

United States Court of Appeals  
Thirteenth Circuit

**Frodo BAGGINS, Defendant-  
Appellant,**

**v.**

**UNITED STATES, Plaintiff,  
Appellee**

Argued and Submitted August 27,  
2011.

Decided December 15, 2011.

Appeal from the United States District  
Court for the District of Widener; S.  
Gamage, District Court Judge,  
Presiding, No. OB-11758334

Before: M. BRANDYBUCK, P.  
TOOK, L. GREENLEAF, EOWYN, J.  
GANDALF, J., Circuit Judges.

**Opinion by TOOK, J.;**  
**GREENLEAF, J., dissenting;**  
**GANDALF, J., dissenting.**

**TOOK, Circuit Judge:**

In this appeal, we consider the narrow issue as to whether the deprivation of computer and Internet access with certain limited conditions is a greater than necessary restraint of the Appellant's freedom to use such technology.

For the reasons stated below, we **AFFIRM** the lower court's sentence and adopt the reasoning of the Fifth Circuit in *United States v. Miller*, that the district court has wide discretion to impose Internet restrictions of this kind as a condition of Baggins' supervised release. 665 F.3d 114 (5th Cir. 2011).

**I. Factual Background**

Appellant, Frodo Baggins, is a thirty-two year old entrepreneur based out of Minas Tirith, Widener. Baggins is a victim of an abusive mother and a harrowing childhood. When he was a teenager, his mother attempted to kill him by throwing acid over his body while he was sleeping. He was severely injured, \*128 suffered severe third degree burns on most of his body, causing permanent disfigurement. The severe damage to his body affected everything from his physical appearance to his ability to perform basic motor functions. The scars on his face have resulted in an uneven smile. One side of his mouth curls upward and the other side of his mouth curls downward. His skin is uniformly "lumpy" and discolored.

Not surprisingly, Baggins suffers from severe psychological side effects. He is unable to go out in public without others staring. His disfigurement shields him from normal interactions with others and people are often afraid to talk to him or touch him. When he goes out in public, people shift their gaze away from his face and body. Baggins suffers from depression, insecurities, Post Traumatic Stress Disorder (PTSD), and a host of other emotional issues.

Baggins struggles deeply with his inability to have intimate relationships. His scars and his unwillingness to be seen in public have prevented him

from initiating personal relationships. He has never had an intimate physical relationship with another person.

Despite \*129 these personal shortcomings, Baggins has had a successful professional career. He has designed a product that increases the fuel efficiency of fighter jets. In addition to decreasing the country's reliance on fossil fuels and mitigating the harmful environmental impact of using large amounts of fuel, his technology has also provided the U.S. government with millions of dollars in cost savings. His design has garnered national acclaim and he has recently obtained multiple patents for his product. He predominantly sells his product to defense contractors and the U.S. government. Baggins is currently working on an adaptation of the technology with the hope that it will function in automobiles and other types of fuel-powered vehicles. His product has the potential to change the fuel efficiency of all automobiles in the future.

Baggins is able to work from home, thus minimizing the necessity to be seen in public. He predominately relies on the Internet and his computer to design his programs and to promote and facilitate professional networking through online office conferences, email, etc. He has an intricate technological system in his home that allows him to live alone by increasing his mobility and lessening the need for him to go out in public. He orders groceries and other necessities over the Internet and has them delivered to his

home. His home is also wired to control ambient air temperature, operate a coffee maker, set alarms, and open cabinets and doors. His home-based technology system functions wirelessly through a web-based network. Without the use of such technology, Baggins' professional productivity would be effectively eliminated and would also be forced to interact with the public to manage his daily needs.

Approximately \*130 eighteen months ago, Baggins downloaded a program called "Ring-Wire" on his computer. Ring-Wire is a peer-to-peer file sharing program that allows users to access media files from each other. Baggins admitted in his testimony that the purpose was to download pornographic images.

On January 5, 2010, at 9:30 p.m., Agent Sauron of the Federal Child Sexual Acts Investigation Unit ("CSI") observed a Ring-Wire transfer of tagged files from user "Gollum21" to "\*Frodo\*" known to contain images of women under the age of majority.

