IN THE SUPREME COURT
OF THE UNITED STATES
October Term 2021

CASE NO: _____

Eleventh Circuit Court of Appeals No. 21-10730
FLND No. 4:20-cr-45-AW-MAF

DAVID WAYNE ARING,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETTION FOR A WRIT OF CERTIORARI to the UNITED STATES COURT OF APPEALS for the ELEVENTH CIRCUIT WITH INCORPORATED APPENDIX

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Questions Presented

QUESTION ONE

Whether in the exercise of its supervisory jurisdiction over the United States Courts, this Court should correct the correctable injustice and violation of essential requirements of law that occurred when the Eleventh Circuit (a) affirmed **lifetime supervised release** for this **first-time, non-violent, former-lawyer-offender** convicted of receiving and watching child pornography, **but who did not share, distribute, or produce any videos or images, and who did not touch any child**; (b) whether lifetime supervised release should be reserved for those who commit more heinous and more serious child-sex offenses and those who are likely to reoffend; and (c) whether the Eleventh Circuit opinion conflicts with decisions of the Third, Fourth, Fifth, Seventh, Eighth, and Tenth Circuit Courts of Appeals, all of which have issued decisions taking a measured and reasonable approach to imposing supervised release following a child pornography conviction, requiring this Court to resolve the conflict between the Eleventh and the other circuits?

QUESTION TWO

Whether in the exercise of its supervisory jurisdiction over the United States Courts, this Court should correct the correctable injustice, and violation of essential requirements of law that occurred when the Eleventh Circuit affirmed the special condition of supervised release providing for a **lifetime ban on computer and Internet access** in the real world in which almost everyone depends upon the Internet for almost everything just about every day, and likely will be even more computer and Internet-dependent in the next few years when Mr. Aring is released from BOP custody?

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PETITION FOR WRIT OF CERTIORARI

Petitioner David Wayne Aring respectfully petitions this Honorable Court for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, addressed to its unjust, erroneous, and unconstitutional decision affirming his sentence for a child computer pornography offense to **lifetime supervised release** and a **lifetime ban from possessing a computer or other electronic devices, or access to the Internet without prior approval from United States Probation.**

Mr. Aring had no prior criminal history. He was convicted for downloading and viewing child pornography on the Internet, but he did not produce, distribute, or share, and he never improperly touched any child or anyone else. There are differing degrees of child pornography offenses. Lifetime supervised release, although generally recommended in the United States Sentencing Guidelines for child pornography, should be reserved for more heinous and aggravated offenders; not for every one, without regard to the relative severity of the offense committed, compared to the panoply of potential offenses.

PARTIES TO THE PROCEEDINGS

David Wayne Aring was the Defendant in the Northern District of Florida and the Appellant in the Eleventh Circuit Court of Appeals. The United States of America was the Plaintiff, Prosecution, and Appellee in the district and appellate courts and is the Respondent in these proceedings.

OPINION BELOW

The final judgment and sentence was entered in the Northern District of Florida in *United States v. Aring*, Case No. 4:20-cr-45-AW-MAF, on February 26, 2021, Docket No. 38. A notice of appeal was timely filed. On October 26, 2021, the United States Court of Appeals for the Eleventh Circuit issued a six-page non-published decision in *United States v. Aring*, Case No. 21-10730, affirming the sentence imposed following Aring's guilty plea to one count of receipt of child pornography. A petition for rehearing was timely filed and was denied by Order of January 10, 2022. Copies of (1) the district court judgment, (2) the Eleventh Circuit opinion, and (3) the Eleventh Circuit order denying the timely-filed petition for rehearing are in the Appendix attached at the end of this Petition.

STATEMENT OF JURISDICTION

The final judgment was entered in the Northern District of Florida on February 26, 2021. The district court had jurisdiction pursuant to 18 U.S.C. §3231. A notice of appeal was timely filed under FRAP 4(b). The Eleventh Circuit had jurisdiction pursuant to 28 U.S.C. §1291. Subject matter jurisdiction is conferred by Supreme Court Rule 10(a). The opinion was entered on October 26, 2021. A petition for rehearing was timely filed and was denied by order of January 10, 2022. This Petition for Writ of Certiorari is timely filed timely pursuant to Supreme Court Rule 13.1.

CONSTITUTIONAL PROVISIONS

The United States Constitution

Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

Amendment 8

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

Course of Proceedings, Disposition in the Courts Below, And Relevant Facts

As set forth on page 2 in the appellate opinion, David Aring appealed his sentence for receipt of materials containing child pornography. He challenged the substantive reasonableness of lifetime supervised release and special conditions of supervised release that **banish him for life,** from having a computer or using the Internet without prior approval of probation. He argued that those special conditions violated his First Amendment rights. The opinion continued, that Aring pleaded guilty to receiving materials containing child pornography. The indictment and plea followed a search of his residence where a large volume of child pornography was discovered including videos and images of prepubescent children as young as three years old being molested.

The sentence was 90 months' imprisonment followed by lifetime supervision with special conditions including he "shall not possess or use a computer [or other electronic device] without prior approval of the probation officer" and "shall not access the Internet or any online computer service at any location (including employment) without prior approval of the probation offi-

cer." He challenged the lifetime term and the special conditions.

The opinion states on page 3 that reasonableness of a sentence and terms and conditions of supervised release are reviewed under a deferential abuse of discretion standard. The burden is on the person challenging the sentence to prove it unreasonable in light of the record. Substantive reasonableness is reviewed to determine whether the sentence achieves the purposes of sentencing in Section 3553(a). A sentence must be sufficient but not greater than necessary to comply with 3553(a)(2) including reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, deter criminal conduct, and protect the public from defendant's future criminal conduct. The court also must consider the nature and circumstances of the offense and defendant's history and characteristics.

