No. 10-4504

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DANIEL LEE JONES,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The government does not request oral argument. Should the Court schedule oral argument, the government would request the opportunity to participate in oral argument.

JURISDICTIONAL STATEMENT

This is an appeal from a district court's final judgment in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. The court entered final

judgment against defendant on November 9, 2010 (R. 43, Judgment),[1] and defendant filed a timely notice of appeal on November 15, 2010 (R. 44, Notice of Appeal). This Court has jurisdiction under 28 U.S.C. 1291.

GOVERNMENT'S STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether this Court should dismiss defendant's appeal because defendant signed a valid plea agreement knowingly and voluntarily waiving his right to appeal his sentence absent certain circumstances that are not present here.

2. If this Court considers defendant's appeal, whether the district court abused its discretion in imposing two special conditions of supervised release.

STATEMENT OF THE CASE

On October 7, 2009, a federal grand jury returned a two-count indictment against Daniel Lee Jones. (R. 1, Indictment). The indictment alleged that defendant, a resident of Oregon and the regional director of the American National Socialist Workers Party (ANSWP), an organization advocating white supremacist ideology, took illegal actions directed at Mr. F. M. Jason Upthegrove, an African-American man and the president of the Lima, Ohio, chapter of the National Association for the Advancement of Colored People (NAACP). Specifically, the

[1] Citations to "R. __" refer to documents, by number, in the district court record. Citations to "Jones Br. __" refer to pages in defendant Jones's opening brief.

indictment alleged that when Mr. Upthegrove began advocating for equal police services for African-Americans in Lima after a member of the Lima Police Department shot and killed an African-American woman, Jones mailed a noose to Mr. Upthegrove. (R. 1, Indictment, pp. 1-3). Count I of the indictment alleged that Jones's actions interfered with and intimidated Mr. Upthegrove because Mr. Upthegrove had been participating in federally protected activities (*i.e.*, speech and assembly) on behalf of African-Americans, in violation of 18 U.S.C. 245(b)(5). (R. 1, Indictment, p. 2). Count II alleged that Jones's actions also violated 18 U.S.C. 876(c) (mailing threatening communications). (R. 1, Indictment, p. 3).

On May 17, 2010, defendant, pursuant to a plea agreement, entered a plea of guilty as to Count II of the indictment. (R. 57, 5/17/10 Transcript (Change of Plea Hearing), p. 22). The district court sentenced defendant on November 8, 2010, to a term of imprisonment of 18 months and a term of supervised release of three years. (R. 55, 11/8/10 Transcript (Sentencing Proceedings), p. 17). The district court imposed several special conditions of supervised release. One such condition included a prohibition on

> accessing any online computer service at any location, including employment or education, without the prior written approval of the United States Probation Office or this Court. This includes any Internet service provider, bulletin board system, or any other public or private computer network. Any approval shall be subject to conditions set by the U.S. Pretrial Services and Probation Office or the Court with respect to that approval.

(R. 55, 11/8/10 Transcript, pp. 18-19). Another special condition prohibited defendant from "associat[ing] with any members of the American National Socialist Workers Party or any other gang or threat group as directed by [defendant's] probation officer." (R. 55, 11/8/10 Transcript, p. 20). Defendant objected to these two conditions. (R. 55, 11/8/10 Transcript, p. 20). Thereafter, the government moved to dismiss Count I of the indictment; the district court granted the motion. (R. 55, 11/8/10 Transcript, p. 22).

The district court entered final judgment on November 9, 2010. (R. 43, Judgment). This appeal followed. (R. 44, Notice of Appeal).

STATEMENT OF FACTS

1. Offense Conduct[2]

At all times relevant to this appeal, defendant was a resident of Portland, Oregon, and acted as a director of the American National Socialist Workers Party (ANSWP). ANSWP is an organization that advocates white supremacist ideology.

In January 2008, a police officer in Lima, Ohio, shot and killed Tarika Wilson, an African-American woman, while the officer was executing a search warrant. The shooting received significant national media attention.

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[2] These facts are taken from the government's proffer of facts at defendant's change of plea hearing. (R. 57, 5/17/10 Transcript, pp. 19-21). Defendant indicated at the hearing that he agreed with the government's statement. (R. 57, 5/17/10 Transcript, p. 21).

Mr. F. M. Jason Upthegrove, the president of the Lima chapter of the National Association for the Advancement of Colored People (NAACP), made numerous public statements requesting unbiased police services for African Americans in Lima. Members of ANSWP, including defendant, learned of the events in Lima and mailed racially-inflammatory flyers to homes across Lima. The flyers included racist text celebrating Tarika Wilson's death. Defendant mailed approximately 150 flyers.

After Mr. Upthegrove learned of the flyers, he publicly criticized them and urged that they be ignored. Defendant then sent a noose and racist magazine to Mr. Upthegrove's residence. Defendant learned of Mr. Upthegrove's address from an ANSWP colleague.

Upon receiving the noose, Mr. Upthegrove immediately feared for his and his family's physical safety. Mr. Upthegrove also considered stopping his advocacy for social justice.

