Case Brief: *United States v. Ellis*[*]

INTRODUCTION

One topic sure to inflame the emotions of any American and inspire a wide range of opinions is what to do when an offender is convicted on child pornography charges. Not only must the question of punishment be addressed, but also, the need for rehabilitation to permit reentry into society. Further, what do we do when a sex offender repeatedly violates the conditions of their release? In the Fourth Circuit's recent decision in *United States v. Ellis*,[1] the court addressed just this question. The court ultimately vacated the special conditions of supervised release imposed by the U.S. District Court for the Western District of North Carolina on such an offender.[2] The Fourth Circuit found the court-imposed conditions banning access to pornography and the internet to be overly restrictive and not "reasonably related" to Ellis's prior criminal convictions, release violations, or ongoing treatment.[3]

FACTS OF THE CASE

In 2005 and 2006, Robert Dale Ellis was convicted under North Carolina law on charges relating to his possession of child pornography.[4] Federal law required Ellis to register as a sex offender based on these convictions.[5] In 2013, Ellis pled guilty to a federal charge of failing to register as a sex offender.[6] Ellis was subsequently sentenced to fifteen months in prison and a five-year term of supervised release with standard sex offense conditions.[7] Ellis was released from prison in June 2014.[8] Throughout the next year, Ellis struggled with homelessness and mental health issues,[9] as well as "'a serious pornography and sex addiction.'"[10] Due to repeated violations of the conditions of his supervised

1. 984 F.3d 1092 (4th Cir. 2021).
2. *Id.* at 1095.
3. *Id.*
4. *Id.* at 1103 ("Mr. Ellis was convicted of second-degree and third-degree sexual exploitation of a minor under North Carolina law. Those offenses penalized the possession of child pornography, . . . and its duplication or distribution where the defendant did not directly facilitate the involvement of the child victim depicted . . . .").
5. *Id.* at 1095.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at 1095–96.
10. *Id.* at 1106 (Quattlebaum, J., concurring).

release, such as traveling without permission and failing to cooperate with his treatment programs, Ellis was imprisoned two more times.[11]

Following release from a sentence imposed in 2018, Ellis once again found himself charged with violations of his conditional release, "including a failure to comply with GPS monitoring and required treatment programs and dishonesty with the probation officer."[12] Ellis was sentenced to eleven months of imprisonment and yet another five-year term of supervised release.[13] Against Ellis's objections, in setting the conditions for release, "the [district] court concluded that Mr. Ellis 'shall [ ] have no Internet access' and 'shall not possess any legal or illegal pornographic materials, nor shall [he] enter any location where such materials can be accessed, obtained, or viewed, including pictures, photographs, books, writings, drawings, videos, or video games.'"[14] The district court "found the conditions were justified to compel Mr. Ellis into complying with his treatment."[15] Ellis filed an appeal challenging the special conditions.[16] On appeal, the Fourth Circuit found both conditions could not be sustained as "reasonably related" under 18 U.S.C. § 3583(d)(1) and that each were overbroad under 18 U.S.C. § 3583(d)(2).[17] As such, the court "conclude[d] that the district court abused its discretion in imposing an outright ban on internet access and on possessing legal pornography or entering any location where it may be accessed."[18]

LEGAL ISSUES AND OUTCOME

In reaching its decision regarding Ellis's conditions of release, the majority first stated the relevant legal framework. In crafting conditions of supervised release, a sentencing court must comply with the requirements listed in 18 U.S.C. § 3583(d).[19]

Section 3583(d) requires that special conditions of supervised release be: (1) "reasonably related" to the nature and circumstances of the offense, the history and characteristics of the defendant, and the statutory goals of deterrence, protection of the public, and rehabilitation; (2) "no greater [a] deprivation of liberty than is reasonably necessary" to achieve those statutory