One month later, Agent Sauron witnessed another file transfer that contained a similarly tagged image. Agent Sauron investigated the user information for the names Gollum21 and \*Frodo\*. The name \*Frodo\* was registered to Frodo Baggins, 606 Fellowship Lane, Minas Tirith, Widener 19766. Agent Sauron compiled a search warrant for Baggins' home, computer, and all other devices that were Internet-accessible. After

approval by a magistrate, federal agents executed a search of Baggins' home. The investigation revealed that Baggins had downloaded six hundred and fifty images over the course of one year. Of those images, twenty-five were of children ranging from fifteen to seventeen years old. \*131

It was disputed at trial whether Baggins knew that the images were of children. However, the images were extracted from Baggins' hard drive and forensically traced. The specific times and dates of the individual downloads were identified and admitted into evidence at trial. Ultimately, the jury found that Baggins possessed child pornography and returned a verdict of guilty and in violation of 18 U.S.C. 2252A(5)(B).

The defendant has no prior criminal history and he consequently satisfies the specifications for a Criminal History Level I. *See* USSG § 4A1.1. A violation of 18 U.S.C. 2252A results in a base offense level of eighteen. *See* USSG §2G2.2. The defendant ultimately qualified for a two-level increase for the use of a computer during the commission of the crime. A pre-sentence report, which was not disputed, determined the defendant's offense level to be a twenty. The sentencing guidelines for a Level twenty offense coupled with a Criminal History Level I established a recommended period of incarceration between 33 and 41 months. The federal district court sentenced Baggins to the minimum 33 months of incarceration followed by ten years of supervised

release. The period of supervised release included a condition of restricted Internet access. For the first three years of the supervised release, the defendant was ordered to have no computer or Internet access, in any capacity, followed by a seven-year period wherein the defendant's Internet access would be conditioned by the authority of an authorized probation officer. Any Internet restrictions imposed were to be set forth in writing by the appropriate probation officer at the time the ten-year period of supervised release commences.

Although the defendant did not object at the time of sentencing, he now appeals the conditions of his sentence as excessive. He argues that the Internet prohibition will effectively deny him the ability to function in his professional capacity and prohibit him from integrating back into society. \*132

## II. Discussion

### A. Standard of Review

Baggins objected to the court's sentencing conditions merely by stating that he "disagreed with the conditions set forth by the court." We have said on multiple occasions that the failure to specifically object to an issue at the trial court proceeding will prevent substantial review in a later appeal. *See* Fed. R. Crim. P. 52(b). Such doctrine allows a trial court to correct any mistakes at the time a decision is promulgated and promotes efficiency by preventing gratuitous

appeals. Additionally, subsequent reversals of trial court decisions undermine the confidence of the trial court system. Thus, this Court gives great deference to the trial court's discretion where counsel has failed to specifically object to a concern. *United States v. Maurer*, 639 F.3d 72, 77 (3d Cir. 2011).

Because Baggins failed to object specifically to his particularized concerns regarding the Internet conditions, we review only for *plain error*. *Id.*

We exercise our discretion to “notice a forfeited error” if: 1) there is error, 2) “that is plain, and 3) that affects substantial rights” and 4) where the “error seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *United States v. Reardon*, 349 F.3d 608, 614 (9th Cir. 2003).

### ***B. Federal Sentencing Guidelines***

Baggins objects to the Internet conditions, claiming that they are a greater restriction on his freedom than necessary and not reasonably related to the factors set forth in 18 U.S.C. §§ 3553 and 3583.<sup>1</sup> The district court's sentence states:

For a period of three years following his release from incarceration, the defendant shall

not have access to any computer, phone, or other electronic device if such device is connected to or has the ability to access the Internet or other similar file-sharing network. For this same time period, the defendant shall not access the Internet at any location or in any capacity.

Following the initial three-year period of supervised release and for the remaining seven years of supervised release, the defendant may have limited access to the Internet and the aforementioned electronic devices only with the express written authorization of the assigned probation officer. The conditions of such access will be determined at the probation officer's discretion at the time that such supervised release commences.