Defendant admitted that he mailed the noose to convey a threat to injure the person of Mr. Upthegrove, and that he did so to silence Mr. Upthegrove's advocacy on behalf of African Americans in Lima.

2. Procedural History

A grand jury in Ohio returned a two count indictment on October 7, 2009, charging defendant with one count of interfering with federally protected activities

and one count of mailing threatening communications. (R. 1, Indictment). On October 8, 2009, defendant made his initial appearance in the United States District Court for the District of Oregon. (R. 7, Rule 5(c)(3) Documents, Attachment 3). The court ordered defendant to appear in the district where his charges were pending. (R. 7, Rule 5(c)(3) Documents, Attachment 2). The court also issued an order setting conditions of defendant's release. (*United States* v. *Jones*, 3:09-473 (D. Ore.), R. 5, Order Setting Conditions of Release).[3] Included in these conditions was a prohibition on directly or indirectly using or possessing "a computer or electronic media, including PDA[s] (personal digital assistant[s]) and cellular phones, with Internet access capabilities or access[ing] a computer or electronic media, **without the prior approval of Pretrial Services**," as well as a prohibition on "all contact with known members of the American National Socialist Workers Party." (*United States* v. *Jones*, 3:09-473 (D. Ore.), R. 5, Order Setting Conditions of Release, p. 1).

On October 20, 2009, defendant appeared before Magistrate Judge Vernelis K. Armstrong for his arraignment in the Northern District of Ohio. (R. 54,

[3] It does not appear that the District of Oregon forwarded this order to the Northern District of Ohio as part of the Rule 5(c)(3) documents sent on October 8, 2009. It is obvious that the Northern District of Ohio was aware of these conditions, however, as Judge Armstrong discussed them at defendant's arraignment on October 20, 2009. Contemporaneously with the filing of this brief, the government has filed an unopposed motion requesting this Court to take judicial notice of the District of Oregon's order.

10/20/09 Transcript (Arraignment)). Defendant pleaded not guilty to both counts. (R. 54, 10/20/09 Transcript, p. 10). Judge Armstrong indicated her intention to adopt the release conditions recommended by the District of Oregon. (R. 54, 10/20/09 Transcript, p. 12). Defendant did not voice an objection. (R. 54, 10/20/09 Transcript, p. 13). Thereafter, Judge Armstrong entered an order continuing, in relevant part, the existing conditions of release. (R. 10-1, Order Setting Conditions of Release). Specifically, Judge Armstrong ordered defendant to refrain from accessing an electronic device with Internet capabilities without prior approval of Pretrial Services, and directed defendant to "[a]void all contact with known members, former &/or current, of the American National Socialist Workers Party." (R. 10-1, Order Setting Conditions of Release, p. 3).

On October 29, 2009, the government filed a motion for a protective order to prevent the public dissemination of discovery materials. (R. 11, Application for Protective Order). The government stated as a basis for its motion the fact that "[d]efendant has previously posted on the Internet the personal information of individuals who oppose his ideology in an effort to intimidate them." (R. 11, Application for Protective Order, p. 2). As examples, the government asserted: (1) defendant posted the address and a photograph of the home of a professor who disagreed with defendant's ideology; (2) ANSWP routinely posted on the Internet personal information of persons who oppose ANSWP's ideology; and, (3)

defendant targeted the victim in this case, Mr. Upthegrove, after an ANSWP member posted his address and phone number and photographs of his family and his co-workers. (R. 11, Application for Protective Order, p. 2). The government argued "there is reasonable cause to believe Defendant will likely use discovery materials to engage in similar acts of intimidation and harassment against the victim and cooperating witnesses." (R. 11, Application for Protective Order, pp. 2-3). Defendant did not object to the protective order.[4] The district court issued a protective order on November 4, 2009, explaining that a protective order was necessary, in part, to "ensure the safety of witnesses, protect the personal information of individuals involved in the case, preserve the integrity of the discovery process and serve the ends of justice." (R. 13, Order, pp. 2-3).

On January 6, 2010, the government moved to revoke defendant's pretrial release. (R. 19, Motion to Revoke Order of Release). As the basis for its motion, the government alleged that: (1) on October 13, 2009, and October 14, 2009, defendant, without permission from Pretrial Services, posted four messages on a

[4] Defendant indicated that a global objection would be premature, given that discovery had not yet commenced, and indicated his intention not to object provided two modifications (not relevant here) were added to the order. (R. 12, Defendant's Response to Government's Request for Protective Order, pp. 1-2).

white supremacist Internet message board[5]; (2) on December 10, 2009, defendant again posted two messages on a white supremacist Internet message board; (3) from December 12 through December 14, 2009, defendant used the Internet to send several emails to a radio talk show host who supported defendant's ideology; (4) on December 14, 2009, defendant communicated with the talk show host via Skype, an Internet-based telephone service; and (5) during the communication with the radio talk show host, defendant acknowledged that he was violating the district court's order and asked the host for help in concealing that fact. (R. 19, Motion to Revoke Order of Release, p. 3). The government explained that defendant's "unfettered and unmonitored use of the Internet poses a particular risk to witness safety given that Defendant has already been given a large amount of discovery materials containing information about government witnesses." (R. 19, Motion to Revoke Order of Release, p. 4).