11. *Id.* at 1096–97 (majority opinion).
12. *Id.* at 1097.
13. *Id.*
14. *Id.* at 1098 (citation omitted).
15. *Id.* at 1097–98.
16. *Id.* at 1098.
17. *Id.* at 1095.
18. *Id.* at 1106.
19. *Id.* at 1098 (citing United States v. Van Donk, 961 F.3d 314, 322 (4th Cir. 2020)).

goals; and (3) consistent with any relevant policy statements issued by the Sentencing Commission.[20]

Ellis asserted that his pornography and internet bans were "insufficiently related to his conduct, history, and rehabilitation and are more restrictive than is reasonably necessary."[21]

In evaluating the restrictions on access to pornography during supervised release, the *Ellis* majority relied heavily on its recent decision in *United States v. Van Donk*.[22] The court in *Van Donk* provided a simple rule for evaluating such restrictions: "Restrictions on otherwise legal pornography are permissible under § 3583(d) where the district court adequately explains why they are appropriate, and the record supports such a finding."[23] In *Van Donk*, the court upheld a pornography restriction largely due to the testimony of a treatment provider explaining that the ban was necessary to "to keep [the defendant] from recidivating and to treat his pornography addiction."[24] In contrast, the *Ellis* majority pointed out that "[t]he government put forward no individualized evidence linking pornography to Mr. Ellis's criminal conduct or rehabilitation and recidivation risk."[25] Further, Ellis's use of pornography was not the basis of any violation, with the majority noting even his lies about pornography use constituted violative conduct of dishonesty, rather than the use itself being violative.[26] Instead, the government advanced the idea that the pornography restriction was a necessary incentive for Ellis's compliance with treatment because it would divert him from "occasions of sin."[27] However, as the majority noted, "[n]othing in § 3583(d), or elsewhere, authorizes a district court to use a condition of release as a 'stick' to encourage desired behavior by a defendant."[28] The court found the condition to be arbitrary and not directly linked to deterrence of criminal conduct, thus failing to create an adequate basis to satisfy the § 3583(d) reasonably related standard.[29]

The majority also took particular issue with the spatial component of Ellis's pornography restriction. Under the terms of the condition, "pornography" referred to any "'visual depiction involv[ing] . . . a [person] engaging in sexually explicit conduct,' which includes 'actual or simulated sexual

20. *Id.* (first citing 18 U.S.C. § 3583(d); then citing United States v. McMiller, 954 F.3d 670, 676 (4th Cir. 2020)).

21. *Id.*

22. 961 F.3d 314 (4th Cir. 2020).

23. *See id.* at 322 (citations omitted).

24. *Id.* at 323.

25. *Ellis*, 984 F.3d at 1099.

26. *See id.* at 1100 ("Mr. Ellis violated his release by travelling outside the judicial district without permission, skipping therapy appointments, and lying to his probation officer, among other similar violative conduct.").

27. *Id.*

28. *Id.*

29. *Id.* at 1100, 1102.

intercourse,' 'masturbation,' or 'exhibition of the anus, genitals, or pubic area.'"[30] By restricting Ellis from being physically present in any location where such materials could be accessed, the court worried Ellis would not only be barred from entering "many bookstores, gas stations, museums, and art galleries," but further, that "the prohibition could be read to cover any location that allows access to a device that can browse the web."[31] While the government argued the limitation to "pornographic material" sufficiently constrained the condition, the breadth of potential locational restrictions led the majority to state that "the district court could have tailored a restraint that more specifically targets the places where, and methods by which, 'pornographic materials' can be accessed."[32] The majority concluded the condition "impermissibly restricts more liberty than is reasonably necessary," and as such, failed to conform with the requirements of § 3583(d)(2).[33]

