

2005 U.S. Dist. LEXIS 52, *

UNITED STATES, v. JEFFREY A. JOHNSON, Defendant.

97-CR-0206, 98-CR-160

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

2005 U.S. Dist. LEXIS 52

January 5, 2005, Decided

PRIOR HISTORY: United States v. Johnson, 1999 U.S. Dist. LEXIS 8819 (N.D.N.Y., June 3, 1999)

DISPOSITION: Defendant's supervised release terms were modified.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant challenged a condition of his supervised release which prohibited him from using the Internet, except for employment purposes, following his conviction on charges including directly using the Internet to entice minors to engage in sex and engaging in physical sexual contact with minors under 18 U.S.C.S. §§ 2422(b), 2423(b), and 2252(a)(1).

OVERVIEW: The original conditions of defendant's supervised release prohibited him from possessing or using a computer to access any on-line computer service (including at his place of employment), and was subsequently modified to allow for Internet access at work. However, defendant was terminated by his court ordered mental health provider for refusing to agree to the terms of their treatment which entirely prohibited his access to the Internet and for being less than forthcoming in treatment. In the instant hearing, the district court altered the terms and conditions of defendant's supervised release to entirely preclude Internet access. Specifically, the court noted that defendant presented as a high risk for re-offending because he was unable to recognize when he entered the offense cycle and had not developed the internal controls (i.e. self control) necessary to prevent re-offending, which suggested that monitoring would be insufficient to protect the community. Finally the court determined that defendant possessed the ability to perform higher skilled jobs, including computer programming, which did not require access to the Internet.

OUTCOME: The conditions of defendant's supervised release were modified to preclude Internet access until such time as the district court was provided sufficient information upon which to conclude that defendant should be entitled to Internet access, either at work or at home.

CORE TERMS: supervised, provider, sexual, probation, monitoring, offender, sex, mental health, child pornography, telephone, picture, mail, mental health treatment, conversation, cycle, re-offending, external, online, adult, chat, place of employment, computer equipment, sexual contact, accessing, progress, movies, sentencing,

convicted, message, ban

LexisNexis(R) Headnotes

Criminal Law & Procedure > Criminal Offenses > Sex Crimes

HN1 There is a high rate of recidivism among sex offenders.

Criminal Law & Procedure > Sentencing > Supervised Release

HN2 Under certain circumstances, a temporary prohibition of access to the Internet as a condition of supervised release may be reasonably related to the purposes of sentencing.

COUNSEL: [***1**] Thomas Spina, Jr., AUSA, Office of the United States Attorney, Albany NY, For the Government.

Kevin E. McCormack, Esq., Office of Kevin E. McCormack, Syracuse NY, Attorney for Defendant.

JUDGES: Thomas J. **McAvoy**, Senior, U.S. District Judge.

OPINIONBY: Thomas J. **McAvoy**

OPINION: MEMORANDUM - DECISION and ORDER

I. INTRODUCTION

Defendant Jeffrey A. Johnson ("Johnson") pled guilty to Counts One (Travel with the Intent to Engage in a Sexual Act with a Minor in violation of 18 U.S.C. § 2423(b)) and Three (Interstate Transportation of Pornographic Material of a Minor in violation of 18 U.S.C. § 2252(a)(1)) of a three count Indictment, and all counts in a separate ten count Information (Counts 1, 2, and 3 charged Johnson with Coercion and Enticement of a Minor to Engage in Sexual Acts in violation of 18 U.S.C. § 2422(b); Count 4 charged Travel with the Intent to Engage in a Sexual Act with a Minor in violation of 18 U.S.C. §§ 2423(b) and 2246(2); Counts 5, 6, 7 and 8 charged the Interstate Transportation of Pornographic Material of a Minor in violation of 18 U.S.C. §§ 2252 [***2**] (a)(1) and 2256(2); Count 9 charged the Possession of Pornographic Materials Depicting Minors in violation of 18 U.S.C. §§ 2252(a)(4) and 2256; and Count 10 was a forfeiture charge). Defendant was sentenced to a term of imprisonment of eighty-eight months, followed by three years of supervised release. Defendant's sentence was affirmed upon appeal. *United States v. Johnson*, 221 F.3d 83 (2d Cir. 2000).

The original conditions of Defendant's supervised release prohibited him from possessing or using a computer to access any on-line computer service (including at his place of employment) without the prior approval of his probation officer. Apparently responding to the Second Circuit's decisions in *United States v. Peterson*, 248 F.3d 79 (2d Cir. 2001) and *United States v. Sofsky*, 287 F.3d 122 (2d Cir. 2002), cert. denied, 537 U.S. 1167, 154 L. Ed. 2d 907, 123 S. Ct. 981 (2003), the United

States Probation Office ("Probation") recommended a modification to the terms and conditions of Defendant's supervised release. As is relevant hereto, the new terms and conditions of supervised release are as follows:

1. You shall participate [***3**] in a mental health program, which will include, but will not be limited to, participation in a treatment program for sexual disorders. The program shall be approved by the United States Probation Office. . . .