At a hearing to consider the government's motion on January 26, 2010, defendant admitted the allegations. (R. 56, 1/26/10 Transcript (Violation Hearing), p. 5). The district court expressly found that defendant violated the terms and conditions of his release (R. 56, 1/26/10 Transcript, p. 5), and proposed

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[5] Defendant refused to permit Pretrial Services to install monitoring equipment on his computer; instead, per an option set forth in his conditions of pretrial release, he relinquished control of his personal computer to Pretrial Services. (R. 19, Motion to Revoke Order of Release, p. 2).

amendments to the conditions (R. 56, 1/26/10 Transcript, pp. 6-8). Specifically, the court proposed GPS monitoring of defendant, and recommended continuing the prohibition on accessing "any computer * * *, Internet service provider * * *, bulletin board system or any other public or private computer network or the service at any location, including employment or education, without prior written approval of the United States Pretrial Services and Probation Office of the Court," and contacting "known members, former members and/or current members of the American National Socialist Workers Party." (R. 56, 1/26/10 Transcript, pp. 7-8; see also R. 24, Amended Order Setting Conditions of Release). Defendant had "[n]o objection to any and all of the conditions." (R. 56, 1/26/10 Transcript, p. 8).

At a change of plea hearing on May 17, 2010, defendant entered, pursuant to a plea agreement, a plea of guilty to Count II of the indictment. (R. 57, 5/17/10 Transcript (Change of Plea Hearing), p. 22). The plea agreement, at paragraph 13, states:

> To the degree permitted by the Ohio Code of Professional Responsibility which governs both prosecutors and defense counsel, the defendant waives the right to appeal his guilty plea, conviction, and sentence on any ground, including any appellate right conferred under Title 18, U.S.C. Section 3742. The defendant further agrees not to contest his sentence in any post conviction proceeding, including but not limited to a proceeding under Title 28[,] U.S.C. Section 2255, except in the event and only to the extent that there may be a retroactive amendment to the sentencing guidelines that would be applicable to the defendant. However, the defendant reserves the right to appeal with respect to: (a) any punishment imposed in excess of the statutory maximum, or the terms stated within this agreement; (b)

> any punishment to the extent it constitutes an upward departure from the guideline range deemed most applicable by the sentencing court; and (c) any other issue directly relating to the interpretation, application, or enforcement of this Agreement. This Agreement does not [a]ffect the government's rights and duties as set forth in 18 U.S.C. Section 3742(b).

(R. 33, Plea Agreement, p. 6).

During the plea hearing, the prosecutor summarized the agreement, including the terms of the appellate waiver. (R. 57, 5/17/10 Transcript, pp. 11-16). The district court confirmed with defendant that he had read and understood the terms of the plea agreement, including the terms of the appellate waiver. (R. 57, 5/17/10 Transcript, pp. 16-18). The district court confirmed that defendant's counsel had gone over the plea agreement with defendant, and confirmed with defendant's counsel that defendant understood the terms of the agreement. (R. 57, 5/17/10 Transcript, pp. 16-17). Defendant then entered a plea of guilty, which the district court accepted. (R. 57, 5/17/10 Transcript, pp. 17-22).

The district court held a sentencing hearing on November 8, 2010. Before sentencing defendant, the district court indicated it had considered the sentencing factors set forth in 18 U.S.C. 3553 (R. 55, 11/8/10 Transcript (Sentencing Hearing), p. 16), and explained that it had "reviewed this matter extensively in light of [the court's] familiarity with the entire situation, but in particular in what happened in this case" (R. 55, 11/8/10 Transcript, p. 15). The district court then sentenced defendant to term of 18 months' imprisonment and three years'

supervised release with standard and special conditions, to include prohibitions on accessing any "on-line" computer services and associating with members of ANSWP and other gang or threat group members. (R. 43, Judgment). The district court waived imposition of a fine, but ordered defendant to pay a $100 special assessment. (R. 43, Judgment). Defendant objected to the two special conditions of supervised release set forth above. (R. 55, 11/8/10 Transcript, pp. 20-21). He appealed on November 15, 2010. (R. 44, Notice of Appeal).

SUMMARY OF ARGUMENT

This Court should dismiss defendant's appeal. Defendant signed a plea agreement voluntarily waiving his right to appeal his sentence unless certain conditions, not present here, were met. The district court engaged in an exhaustive Rule 11 plea colloquy with defendant to ensure that defendant entered into the plea agreement – including its waiver provision – knowingly and voluntarily.

If this Court nonetheless considers defendant's appeal, this Court should affirm the district court's judgment. The district court did not abuse its discretion in imposing the two challenged special conditions of supervised release. Although the district court failed to state on the record its reasons for imposing the challenged conditions, the reasons for the conditions are clear from the record, as they were carried over from defendant's pretrial release. Any error by the district court in failing to state its reasons is therefore harmless.

Moreover, the special conditions are reasonably related to the sentencing factors set forth in 18 U.S.C. 3553(a). The defendant gathered personal information about his victim from the Internet, and committed his crime because of his association with the American National Socialist Workers Party. Defendant repeatedly violated the terms of his pretrial release, which included a restriction on his Internet access. Courts have routinely upheld restrictions on Internet access

and associational rights when, as here, they are necessary to protect the public and aid a defendant's rehabilitation.

