninth Circuit has invalidated a condition requiring a sex offender treatment program "which *may include* inpatient treatment, as approved, and directed by the Probation Officer."[49] That condition left commitment to inpatient treatment to the discretion of the probation officer. The court recognized that "[i]n terms of the liberty interest at stake, confinement to a mental health facility is far more restrictive than having to attend therapy sessions, even daily."[50]

A treatment condition is advised by U.S.S.G. § 5D1.3(d)(7)(A). A standard-type treatment condition provides:

> The defendant shall enter and complete a sex offender treatment program as directed by and until released by the United States Probation Office. The defendant shall abide by the policies of the program to include physiological testing. The defendant is to pay all or part of the costs of treatment as directed by United States Probation.

There is thus the potential that a treatment provider or a probation officer may attempt to impose rules and policies that are more restrictive, and ultimately unconstitutional, than conditions that may be imposed by a court. Monitoring such overbreadth and unconstitutional delegation requires an ongoing relationship with clients.

Counsel must be vigilant and prepared to challenge any overly restrictive, vague, or overbroad rules imposed by a treatment provider or a probation officer. A sentencing court cannot "abdicate its judicial responsibility" for setting conditions of release.[51] A condition "cannot be cured by allowing the probation officer an unfettered power of interpretation, as this would create one of the very problems against which the vagueness doctrine is meant to protect, i.e., the delegation of 'basic policy matters to policemen … for resolution on an ad hoc and subjective basis.'"[52] In the context of determining what is pornographic, delegation of such authority creates "a real danger that the prohibition on pornography may ultimately translate to a prohibition on whatever the officer personally finds titillating."[53] A probation officer could well interpret the term more strictly than intended by the court or understood by the defendant.

In *Antelope*, the court of appeals ruled a condition prohibiting possession of "any pornographic, sexually oriented or sexually stimulating materials" to be impermissibly vague.[54] It followed an earlier ruling that "pornography" lacks any recognized legal definition, thus "a probationer cannot reasonably understand what is encompassed by a blanket prohibition on 'pornography.'"[55] The Third Circuit explained it best: "The term pornography, unmoored from any particular statute, has never received a precise legal definition from the Supreme Court, or any other federal court, and remains undefined in the federal code."[56] Consequently, "[r]easonable minds can differ greatly about what is encompassed by pornography."[57]

Highlighting the controversy in this area of law, the Eighth Circuit disagrees and routinely upholds conditions prohibiting the possession of pornography or sexually explicit material, as long as the district court makes individualized findings warranting the prohibition.[58] And the Fifth and Tenth Circuits interpret "pornographic, sexually oriented or sexually stimulating materials" in a "commonsense way."[59] Moreover, the appellate courts are split whether the ban can extend to adult pornography absent an adequate explanation.[60]

The principal holding in *Antelope* reversed the district court's revocation of probation and imprisonment of the defendant for refusing to participate in sex offender treatment based on the Fifth Amendment privilege against self-incrimination.[61] Given that sex offender treatment, including polygraph testing, is a commonplace special condition in sex offense cases, defense attorneys need to counsel their clients about their Fifth Amendment rights to remain silent during supervision.[62] If the defense attorney does not tell them, no one will.

The Fifth Amendment right against self-incrimination is not self-executing. The right must be affirmatively asserted to remain silent. "[I]n the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming the [Fifth Amendment] privilege, the government has not 'compelled' him to incriminate himself."[63]

However, "application of this general rule is inappropriate in certain well-defined situations."[64] "In each of those situations … some identifiable factor was held to deny the individual a 'free choice to admit, deny, or to refuse to answer.'"[65] The two main exceptions to the general rule — that the privilege must be claimed when self-incrimination is threatened — are situations in which a suspect is in police custody and cases in which the assertion of the privilege is penalized so that the option to remain silent is foreclosed and the incriminating testimony is effectively compelled.[66]

While imprisoned, clients suffer limited Fifth Amendment rights, as established by the Supreme Court in *McKune v. Lile*, overviewed below. Moreover, pursuant to the Adam Walsh Act, imprisoned sex offenders certified as sexually dangerous persons by the Attorney General or the Director of the Bureau of Prisons are subject to civil commitment when their prison terms expire.[67] Defense lawyers must assist clients in avoiding that certification and particularly caution them about participation in prison sex offender programs.