The majority additionally considered many of the same arguments when evaluating the outright ban on Ellis's internet access. The government argued that "because Mr. Ellis was convicted of a child pornography offense, admitted to legal pornography use, and failed to cooperate with sex offender treatment," the ban met § 3583(d)(1)'s "reasonably related" requirement.[34] The majority disagreed and noted that while the crimes Ellis was convicted of "are often carried out online, those convictions alone do not justify an internet ban under § 3583(d) absent some evidence of Mr. Ellis's own illegal internet activity."[35] However, the majority concluded that "absent some evidence linking his offense or criminal history to unlawful use of the internet," the internet ban could not be reasonably related.[36] Because Ellis's convictions and supervised release violations did not involve the internet, the evidentiary standard was not met[37] and thus, the internet ban could not be upheld as reasonably related.[38]

The majority concluded the complete ban on internet use was overbroad.[39] The court opined that "[a] complete ban on internet access is a particularly

30. *Id.* at 1101 (citing 18 U.S.C. § 2256(2)(A), (8)).

31. *Id.* (citation omitted).

32. *Id.* at 1101–02.

33. *Id.* at 1101.

34. *Id.* at 1102.

35. *Id.* at 1103 (first citing United States v. Burroughs, 613 F.3d 233, 243 (D.C. Cir. 2010); then citing United States v. Peterson, 248 F.3d 79, 82–83 (2d Cir. 2001)).

36. *Id.* at 1102. The court cited four other circuits that reached the same conclusion. *Id.* (first citing United States v. Eaglin, 913 F.3d 88, 95–99 (2d Cir. 2019); then citing United States v. Ramos, 763 F.3d 45, 61–62 (1st Cir. 2014); then citing United States v. Baker, 755 F.3d 515, 525–26 (7th Cir. 2014); and then citing *Burroughs*, 613 F.3d at 242–43).

37. *Id.* at 1102–03.

38. *Id.*

39. *Id.* at 1104.

broad restriction that imposes a massive deprivation of liberty."[40] Due to the breadth of the ban and its potential impact on reentry into society, the majority pointed out such a condition "will rarely be the 'least restrictive alternative.'"[41] The court referenced solutions that would be much more tailored, such as potentially barring access to certain websites and web services, which could be enforced by "monitoring software and computer inspection."[42] As another breadth argument, the court also mentioned that the majority of circuits have deemed a complete ban on internet access to be overbroad "even where the record contains evidence of non-contact child pornography activity, or similar conduct, on the internet."[43] Taken together, the court found the ban could not be deemed "reasonably necessary" under § 3583(d)(2).[44]

In a short concurrence, Judge Quattlebaum stated that while "the pornography and internet bans here involve a greater liberty deprivation than is reasonably necessary," the majority incorrectly concluded that "the bans were not reasonably related to Ellis'[s] history and treatment under § 3583(d)(1)."[45] Judge Quattlebaum noted that the latest restrictive conditions were the end result of increasingly restrictive conditions applied each time Ellis's supervised release was revoked.[46] To ensure Ellis received the treatment he desperately needed, the district court imposed conditions it thought would assure compliance.[47] While the conditions were overbroad, in Judge Quattlebaum's opinion, "the bans were sufficiently related to Ellis' 'history and characteristics' and 'the need' to provide Ellis with 'correctional treatment in the most effective manner,'" and thus, reasonably related under § 3583(d)(1).[48]

HISTORY AND CONTEXT

Restrictions on access to the internet have significant First Amendment implications, particularly in an ever-modernizing world. The U.S. Supreme Court recently issued an opinion in *Packingham v. North Carolina*,[49] in which the Court struck down a North Carolina statute that made it a felony for sex offenders to access social media sites.[50] Even barring access to this subset of the internet was found to be an impermissible prohibition on "what for many are

40. *Id.* (first citing Packingham v. North Carolina, 137 S. Ct. 1730, 1737–38 (2017); then citing United States v. Lacoste, 821 F.3d 1187, 1191 (9th Cir. 2016); and then citing United States v. Voelker, 489 F.3d 139, 145 (3d Cir. 2007)).