Finally, this Court can narrowly construe the restriction on defendant's associational rights to avoid any constitutional concerns.

ARGUMENT

I

THE DEFENDANT WAIVED HIS RIGHT TO APPEAL HIS SENTENCE, INCLUDING THE SPECIAL CONDITIONS OF SUPERVISED RELEASE; AS SUCH, THIS COURT SHOULD DISMISS HIS APPEAL

A. Standard Of Review

Whether a defendant validly waived his right to appeal his sentence in a plea agreement is reviewed *de novo*. *United States* v. *Gibney*, 519 F.3d 301, 305 (6th Cir. 2008), cert. denied, 129 S. Ct. 1026 (2009).

B. Discussion

It is well settled that a criminal defendant may waive any right, even a constitutional right, by means of a plea agreement, provided the waiver is made knowingly and voluntarily. *United States* v. *McGilvery*, 403 F.3d 361, 362-363 (6th Cir. 2005); *Gibney*, 519 F.3d at 305-306. The record here clearly indicates that defendant waived his right to appeal his sentence, including the special conditions of supervised release, and did so knowingly and voluntarily.

1. The Plea Agreement Contained A Valid Waiver Of Defendant's Appellate Rights

Following a hearing, the district court accepted the plea agreement reached by the parties on May 17, 2010. (R. 33, Plea Agreement; R. 57, 5/17/2010 Transcript, p. 22). The agreement limits defendant's right to appeal in just three circumstances: (1) if the punishment imposed is in excess of the statutory maximum, or the terms stated in the agreement; (2) if the punishment constitutes an upward departure from the applicable guidelines range; or (3) if the issue on appeal directly relates to the interpretation, application or enforcement of the agreement. (R. 33, Plea Agreement, p. 6).

The plea agreement makes clear that defendant waived his right to appeal his conditions of release except in three circumstances, none of which is applicable here. First, the defendant may appeal if his punishment exceeds either "the statutory maximum, or the terms stated" in the agreement. (R. 33, Plea Agreement, p. 6). Defendant's sentence of 18 months' imprisonment and three years' supervised release does not exceed the statutory maximum for defendant's count of conviction, which is a term of imprisonment of five years and a term of

supervised release of three years.[6] 18 U.S.C. 876(c); 18 U.S.C. 3583(b)(2); (R. 43, Judgment, pp. 2-3, 5).

Nor does defendant's sentence exceed the terms of the plea agreement. The plea agreement required the government to recommend to the district court a

[6] Several courts have held – and this Court has strongly suggested – that special conditions of supervised release are considered part of a defendant's "sentence," such that valid appellate waivers of a defendant's "sentence" preclude appellate review of conditions of supervised release. See, *e.g.*, *United States* v. *Sandoval*, 477 F.3d 1204, 1207-1209 (10th Cir. 2007) (rejecting defendant's challenge to supervised release conditions after executing valid appellate waiver of sentence, because "[s]upervised-release conditions are part of [a defendant's] sentence"); *United States* v. *Joyce*, 357 F.3d 921, 924 (9th Cir.) (dismissing appeal for lack of jurisdiction, where defendant challenged conditions of supervised release after executing valid appellate waiver of sentence, because "sentence" includes supervised release), cert. denied, 543 U.S. 915 (2004); *United States* v. *Andis*, 333 F.3d 886, 892-893 & n.7 (8th Cir.) (en banc) (dismissing appeal where defendant's valid appellate waiver of sentence "undisputed[ly]" included conditions of supervised release; court was required to impose term of supervised release, therefore waiver reached portion of defendant's sentence that involved imposition of a term of supervised release and its conditions), cert. denied, 540 U.S. 997 (2003); *United States* v. *Sines*, 303 F.3d 793, 799 (7th Cir. 2002) (rejecting defendant's challenge to special conditions of supervised release where defendant agreed not to challenge any sentence within the bounds of the plea agreement, reasoning that "unanticipated sentences do not create grounds for negating the terms of a plea agreement"); *United States* v. *Lee*, 502 F.3d 447, 449 (6th Cir. 2007) (holding that defendant's waiver of appeal "may arguably foreclose" his challenge to special conditions of supervised release, but reaching merits of claim because the case "possibly implicates ineffective assistance by his counsel"); but see *id.* at 451 (Batchelder, J., dissenting) (opining that court "will never have jurisdiction over [defendant's] challenge to conditions of his supervised release, as it is clear that he has waived his right to assert these claims on appeal"); cf. *United States* v. *Gibney*, 519 F.3d 301, 305-306 (6th Cir. 2008) (holding defendant waived right to appeal restitution order, where defendant waived right to appeal his sentence), cert. denied, 129 S. Ct. 1026 (2009).

reduction in defendant's offense level pursuant to U.S. Sentencing Guidelines § 3E1.1(a) (R. 33, Plea Agreement, pp. 3-4), which the government did (R. 55, 11/8/10 Transcript, p. 4) and which the district court accepted (R. 55, 11/8/10 Transcript, pp. 4-5). The plea agreement also prohibited the government from seeking an upward departure (R. 33, Plea Agreement, p. 4), which it did not (R. 55, 11/8/10 Transcript, pp. 13-14).