7. You shall not use or possess any computer or any other device with online capabilities, at any location, except at your place of employment, unless you participate in the Computer Restriction and Monitoring Program. You shall permit the United States Probation Office to conduct periodic, unannounced examinations of any computer equipment you use or possess, limited to all hardware and software related to online use (e. g., use of the World Wide Web, e-mail, instant messaging, etc) and the viewing of pictures or movies that may violate your conditions of supervised release, except at your place of employment. These examinations may include retrieval and copying of data related to online use, the viewing of pictures and movies, and potential violations of the terms and conditions of supervised release from this computer equipment and any internal or external peripherals. This computer equipment may be removed to the Probation Office for a more thorough examination. The Probation [***4**] Office may install any hardware or software system that is needed to monitor your computer use, subject to the limitations described above.

8. If your employment requires the use of a computer, you may use a computer in connection with the employment approved by the probation officer, at your place of employment, provided you notify your employer of: (1) the nature of your conviction; and (2) the fact that your conviction was facilitated by the use of the computer. The probation officer must confirm your compliance with this notification requirement.

Defendant subsequently requested reconsideration of the modified terms and conditions of supervised release and also requested a stay of the new terms pending appeal. These requests were denied.

Matters were complicated when Condition 1 clashed with Condition 7. Specifically, based upon their individual assessment of Defendant, his history, and his progress in treatment, the mental health treatment provider approved by Probation, Tompkins County Mental Health Services ("TCMHS"), required that Defendant not have access to the Internet as part of treatment and the preparation of a safety plan. When Defendant refused to agree [***5**] to this request and TCMHS came to learn that Defendant had been less than forthcoming with them, n1 Defendant was terminated from the treatment program and sought to obtain his own mental health provider.

This particular provider, Dr. Richard Maxwell, has not been approved by Probation, as is required by Condition 1. n2 Defendant's selected mental health provider has opined that access to the Internet is not an impediment to Defendant's treatment at this time. n3 Probation has accepted TCMH's determination and taken the position that Defendant should not have access to the Internet. Defendant contends that Probation's position directly contravenes Condition 7, which permits Internet access under certain circumstances. To lay a proper record and make an informed decision, the Court ordered a hearing on the issue of the relatedness of Defendant's mental health treatment and Internet access.

- - - - - Footnotes - - - - -

n1 The mental health treatment provider felt that there was a lack of trust with Defendant which impeded the treatment process.

n2 According to the testimony of United States Probation Officer Agnes McBride, Probation only approves providers who adhere to the Practice Standards and Guidelines for Members of the Association for the Treatment of Sexual Abusers. Dr. Maxwell is not a member of the Association for the Treatment of Sexual Abusers and, prior to the hearing, was unfamiliar with their standards and guidelines. [***6**]

n3 As will be discussed below, Dr. Maxwell did testify that there could be circumstances when he, too, would recommend that Defendant be prohibited from accessing the Internet.

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II. THE HEARING

A hearing was held on December 29, 2004 and January 3, 2005, at which time Defendant and the government were afforded the opportunity to present and cross-examine witnesses and to present other pertinent evidence.

The government's witness, Linda Riley, who supervised Defendant's treatment program and was involved in Defendant's group therapy program at TCMHS, testified that Defendant presents as a high risk for re-offending. Riley offered several reasons for her opinion. Many of the reasons were based on the nature of Defendant's offense - he went to great lengths to chat with minors, he went to great lengths to engage in sex with minors (traveling long distances around the country), his crimes involved manipulation, etc. Riley also provided several reasons pertaining to his post-offense behavior: although Defendant admitted committing the crimes in the Indictment, he has not come to terms with [***7**] his offense behavior; he has not identified risk causing behavior; he has not sufficiently accepted the risk he presents to re-offend;

he is unable to recognize when he enters the offense cycle; he has not developed the internal controls (*i.e.* self control) necessary to avoid and/or prevent behavior likely to lead to re-offending; he has not responded well to external controls (*e.g.*, in the past, he continued his efforts to contact minors for sexual discussion and/or contact despite being aware of the possibility that he might actually have been chatting with law enforcement personnel, rather than minor females); he has deflected personal accountability onto the legal system; he has been less than forthcoming in the treatment program; and he continues to act in a secretive manner concerning his sexual activity, which is characteristic of sexual offenders. n4 It is Riley's opinion that Defendant has not sufficiently progressed to a point where he can safely be "weaned" onto using the Internet and without posing a high risk to minors on the Internet.

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n4 Defendant did not disclose to his treatment provider that he had a sexual fantasy about his niece or that he placed a personal ad in the newspaper which resulted in his receiving oral sex from an adult female. These facts only came to light when Defendant took a polygraph test, one of the other conditions of supervised release.

- - - - - End Footnotes- - - - - **[*8]**

Riley further opined that group therapy (which was being provided, in part, by Riley) is the nationally recognized and recommended form of treatment for male, adult sex offenders; that Defendant does not fit within an exception to this recommendation; and that individual therapy would be inappropriate because it provides an opportunity for Defendant to manipulate the therapist and does not enable the offender to have the benefit of the views and comments of other offenders who have had similar experiences and are able to "call out" the offender on any thought errors or attempts to internalize or explain away actions consistent with the offense cycle. Riley stated that a prohibition on Internet access is not an automatic, blanket prohibition, but is based on the individual's characteristics. Thus, depending on progress in therapy, a person could gain access to the Internet.