On page 4 the opinion finds that the district court did not abuse discretion by imposing lifetime supervised release; the guidelines recommend "five years to life" for sex offenses. The Sentencing Commission policy statement recommends "the statutory maximum term" for sex offenses and **any offense under Section 2252A, no less than five to life**. In imposing lifetime supervision, the court considered the horrific nature of the pornographic images Aring possessed for years including

images of girls as young as three being molested. The court was concerned about whether Aring fully appreciated harm to the victims of the pornography, and added that "if things go well," the length of supervision "can be modified later" by the court. The opinion concludes that imposing lifetime supervision was within the range of reasonable sentences in this case. *Ibid.*

Statement of the Relevant Facts

"***Common sense must not be a stranger in the House of the Law;***" and "***[I]t would be positively inhumane…"*** to rule against the person seeking relief in this case. *Cantrell v. Kentucky Unemployment Insurance Commission*, 450 SW2d 235 (KY 1970) (Palmore, Justice). *Cantrell* was decided more than 50 years ago, has inapplicable facts, is not binding, nor persuasive, nor recent, nor even federal. Nonetheless, Justice Palmore's words about "common sense" apply to every case and every court.

At sentencing the defense argued that lifetime supervised release was not appropriate because although numerous horrific videos and images were obtained and watched by Aring, he did not produce child pornography, molest children,

share, distribute, or sell videos and images; and the condition of lifetime banishment from Internet access and possession of computers or electronic devices was overly-punitive and unwarranted.

REASONS FOR GRANTING THE WRIT

REASON ONE

In the exercise of its supervisory jurisdiction over the United States Courts, this Court should correct the correctable injustice that occurred when the Eleventh Circuit (a) affirmed lifetime supervised release for this first-time, non-violent, former-lawyer-offender convicted of receiving and watching child pornography, but who did not share, distribute, or produce any videos or photos, and did not molest any child; (b) lifetime supervised release should be reserved for those who commit more heinous and severe child-sex offenses and those who are likely to reoffend; and (c) this Eleventh Circuit decision conflicts with the Second, Third, Fourth, Seventh, Eighth, and Tenth Circuit Courts of Appeals, all of which have issued decisions taking a measured and reasonable approach to supervised release when sentencing for a child pornography conviction, requiring a resolution of this conflict between circuits.

The Eleventh Circuit violated the essential requirements of law in affirming the district court's clear error and abuse of discretion by imposing lifetime supervised release "authorized" for child sex offenders, but **unreasonable in this case**. A reasonable term of years of supervision would be more than sufficient to satisfy all sentencing goals.

(a) Lifetime supervised release was an abuse of discretion and reversible error for this first-time, non-violent, former-lawyer-offender convicted of receiving and watching child pornography, but who did not share, distribute, or produce any videos or photos, and did not touch any child

There are different degrees and severities of child sex offenses. Some offenders are hands-on and subject children to unspeakable indignities. Others actively abuse children by producing, making, selling, sharing, trading, and distributing child pornography. Not Aring, who received and viewed videos and images causing harm to victims but nothing more egregious. Sentences for such offenses usually vary downward. Supervised release after incarceration should be measured, fair, and proportional after close consideration of the facts and the defendant.

Aring received many images and videos. He was evaluated by two experts who determined that he was not a threat to any child and not a risk to reoffend. Offenders age out of criminal behavior. Aring is 50 years old, serving 90 months in prison; release date August 2027 when he will be 55 and hopefully will have received counseling and treatment while incarcerated. Punishment is important, but rehabilitation and self-improvement even more, along with educational courses and therapy addressing the mental and emotional issues that created the problem. Punishment by warehousing without counseling and rehabilitation is unconscio-

nable. Lifetime supervision is unnecessary.

The prosecution argued below that the Eleventh Circuit routinely affirms lifetime supervised release for child pornography offenders, citing *United States v. Cubero*, 754 F.3d 888, 890-91, 898 (11th Cir. 2006) and *United States v. Lothamer*, 753 F..App'x 870, 871-73 (11th Cir. 2018). *Cubero* was inapplicable because he pleaded guilty to **one count of *distribution*** and was sentenced to 151 months and lifetime supervised release. Similarly Lothamer pleaded guilty to ***distribution and attempted production* of child pornography** and was sentenced to 180 months and lifetime supervised release. **Distribution and attempted production are more serious, egregious offenses.** Aring pleaded guilty to one count of **receiving** material containing child pornography. Count Two, alleging possession and access with intent to view was dismissed. There was no evidence and Aring was **never charged with distribution, production, or attempted production. Distribution and production are more aggravated offenses than receiving and watching**.

Lothamer held that a sentence must be sufficient but not greater than necessary, and supervised release must be based on deterrence, protection of the public, and rehabilitation, **but not retribution** considering the facts of the offense, the history and characteristics of the defendant, and relevant sentencing policies.

The Eleventh Circuit wrote that Lothamer's lifetime supervised release "can be shortened in the future by the district court" citing *United States v. Trailer,* 827 F.3d 935-36 (11th Cir. 2016) (defendant may petition the district court for modification or early termination of supervised release serving one year of the term. *Id*., at 937-38.

That is not a valid basis to affirm overly-punitive lifetime supervised release for **mere receipt**. To hold that Aring could seek a reduction is a false flag, failing to compare the importance of degree of his offense with *Lothamer* and *Cubero*.

Aring downloaded files containing child pornography from computers. A thumb drive was found in his apartment. Defendants use computers to download contraband. That was the extent of Aring's offense conduct. He did not produce, sell, trade, share, or otherwise distribute videos. He admitted to downloading images and videos on an anonymous peer-to-peer file-sharing program, but did not share files using more personal, direct methods such as email or a "closed" file-sharing program.