Second, defendant may appeal if his punishment constitutes an upward departure from the guidelines range. It does not, and defendant makes no argument to the contrary.

Finally, defendant may appeal an issue relating to the interpretation, application, or enforcement of the plea agreement. (R. 33, Plea Agreement, p. 6). Defendant makes no such claim on appeal.

2. Defendant's Waiver Of His Appellate Rights Was Knowing And Voluntary

This Court upholds a waiver of appeal where, as here, the record clearly demonstrates that waiver was part of the plea agreement, defendant had the opportunity to read and review the plea agreement with counsel, defendant was informed in open court that he had waived his right to appeal his sentence, and the district court found defendant made a knowing waiver of those rights. *United States* v. *Swanberg*, 370 F.3d 622, 626 (6th Cir. 2004).

The record here demonstrates that defendant understood the waiver contained in the plea agreement and consented to it voluntarily. Indeed, defendant has not produced any evidence to suggest otherwise or asserted any claim that the plea was not knowing and voluntary.

At defendant's change of plea hearing, the district court conducted a thorough Rule 11 colloquy. See Fed. R. Crim. P. 11. At the court's request, the government summarized the plea agreement, including the waiver provision, and the court reviewed the agreement's terms with defendant in detail, including the waiver provision. (R. 57, 5/17/10 Transcript (Change of Plea Hearing), pp. 11-18). The district court confirmed that defendant understood the terms of the plea agreement, including the waiver provision (R. 57, 5/17/10 Transcript, pp. 16, 18), and also confirmed that defense counsel reserved no doubt that defendant understood the terms of the plea agreement, including the waiver provision (R. 57, 5/17/10 Transcript, p. 17). Given these circumstances, defendant entered into his plea agreement – and accepted the waiver of appellate rights contained therein – knowingly and voluntarily. See *United States* v. *Fleming*, 239 F.3d 761, 764 (6th Cir. 2001).

Because defendant knowingly and voluntarily waived his right to appeal, this Court should dismiss his appeal.

II

ASSUMING THIS COURT FINDS THAT DEFENDANT DID NOT WAIVE HIS APPELLATE RIGHTS, THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IMPOSING SPECIAL CONDITIONS OF SUPERVISED RELEASE

A. Standard Of Review

This Court reviews the imposition of a special condition of supervised release for abuse of discretion. *United States* v. *May*, 568 F.3d 597, 607 (6th Cir. 2009).

B. Discussion

The district court did not abuse its discretion when it imposed special conditions of supervised release as part of defendant's sentence. Federal law requires a district court to impose specific conditions on a term of supervised release if certain circumstances are present. 18 U.S.C. 3583(d). Moreover, federal law permits a district court to impose "special" conditions of supervised release that the district court deems appropriate. *Ibid.*; see also *United States* v. *Modena*, 302 F.3d 626, 636 (6th Cir. 2002), cert. denied, 537 U.S. 1145 (2003).

In determining whether a district court appropriately exercises its discretion in imposing special conditions of supervised release, this Court reviews the district court's decision for procedural and substantive compliance with statutory factors. *United States* v. *Carter*, 463 F.3d 526, 528-529 (6th Cir. 2006). The procedural component is satisfied where the district court has stated its reasons for imposing a

particular sentence, including its rationale for mandating any special conditions of supervised release. *Ibid.* Failing to do so, however, is harmless error "if the supporting reasons are evident on the overall record, and the subject special condition is related to the dual major purposes of probation, namely rehabilitation of the offender and enhancement of public safety." *United States* v. *Kingsley*, 241 F.3d 828, 836 (6th Cir.), cert. denied, 534 U.S. 859 (2001).

The substantive component is satisfied where the special condition of supervised release meets three requirements. First, the condition must be "reasonably related to" several sentencing factors set forth in 18 U.S.C. 3553(a). 18 U.S.C. 3583(d)(1). These include:

> the nature and circumstances of the offense and the history and characteristics of the defendant, and the need to afford adequate deterrence, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

United States v. *Ritter*, 118 F.3d 502, 504 (6th Cir. 1997); see 18 U.S.C. 3583(d)(1), 3553(a)(1) & (a)(2)(B)-(D); U.S. Sentencing Guidelines § 5D1.3(b). Second, any special condition of supervised release must involve no greater deprivation of liberty than is reasonably necessary to achieve the sentencing purposes set forth in 18 U.S.C. 3553(a)(2)(B)-(D). 18 U.S.C. 3583(d)(2); see also *Carter*, 463 F.3d at 529. And third, the special condition of supervised release must be "consistent with any pertinent policy statement issued by the Sentencing

Commission." 18 U.S.C. 3583(d)(3); see also *Carter*, 463 F.3d at 529. A condition must satisfy all three requirements, but need not satisfy every factor and purpose set forth in each of the first two requirements. *Carter*, 463 F.3d at 529.

