Computer Restrictions on Supervised Sex Offenders

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Last week I wrote about the North Carolina law that makes it a crime for any registered sex offender to use a commercial social network, G.S. 14-202.5. In that post I noted that similar laws in other states have been overturned or limited on First Amendment grounds, and that litigation on the constitutionality of our law is pending before the court of appeals. Today's post considers the related issue of what computer restrictions can apply to sex offenders who are on probation or post-release supervision. Those offenders are subject to different statutes and, ultimately, a more limited version of certain fundamental constitutional rights. Those rights can be diminished during the offender's period of supervision as long as the limits are "designed to meet the ends of rehabilitation and protection of the public" and "reasonably related to such ends." *See* State v. Strickland, 169 N.C. App. 193 (2005) (upholding against a due process challenge the statutory probation condition prohibiting a sex offender, convicted of an offense involving sexual abuse of a minor, from living with his own minor child during his period of supervision).

In North Carolina, a person on probation for a reportable crime or a crime that involved the physical, mental, or sexual abuse of a minor is subject to additional special conditions of probation. G.S. 15A-1343(b2). One of those conditions requires the probationer to submit to warrantless searches reasonably related to the probation supervision, expressly providing that "warrantless searches of the probationer's computer or other electronic mechanism which may contain electronic data shall be considered reasonably related to the probation supervision." G.S. 15A-1343(b2)(9). Another condition says that the offender may not "communicate with . . . the victim of the offense." G.S. 15A-1343(b2)(3). That condition would prohibit a probationer from contacting his or her victim through a website like Facebook. Those are the only conditions that bear on the offender's ability to use computers or the Internet. Identical conditions apply to sex offenders on post-release supervision. G.S. 15A-1368.4(b1)(8) and (3).

Could a judge order more restrictive conditions limiting Internet use or computer access? Almost certainly. Under G.S. 15A-1343(b2)(6) the court is expressly authorized to order any other conditions determined by the court to be reasonably related to the defendant's probation. In fact, up until fairly recently, Community Corrections routinely asked courts to impose a battery of 18 additional conditions on sex offenders, referred to collectively as the Sex Offender Control Program. Those conditions (listed on now-discontinued form DCC-40) specifically prohibited contact with a victim through the Internet and the possession of any pornography—including non–child pornography—from the Internet. Community Corrections discontinued the program several years ago, but a judge could consider adding similar conditions on a case by case basis.

Exactly how far a court may go in limiting a defendant's computer use is an open question in North Carolina. In general, our appellate courts give trial judges broad discretion in tailoring a judgment to fit a particular offender and offense. *See* State v. Cooper, 304 N.C. 180 (1981) (upholding a special condition prohibiting a defendant, convicted of possession of stolen credit cards, from operating a vehicle between midnight and 5:30 a.m.); State v. Harrington, 78 N.C. App. 39, 48 (1985) (collecting cases on ad hoc conditions of probation); *see also* this prior post.

Cases from other jurisdictions are divided, as courts struggle to balance the need for public safety in light of the "strong link between child pornography and the Internet" against the "virtually indispensable nature of the Internet in today's world." United States v. Rearden, 349 F.3d 608 (9th Cir. 2003). No universal legal test has emerged, but courts typically consider three factors when determining whether a particular restriction goes too far. They are:

- **The duration of the restriction.** *Compare* United States v. Voelker, 489 F.3d 139 (3d Cir. 2007) (vacating a lifetime ban on all computer use and Internet access as a condition of supervised release, concluding that it imposed a greater deprivation of liberty than necessary), *with* United States v. Crandon, 173 F.3d 139 (3d Cir. 1999) (upholding a 3-year restriction).
- **The scope of the restriction**, especially whether it is an absolute bar or whether the offender can use a computer or the Internet with a probation officer's permission. *Compare* United States v. Miller, 665 F.3d 114 (5th Cir. 2011) (upholding a 25-year limit on all computer use and Internet access, including smartphones, without prior written permission from a probation officer), *with* United States v. Albertson, 645 F.3d 191 (3d Cir. 2011) (vacating a 20-year prohibition that allowed Internet use when preapproved by a probation officer because it still made modern life—with the expansion of online commerce and things like electronic filing of taxes—"exceptionally difficult" (quoting United States v. Holm, 326 F.3d 872 (7th Cir. 2003)).
- **The nature of the defendant's crime**, especially whether it involved use of the Internet as a direct instrument of harm beyond possession of child pornography. *Compare* United States v. Love, 593 F.3d 1 (D.C. Cir. 2010) (upholding an Internet restriction on a defendant who "not only distributed child pornography but . . . also solicited sex" online), *with* United States v. Heckman, 592 F.3d 400 (3d Cir. 2010) (vacating a lifetime ban on Internet use for a defendant who "had never been convicted of criminal behavior that involved the use of the Internet . . . to lure a minor . . .").

There is no published case from the Fourth Circuit, but an unpublished case upheld a three-year prohibition on the defendant's use of any networked computer. United States v. Granger, 117 Fed. Appx. 247 (4th Cir. 2004) (unpublished).

Those are all federal cases, largely turning on whether the condition in question satisfies the requirement in 18 U.S.C. § 3583(d)(2) that it "involve[] no greater deprivation of liberty than is reasonably necessary." But the analysis strikes me as helpful to determining what limits would be permissible as a matter of state statute and within the constitutional limits discussed in *State v. Strickland*.