In *United States v. R.V.*, 157 F.Supp.3d 207, 210 (E.D..N.Y 2016) Judge Weinstein authored a thoughtful order examining non-production guidelines:

> The Internet revolution has vastly increased the availability and accessibility of child pornography online, greatly expanding the

> category of people arrested for possession and distribution offenses involving explicit sexual images of minors obtained through home computers using various peer-to-peer file sharing programs. As a result, there has been an enormous increase in this criminal class, governmental resources used to ferret out its members, criminal prosecutions, and incarcerations.
>
> **Failure to distinguish among the multitude of vectors involved in a sentencing decision is particularly grave in the field of child pornography offenses**. *Ibid. (*emphasis added*)*

In 2012 the Sentencing Commission issued an extensive report determining that the "existing sentencing scheme in non-production cases no longer adequately distinguishes among offenders based on their degrees of culpability" given the impact of the Internet on how the offense is committed. See, the 2012 USSC Report on congressional testimony and reports as to sex-offense topics on federal child pornography offenses – the Full Report to Congress. USSC Report at 101. As the Commission explained in 2012 (emphasis added):

> Non-production child pornography offenses have become almost exclusively Internet-enabled crimes; the typical offender today uses modern Internet-based technologies such as peer-to-peer (P2P) file-sharing programs that were just emerging only a decade ago [now two], and that now facilitate large collections of child pornography The typical offender's collection not only has grown in volume but also contains a wide variety of graphic sexual images (including images of very young victims) which are now readily available on the Internet. As a result, **four of the six sentencing enhancements in Section 2G2.2 - … relating to computer usage and the type and volume of images possessed by offenders,** which together account for offense levels – **now**

apply to most offenders and, thus, fail to differentiate among offenders in terms of their culpability.

This rationale applies to the "one-size-fits-all" Guidelines recommendation for lifetime supervised release which **fails to differentiate among offenders in terms of their culpability**. After prison Aring will experience harsh punitive measures. In 2021 Aring was disbarred by The Florida Bar. He was ordered to pay restitution. Given the likely diminution in earning-potential after release, he may pay this debt to society for a long time. The phrase "blood from a turnip" springs to mind. He has a felony conviction. He must register as a sex offender, "a designation that carries both societal stigma and numerous practical restrictions designed to protect children." *United States v. Autery*, 555 F.3d 864, 872 (9th Cir. 2009). There also is a risk of danger to his safety in the Bureau of Prisons. Denomination as a sex offender provides a lifetime of continuous punishment, marked as a pariah with severe restrictions on residence, movements, activities, and associations. *R.V., supra,* 157 F.Supp.3d at 210.

Piling on with lifetime supervised release may may be acceptable to the Eleventh Circuit, **it is not normal in most other circuits.** In *United States v. Alvarado*, 691 F.3d 592, 598 (5th Cir. 2012), the Fifth Circuit **reversed lifetime**

supervision in a child pornography receipt case based on the district judge's statement that she always gave lifetime supervision in child pornography cases (emphasis added):

> The district judge automatically defaulted to the imposition of a lifetime term.…**The statute, however, provides for a range of five years to lifetime …supervision. Therefore, Congress clearly contemplated that there would be instances where less than the maximum would be reasonable**. The judge, by her own admission, never considered the possibility of anything less than lifetime supervision. Hence, the error was plain. Clearly, the imposition of lifetime of supervised release affects substantial rights. And where a judge admits to the automatic imposition of a sentence, without regard for the specific facts and circumstances of the case or the range provided for in the statute, [that] seriously affects the fairness, integrity, and public reputation of judicial proceedings.

The Second Circuit vacated a 25-year term of supervision for child pornography possession as being "excessive and unreasonable" in *United States v. Jenkins*, 854 F.3d 181, 189 (2d Cir. 2017). And in *United States v. Quinn*, 698 F.3d 651 (7th Cir. 2012), the Seventh Circuit vacated lifetime supervised release in a child pornography possession case and ordered the district court to "consider the possibility of setting sunset dates for some of the more onerous terms" of supervision.

Aring faces the unusually long lifetime restriction of liberty. Courts should be incredulous at the imposition of lifetime supervision in a non-production case.

Research published in the U.S. Courts' Federal Probation Journal shows that defendants "convicted of child pornography exhibited lower general and violent re-arrest rates and supervision revocations". Thomas Cohen & Michelle Spidell, How Dangerous Are They? An analysis of Sex Offenders Under Federal Post-Conviction Supervision, 80 Fed. Probation J., 28, 30-31 (Sept. 2016), uscourts.gov/sites/default/files/80_2_4_

> [Unsurprisingly] child pornography is the most common type of sex offense within the federal system. Offenders convicted of child pornography have lower risk-characteristics, and recidivate less frequently compared to contact-sex- offenders.

Ibid. The sex offender registry will protect the public from further crimes of Mr. Aring. Two psychosexual evaluations filed of record found him to be low-risk. Letters filed for sentencing showed he has strong family support.

> **(b) Lifetime supervised release should be reserved for those who commit more heinous and more serious child-sex offenses than those who merely receive and watch videos and images, or those most likely to reoffend.**

Lifetime supervised release with a lifetime ban on computer possession and Internet access as a special condition is unnecessarily harsh, excessive, unreasonable, cruel, and plainly unconstitutional.

Lifetime supervised release is permitted for child pornography offenses but is not mandatory. The recommended term of supervised release may be from five

years to life; a large range of terms of supervised release. Child pornography is harmful, despicable, and unpleasant, but there are degrees of offenses. Some are more detestable and harmful than others. Offenses that include in-person, hands-on activities with children, those who make videos interacting with and directing youngsters, telling them what to do, producing, distributing videos, profiting financially from distributing and selling all are, without doubt more heinous than merely receiving and viewing. When a video is viewed the child is victimized and harmed all over again. There is restitution.