1. The District Court's Failure To Provide Specific Reasons For Imposing The Special Conditions Of Supervised Release Was Harmless Error; The Record Makes Clear That The Special Conditions Of Supervised Release Are Reasonably Related To The Statutory Sentencing Factors

The government acknowledges that the district court here did not expressly state on the record its reasons for imposing the two challenged special conditions of release. Doing so was harmless error, however, as the reasons supporting the conditions are evident from the overall record. *Kingsley*, 241 F.3d at 836; *United States* v. *Berridge*, 74 F.3d 113, 118-119 (6th Cir. 1996).

The district court explained at the sentencing hearing that the sentence was reached after the court reviewed the matter "extensively" and was based on the court's "familiarity with the entire situation" and a review of the sentencing factors set forth in 18 U.S.C. 3553. (R. 55, 11/8/10 Transcript, pp. 15-16). As explained below, the record in this case makes clear that the special conditions of supervised release were imposed because: (1) defendant and other members of ANSWP routinely posted on the Internet personal information about individuals who oppose ANSWP's ideology; (2) defendant failed to comply with similar terms that governed his pretrial release; and (3) a restriction on Internet access and

association with ANSWP members and others espousing similar ideology was necessary to protect the public and to prevent defendant's recidivism.

The special conditions of defendant's supervised release were nearly identical to the terms and conditions of defendant's pretrial release. These conditions were initially imposed by the district court in Oregon (*United States* v. *Jones*, 3:09-473 (D. Ore.), R. 5, Order Setting Conditions of Release), and were re-imposed by the district court below (R. 10-1, Order Setting Conditions of Release). The basis for the conditions is obvious from the record. For example, as set forth in the government's motion for a protective order, defendant previously posted on the Internet the personal information of individuals who opposed his ideology. (R. 11, Application for Protective Order, p. 2.). Defendant was not alone in doing so; in fact, members of ANSWP routinely posted on the Internet personal information of people who opposed the organization's ideology. (R. 11, Application for Protective Order, p. 2). Indeed, defendant targeted the victim in this case, Mr. Upthegrove, after another member of ANSWP posted Mr. Upthegrove's personal information on the Internet. (R. 11, Application for Protective Order, p. 2). The district court granted the motion after finding reasonable cause to believe that it was necessary to ensure the safety of witnesses and protect the personal information of individuals involved in the case. (R. 13, Order, pp. 2-3).

The government later filed a motion to revoke defendant's pretrial release after defendant posted messages on a white supremacist Internet message board, sent emails to a radio talk show host who shared defendant's ideology, communicated with the radio talk show host using an Internet-based communications service, and acknowledged to the radio host that doing so was in violation of his terms of pretrial release. (R. 19, Motion to Revoke Order of Release). Defendant *admitted* to the district court that he had violated the terms of his release (R. 56, 1/26/10 Transcript, p. 5), causing the district court to impose even stricter release terms (R. 24, Amended Order Setting Conditions of Release).

Moreover, at defendant's change of plea hearing, defendant *agreed* with the government's proffer of evidence that: (1) he was a director of ANSWP; (2) ANSWP advocated white supremacist ideology; (3) he sent more than 150 flyers containing racist text regarding the death of Tarika Wilson to residences in Lima, Ohio; (4) he targeted his victim, Mr. Upthegrove, because of Mr. Upthegrove's advocacy on behalf of African Americans in Lima, Ohio; and, (5) by mailing a noose to Mr. Upthegrove's home, he intended to threaten Mr. Upthegrove and stop Mr. Upthegrove's advocacy efforts. (R. 57, 5/17/10 Transcript, pp. 19-21).

The record shows that the defendant and members of his organization use the Internet to obtain and share information with each other about potential targets. Thus, restricting defendant's Internet access absent approval from the court and

restricting his association with members of ANSWP[7] is reasonably designed both to protect the public from future criminal acts by defendant, and to help defendant "avoid[] the conditions that led him to commit his current offense." *Berridge*, 74 F.3d at 119. These goals take into consideration, and fall squarely within, the sentencing factors set forth in 18 U.S.C. 3553(a) – they account for the nature and circumstances of the offense and the history and characteristics of the defendant, and are necessary to protect the public from further crimes of the defendant and to afford adequate deterrence. *Ritter*, 118 F.3d at 504; see also 18 U.S.C. 3553(a)(1) & (2)(B)-(C). And although the district court did not articulate these specific reasons on the record, the reasons for the special conditions are "relatively obvious" and "quite clear." *Berridge*, 74 F.3d at 119 (finding harmless district court's error in failing to provide specific reasons for imposing special condition of supervised release where the reasons for the special condition were "relatively obvious" and "quite clear," because condition would assist defendant "in avoiding the conditions that led him to commit his current offense"); *Kingsley*, 241 F.3d at 836-840 (upholding, as special conditions of supervised release following term of imprisonment for weapons violation, random warrantless searches of the defendant at the discretion of probation officer, and suspension of defendant's driving

[7] We address the restriction on associating with any member of a gang or threat group in Section II.B.2.c.

privileges during period of supervised release, where district court did not provide specific reasons for conditions at sentencing, but where conditions advanced goals of probation and were supported by record); see also *United States* v. *Brogdon*, 503 F.3d 555, 564 (6th Cir. 2007) (finding harmless district court's error in failing to provide specific reasons for imposing conditions related to sex-offender convictions following defendant's conviction for felon-in-possession, where reasons for conditions were "more than amply supported by the record and reasonably relate[d] to the rehabilitation of the Defendant and the enhancement of public safety"), cert. denied, 552 U.S. 1211 (2008).