The government then offered Nancy Wayman as a witness. Wayman also participated in the evaluation and treatment of Defendant at TCMHS. To save time, the government indicated that Wayman would testify in substantially the same manner as Riley. Thus, the government suggested that Wayman not take the stand, unless **[*9]** Defendant wished to cross-examine her. Defendant declined the opportunity to put Wayman on the stand and did not object to the government's assertion that her testimony would be substantially similar to that of Riley.

The government also offered the expert testimony of Catherine Diana, a licensed social worker who specializes in the treatment of sex offenders. Diana's testimony was consistent with that of Riley. She opined that someone in Defendant's situation is appropriately classified as a high risk of re-offending (for substantially the same reasons stated by Riley) and that group therapy is the appropriate treatment modality for an individual such as Defendant. Diana expressed concern that, based on the

information provided to her, access to the Internet would increase the risk of offending behavior until such time as the offender is able to identify the offense cycle, understand why he offended, and understand how he overcame internal and external barriers. Diana opined that someone in Defendant's position not be given access to the Internet until that person was able to accept adequate responsibility, understand the motivation for his behavior, understand what triggers offensive [*10] behavior, make significant changes in his lifestyle, and work through any denials.

Defendant called Dr. Maxwell as his sole witness. Maxwell is a psychologist with a general practice. Maxwell met with Defendant on five separate occasions to evaluate him for ongoing treatment. Maxwell has not provided any treatment to Defendant. By his own admission, Maxwell is not an expert in treating adult, male sex offenders. Most of Maxwell's practice deals with counseling married couples. Throughout his career, Maxwell has only treated three adult sex offenders (a fourth case involved an adolescent sex offender). As previously noted, Maxwell was unfamiliar with the treatment standards promulgated by the Association for the Treatment of Sex Offenders ("ATSA"). n5

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n5 These standards were utilized by TCMHS and Diana.

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Maxwell did not disagree with the treatment provided by TCMHS or with the opinions of Diana. He did opine, however, that someone who spent six years in prison and underwent significant changes to their life as [*11] a result of offending conduct is likely to have some short-term internal controls for fear of returning to prison and further upending their life. Thus, Maxwell was most concerned in developing a long-term plan. Maxwell believed that the greatest risk was in the long term. In accordance with this opinion, Maxwell stated that he would allow Defendant to access the Internet, subject to monitoring. According to Maxwell, this would provide important information concerning Defendant's actual behavior on the Internet. In other words, observing his behavior would give the clearest picture into his ability to control himself.

Maxwell admitted that he did not know whether Defendant is a pedophile or a sexual addict, and that this distinction would make a difference in his opinion concerning treatment and Internet access. If Defendant is found to be a pedophile, this would increase the risk associated with Internet access. Maxwell also stated that, if Defendant was allowed on the Internet and accessed sexually explicit content or attempted to arrange a sexual rendezvous, he would recommend that Defendant be prohibited from accessing the Internet. Maxwell further stated that, if appropriate [*12] monitoring was not available, he would recommend that Defendant not be on the Internet.

III. FINDINGS OF FACT

Based on the evidence adduced at the hearing, the Court finds that the *Practice*

Standards and Guidelines for Members of the Association for the Treatment of Sexual Abusers promulgated by ATSA is the nationally accepted and appropriate methodology for the treatment of sexual offenders. Therefore, the United States Probation Office may require that mental health providers adhere to those standards as a condition of being an approved provider.

The Court further finds that adherence to the ATSA standards, including group therapy, presents the most appropriate treatment modality for Defendant at this time. The evidence clearly demonstrates that group therapy is the preferred form of therapy for male, adult sex offenders and there is no evidence that Defendant falls within any exceptions to this.

The Court also finds that allowing Defendant access to the Internet at this time is contraindicated from the standpoints of ongoing therapy and protection of the community. The undisputed evidence in the record is that, although Defendant has admitted to his crimes, he [*13] is in denial concerning his risk of re-offending, he has not come to terms with what motivates him to offend, he has not come to terms with how he overcame his internal controls that should have prevented him from offending, and he has not come to terms with how he overcame any external controls that should have deterred him from offending. There is no indication that Defendant recognizes when he is in the offense cycle such that he would be able to control his behavior and stop himself from engaging in illegal behavior. According to the credible testimony from the health care providers, these behaviors suggest that Defendant is at high risk for re-offending. This is bolstered by the statistical evidence that sex offenders pose a high risk of recidivism. Even if Defendant could recognize his offense cycle, his lack of insight into what motivates him to act inappropriately and his inability to do the right thing (lack of internal controls) suggests that he not be put into a situation where he could cause harm to children.