In the prison context, *McKune v. Lile* addressed the Fifth Amendment right against compelled incrimination in sex offender treatment.[68] A plurality of four justices wrote that prisoners can be compelled to choose between (1) undergoing sex offender treatment that requires non-immunized potentially self-incriminating disclosures and (2) foregoing a host of prison privileges that are only available to treatment participants.[69] In dissent, four other justices explained that such a choice rises to the level of compulsion that is prohibited by the Fifth Amendment.[70]

The time is ripe to object to, and litigate, special conditions of supervised release.

Justice O'Conner's concurrence focused on compelled self-incrimination and prison privileges:[71]

> I do not believe the consequences facing respondent in this case are serious enough to compel him to be a witness against himself. These consequences involve a reduction in incentive level, and a corresponding transfer from a medium-security to a maximum-security part of the prison. In practical terms, these changes involve restrictions on the personal property respondent can keep in his cell, a reduction in his visitation privileges, a reduction in the amount of money he can spend in the canteen, and a reduction in the wage he can earn through prison employment. … These changes in living conditions seem to me minor. Because the prison is responsible for caring for respondent's basic needs, his ability to support himself is not implicated by the reduction in wages he would suffer as a result. While his visitation is reduced as a result of his failure to incriminate himself, he still retains the ability to see his attorney, his family, and members of the clergy. … The limitation on the possession of personal items, as well as the amount that respondent is allowed to spend at the canteen, may make his prison experience more unpleasant, but seems very unlikely to actually compel him to incriminate himself.[72]

She thus concurred in the plurality's conclusion — that Lile had not stated a Fifth Amendment claim cognizable under 42 U.S.C. § 1983 — because a forced choice between waiving the right against self-incrimination and foregoing certain prison privileges did not rise to the level of compulsion prohibited by the Fifth Amendment.

Consequently, defense lawyers must educate their clients about asserting their right to remain silent in prison rather than leaving them to resort to post-hoc claims that self-incrimination while incarcerated was compelled in violation of the Fifth Amendment. The new era of federal civil commitment of sexually dangerous persons heightens the need for such advice.[73]

Another aspect of the Adam Walsh Act, the advent of federal sex offender failure-to-register prosecutions, opens a new chapter in special conditions of supervision.[74] In *United States v. Goodwin*, the Seventh Circuit reversed inadequately explained special conditions because the defendant's offense history (lewd and lascivious act in the presence of a child and failure to register) did not justify the conditions without explanation.[75] Failure to register is not per se a sex offense. And while most federal sex offenses involve computers and the Internet, the conviction requiring registration, particularly dated ones, may have nothing to do with such technology. Special conditions reflect the clients and the facts of a case, not boiler plate imposition. For that reason, in a failure-to-register case, the Second Circuit recently "held the [penile] plethysmographic condition does not bear adequate relation to the statutory goals of sentencing to outweigh the harm it inflicts, that it involves a greater deprivation of liberty than is reasonably necessary to serve any of those statutory goals, and that it may not, consistent with substantive due process, be imposed on [the defendant.]"[76]

Sex offender conditions are being applied in all sorts of cases, typically, but not necessarily, based on prior sex offense convictions,[77] heightening the need for lawyers to pay very careful attention, before and during the sentencing hearing, to the imposition of conditions in all cases. In some cases, the courts of appeals have reversed such conditions when the sex offenses were dated and thus unlikely to serve the goals of deterrence or protecting the public.[78]

Practice Pointers

Defense counsel should take the following steps to prevent unwarranted, unreasonable, and unconstitutional special conditions of supervised release.

1. In the plea agreement, the defense attorney should not waive the client's right to appeal special conditions of supervised release. Likewise, counsel should not waive a client's right to challenge special condition in post-conviction proceedings. If forced to waive these rights, counsel should negotiate language invalidating the waiver if objections are made to special conditions of supervised release.