Because any error by the district court in failing to state explicitly its reasons for imposing the special conditions of supervised release was harmless, this Court does not need to remand the case to the district court to provide the court with an opportunity to state its reasons on the record. See Jones Br. 8.

2. The District Court Did Not Abuse Its Discretion In Imposing The Special Conditions Of Release

a. Restriction On Internet Access

The district court here did not abuse its discretion in prohibiting defendant from accessing any online computer service without prior approval from the court. Restricting a defendant's Internet access may protect "the welfare of the community * * * by keeping an offender away from an instrumentality of his offenses." *United States* v. *Johnson*, 446 F.3d 272, 281 (2d Cir.), cert. denied, 549

U.S. 953 (2006). Courts have thus upheld special conditions of release that restrict Internet access where necessary to serve "as an external control" on a defendant's illegal actions. *Id.* at 281-282; see also *United States* v. *Crandon*, 173 F.3d 122, 127-128 (3d Cir.), cert. denied, 528 U.S. 855 (1999); *United States* v. *Alvarez*, 478 F.3d 864, 868 (8th Cir. 2007) (affirming condition prohibiting residential Internet access where, due to defendant's characteristics, "severe restrictions may [have been] the only way to prevent [defendant] from accessing prohibited material" due to a documented "problem with self-control"). True, many courts have vacated outright bans on Internet access as unnecessarily restrictive where monitoring or periodic inspections of a defendant's computer would suffice. *United States* v. *Sofsky*, 287 F.3d 122, 126-127 (2d Cir. 2002); *United States* v. *Freeman*, 316 F.3d 386, 392 (3d Cir. 2003); *United States* v. *Perazza-Mercado*, 553 F.3d 65, 73-74 (1st Cir. 2009). But in this case, defendant previously *refused* to have monitoring software installed on his computer, opting instead to surrender his computer to the court. (R. 19, Motion to Revoke Order of Release, p. 2). Defendant also received a relatively short term of imprisonment. Restrictive conditions on his release are therefore warranted to ensure that defendant can conform his conduct to the law once released. Moreover, defendant may access the Internet after receiving permission from the court. Defendant's Internet restriction is thus of limited duration and not unconditional. See *United States* v. *Thielemann*, 575 F.3d 265,

278 (3d Cir. 2009) (upholding special condition of supervised release restricting defendant's access to Internet for ten years, in part because defendant could access Internet if granted permission by Probation Office). Because defendant previously refused to have his computer monitored while on pretrial release, and because defendant routinely violated the terms of his pretrial release by accessing the Internet and took steps to conceal those violations from the court, the special condition of release imposed here was not a greater deprivation of liberty than reasonably necessary to achieve the statutory sentencing factors set forth above. 18 U.S.C. 3583(d)(2); see also *Carter*, 463 F.3d at 529.

b. Restriction On Right Of Association

The district court here did not abuse its discretion in prohibiting defendant from associating with any member of the American National Socialist Workers Party, or with any member of a gang or hate group. This Court, and many others, have recognized that "'individual fundamental rights safeguarded by the United States Constitution may be denied or limited by judicially exacted special conditions of supervised release, as long as those restrictions are directly related to advancing the individual's rehabilitation' and preventing recidivism." *May*, 568 F.3d at 608 (quoting *Kingsley*, 241 F.3d at 839 n.15). Courts have thus routinely upheld special conditions of release that may otherwise infringe on a defendant's First Amendment right of freedom of association, provided the restriction is

"primarily designed to meet the ends of rehabilitation and protection of the public." *Ritter*, 118 F.3d at 504. To that end, the Ninth Circuit held that a district court did not abuse its discretion in imposing conditions of probation that prohibited the defendant, who was convicted on one count of unlawfully exporting firearms from the United States to the United Kingdom, from: (1) participating in any American Irish Republican movement, (2) belonging to or participating in any Irish or Irish Catholic organization or group, (3) visiting any Irish pubs, and (4) accepting any employment that would directly or indirectly associate the defendant with any Irish organization or movement. *Malone* v. *United States*, 502 F.2d 554, 555-557 (9th Cir. 1974), cert. denied, 419 U.S. 1124 (1975). The *Malone* Court reasoned that the defendant's crime "stemmed from high emotional involvement with Irish Republican sympathizers," *id.* at 556, and, as such, the restrictions were "reasonably related to the goals of probation and the accomplishment of public order and safety," *id.* at 557.

More recently, the Seventh Circuit held that a district court did not abuse its discretion in prohibiting a defendant, who was a member of an organization loosely associated with white supremacist "skinhead" and "neo-Nazi" groups and who pleaded guilty to one count of possession of an unregistered firearm, from "participat[ing] in, or associat[ing] with" members of "skinhead" or "neo-Nazi" organizations. *United States* v. *Showalter*, 933 F.2d 573, 574-576 (7th Cir. 1991).