\*133 18 U.S.C. § 3583(k) provides that the defendant may be sentenced to a period of supervised release for not less than five years, up to a period of life. When analyzed together, §§ 3583 and 3553 require that conditions be “reasonably related” to the “nature and circumstances of the offense and the history and characteristics of the defendant, and to the need to deter crime, to protect the public from further crimes of the defendant and to provide needed training, medical care, or other correctional treatment to the defendant.” *United States v. Love*, 593 F.3d 1, 11 (D.C. Cir. 2010) (quoting *United States v. Stanfield*, 360 F.3d 1346 (D.C. Cir. 2004)). Further, such

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<sup>1</sup> Baggins did not raise the issue of whether the conditions amounted to an occupational restriction under USSG § 5D1.3(e)(4).

conditions may not be a “greater deprivation of liberty than is reasonably necessary” to further sentencing goals. 18 U.S.C. § 3583(d)(2).

In his brief, Baggins objects to the Internet conditions because they amount to a total ban on his ability to access the Internet for a significant period of time and less restrictive means exist for supervising his Internet access. He also argues that the “Internet ban” is not a proportionate punishment to the severity of his offense. He contends that he “merely” possessed child pornography and had no “direct communication” with children. Finally, Baggins suggests that the Internet restrictions foreclose his ability to continue his professional career and eliminate any possibility of future employment. He argues that the conditions therefore are in conflict with the goal of promoting his rehabilitation and successful assimilation into the community.

We address these issues *seriatim*.

### ***I. The Internet Restrictions Are Not A Greater Than Necessary Restriction Of The Defendant’s Liberty Interests.***

\*134 The Federal Sentencing Guidelines specifically recommend the restriction of Internet accessibility in instances of “sex crimes.” USSG § 5D1.2(b)(2); *see also United States v. Gonzalez*, 445 F.3d 815, 819 (5th Cir. 2006) (holding that the “consumption” of child pornography qualifies as a sex offense)). Therefore, the issue presented is not whether the court may

impose such conditions but rather the extent of the Internet deprivation.

This is an issue of first impression for this Court; however, many of our sister courts have had the opportunity to comment on the issue. Two competing interests have evolved. On the one hand, some courts, and the Third Circuit in particular, have held that the Internet is “virtually indispensable in the modern world” and that restrictions upon its use must be narrowly tailored to prevent a “substantial burden” on a defendant’s liberty. *United States v. Voelker*, 489 F.3d 139, 148 n.8 (3d Cir. 2007) (stating that computer and Internet access is “increasing exponentially”). In contrast, the Fifth Circuit and other courts have focused on the State’s ability to protect the public from sex offenders. *United States v. Miller*, 665 F.3d 114 (2011). In these jurisdictions, the offender’s liberty and First Amendment rights must yield to the State’s security interests.

Generally, the Third Circuit and other like-minded courts hold that absolute bans are essentially *per se* unreasonable. These courts have held that a less-restrictive means of accomplishing sentencing goals is almost always available. *United States v. Silvius*, 512 F.3d 364, 371 (7th Cir. 2008) (holding that an absolute ban on computer and Internet access is “in most cases an overbroad condition of supervised release.”); *see also United States v. White*, 244 F.3d 1199, 1205-06 (10th Cir. 2001) (holding that a condition prohibiting possession of a

computer with Internet access was at once over and under inclusive)). Thus, the burden placed on the defendant's liberty interests, including the ability to get a weather report, read a newspaper, or to complete other mundane tasks is too great. Appellant Baggins requests that we adopt this view.

We decline to do so. In our view, the safety of our citizens is the far greater and more substantial interest. Further, we decline to adopt an analysis that prevents the district court from using its broad discretion to decide a sentence that is tailored to the fact-specific circumstances of each case.  
**\*135**

The jurisdictions that have adopted the Fifth Circuit's rationale, as stated in *United States v. Miller*, hold that Internet restrictions are limited only by the need to serve the "statutory goals outlined in 18 U.S.C. § 3583(d)." 665 F.3d 114, 131 (2011).