2. Immediately following the change of plea, the defense lawyer should send a letter or email to the probation officer and object to the district court considering any special conditions of supervised release, whether listed or not listed in the Sentencing Guidelines, unless the defendant is provided, prior to sentencing, with the exact language of all proposed special conditions.[79]

3. If the probation officer fails to provide specific notice in the presentence investigation report, including the precise language of the proposed special conditions, the defense lawyer should object with detailed specificity in the PSR objections letter.

4. If counsel's objections regarding special conditions are unresolved, counsel should renew the objections in the sentencing memorandum.

5. At sentencing, if the district court fails to consider or grant defense objections to special conditions of supervision, either in whole or in part, the defense should lodge very specific objections to the offensive language in the district court's special conditions. The objections must be clear and precise. In non-sex offense or failure-to-register cases, the defense should particularly focus on whether the conditions reflect the client's current conduct or conversely, whether they are based on remote events and/or generic special conditions that do not reflect either the client's historic or current conduct.

6. If any of the special conditions of supervised release are unwarranted, unreasonable, or unconstitutional, defense counsel should appeal.

7. The client must be advised of his continuing Fifth Amendment rights to remain silent and against self-incrimination while in custody. The Bureau of Prison has its own sex offender treatment program for inmates. Given the advent of civil commitment under the Adam Walsh Act, Fifth Amendment rights are particularly important while the client is in custody.

8. Lawyers must advise clients of their continuing Fifth Amendment rights

to remain silent and against self-incrimination while on supervised release. Sex offender treatment is a routine special condition of supervision. Treatment can involve, and in some instances require, self-incrimination. Furthermore, the lawyer and the client must remain vigilant because the treatment provider and/or the probation office may attempt to impose rules that are more restrictive than the court-imposed conditions, all of which must comply with the Constitution and statutory and case law.

9. The client should be urged to contact the lawyer if he has any concern regarding self-incrimination or overly restrictive or intrusive rules of sex offender treatment.

10. Conditions in sex offender cases seem to be rapidly developing, especially as technology evolves. Counsel should recommend that the client contact counsel should the probation officer suggest that the client agree to modified conditions of supervised release.

Conclusion

The defense lawyer must listen to the district court's conditions of supervised release. Writing them down as the court announces them may help focus the attorney. A preserved legal issue is one foundation of a successful appeal. Several courts of appeals have closely scrutinized release conditions, particularly in the last several years, and, in some instances, invalidated or limited conditions that violate clients' liberties.

Defense lawyers must educate clients. Especially when defendants are sex offenders, restrictions on their liberty continue long after they serve their prison terms. They need to know their rights. And they need to be on guard for further infringements of their rights. Clients need to know that they can remain silent and know that they can contact defense counsel to protect their rights.