Compare *United States v. Perrin*, 926 F.3d 1044, 1048-49 (8th Cir. 2019), where a term of 20 years' supervised release imposed in Minnesota was affirmed. There the defendant was convicted of eliciting a fourteen year old boy to have sex, sent photos of his naked body parts to the child, and over several years preyed on other children including a teenage girl, using technology to invade her home and bedroom. Such offenses might warrant lifetime supervised release, but that court chose to impose a term of years, albeit a lengthy term.

In *United States v. Arbaugh*, 951 F.3d 167 (4th Circuit 2020) and in *United States v. Ross,* 912 F.3d 740 (4th Cir. 2019) the Fourth Circuit vacated and reman-

ded the defendants' sentences for procedural error with regard to the restrictive special conditions of supervised release.

Ross was convicted of receiving and possessing child pornography. He was sentenced to 120 months and placed on supervised release for life, with restrictive special conditions. The Fourth Circuit vacated and remanded because the district court did not properly explain its rationale for the special conditions. Ross was entitled to a sufficient explanation for the significant deprivation of liberty that was imposed.

In *Arbaugh*, the defendant was convicted of engaging in illicit sexual conduct with a minor in a foreign country, specifically Haiti. Again the Fourth Circuit found that the district court procedurally erred in failing to explain the reasons for imposing computer-related special conditions of supervised release. The special conditions were vacated and remanded for partial resentencing. 951 F.32d 170.

A defendant who watched videos should not receive lifetime supervised release. That should be reserved for repeat offenders or defendants who make, produce, direct, distribute and profit from selling videos. Just as a person who

purchases drugs for personal use is not as culpable as the source who manufactured, packaged, distributed, sold and greatly profited from the drugs. That more culpable, more deeply-involved defendant deserves a harsher, longer term of incarceration and a longer term of supervised release based upon the more serious nature of the offenses committed.

(c) The Eleventh Circuit decision conflicts with decisions of the Third, Fourth, Fifth, Seventh, and Eighth Circuit Courts of Appeals, all of which have issued decisions taking a measured and reasonable approach to imposing a term of supervised release when sentencing for a child pornography conviction, requiring this Court to resolve the conflict between circuits.

The government relied on cases that fell wide of the mark as to unreasonable special conditions of supervised release. They cited as supplemental authority *United States v. Cordero*, No. 18-10837 (11th Cir. August 4, 2021) where Cordero entered a guilty plea to one count of accessing with intent to view child pornography but was sentenced to twelve months and one day in custody and **ten years' supervised release**. Ten years?

The Second Circuit held lifetime supervision in a child sex case to be **extreme and unusual; subjecting the** d**efendant indefinitely to the possibility of imprisonment for violating its terms; and** at odds with the rehabilitative purpo-

ses of supervised release, as it **presumes that the need for supervision will never end and that the defendant is essentially incorrigible**. *United States v. Brooks,* 889 F.3d 95, 101 (2d Cir. 2018). In *Jenkins, supra*, 854 F.3d at 195, the Second Circuit held that given the defendant's personal characteristics and the nature of his offense, the "constellation of restrictions" compounded by a 25-year duration created greater deprivation of liberty than was reasonably necessary.

The Seventh Circuit held in *United States v. Thompson*, 777 F.3d 368 (7th Cir.2015), that a **one-size-fits-all approach to supervised release is simply unacceptable.** ***Thompson*** **was a hands-on child sex offender**. The Seventh Circuit held that he will be almost 41 years old when released and seemed odd to devise so far in advance, such restrictions, but that is how supervised release operates. It was unauthorized and beyond odd to impose lifetime supervised release without articulated justification.

The need for express justification was acute because, after prison, as a convicted sex offender Thompson would be subject to a lifetime of mandatory state and local sex-offender reporting, apart from supervised release. Sensible or not, the lifetime term was vitiated by the fact that in imposing it the judge was laboring under the misapprehension that in his words, "a term, of supervised re-

lease can be reduced but cannot be extended." Wrong. It can be extended. *See,* 18 US.C. Section 3583(e)(1)-(2); Fed R.Crim.P 32.1(c), which is why the district court's comment that Aring could petition the court for modification after prison and one year on supervised release, was not a reason to justify lifetime supervised release. It was not as though the judge thought that after release from prison Thompson would be a menace to young girls until he dies, perhaps as an octogenarian or even a nonagenarian. Rather it was because the future cannot be predicted. Any term of supervision less than life would create a risk of Thompson committing further crimes at an advanced age. Should that risk seem acute years in the future when Thomson completes his prison term, a finite term of supervised release could be extended, which the judge failed to understand. The Seventh Circuit was surprised that neither prosecution nor defense noted the judge's error at sentencing. *Thompson,* 777 F.3d at 375.

See also, *United States v. Holena*, 906 F.3d 288, 289 (3rd Cir. 2018) (Holena attempted to entice a fourteen year old boy to have sex. To protect the public, a sentencing judge may restrict a convicted defendant's use of computers and the Internet. But to respect the defendant's constitutional liberties the judge must

tailor those restrictions to the danger posed by the defendant. A complete ban on computer and Internet use "will rarely be sufficiently tailored." (citation omitted)).

REASON TWO

In the exercise of its supervisory jurisdiction over the United States Courts, this Court should correct the correctable injustice, and violation of essential requirements of law that occurred when the Eleventh Circuit affirmed a special condition of supervised release providing a lifetime ban on computer and Internet access in the present world in which almost everyone depends upon the Internet for almost everything every day, and the world likely will be even more computer and Internet-dependent in the next few years when Aring is released from BOP custody.