Furthermore, Defendant's inability to respond to external controls (e.g. the threat of detection by law enforcement) suggests that monitoring may be insufficient [*14] to protect the community at this time. Based on his past history, Defendant appears to have continued to engage "minors" on the Internet notwithstanding the very real possibility that he was actually conversing with law enforcement. Without any indication that Defendant has built up any internal controls or is better able to respond to external controls, the Court has no confidence that Defendant is not likely to re-offend, even with monitoring in place. n6 Moreover, although monitoring may enable Probation to learn of any transgressions after the fact, given the practical and technical inabilities of Probation to monitor Defendant real-time or with sufficient speed to protect a potential victim, and the speed of the Internet and of modern-day travel, any "hits" from monitoring may be too late for a minor victim with whom Defendant may have engaged in sexually explicit conversation, viewed sexually explicit pictures or movies, or had physical sexual contact.

- - - - - Footnotes - - - - -

n6 Defendant's efforts at taking out a personal ad in a new spaper and meeting an adult woman for oral sex suggests that he is re-entering his offense cycle. Although

Defendant certainly is entitled to seek out and engage in a "normal" adult relationship, it is entirely unclear that Defendant's meeting with this woman was "normal," rather than for purposes of sexual gratification only. There is no evidence that Defendant made any effort to develop a lasting relationship. Defendant's seeking out sex through the new spaper is indicative of, and somewhat similar to, the methods by which he solicited sex from minors over the Internet. This causes concern to the mental health care providers and the Court that Defendant is falling right back into his old behaviors.

- - - - - End Footnotes- - - - - **[*15]**

The record also suggests that Defendant has been less than truthful with his mental health care providers and with probation and has otherwise acted in a secretive manner concerning his sexual activity. Even Dr. Maxwell testified that Defendant exhibits errors of omission in that he is not particularly forthcoming. According to the credible evidence, secrecy concerning sexual conduct may also be indicative of entry into the offense cycle. The Court finds credence in TCMH's assessment that Defendant "has avoided exploring emotional contributors to his offending as well as subsequent events, using intellectualization and rationalization to keep everything at arm's length." Gov't Ex. 3. The foregoing lends support for the TCMH's and Diana's conclusions that Defendant remains to be at a high-risk for re-offending and, thus, should not, at this time, be on the Internet.

Based on the above facts and, in particular, the evidence from the mental health providers, the Court finds that it is not now appropriate for Defendant to have access to the Internet. This finding may change depending upon Defendant's progress in his mental health treatment. At this time, however, the Court finds that **[*16]** access to the Internet is detrimental to Defendant's treatment and to the safety of the community.

Defendant argues that, notwithstanding any medical evidence, as a matter of law, the Court cannot deny him access to the Internet. The Court disagrees. The Second Circuit first spoke of the issue of Internet access in *United States v. Peterson*, 248 F.3d 79 (2d Cir. 2001). In *Peterson*, the defendant was convicted of bank larceny in violation of 18 U.S.C. § 2113(b). The defendant had previously been convicted of incest. Upon his release from prison, the court subjected the defendant to various terms and conditions of supervised release which included restrictions on computer use and Internet access. On appeal, the Second Circuit found that "the broad restrictions on Peterson's computer ownership and Internet access are not reasonably related . . . to the nature and circumstances of the offense or Peterson's history and characteristics. . . . Nor are they reasonable necessary to the broad sentencing purposes indicated in [18 U.S.C.] § 3553(a)(2)." 248 F.3d at 82 (internal quotations and citations omitted).

The instant case **[*17]** is clearly distinguishable from *Peterson*. In *Peterson*, the Second Circuit was careful to note that, in that case, 'there is no indication that [the defendant's] past incest offense had any connection to computers or to the Internet.'" 248 F.3d at 83. Here, by contrast, Defendant was convicted of matters pertaining to

the illegal possession of child pornography, traveling across state lines to have sexual contact with minors, and enticing minors to have sexual contact. Significantly, the primary tool in facilitating Defendant's criminal activity was the Internet. It was by use of the Internet that Defendant located his victims. As the Second Circuit noted in this very case, "the use of computers . . . created unique access to minors." *United States v. Johnson*, 221 F.3d 83, 99 (2000). It was by use of the Internet that Defendant was able to communicate with his victims. It was by use of the Internet that Defendant was able to engage in intimate conversations with his victims. It was by use of the Internet that Defendant enticed his victims to agree to sexual contact. It was by use of the Internet that Defendant arranged his sexual encounters. It [*18] was by use of the Internet that Defendant obtained his sexually explicit pictures. Without the Internet, it is highly likely that many, if not all, of Defendant's crimes would not have happened. Thus, unlike in *Peterson*, here, a prohibition on Internet access is directly related to the nature and circumstances of the offense.