Notes

1. Go to http://www.fd.org/pdf_lib/WS2011_06/fine_print.pdf.
2. *Id.* at 8.
3. 18 U.S.C. § 3583(k).
4. U.S.S.G. § 5D1.2(b).
5. 18 U.S.C. § 3583(d)(2).
6. 18 U.S.C. § 3583(d)(1-3).
7. U.S.S.G. § 5D1.3(d)(1)-(6).
8. U.S.S.G. § 5D1.3(c).
9. *United States v. Weber*, 451 F.3d 552, 559 (9th Cir. 2006) (footnote omitted).
10. *United States v. Guagliardo*, 278 F.3d 868, 872 (9th Cir. 2002) (citation omitted); *United States v. Johnson*, 626 F.3d 1085, 1090 (9th Cir. 2010).
11. *See, e.g., United States v. Goddard*, 537 F.3d 1087, 1089 (9th Cir. 2008) (narrowly construing computer restrictions to prevent overbreadth); *United States v. Cope*, 527 F.3d 944, 957 (9th Cir. 2008) (remanding to district court to limit condition because its current language is overbroad).
12. *See, e.g., United States v. Perazza-Mercado*, 553 F.3d 65, 73 (1st Cir. 2009) (vacating total ban on home Internet use but remanding for imposition of more narrowly tailored restriction in light of technological options).
13. *Id.* at 72.
14. *See, e.g., United States v. Morais*, 670 F.3d 889, 896-97 (8th Cir. 2012); *United States v. Laureys*, 653 F.3d 27, 35 (D.C. Cir. 2011) (also approving on plain error review condition requiring defendant to log his Internet access); *United States v. Love*, 593 F.3d 1, 27-28 (D.C. Cir. 2010); *United States v. Zinn*, 321 F.3d 1084, 1093 (11th Cir. 2003); *United States v. Walser*, 275 F.3d 981, 988 (10th Cir. 2001).
15. *See, e.g., United States v. Rearden*, 319 F.3d 608, 620-21 (9th Cir. 2003).
16. *See, e.g., United States v. Johnson*, 446 F.3d 272, 283 (2d Cir. 2006); *United States v. Paul*, 274 F.3d 155, 169 (5th Cir. 2001); *United States v. Crandon*, 173 F.3d 122, 127-28 (3d Cir. 1999).
17. *See, e.g., United States v. Blinkinsop*, 606 F.3d 1110, 1123 (9th Cir. 2010) (rejecting absolute ban on possessing computer with Internet access); Rearden, 349 F.3d at 621 ("The condition does not plainly involve a greater deprivation of liberty than is reasonably necessary for the purpose because it is not absolute; rather, it allows for approval of appropriate online access by the Probation Office."); *United States v. Holm*, 326 F.3d 872, 878-79 (7th Cir. 2003); *United States v. Freeman*, 316 F.3d 386, 391-92 (3d Cir. 2003); *United States v. Sofsky*, 287 F.3d 122, 126-27 (2d Cir. 2002).
18. *United States v. Wiedower*, 634 F.3d 490, 494-95 (8th Cir. 2011); *United States v. Crume*, 422 F.3d 728, 733 (8th Cir. 2005).
19. *Crume*, 422 F.3d at 733.
20. *Id.*
21. *Crume*, 422 F.3d at 733; *see also United States v. Holm*, 326 F.3d at 877-78.
22. *United States v. Voelker*, 489 F.3d 139, 144-47 (3d Cir. 2007); *see also United States v. Miller*, 594 F.3d 172, 188 (3d Cir. 2010).
23. *Blinkinsop*, 606 F.3d at 1119-1122 (9th Cir. 2010) (court determined that Special Condition 4, stating that defendant

shall not go to or loiter near school yards, parks, play grounds, arcades, or other paces primarily used by children under the age of 18, may be overbroad.).

24. *Blinkinsop*, 606 F.3d at 1122-1123 (court affirmed Special Condition 7 — prohibiting defendant from possessing camera phones or electronic devices that could be used for covert photography — and noted that the defendant "may have a cell phone, as long as it does not have a camera module, and he can have a camera, as long as it is readily identifiable as a camera").

25. *Blinkinsop*, 606 F.3d at 1123 (court rejected Special Condition 13 — stating that defendant shall not possess or use any computer or other electronic device that can provide access to the Internet — because "[a]s the government concedes, banning Blinkinsop's Internet usage contravenes *United States v. Riley*, 576 F.3d 1046, 1050 (9th Cir. 2009)").

26. *United States v. Little Dog*, 493 Fed App'x. 898, 900 (9th Cir. 2012) (unpublished) (overbroad to prohibit defendant from "patron[izing] any place where [sexually explicit] material or entertainment is available").