It just is common sense that lifetime Internet and computer banishment has evolved from barely acceptable to unconstitutional in the past few years. On the BOP website, Aring's presumptive release date is in April 2027 with anticipated release to a halfway house in fall 2026. In the next five years, Internet access will become more necessary for daily life in ways we cannot yet predict.

The Internet is more important than United States Mail or landline telephones. Prohibiting use of public roads would be less burdensome than an Internet ban. Most local, state, and federal governments require the public to use

the Internet to access their services and offer no options. In the next five years the possibilities for technological progress are endless. It is important to compartmentalize the distasteful nature of the offense and protect offenders from governmental abuse by outdated, unconstitutional conditions and lifetime supervision.

Banning Internet access and possessing computers or electronic devices should be stricken from Aring's sentence and from every similar case. This barbaric, unreasonable punishment will cause all of them to be denied life necessities,

Cases cited to affirm the sentence actually support Aring's challenges. U*nited States v. James Taylor*, Appeal No. 20-10742 (11th Cir. May 21, 2021), affirming special condition of searches of electronic devices was not a child pornography case. The charge was possession of a firearm by a convicted felon. Taylor was unresponsive in the driver's seat of a vehicle with a knife and a firearm. He had a lengthy record and substance abuse issues. He pleaded guilty and was sentenced to 30 months in custody, and supervised release for 3 years. Three years with special conditions is not a lifetime with abusive conditions.

Also cited below was *United States v. Virgil Lee Moran*, 573 F.3d 1132, 1139 (11th Cir. 2009) for the proposition that before imposing special conditions the court should consider the history and characteristics of the defendant, provide adequate punishment and rehabilitation, and protect society at large. *Moran* was more than one isolated sentence quoted from it. In 2008 Moran was charged with felon in possession of a firearm and was sentenced to prison for 63 months and three years' supervised release. Whether the court must give advance notice of intent to impose special conditions of supervised release was a question of first impression in the Eleventh Circuit, answer: NO.

Moran's PSR listed a long and horrifying criminal history back to 1994, including 3 arrests for sex crimes against his wife and young daughter, allegations of sexual abuse of a four-year old girl, kidnapping, false imprisonment and sexual assault of his wife, using a knife to imprison and sexually assault his wife for two days; lewd and lascivious acts on a child under age 12; and a charge that he followed a four year old girl into a bathroom where he digitally penetrated her vagina; and then forced her into his truck where he kicked and raped her. He was never prosecuted for those allegations.

In 2008 the judge imposed special conditions of supervised release for firearm possession including sex-offender conditions unrelated to the firearm. The

Eleventh Circuit affirmed all special conditions. More interesting, his term of supervised release was **three years, not lifetime, but Taylor was cited as authority to support affirming the lifetime computer/Internet special conditions here.**

***Taylor* demonstrates that lifetime supervised release is not appropriate in the most egregious of cases where the defendant is accused of violent, horrific sex offenses against women and children.** Nor did many other cases 1 cited below to support affirming lifetime supervised release here.

The imposition of a lifetime ban on computer possession and Internet access as a special condition is excessive, unnecessary. unreasonable, cruel, and plainly unconstitutional in violation of the First Amendment under *Packingham v. North Carolina*, 137 S.Ct. 1730 (2017). That may have been raised for the first time on appeal, but Aring met all requirements for plain error review. There are a plethora of reasons why a lifetime ban on Internet use is wrong, unreasonable, impractical, and reversible.

Internet access is necessary for everyone every day. The restrictions and special conditions that in effect ban use of computers and access to the Internet except with prior approval of probation, is not just unreasonable, oppressive, and

burdensome, it violates First Amendment Freedom of Speech. Affirming both restrictions was clear error and should be Reversed, Vacated, and Remanded.

The Second Circuit agreed in *United States v. Peterson,* 248 F.3d 79, 83 (2d Cir. 2001) found that a ban on computer access prevents an individual from using a computer at a library to do any research, get a weather forecast, or read a news-paper without probation officer approval. *See also United States v. White*, 244 F.3d 1199, 1206 (10th Cir. 2001), striking down an Internet ban in a case where defendant had multiple child pornography convictions. **Such a ban "is the 21st Century equivalent of forbidding access to all telephone calls, or all newspapers."**

The Seventh Circuit held **in 2003**, *United States v. Holm*, 326 F.2d 872, 878 (7th Cir. 2003), striking a ban on Internet access in a child pornography case:

> …such a ban renders modern life – in which, for example, the government strongly encourages taxpayers to file their income tax returns electronically, where more and more commerce is conducted online, and where vast amounts of government information are communicated *via* websites, life would be exceptionally difficult without such access.

This drastic measure is inappropriate and should be vacated. *See, Holm, supra,* 326 F.3d at 879; and *Peterson*, 248 F.3d at 83 (although a defendant might use a telephone to commit fraud, this would not justify a condition of probation

that included an absolute ban against the use of the telephone; nor would a defendant's proclivity toward pornography justify a ban on all books, magazines, and newspapers).

And finally in *United States v. Zinn*, 321 F.3d 1084 (11th Cir. 2003), a conviction for possession of child pornography, search of Zinn's residence revealed over 4,000 images of child pornography. At his plea hearing Zinn admitted "receiv[ing] child pornography over the Internet." The court sentenced Zinn to 33 months' imprisonment **and three years' supervised release** with special conditions. One condition was restricting Internet access. The sentence was affirmed in spite of arguments that that the restrictions were unduly harsh, violated First and Eighth Amendment rights, and even taking into account the court's concern in such cases, were excessive.