Furthermore, unlike in *Peterson*, here, a prohibition on Internet access is reasonably necessary to the broad sentencing purposes in § 3553(a)(2). See *United States v. Sofksy*, 287 F.3d 122, 126 (2d Cir. 2002). A prohibition on the Internet reflects the seriousness of the offense and will deter future criminal conduct. In addition, without access to the Internet, it would be extremely difficult for Defendant to find and lure young victims or to avoid detection by law enforcement. See *United States v. Johnson*, 221 F.3d 83, 99 (2d Cir. 2000). Thus, such a restriction is likely to protect the public from further crimes of Defendant. Moreover, based on the testimony from the mental health providers, allowing Defendant access to the Internet is inappropriate at this time and is not likely to further Defendant's treatment. Proper [*19] treatment requires that Defendant first understand the motivations for his crime and his offense cycle and that he develop and respond to the appropriate internal and external controls before he be placed into a risky situation. There is no evidence that Defendant has accomplished this. Until such controls are put in place, there is too much risk of re-offending, which would be to the detriment of the community at large and to Defendant's rehabilitation. As in *United States v. Crandon*, 173 F.3d 122, 128 (3d Cir. 1999), a case cited by the Second Circuit in *Peterson*, "in this case the restrictions . . . are permissible because the special condition is narrowly tailored and is directly related to deterring [Defendant] and protecting the public."

Defendant also relies on *United States v. Sofksy*, 287 F.3d 122 (2d Cir. 2002), another case in which the Second Circuit addressed the issue of Internet access. In that case, the defendant received more than 1,000 images of child pornography on his computer. The defendant also traded pictures of child pornography over the Internet. As a condition of supervised release, the district court prohibited the [*20] defendant from accessing a computer, the Internet, or a bulletin board system at any time, unless approved by the probation officer. In reviewing this condition, the Second Circuit noted that "the condition prohibiting [the defendant] from accessing a computer or the Internet without his probation officer's approval is reasonably related to the purposes of his sentencing." 287 F.3d at 126. Nevertheless, the Second Circuit found that, based on the many significant uses of the Internet in today's society and "in light of the nature of his offense, we hold that the condition inflicts a greater deprivation on [the defendant's] liberty than is reasonably necessary." *Id.*

The Court finds that Sofksy, too, is distinguishable from the instant matter. There is a significant distinction between Sofksy's crimes and those of Defendant. In Sofksy, the defendant was transmitting pictures and movies of child pornography. Although the Court does not suggest that the distribution of child pornography is not a serious crime (it most certainly is), it is a lesser crime than seeking out minors, engaging in explicit sexual conversations with minors, enticing minors to have [*21] physical sexual conduct, and actually engaging in physical sexual contact with minors. That is what Defendant did here. Although the children depicted in the pictures in Sofksy certainly were victimized and arguably were victimized each time one of the pictures was shared with a new person, through the use of the Internet, Defendant in this case was seeking out and creating new victims each and every time he communicated with a minor regarding sex.

As the mental health care providers testified in this case, and as the Second Circuit has noted, *HN1* "there is a high rate of recidivism among sex offenders." *United States v. Lifshitz*, 369 F.3d 173, 189 (2d Cir. 2004). In Sofksy, one of the goals of supervised release was to prevent the continued exchange of child pornography. See, e.g., *Lifshitz*, 369 F.3d at 189 ("The 'special needs' that the probation system implicates are, in this case, enhanced by combination with the government's interest in eradicating child pornography."). Here, the goal is to prevent Defendant from communicating, and having physical contact, with potential victims. There is an appreciable difference in the crimes in Sofksy [*22] and the instant matter that justifies the restriction on Internet access.

The Court is cognizant of the Second Circuit's analogy to mail fraud or wire fraud discussed in *Peterson* and *Sofksy*. In *Peterson*, 248 F.3d at 83, the Second Circuit stated that "although a defendant might use the telephone to commit fraud, this would not justify a condition of probation that includes an absolute bar on the use of telephones." In *Sofksy*, the Second Circuit similarly stated that "the same could be said of a prohibition on the use of mails imposed on a defendant convicted of mail fraud. A total ban on Internet access prevents use of e-mail . . . and . . . other common-place computer uses." 287 F.3d at 126. For the following reasons, *Peterson* and *Sofksy* are further distinguishable from the instant matter.

First, as noted, the nature of Defendant's crimes are more serious than those in *Peterson* (larceny) and *Sofksy* (transmission of child pornography). The nature of the crime in and of itself warrants stricter controls over Internet access.

Second, the analogy of mail or wire fraud to the instant case is inappropriate given the consequences [*23] of the criminal activity at issue here. In mail or wire fraud cases, the harm caused by the criminal activity most often is monetary. In *Peterson*, the damages were monetary. In *Sofksy*, the damages were not monetary, but there was no indication that the defendant was creating new victims. n7 In the instant matter, the potential harm is vastly greater than a financial crime and more significant than the crime in *Sofksy*. Each time Defendant contacted a new minor concerning sex, he created a new victim. While it is fairly easy to place a value on a loss caused by fraud, there can be no financial value placed on the harm caused by the sexual exploitation of a minor. Moreover, while the loss caused by fraud can be "cured" by restitution, there can be no cure to the harm caused by the sexual exploitation of a

minor - the harm is permanent and extensive.

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n7 Arguably, the defendant was contributing to the creation of new victims by facilitating and contributing to the expansion of the market for child pornography. Johnson, 221 F.3d at 98. Assuming this to be true, any contribution to the creation of new victims is less direct than in the instant matter.