27. *United States v. Collins*, 684 F.3d 873, 880, 890-891 (9th Cir. 2012) (court found the following special condition to be possibly overbroad and arbitrary: "The defendant shall not reside within 2,000 feet of school yards, parks, public swimming pools, playgrounds, youth centers, video arcade facilities, or any other places primarily used by persons under the age of 18. The defendant's residence shall be approved by the probation officer, and any change in residence must be preapproved by the probation officer. The defendant shall submit the address of the proposed residence to the probation officer at least 10 days prior to any scheduled move."). *United States v. Guagliardo*, 278 F.3d at 872-73 ("We remand for the court to specify a precise distance limitation for Guagliardo's residency restriction."). *Compare United States v. Laureys*, 653 F.3d at 34 (on plain error review, upholding prohibition against loitering in places where children congregate); *Crume*, 422 F.3d at 734 (approving condition barring visiting places where children under the age of 18 congregate and emphasizing condition applies only where children *actually* congregate); *United States v. Peterson*, 248 F.3d 79, 86 (2d Cir. 2001) ("it is unclear whether the prohibition applies only to parks and recreational facilities in which children congregate, or whether it would bar the defendant from visiting Yellowstone National Park or joining an adult gym. In view of the defendant's prior child sex abuse, the court had justification to impose a condition of probation that prohibits the defendant from being at educational and recreational facilities where children congregate. In our view, however, there would be no justification to forbid the defendant from being at parks and educational or recreational facilities where children do not congregate."). *Contrast United States v. Wiedower*, 634 F.3d at 498 ("While somewhat ambiguous given the exact wording, we construe the condition to restrict Wiedower from contacting minors or entering places where minors congregate unless he obtains prior approval from the probation office."); *United States v. MacMillen*, 544 F.3d 71, 76 (2d Cir. 2008) ("[W]e conclude that the district court did not abuse its discretion in ordering MacMillen not to frequent locations where children are likely to congregate, and then appending to that formulation a nonexclusive list of exemplars."); *United States v. Paul*, 274 F.3d at 167 ("We find that there is sufficient common understanding of the types of locations that constitute 'places, establishments, and areas frequented by minors' to satisfy the constitutional requirement of reasonable certainty in this case.").

28. *United States v. Preston*, 706 F.3d 1106, 1123 (9th Cir. 2013) (The defendant raped an eight-year-old boy who lived next door. At sentencing, the district court applied a condition that prohibited the defendant from "being in the company of children under the age of 18" without prior approval of the probation officer. Citing *United States v. Soltero*, 510 F.3d 858, 866 (9th Cir. 2007) and *Wolf Child*, 699 F.3d at 1086, 1092, 1096, 1101-1102, the Ninth Circuit held that it was plain error to apply the condition because it had no mental state requirement. The condition was overly vague because "if, unbeknownst to Preston, one of his co-workers happens to be a mature-looking 17-year-old, Preston would be in violation of the terms of his release."). *See also United States v. Davis*, 452 F.3d 991, 996 (8th Cir. 2006) ("We therefore conclude that the district court erred in not allowing Mr. Davis to have unsupervised contact with his own children during his term of supervised release."). *Compare United States v. Loy*, 237 F.3d 251, 270 (3d Cir. 2001) (construing condition prohibiting unsupervised contact with minors not to apply to defendant's own children); *United States v. Wolf Child*, 699 F.3d 1082, 1089, 1094, 1101-1102 (9th Cir. 2012). *Contrast United States v. Roy*, 438 F.3d 140, 144-45 (1st Cir. 2006) (contact with girlfriend's children requires preapproval of probation officer); *United States v. Mark*, 425 F.3d 505, 508 (8th Cir. 2005) (contact with own children without preapproval of probation office justified under facts of the case).

29. *Wolf Child*, 699 F.3d at 1094-95.

30. *Id.* at 1088.

31. *Id.* at 1088-1089.

32. *Id.* at 1089.

33. *Id.*

34. *Id.*

35. *Id.* at 1096-1097.

36. *Id.* at 1100 (emphasis by the court).

37. *Id.* at 1103.

38. *Id.*

39. *Id.*

40. Docket No. 20 in No. 11-30204.

41. *Id.*

42. *United States v. Plumage,* No. CR-11-06-GF-DLC, docket No. 59 at 4 (D. Mont.).

43. 451 F.3d 552 (9th Cir. 2006).

44. *Id.* at 562 (internal quotations and citations omitted).

45. *Id.* at 568 (internal quotations and citations omitted). *Contrast United States v. Dotson*, 324 F.3d 256, 261 (4th Cir. 2003) (approving penile plethysmograph condition without specific findings); *United States v. Lee*, 502 F.3d 447, 450 (6th Cir. 2007) (challenge not ripe for review).

46. *Preston*, 706 F.3d at 1122.

47. 395 F.3d 1128 (9th Cir. 2005).