In *Zinn*, 321 F.3d at 1092-93, the court addressed the special condition of "restrictions on Internet usage." The defense argued that the court could have satisfied the statutory sentencing goals for this offense without foreclosing all Internet use. The Eleventh Circuit reviewed the special condition restricting Internet use for abuse of discretion, citing *United States v.Bull*, 214 F.3d 1275, 1278 (11th Cir. 2000). Whether a district court could prohibit a convicted child

pornography offender from using the Internet while on supervised release was an issue of first impression in *Zinn*. The Fifth Circuit previously upheld a complete ban on a convicted sex offender's Internet use while on supervised release in *United States v. Paul*, 274 F.3d 155, 169-70 (5th Cir. 2001); and the Tenth Circuit held that a general prohibition against Internet use on supervised release was not error where ethe offender was allowed to access the Internet with the probation officer's prior permission. *United States v. Walser*, 275 F.3d 981, 988 (10th Cir. 2001). *Zinn* found *Paul* and *Walser* to be persuasive and concluded that there as no abuse of discretion. *Zinn* acknowledged that the Internet has become an important resource for information, communication, commerce and other legitimate uses, all of which may be potentially limited as a result of this decision. But the facts of the case highlight the concomitant dangers of the Internet and the need to protect both the public and sex offenders from potential abuse. The restriction was not overly broad because Zinn could still use the Internet with probation officer approval, thereby balancing the protection of the public with the goals of sentencing,

CONCLUSION

Based upon the foregoing arguments and authorities David Wayne Aring respectfully prays that this Honorable Court will GRANT its most gracious Writ, VACATE the judgment of the Eleventh Circuit, and REMAND with appropriate instructions concerning resentencing and imposing a reasonable term of years of supervised release, eliminating the overly-burdensome special conditions banning Internet access and possession of a computer and electronic devices without probation approval; and will find the restrictions on Internet and computer use as a lifetime special condition (1) for work and (2) only with prior permission of the court or probation, banning use of computers and Internet access absent severe restrictions violates Aring's First Amendment rights, and rises to the level of cruel and unusual punishment in violation of the Eighth Amendment. This is the Twenty-First Century and the world is Internet and computer-dependent for many of the aspects of day-to-day life that everyone takes for granted.

Respectfully submitted,

/s/ Sheryl J. Lowenthal

Sheryl J. Lowenthal, CJA Appellate Counsel
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APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

David Wayne Aring v. United States of America

JUDGMENT AND SENTENCE
US v. David Wayne Aring
Northern District of Florida
Case No. 20-cr-45-001
Entered on February 26, 2021

OPINION AFFIRMING CONVICTION AND SENTENCE
US v. David Wayne Aring
United States Eleventh Circuit Court of Appeals
Appeal No. 21-10730
Entered on October 26, 2021

ORDER DENYING TIMELY FILED
PETITION FOR REHEARING
Entered on January 10, 2022

UNITED STATES DISTRICT COURT

Northern District of Florida

UNITED STATES OF AMERICA
v.
DAVID WAYNE ARING

JUDGMENT IN A CRIMINAL CASE

Case Number: 4:20CR00045-001

USM Number: 73766-018

Randolph P. Murrell (FPD)
Defendant's Attorney

THE DEFENDANT:

☑ pleaded guilty to count(s) one

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☐ was found guilty on count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 2252A(a)(2) 18 U.S.C. § 2252A(b)(1)	Receipt of Child Pornography	12/2/2019	one

The defendant is sentenced as provided in pages 2 through 10 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☑ Count(s) two ☑ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

2/16/2021
Date of Imposition of Judgment

s/ *Allen Winsor*
Signature of Judge

Allen Winsor, United States District Judge
Name and Title of Judge

2/26/2021
Date

DEFENDANT: DAVID WAYNE ARING
CASE NUMBER: 4:20CR00045-001

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

ninety (90) months.

☑ The court makes the following recommendations to the Bureau of Prisons:

that the defendant be designated to a facility in or as near to Ocala, Florida, as deemed eligible.

☐ The defendant is remanded to the custody of the United States Marshal.

☑ The defendant shall surrender to the United States Marshal for this district: or if a facility is designated before then, the defendant may report to the institution directly

☑ at 12:00 ☐ a.m. ☑ p.m. on 3/22/2021 .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: DAVID WAYNE ARING
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SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

LIFE.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☑ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☑ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

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STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

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ADDITIONAL SUPERVISED RELEASE TERMS

1. The defendant must submit his person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. Failure to submit to a search may be grounds for revocation of release. The defendant must warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that the defendant has violated a condition of his supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

2. The defendant shall not possess or use a computer without the prior approval of the probation officer. “Computer” includes any electronic device capable of processing or storing data as described at 18 U.S.C. § 1030, and all peripheral devices.

3. As directed by the probation officer, the defendant shall enroll in the probation office’s Computer and Internet Monitoring Program (CIMP), and shall abide by the requirements of the CIMP program and the Acceptable Use Contract.

4. The defendant shall not access the Internet or any “on-line computer service” at any location (including employment) without the prior approval of the probation officer. “On-line services” include any Internet service provider, or any other public or private computer network. As directed by the probation officer, the defendant shall warn his employer of restrictions to his computer use.

5. The defendant shall consent to the probation officer conducting periodic unannounced examinations of his computer equipment, which may include retrieval and copying of all data from his computer(s) and any peripheral device to ensure compliance with this condition, and/or removal of any such equipment for the purpose of conducting a more thorough inspection. The defendant shall also consent to the installation of any hardware or software as directed by the probation officer to monitor the defendant’s Internet use.

6. The defendant shall not possess or use any data encryption technique or program.

7. The defendant shall refrain from accessing, viewing, or possessing via the Internet, or any other form of media, any pornography (to include adult pornography) or other materials depicting sexually explicit conduct as defined at 18 U.S.C. § 2256(2).