- - - - - End Footnotes- - - - - **[*24]**

Third, the medium of communications discussed in Peterson and Sofsky are substantially different than the Internet, particularly when considering the nature of the offenses at issue here. By using mail or the telephone, it is nearly impossible to identify and locate potential victims. By contrast, the Internet readily allows you to identify persons with certain characteristics (e.g. minor females). This can be accomplished by browsing an individual's "profile" that he or she may have posted on the Internet or visiting chat rooms or web sites where people with particular characteristics or interests are likely to be found. See Holly Auer, *Buffalo News, Inc.*, June 16, 2002 (retrieved from http://www.cybersmart.org/news/2002_06_16.asp) ("[Sexual offenders] cull identifying details -- age, gender, hobbies and location -- from online profiles and message boards and begin to bombard their intended victim with e-mails and Instant Messages. . . . As the number of computer and Net users grows, so too will the number of predators lurking behind the Internet's cloak of anonymity, the FBI's [Paul] Moskal said.").

By using mail or the telephone, a sexual offender is more likely **[*25]** to be detected than someone using the Internet. Mail must go through the post office and into a mailbox. The envelope or letter, both physical objects, are likely to be found or seen by a minor's parents. The repeated receipt of mail from an unknown individual may (and hopefully will) cause a parent suspicion. Moreover, the letter in an envelope is a permanent record of the sender's thoughts and statements. Telephones ring throughout the house. Parents are likely to be alerted to calls by an unknown individual. To talk on the phone, one must use his or her voice, which can be overheard and, therefore, monitored by parents. Further, telephone numbers can be traced.

The Internet, on the other hand, allows for much more surreptitious activity. James Brooke, *Sex Web Spun Worldwide Traps Children*, N.Y. Times, Dec. 23, 2001, at A12 ("Pedophiles have gravitated to the Internet . . . because it offers anonymity. . . ."). Generally speaking, text messages over the Internet do not result in a tangible record. Frequently, the Internet provides a direct connection to a minor's bedroom or other private spot where parental monitoring may be limited. Internet communications can occur 24 hours **[*26]** a day, seven days a week virtually undetected. n8 In today's world of wireless communication, an individual can connect to the Internet almost anywhere. Cell phones have become ubiquitous. Many minors have cell phones that have text messaging, e-mail or other Internet capabilities. All of

these allow an unprecedented form of clandestine access to minors by sexual offenders. See Lifshitz, 369 F.3d at 189 ("The rise of the Internet has only . . . augmented the accompanying problems of child victimization . . . 'The Internet and cellular telephone explosion has been a boon to adults who prey on young people for sex.'") (quoting James Brooke, *Sex Web Spun Worldwide Traps Children*, N.Y. Times, Dec. 23, 2001, at A12). Internet communications, particularly via chat rooms, can occur silently and without detection - there is no envelope in the mailbox, there is no ringing telephone, and it is quite easy to disguise the source of the computer transmission (*i.e.*, the sender's identity and location) and the contents of the communication. n9 With the Internet, a "window" of words silently appears on a screen, n10 and those words can disappear just as quickly and quietly [*27] as they appeared. n11

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n8 Mail usually only comes once a day, increasing the ability to monitor incoming mail. Telephones ringing at odd hours (*e.g.*, early in the morning or late at night) are likely to cause parents to become suspicious.

n9 Unless one of the parties to an on-line chat is recording the conversation by storing the text, once the "chat window" is closed, it is extremely difficult (if not impossible) to recreate the conversation, know whether it ever occurred, or identify the parties to the "chat".

n10 Although many computers may "ring" or make a sound when a chat is commenced, it is easily turned off by: (i) changing the program settings to stop the "ring" or (ii) turning off the computer's speakers. Obviously, one can also turn off the ring to a telephone. However, without a ringer, it is quite difficult to know when a call is coming in. With the Internet, because a text message appears on a screen, a ringer is not needed to determine when there is an incoming message.

n11 To the extent it may be argued that monitoring is a less restrictive, yet equally effective tool, the Court disagrees. The Second Circuit noted in Lifshitz, 369 F.3d at 192, and in *United States v. Balon*, 384 F.3d 38, 45 n.3, that monitoring can easily be circumvented, thereby further suggesting the need for a temporary ban. "The use of monitoring software that allows a user with the right skills . . . time to delete files or other information would clearly fail to meet the needs of supervised release." *Balon*, 384 F.3d at 45. This is of particular concern here where we are dealing with a particular Defendant who is intelligent and a highly sophisticated computer user. There is no monitoring at the place of employment and there can be no monitoring if, for example, Defendant uses a computer with Internet access at a public library, Internet cafe, friend's house, or elsewhere, or if Defendant uses some other medium with Internet access, such as a cell phone or a Blackberry. More importantly, as previously noted, at this time, monitoring is insufficient to protect potential victims.