48. *Weber*, 451 F.3d at 568, n.17. *See also United States v. Begay*, 631 F.3d 1168, 1176 (10th Cir. 2011) ("Begay has not explained how polygraph testing constitutes a significant further deprivation of his liberty. The district court did not abuse its discretion by imposing the condition."); *United States v. Dotson*, 324 F.3d at 261 ("The use of a polygraph test here is not aimed at gathering evidence to inculpate or exculpate Dotson. Rather, the test is contemplated as a potential treatment tool upon Dotson's release from prison — as witnessed by the district court's direction that the results of any polygraph testing not be made public.") (citations omitted); *United States v. Zinn,* 321 F.3d at 1092 ("If and when appellant is forced to testify over his valid claim of privilege, he may raise a Fifth Amendment challenge. In the meantime, we can only decide whether requiring polygraph testing as a condition of supervised release generally violates the Fifth Amendment so as to amount to plain error. We hold it does not."); *United States v. Lee*, 315 F.3d 206, 217 (3d Cir. 2006) ("Since appellant is already directed to report periodically to the probation officer and provide truthful answers after he is released from imprisonment … the additional requirement that Lee undergo polygraph testing does not place a significantly greater demand on him.").

49. *United States v. Esparza*, 552 F.3d 1088, 1090-1092 (9th Cir. 2009) (emphasis by court).

50. *Id*. at 1091. See also *id*. n.5 ("We hold only that a district court may not delegate to the probation officer the decision whether a defendant must be committed to in-patient treatment.").

51. *See United States v. Mohammad*, 53 F.2d 1426, 1438 (7th Cir. 1995).

52. *Loy*, 237 F.3d at 266 (citation omitted).

53. *Loy*, 237 F.3d at 266.

54. *Antelope*, 395 F.3d at 1141-42.

55. *Guagliardo*, 278 F.3d at 872; *see also Riley*, 576 F.3d at 1048 (striking as impermissibly overbroad condition prohibiting accessing via computer any material that relates to children).

56. *Loy*, 237 F.3d at 263.

57. *Guagliardo*, 278 F.3d at 872.

58. *Wiedower*, 634 F.3d at 496; *United States v. Stults*, 575 F.3d 834, 854-55 (8th Cir. 2009); *United States v. Ristine*, 335 F.3d 692, 694-95 (8th Cir. 2003).

59. *United States v. Mike*, 632 F.3d 686, 701 (10th Cir. 2011); *United States v. Brigham*, 569 F.3d 220, 234 (5th Cir. 2009).

60. *See Perazza-Mercado*, 553 F.3d at 75-79 (holding that district court plainly erred in imposing a "ban on the possession of adult pornography as a condition of supervised release, without any explanation and without any apparent basis in the record for the condition"); *United States v. Voelker*, 489 F.3d at 150-153 (citation and quotation omitted) (holding on review for abuse of discretion that "[t]he district court] ignored our caution that the deprivation of liberty can be no greater than necessary to meet the goals [of 18 U.S.C. § 3583(d)(2)] … [and] failed to provide an analysis or explanation to support this broad restriction"). *But see United States v. Daniels*, 541 F.3d 915, 927-28 (9th Cir. 2008) (holding that district court "did not plainly err in limiting [defendant's] possession of materials depicting sexually explicit conduct because the condition furthered the goals of rehabilitating him and protecting the public" where defendant was convicted of possession of child pornography and could "slip into old habits of amassing child pornography") (quotations and citations omitted); *Rearden*, 349 F.3d at 611 (upholding similar condition on plain error review); *United States v. Carpenter*, 280 F. App'x 866, 869 (11th Cir. 2008) ("With regard to the ban on possessing sexually explicit materials, neither this court nor the Supreme Court has held a lifetime condition prohibiting a similarly situated sex offender from possessing any sexually explicit materials is overly broad. Accordingly, the district court did not plainly err in prohibiting [defendant convicted of sex trafficking of a minor and enticing a minor to engage in prostitution] from possessing sexually explicit materials.").

61. *Antelope*, 395 F.3d at 1131-32.

62. *See, e.g.*, U.S.S.G. § 5D1.3(d)(7)(A) (advising sex offender treatment as a special condition); *United States v. York*, 357 F.3d 14, 27-28 (1st Cir. 2004) (upholding sex offender treatment and polygraph conditions but recognizing right to assert valid Fifth Amendment privilege).