Baggins was convicted of possessing child pornography. In our view, every single pornographic image of a minor is a societal injustice. Every time a pornographic image of a child is observed, the market for predatory acts against children is enhanced and substantiated. See *United States v. Heckman*, 592 F.3d 400, 404 (3d Cir. 2010) (stating that the dissemination of child porn is itself a harmful violation)). Child pornography is one of the greatest evils in our society and we find that in comparison, a temporary restriction of a sex offender's Internet access is but a

minor constraint to endure for such an injurious offense. Consequently, we hold, like the Fifth Circuit in *Miller*, that the Internet conditions are only limited by the statutory goals set forth in 18 U.S.C. § 3583(d).

18 U.S.C. § 3583(d) requires that conditions be 1) "reasonably related to the factors set forth in § 3553" 2) "involve no greater deprivation of liberty than is reasonably necessary" and 3) be consistent with the USSG "policy statements."

The § 3553 factors require the court to look to the "nature and circumstances of the offense," the "history and characteristics of the defendant," the "seriousness of the offense," the need to deter crime, to "protect the public from further crimes," and to "provide needed training, medical care, or other correctional treatment." 18 U.S.C. § 3553.

The district court had a reasonable basis for limiting Baggins' Internet access because the conditions were 1) reasonably related to the offense, 2) proportional with regard to Baggins' particular level of Internet proficiency, and 3) within the recommended timeframe promulgated by the USSG, which allows Internet conditions for a period between five years and life. See USSG § 5D1.2. We consequently ascertain no plain error that would affect the judicial integrity of the proceedings.

***A. The Conditions Were Reasonably Related To The Offense***

\*136 First, Baggins used the Internet as an instrumentality of his crime. He accessed the Internet, downloaded a software program, and used that program to obtain, observe, and share images of children in sexually compromising situations. Many courts have similarly held that there is a “strong link between child pornography and the Internet, and the need to protect the public...” *United States v. Zinn*, 321 F.3d 1084, 1092 (11th Cir. 2003). It was not unreasonable for the court to decide that an Internet restriction was appropriate in this case when Baggins used the Internet to perpetuate his crime. Because Baggins used the Internet as an instrumentality of his crime, the restriction of his future Internet access is reasonably related to the crime of possessing child pornography. The condition also relates to the purposes of deterring Baggins from accessing pornographic material in the future and for protecting the public from Baggins’ indiscriminate Internet usage.

***B. The Court Adequately Considered Whether The Condition Was More Restrictive Than Necessary***

Second, the unconditional three-year ban is not more restrictive than necessary. Baggins is a sophisticated user of technology. He uses the Internet regularly and it is evident from his professional occupation and experience that he is adept at

engineering and manipulating sophisticated technological systems. Baggins’ sophisticated know-how is similar to the defendant in *United States v. Johnson*. 446 F.3d 272 (2d Cir. 2006). In that case, Johnson was an aerospace engineer with an in-depth knowledge of technology. *Id.* at 274. The Second Circuit determined that the defendant had the ability to “circumvent the software needed for monitoring.” *Id.* at 282. The court upheld a total ban of Johnson’s Internet access because less restrictive means were inadequate. *Id.*

Here, it was reasonable for the district court to assume that Baggins could easily sidestep less restrictive alternative conditions because he developed technology using intricate web based programs in a professional capacity. Although a total ban on Internet access is not warranted in every case, here, Baggins has the technological expertise to prevent a lesser restriction from being effective. The three-year ban on Internet access and computer equipment will ensure that Baggins is not tempted to seek out illicit materials involving children. Such restriction is only for a limited time period. After the three-year term, he may access the Internet with his probation officer’s approval. Assuming that Baggins complies with the conditions of the initial period of supervised release, there will be little reason for his probation officer to prevent him from accessing the Internet in the future. Thus, the Internet conditions are plainly not more restrictive than necessary.

***C. The Internet And Computer Restrictions Reasonably Relate To The Sentencing Guidelines***

Finally, Baggins is a young man. At only thirty-two years of age, a three-year absolute limitation followed by a seven-year conditional limitation does not totally deprive him of his professional livelihood. Such period represents a reasonable restriction on his ability to access the instrumentality of the crime at issue. Following the initial three-year period, Baggins will be free to resume his Internet activities, assuming they are compatible with the law, with the permission of his probation officer.