- - - - - End Footnotes- - - - - **[*28]**

Unlike the mail, the Internet allows for virtually instantaneous communication with others. James Brooke, *Sex Web Spun Worldwide Traps Children*, N.Y. Times, Dec. 23, 2001, at A12 ("Pedophiles have gravitated to the Internet . . . because it offers . . . immediate contact with children. . . ."). The ability to have a "real time" conversation unquestionably facilitates the goals of sexual offenders. It likely is much easier to entice or persuade a victim in the moment of a real time conversation, than over the days or weeks of using the mail. It also has been said that the Internet facilitates more candid communication than face-to-face conversations or conversations over the telephone. This allows for easier communications concerning topics such as sex. Moreover, the speed of Internet communications allows for the instantaneous commission of crimes. Images depicting child pornography can be transmitted in a matter of seconds, conversations of a sexual nature can be commenced in a matter of seconds, and sexual trysts can be arranged in a matter of seconds.

Fourth, both Peterson and Sofksy discussed an "absolute bar", Peterson, 248 F.3d at 83, and "[a] **[*29]** total ban", Sofksy, 287 F.3d at 126, on use of the Internet. The condition being imposed on Defendant here is not an absolute bar or total ban. To the contrary, what is being imposed is a temporary bar/ban on Internet access based on the Court's factual findings concerning the progress of Defendant's mental health treatment and the interplay between his progress in treatment (or the lack thereof) and the risks he poses to the community. The mental health providers testified that Defendant should not be denied access to the Internet simply because he used the Internet to accomplish his crimes, but because of his denial concerning his risk for re-offending, his inability to come to terms with the motivations for his crimes, his inability to understand the need for, and to develop, adequate internal controls, and his inability to respond to external controls. It, therefore, is conceivable that, depending on Defendant's progress in treatment, he can be allowed access to the Internet in the future. Thus, the Court is not imposing an absolute, unconditional ban, but a conditional ban based upon an individualized assessment of the totality of the circumstances presented. **[*30]**

In Lifshitz, 369 F.3d 173 and Balon, 384 F.3d 38, other cases cited by Defendant, the issue was not whether the defendant was entitled to Internet access, but whether the computer monitoring provision was overbroad. In Lifshitz, the Second Circuit held that "although the Fourth Amendment offers protection against searches of home computers, the 'special needs' of the probation system are sufficient to justify conditioning Lifshitz's probation upon his agreement to submit to computer monitoring." 369 F.3d at 193. The Second Circuit was concerned, however, over the breadth of the monitoring and remanded the matter to the district court to "evaluate the privacy implications of the proposed computer monitoring as well as their efficacy as compared with computer filtering." *Id.*

The instant matter is, once again, distinguishable. First, Lifshitz and Balon n12 involved the transmission of child pornography. As discussed, this case is more serious in that it involves directly using the Internet to entice minors to engage in sex and engaging in physical sexual contact with minors. Second, at this point, this case does not concern **[*31]** the Fourth Amendment and the extent to which Defendant's

activities in his home may be monitored by Probation, but whether Defendant is entitled to access the Internet at all at this time. Lifshitz and Balon simply do not address this issue. To the contrary, Balon and Lifshitz recognize that *HN2*"under certain circumstances, such a condition may be 'reasonably related to the purposes of sentencing.'" 369 F.3d at 189 (quoting Sofsky, 287 F.3d at 126). Thus, these cases do not further Defendant's argument.

----- Footnotes -----

n12 Balon had previously been convicted for sexually abusing minors.

----- End Footnotes-----

The Court has concern regarding the effects of prohibiting Internet access on Defendant's employment. Defendant is an educated individual who, before his conviction, enjoyed success in a technical career. Since being released from prison, Defendant has suffered a significant setback in his employment opportunities, performing maintenance work. All mental health care providers agree that professional advancement [***32**] is an important part of Defendant's resuming a positive lifestyle. The Court is interested in assisting Defendant in resuming a positive lifestyle.

The evidence concerning Defendant's job prospects with and without Internet access was wanting and came in the form of hearsay testimony. Defendant insists he needs Internet access to enjoy full promotional opportunity. There are some letters in the record from Defendant's current provider to this effect. However, these letters are somewhat contradictory. For example, in one of the December 6, 2004 letters (Def. Ex. F), Defendant's employer states that the company "heavily uses the Internet." In another letter from Defendant's employer dated December 6, 2004 (Def. Ex. G), the employer states that "working at [the company] requires occasional use of the Internet." The December 30, 2004 letter from Defendant's employer suggests, however, that, while Internet access would be preferred, Defendant can achieve higher skill-level jobs with his current employer in the computer field without direct Internet access. Indeed, it appears that Defendant successfully performed some work as a computer programmer without Internet access. Based on the [***33**] totality of the circumstances, including, but not limited to, Defendant's ability to perform higher skilled jobs without accessing the Internet, the limited time during which Defendant would be prohibited from accessing the Internet (the earlier of: (1) proof that Defendant has sufficiently progressed to a level whereby the risks of harm to the community by permitting him such access are adequately diminished; or (2) the termination of supervised release), and the factors previously discussed, the Court finds that a temporary ban on Defendant's Internet access is appropriate and is not outweighed by the potential restrictions on his employment opportunities.