The defendant in *Showalter* challenged the associational aspect of his condition of supervised release on the ground that it was insufficiently clear to comply with 18 U.S.C. 3563(b)(7),[8] which allowed a district court to order a defendant to "refrain from frequenting specified kinds of places or from associating unnecessarily with specified persons." The Seventh Circuit disagreed. *Showalter*, 933 F.2d at 575. Relying on *Malone*, the Seventh Circuit concluded that the restriction was justified by the district court's concern that the defendant "not involve himself with those who might fuel his proclivity for lawbreaking." *Ibid.* The court explained that the district court correctly concluded that the defendant "need[ed] to be separated from other members of white supremacist groups to have a chance of staying out of trouble." *Id.* at 576; see also *Porth* v. *Templar*, 453 F.2d 330, 334 (10th Cir. 1971) ("It is also clear that the court has the power to restrict the probationer's association with groups that would palpably encourage him to repeat his criminal conduct.").

This Court has upheld similar restrictions. In *May*, this Court held the district court did not abuse its discretion when ordering the defendant "to have no association with the Financial Services Industry, in any capacity whatsoever, except as a consumer." 568 F.3d. at 608. The defendant in *May* was convicted of tax evasion and willful failure to account for and pay payroll taxes. *Id.* at 600.

[8] This provision is currently set forth at 18 U.S.C. 3563(b)(6).

This Court reasoned that because the defendant used his position as head of a financial services company to embezzle money meant for his payroll taxes, "the district court would be understandably concerned about [the defendant]'s working in the financial services industry again when he had already demonstrated that he could not be trusted with other people's money." *Id.* at 608; see also *United States* v. *Bortels*, 962 F.2d 558, 559-560 (6th Cir. 1992) (upholding special condition of supervised release prohibiting defendant from associating with fiancé, where defendant endangered others in a high-speed chase to protect her fiancé from arrest and district court noted that defendant's rehabilitation would be aided if she avoided contact with fiancé during period of supervised release). Because defendant's crime was directly related to his membership in ANSWP, restricting defendant's association with members of that organization and others that share a similar intolerant ideology is necessary to aid defendant's rehabilitation. *Bortels*, 962 F.2d at 559-560; *Showalter*, 933 F.2d at 576.

c. The Special Condition Of Supervised Release Restricting Defendant's Right Of Association Is Constitutional

Contrary to defendant's assertion (Jones Br. 7), the associational restriction imposed in this case is not unconstitutionally vague. The Seventh Circuit rejected an argument similar to defendant's in *United States* v. *Schave*, 186 F.3d 839 (7th Cir. 1999). The defendant in *Schave* was convicted after selling a number of explosives to an undercover agent posing as a member of New Order, a white

supremacy organization. *Id.* at 840. As a special condition of supervised release, the court prevented Schave from "associat[ing], either directly or indirectly, with any member or organization which espouses violence or the supremacy of the white race." *Id.* at 843. Schave challenged this condition as impermissibly vague. *Ibid.* The Seventh Circuit rejected Schave's argument. *Id.* at 843-844. Noting that the condition was "inartfully drafted," and "potentially overbroad," the court of appeals reasoned that the condition's "potential constitutional difficulties are easily avoided through an appropriate limiting construction." *Ibid.* The court of appeals recognized that the district court would be aware of the limitations on its own power, and would not have intended the restriction to cover a range of activities not supported by its purpose. *Id.* at 844. The court of appeals, "interpret[ing] the restriction in light of the crime for which [the defendant] was charged and which necessitated the imposition of conditions of supervised release," concluded that the restriction "reach[ed] only those activities which would reasonably relate to the danger of [the defendant] reassociating with white supremacist groups or organizations which pursue their aims through violent means." *Ibid.* Viewed in this manner, the Seventh Circuit concluded that "the condition provides sufficient notice of the conduct prohibited and hence is not unconstitutionally vague." *Ibid.* A similar interpretation is warranted in this case, and avoids the constitutional concerns raised by defendant. *Ibid.*; see also *United States* v. *Loy*, 237 F.3d 251,

269-270 (3d Cir. 2001) (interpreting associational restriction narrowly so as to avoid potentially overbroad or vague application).

CONCLUSION

For the reasons stated, this Court should dismiss defendant's appeal; however, if this Court considers defendant's appeal, this Court should affirm defendant's sentence.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached BRIEF FOR THE UNITED STATES AS APPELLEE:

(1) complies with Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 7139 words; and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font.

s/Angela M. Miller
ANGELA M. MILLER
Attorney

Dated: April 15, 2011

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court using the CM/ECF system on April 15, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Angela M. Miller
ANGELA M. MILLER
Attorney

ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record Entry Number	Title
1	Indictment
7	Rule 5(c)(3) Documents
10-1	Order Setting Conditions of Release
11	Application for Protective Order
12	Defendant's Response to Government's Request for Protective Order
13	Protective Order
19	Motion to Revoke Order of Release
24	Amended Order Setting Conditions of Release
33	Plea Agreement
43	Judgment
44	Notice of Appeal
54	10/20/09 Transcript
55	11/8/10 Transcript
56	1/26/10 Transcript
57	5/17/10 Transcript