41. *Id.* (citing United States v. Holm, 326 F.3d 872, 878 (7th Cir. 2003)).

42. *See id.* (citation omitted).

43. *Id.* at 1104–05 (citing *Holm*, 326 F.3d at 878)).

44. *Id.* at 1105.

45. *Id.* at 1106 (Quattlebaum, J., concurring).

46. *See id.* at 1106–07.

47. *See id.*

48. *Id.* at 1107 (citing 18 U.S.C. § 3553(a)(1), (2)(D)).

49. 137 S. Ct. 1730 (2017).

50. *Id.* at 1738.

the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge."[51] The question of a full or partial internet ban's permissibility in the context of a sex offender's supervised release is, by necessity, answered on a case-by-case basis.

The Fourth Circuit appears to be teasing that line out in the wake of *Ellis*. In *United States v. Hamilton*,[52] a convicted sex offender appealed a condition of his supervised release that prohibited him from accessing the internet except for reasons approved in advance by his probation officer, arguing that the prohibition was overbroad and not sufficiently related to his conduct.[53] The *Hamilton* court explained that when there is evidence of online criminal conduct by a sex offender, the court must distinguish between (a) cases that involve "non-contact child pornography activity, or similar conduct . . . , in which a total ban sweeps too broadly . . . and [(b)] cases in which there is contact with a minor . . . ," which may warrant a total internet ban.[54] In *Hamilton*, the defendant specifically used the internet to entice minors to "send him sexually explicit pictures," and subsequently perpetrated rape facilitated by the internet.[55] Further, the defendant violated a protective order in trying to contact his victim, "suggest[ing] that a more narrowly tailored ban is not sufficient to meet the statutory goal of 'protect[ing] the public from further crimes of the defendant.'"[56] The court also noted that § 3583 "allows for the modification of supervised release if 'such action is warranted by the conduct of the defendant released and the interest of justice.'"[57] Thus, conditions that could potentially be overbroad based on changed facts and circumstances are subject to refinement as needed, particularly when internet use is curtailed.[58] It appears the Fourth Circuit anchors sufficiency determinations in the particular nature of the internet's involvement in sex crimes.

POTENTIAL IMPACT

As the Court in *Packingham* noted with regard to internet access, "[e]ven convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, particularly if they seek to reform and to pursue lawful and rewarding

51. *Id.* at 1732.

52. 986 F.3d 413 (4th Cir. 2021).

53. *Id.* at 416 ("You must not access the Internet except for reasons approved in advance by the probation officer.").

54. *Id.* at 421–22 (quoting United States v. Ellis, 984 F.3d 1092, 1104–05 (4th Cir. 2021) (citations omitted)).

55. *Id.* at 422.

56. *Id.* (quoting 18 U.S.C. § 3553(a)(2)(C)).

57. *Id.* at 422–23 (quoting 18 U.S.C. § 3583(e)(1)).

58. *See id.* at 423.

lives."[59] Courts have been making increasingly clear that any infringement on the right to access the internet will be analyzed with constitutional scrutiny due to its First Amendment implications. As such, a steady stream of challenges is likely as sex offenders continue to grapple with their ability to participate in modern society. The government should be prepared to defend such restrictions as being sufficiently narrowly tailored. In a recent opinion issued by the Fourth Circuit, in which a defendant challenged restrictions on electronic device use, rather than internet use in particular, the court stated "[s]uch a challenge now requires application of *Ellis* and *Hamilton*."[60] The Fourth Circuit appears determined to ensure sex offenders have a fighting chance to reenter an internet-dependent society and the government would be wise to tailor conditions conducive to that end.

GEORGE DYLAN BOAN**

59. Packingham v. North Carolina, 137 S. Ct. 1730, 1732 (2017).
60. United States v. Whitten, 846 F. App'x 177, 178 (4th Cir. 2021).

** J.D. Candidate, Class of 2022.