IV. CONCLUSION

The factors to be considered in deciding whether to modify the terms of supervised

release "include the nature and circumstances of the offense, the need for deterrence, the need to protect the public, the need to provide defendant with training or medical care, and the relevant provisions of the Sentencing Guidelines." *United States v. Gross*, 307 F.3d 1043, 1044 (9th Cir. 2002); see 18 U.S.C. § 3553(a). "The statute that authorizes district courts to modify **[*34]** the conditions of supervised release does not require new evidence, nor even changed circumstances in the defendant's life. . . .The comments to Rule 32.1(c) provide, 'Probation conditions should be subject to modification, for the sentencing court must be able to respond to changes in the probationer's circumstances as well as new ideas and methods of rehabilitation.'" *Gross*, 307 F.3d at 1044 (quoting FED. R. CRIM. P. 32.1(b)). A "district court is free to modify the terms of supervised release at any time after considering factors such as the nature and circumstances of the offense or the history and characteristics of the defendant." *United States v. Behler*, 187 F.3d 772, 778 n.3 (8th Cir. 1999). As the Seventh Circuit has noted, just as a district court has wide discretion when imposing the terms of supervised release . . . so too must it have wide discretion in modifying the terms of that supervised release. *United States v. Sines*, 303 F.3d 793, 800 (7th Cir. 2002) (internal citation omitted).

Here, the Court finds that there are changed circumstances and additional information concerning Defendant's mental health treatment and **[*35]** methods of rehabilitation warranting a modification of the terms and conditions of supervised release. These changed circumstances include, but are not limited to: (1) Defendant's termination from the mental health care program approved by Probation; (2) information received from the Court concerning the types of mental health treatment available to, and appropriate for, sexual offenders; (3) information concerning the risk to the community posed by Defendant; (4) information concerning Probation's ability to monitor computer use; and, to a lesser extent, (5) information obtained from Defendant's polygraph test. The Court finds that a change in the terms and conditions of supervised release will provide Defendant with appropriate mental health treatment, see *Lifshitz*, 369 F.3d at 189 (noting that a computer monitoring requirement "could further [the defendant's] welfare - rather than simply serve the needs of the state - and help to rehabilitate the probationer), and better protect the public. See *Lifshitz*, 369 F.3d at 190 (acknowledging the harm to the community from the transmission of child pornography); see also *United States v. Zinn*, 321 F.3d 1084, 1093 (11th Cir. 2003) **[*36]** ("We realize the Internet has become an important resource for information, communication, commerce, and other legitimate uses, all of which may be potentially limited to Appellant as a result of our decision. Nevertheless, the particular facts of this case highlight the concomitant dangers of the Internet and the need to protect both the public and sex offenders themselves from its potential abuses."). As the Second Circuit has noted, "the use of computers to traffic in child pornography [and to locate minors for sex] heightens the difficulty of detection by law enforcement, has the potential of vastly expanding the market for such materials, and creates unique access to minors." *Johnson*, 221 F.3d at 99. Taking into consideration the nature and extent of Defendant's offenses, his mental health treatment goals, the methods he employed to commit his crimes, the lengths to which he went to accomplish he crimes, the ease by which the computer can be used to avoid detection by law enforcement, Defendant's sophistication with computers that may render monitoring ineffective, Defendant's lack of appreciation of

his offense cycle, Defendant's apparent reversion into the [*37] offense cycle, the nature and characteristics of Defendant's victims, the risk of re-offending, and the need to protect minors, the Court finds that a change in the terms and conditions of supervised release is warranted.

To be clear, the Court is not delegating the authority to preclude Internet access to a mental health treatment provider or Probation. Rather, based upon the evidence adduced at the hearing, including the testimony of the mental health care providers, the Court is altering the terms and conditions of supervised release to preclude Internet access until such time as the Court is provided sufficient information upon which to conclude that Defendant should be entitled to Internet access.

Accordingly, it is hereby ORDERED THAT:

Conditions 7 and 8 are hereby DELETED. A new Condition 7 is hereby added as follows:

7. You shall not use or possess any computer or any other device with online capabilities at any location until you have been cleared to do so by this Court or have received the prior approval of the United States Probation Office, after it has been so authorized by the Court. You shall permit the United States Probation Office to conduct periodic, unannounced [*38] examinations of any computer equipment you use or possess, limited to all hardware and software related to online use (e.g., use of the World Wide Web, e-mail, instant messaging, etc.) and the viewing of pictures or movies that may violate your conditions of supervised release, except at your place of employment. These examinations may include retrieval and copying of data related to online use, the viewing of pictures and movies, and potential violations of the terms and conditions of supervised release from this computer equipment and any internal or external peripherals. This computer equipment may be removed to the Probation Office for a more thorough examination. The Probation Office may install any hardware or software system that is needed to monitor your computer use, subject to the limitations described above.

8. Deleted and not replaced.

All other terms and conditions of supervised release shall remain the same, including the requirement that he *participate* in a mental health program, which will include, but will not be limited to, *participation* in a treatment program for sexual disorders. The program shall be approved by the United States Probation [*39] Office. Absent any evidence of impropriety by Probation or the mental health care treatment provider, of which there has been absolutely none in this case, Defendant is not free to challenge the provider selected by Probation or the modality of treatment, and Defendant may not select the provider of his own choosing.

IT IS SO ORDERED.

Dated: January 5, 2005

Thomas J. **McAvoy**

Senior, U.S. District Judge






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