63. *Garner v. United States*, 424 U.S. 648, 654 (1976) (footnote omitted). *See also Minnesota v. Murphy*, 465 U.S. 420, 427-29 (1984).

64. *Murphy*, 465 U.S. at 429.

65. *Id*. (citing *Garner*, 424 U.S. at 657).

66. *Id*. at 429-34.

67. *See generally* John Matthew Fabian, *To Catch a Predator, and Then Commit Him for Life: Analyzing the Adam Walsh Act's Civil Commitment Scheme Under 18 U.S.C. § 4248 — Part One*, 33 THE CHAMPION 44 (February 2009).

68. 536 U.S. 24.

69. *Id.* at 29-48.

70. *Id*. at 54-72.

71. *Id*. at 48-54.

72. *Id*. at 501-51 (O'Connor, J., concurring).

73. *See also Allen v. Illinois*, 478 U.S. 364 (1986) (Illinois sexually dangerous persons proceedings are civil rather than criminal, so that federal constitutional privilege against self-incrimination does not apply in civil proceedings).

74. If a defendant is required to register under the Sex Offender Registration and Notification Act, 18 U.S.C. § 3583(d) mandates a supervision condition that the person comply with the Act.

75. *United States v. Goodwin*, 717 F.3d 511, 523-27 (7th Cir. 2013). *See also United States v. Windless*, 719 F.3d 415 (5th Cir. 2013) (district court cannot rely on "bare arrest records" to impose conditions of supervised release).

76. *United States v. McLaurin*, 731 F.3d 258, 264 (2d Cir. 2013).

77. *See, e.g.*, *United States v. Sebastian*, 612 F.3d 47 (1st Cir. 2010); *United States v. Dupes*, 513 F.3d 338 (2d Cir. 2008); *United States v. Ross*, 475 F.3d 871 (7th Cir. 2007); *United States v. Smart*, 472 F.3d 556 (8th Cir. 2006); *United States v. Prochner*, 417 F.3d 54 (1st Cir. 2005); *United States v. York*, 357 F.3d 14 (1st Cir. 2004).

78. *United States v. Carter*, 463 F.3d 526 (6th Cir. 2006) (sex offense 17 years old); *United States v. T.M.*, 330 F.3d 1235 (9th Cir. 2003) (sex offense accusation 40 years old and conviction 20 years old); *United States v. Scott*, 270 F.3d 632 (8th Cir. 2001) (sex offense 15 years old).

79. *Preston*, 706 F.3d at 1122; *United States v. Cope*, 527 F.3d at 943 (9th Cir. 2008); *United States v. Wise*, 391 F.3d 1027, 1033 (9th Cir. 2004) ("Where a condition of supervised release is not on the list of mandatory or discretionary conditions in the sentencing guidelines, notice is required before it is imposed, so that counsel and the defendant will have the opportunity to address personally its appropriateness."); *United States v. Scott*, 316 F.3d 733, 736 (7th Cir. 2003). *Contrast United States v. Moran*, 573 F.3d 1132, 1138 (11th Cir. 2009) ("The district court was not required to notify Moran before it imposed special conditions to address his proclivity for sexual misconduct."). ■

About the Authors

Daniel Donovan has practiced law in Great Falls, Mont., since 1976, including service as an Assistant Federal Defender in the District of Montana from 1993 to 2000. He was counsel for Johnny Old Chief in *Old Chief v. United States*, 519 U.S. 172 (1997), representing Mr. Old Chief from his initial appearance through the Supreme Court opinion and thereafter.

Daniel Donovan
Daniel Donovan, PC
P.O. Box 2799
Great Falls, MT 59403
406-727-0500
E-MAIL dan@danieldonovanlaw.com

John Rhodes has served as an Assistant Federal Defender for the District of Montana since 1998. In 2002, he served in Washington, D.C., as Special Counsel to the U.S. Sentencing Commission..

John Rhodes
Federal Defenders of Montana
P.O. Box 9380
Missoula, MT 59807
406-721-6749
E-MAIL john_rhodes@fd.org