8. The defendant shall not frequent or loiter within 100 feet of any location where children are likely to gather or have contact with any child under the age of 18 unless otherwise approved by the probation officer. Children are likely to gather in locations including, but not limited to, playgrounds, theme parks, public swimming pools, schools, arcades, museums.

9. The defendant's employment shall be approved by the Probation Officer, and any change in employment must be pre-approved by the Probation Officer. The defendant shall submit the name and address of the proposed employer to the Probation Officer at least 10 days prior to any scheduled change.

10. The defendant’s residence shall be approved by the probation officer, and any change in residence must be pre-approved by the Probation Officer. The defendant shall submit the address of any proposed residence to the Probation Officer at least 10 days prior to any scheduled change.

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ADDITIONAL STANDARD CONDITIONS OF SUPERVISION

11. The defendant shall participate in and successfully complete sex offender-specific treatment, as directed by the probation officer. The defendant is to pay part or all of the cost of this treatment, at an amount not to exceed the cost of treatment, as deemed appropriate by the probation officer. The actual copayment schedule shall be determined by the probation officer. The probation officer shall release the presentence report and all previous mental health evaluations to the treatment provider. As part of the treatment program, the defendant shall submit to polygraph or other psychological or physiological testing as recommended by the treatment provider.

12. The defendant shall be required to submit to periodic polygraph testing at the discretion of the probation office as a means to ensure that he is in compliance with the requirements of his supervision or treatment program.

13. The defendant shall register with the state sex offender registration agency as required by state law. The defendant shall provide proof of registration to the Probation Officer within three days of release from imprisonment/placement on supervision. In any state that has adopted the requirements of the Sex Offender Registration and Notification Act (42 USC sec. 16901 et seq.), the defendant shall also comply with all such requirements as directed by the Probation Officer, the Bureau of Prisons, or any state sex offender registration agency in which he resides, is a student, or was convicted of a qualifying offense.

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CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 100.00	$ 9,000.00 plus amount TBD for "Sweet White Sugar Series"	$	$	$

☑ The final determination of restitution is deferred until 3/22/2021. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage
"Jessica Series"		$3,000.00	
Anna ("Middle Model Sister Series")		$3,000.00	
"Jenny Series"		$3,000.00	
"Sweet White Sugar Series"		TBD	

TOTALS $ 0.00 $ 9,000.00 plus amount to be determined

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 9,100.00 plus amount TBD due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:
See page 9.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

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ADDITIONAL FORFEITED PROPERTY

a. One SanDisk 16 GB thumb drive, SN: BL130323463B,
b. One SanDisk Extreme USB 3.0 32 GB thumb drive, SN: BM130123463B,
c. One PNY 8 GB thumb drive, SN: 441FA208 Hex,
d. One DataTraveler 112 USB 2GB thumb drive,
e. One SanDisk 32 GB (pink) thumb drive, SN: BM150725243B,
f. One HP 4GB thumb drive SN# 0Xecc030008b014,
g. One Samsung Galaxy S5 cell phone, IMEI: 310260681180201,
h. SanDisk Ultra USB 3.0 128 GB thumb drive, SN: BP180526263B,
i. One Cooler Master desktop computer, SN: Unavailable,
j. Two doll wigs and clothing,
k. One sex doll,
l. One World of Warcraft dongle,
m. One HP Pavilion P6210y PC desktop computer, SN: MXU9470GWD,
n. One external hard drive, SN: WX21DA87C2HU.

See ECF No. 32.

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CASE NUMBER: 4:20CR00045-001

DENIAL OF FEDERAL BENEFITS

(For Offenses Committed On or After November 18, 1988)

FOR DRUG TRAFFICKERS PURSUANT TO 21 U.S.C. § 862(a)

IT IS ORDERED that the defendant shall be:

☐ ineligible for all federal benefits for a period of _____ .

☐ ineligible for the following federal benefits for a period of _____ .

(specify benefit(s))

OR

☐ Having determined that this is the defendant's third or subsequent conviction for distribution of controlled substances, IT IS ORDERED that the defendant shall be permanently ineligible for all federal benefits.

FOR DRUG POSSESSORS PURSUANT TO 21 U.S.C. § 862(b)

IT IS ORDERED that the defendant shall:

☐ be ineligible for all federal benefits for a period of _____ .

☐ be ineligible for the following federal benefits for a period of _____ .

(specify benefit(s))

☐ successfully complete a drug testing and treatment program.

☐ perform community service, as specified in the probation and supervised release portion of this judgment.

☐ Having determined that this is the defendant's second or subsequent conviction for possession of a controlled substance, IT IS FURTHER ORDERED that the defendant shall complete any drug treatment program and community service specified in this judgment as a requirement for the reinstatement of eligibility for federal benefits.

Pursuant to 21 U.S.C. § 862(d), this denial of federal benefits does not include any retirement, welfare, Social Security, health, disability, Veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility. The clerk of court is responsible for sending a copy of this page and the first page of this judgment to:

U.S. Department of Justice, Office of Justice Programs, Washington, DC 20531

[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 21-10730

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID WAYNE ARING,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket No. 4:20-cr-00045-AW-MAF-1

Before BRANCH, LAGOA, and BRASHER, Circuit Judges.

PER CURIAM:

David Aring appeals his sentence for receipt of materials containing child pornography. Aring challenges the substantive reasonableness of his lifetime term of supervised release, as well as the substantive reasonableness of special conditions of his supervised release that bar him from using a computer or the Internet without his probation officer's approval. Aring also argues that the special conditions of his supervised release violate his First Amendment rights. For the following reasons, we affirm.

I.

Aring pled guilty to a charge of receiving materials containing child pornography in violation of 18 U.S.C. § 2252A(a)(2) and (b)(1). Aring's indictment and plea resulted from a search of his home in which a large volume of child pornography was discovered, including videos and images showing prepubescent children as young as three years old being molested. The district court sentenced Aring to 90 months' imprisonment with lifetime supervision to follow. The district court imposed several special conditions of supervised release, among them that Aring "shall not possess or use a computer without the prior approval of the probation officer" and "shall not access the Internet or any 'on-line computer service' at any location (including employment) without the prior approval of the probation officer." Aring timely appealed, challenging only the terms and conditions of his supervised release.

We review the reasonableness of a sentence, including the imposition of terms and conditions of supervised release, under a deferential abuse-of-discretion standard. *Gall v. United States*, 552 U.S. 38, 51 (2007); *United States v. Ridgeway*, 319 F.3d 1313, 1315 (11th Cir. 2003). The party challenging the sentence bears the burden of demonstrating that the sentence is unreasonable in light of the record, the 18 U.S.C. § 3553(a) factors, and "the substantial deference afforded to sentencing courts." *United States v. Rosales-Bruno*, 789 F.3d 1249, 1256 (11th Cir. 2015).

We evaluate a sentence's substantive reasonableness by considering whether the sentence achieves the sentencing purposes stated in § 3553(a). *See id.* The district court must impose a sentence that is sufficient, but not greater than necessary, to comply with the purposes listed in § 3553(a)(2), including the need to reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, deter criminal conduct, and protect the public from the defendant's future criminal conduct. 18 U.S.C. § 3553(a)(2); *United States v. Croteau*, 819 F.3d 1293, 1309 (11th Cir. 2016). The district court must also consider the nature and circumstances of the offense and the history and characteristics of the defendant. 18 U.S.C. § 3553(a)(1).

We will vacate a sentence only if we are left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that is outside the range of reasonable sentences dictated by the facts of the case. *United States v. Irey*, 612 F.3d 1160, 1190 (11th

Cir. 2010) (en banc). The district court abuses its discretion when it fails to consider relevant factors that were due significant weight, gives an improper or irrelevant factor significant weight, or commits a clear error of judgment by balancing proper factors unreasonably. *Id.* at 1189. We presume that a sentence is reasonable if it is within the applicable Sentencing Guidelines range. *United States v. Wayerski*, 624 F.3d 1342, 1353 (11th Cir. 2010).

The district court did not abuse its discretion by sentencing Aring to lifetime supervision. The guidelines recommend a supervised release term of five years to life for sex offenses like Aring's. U.S.S.G. § 5D1.2(b). The Sentencing Commission's policy statement accompanying this provision recommends "the statutory maximum term of supervised release" for sex offenses—in this case, life. *Id.*; *see* 18 U.S.C. § 3583(k) (providing that the "authorized term of supervised release . . . for any offense under section . . . 2252A . . . is any term of years not less than 5, or life"). In imposing lifetime supervision, the district court considered factors such as the horrific nature of the pornographic images Aring possessed over a period of years, which included images of girls as young as three being molested. The district court expressed concern about whether Aring fully appreciated the harm to the victims of the child pornography he possessed and consumed. The district court also noted that, "if things go well," the length of Aring's supervision "can be modified later" by the district court. The district court's imposition of lifetime supervision was within the range of reasonable sentences in this case.

The district court also did not abuse its discretion in imposing special conditions of supervised release prohibiting Aring from using a computer or the Internet without his probation officer's approval. The guidelines contain a policy statement recommending special conditions of supervised release "limiting the use of a computer or an interactive computer service in cases in which the defendant used such items." U.S.S.G. § 5D1.3(d)(7)(B). That recommendation applies here. Aring received a large volume of child pornography via the Internet. This Court "uniformly ha[s] 'upheld conditions limiting computer access, emphasizing that such access could well enable a sex offender to offend once again.'" *United States v. Cordero*, 7 F.4th 1058, 1070 (11th Cir. 2021) (quoting *United States v. Carpenter*, 803 F.3d 1224, 1239 (11th Cir. 2015)). The district court noted that Aring's special conditions of supervised release do not amount to an absolute bar on Aring's use of a computer or the Internet. The district court sentenced Aring with the "expectation that if there is a professional need for it," while on supervised release, Aring will be allowed to use a computer or the Internet as appropriate with the approval and monitoring of the probation office. As with the term of his supervised release, Aring is free to ask for a modification of his supervised release conditions later. *See* 18 U.S.C. § 3583(e).

II.

Aring's constitutional argument is unavailing. Aring did not raise this argument in the district court, so we review it for plain error. Aring argues that the special conditions of his supervised

release prohibiting him from using a computer or the Internet without his probation officer's approval are unconstitutional under *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017). They are not. This Court's opinion in *United States v. Bobal*, 981 F.3d 971 (11th Cir. 2020)—in which we held that "[a] district court does not commit plain error by imposing a computer restriction as a special condition of supervised release, even if the term of supervised release is life"—squarely forecloses Aring's constitutional argument. *See Cordero*, 7 F.4th at 1070–71. Because Aring has not shown that his sentence is substantively unreasonable or unconstitutional, we affirm.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

October 26, 2021

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 21-10730-BB
Case Style: USA v. David Aring
District Court Docket No: 4:20-cr-00045-AW-MAF-1

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing, are available at www.ca11.uscourts.gov. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Tonya L.

Richardson, BB at (404) 335-6174.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Djuanna H. Clark
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-10730-BB

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

DAVID WAYNE ARING,

Defendant - Appellant.

Appeal from the United States District Court
for the Northern District of Florida

BEFORE: BRANCH, LAGOA, and BRASHER, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by Appellant is DENIED.

ORD-41