Baggins suggests that he “merely” possessed child pornography and that he had no “direct communication” with children. \*137 As we have mentioned, we regard sexual offenses, and particularly the dissemination and collection of child pornography, as one of the most egregious crimes against society. We make no distinction between “merely” possessing child pornography and producing or widely disseminating it. Had the Sentencing Commission intended a distinction, they would have provided for such. Instead, §3583(k) allows an extended period of supervised release for all the delineated sexual offenses therein. The nature and circumstances of Baggins’ crime reflect a disregard for the innocence and vulnerability of young children. We hold that in this case, a temporary unconditional Internet restriction is not overly burdensome. The conditions act to deter serious

sexual offenses and protect the public from dangerous Internet users.

Thus, because the Internet was an instrumentality of the offense and because Baggins has an above average aptitude for the intricacies of the Internet, which may be used to take advantage of the lesser restrictive means of oversight, the district court’s conditions are reasonably related to the goals of deterring future criminal behavior and they reflect the serious nature and circumstances of a predatory sex offense.

***II. Forcing The Defendant To Abstain From Using The Instrumentality Of His Crime Satisfies The Policy Goal Of Rehabilitation.***

Baggins alleges that the Internet conditions will prevent him from engaging in his chosen professional capacity and that it is contrary to the goal of his rehabilitation. We agree that the Internet condition at issue will most likely limit Baggins’ ability to communicate through email and use Internet-based technologies. Such is the price to pay for committing serious sex offenses involving children. Although acclimating back into society after a period of incarceration is an important goal, Baggins is not prohibited from doing so merely because he cannot use the Internet. Baggins may use his considerable expertise and knowledge in other capacities. If he is unable to do the same or similar occupation, he may have to explore other occupations that do not use Internet technology. The

district court may have determined that Baggins' rehabilitation would be best achieved by preventing him access to materials that may tempt him to procure child pornography. The fact that his occupation involves using the Internet as well is an unfortunate consequence. It does not, however, make unreasonable the court's decision to temporarily restrict his Internet access for a period of three years. After those three years, Baggins may request the freedom to use the Internet for whatever his chosen professional capacity may be.

\*138 Finally, Baggins may have been sentenced to a longer period of incarceration. Instead, the district court imposed the minimum period of incarceration and a longer period of supervised release. It is surely common sense that if the district court could impose a period of incarceration, which would completely deprive Baggins of any freedom, a period of conditional supervised release is not a greater than necessary restriction in comparison. Such a restriction is not unreasonable and was within the district court's broad discretion.

Therefore, on the record before us, we cannot say that it was plain error for the district court to sentence the defendant to a conditional term of supervised release. The three-year ban of Internet and computer access is only temporary and is reasonably related to the grotesque nature of his crime and the important goal of protecting the public.

Accordingly, we AFFIRM the conditions as set forth in the sentencing order.

**GREENLEAF, J., Dissenting,**

***A. An Abuse Of Discretion Standard Of Review Is Appropriate***

\*139 I would apply an *abuse of discretion* standard of review to the present case.

I find the Second Circuit opinion in *United States v. Sofsky* convincing. 287 F.3d 122, 125 (2d Cir. 2002). In that case, the Second Circuit applied a "relaxed plain error review" because the defendant did not have notice of the sentencing conditions, and the issue related solely to sentencing matters. *Id.* Like the court in *Sofsky*, I would allow an appellant to raise an issue on appeal, without explicitly preserving the issue for review, where that issue concerned only sentencing matters. At most, a court would conduct a thorough review of the issue on the merits and the case would be potentially remanded solely for a sentencing modification. These consequences are of minimal inconvenience to the court. The interests of consistent and equitable sentencing permit a relaxed standard of review in comparison to furthering the interests of efficiency and conserving judicial resources. *See United States v. Escalante-Reyes*, 689 F.3d 415, 422 (5th Cir. 2012) (discussing the balance between judicial efficiency and justice).

In this case, Appellant Baggins made a sufficient, although generalized, objection to the district court's sentence. This Court should review the merits of the case under a more relaxed abuse of discretion standard.

***B. The District Court Failed To Memorialize Its Rationale In The Record.***

Even assuming plain error review, I would remand this case to the district court to explain its rationale for imposing the Internet restrictions. A district court is given broad discretion to impose conditions on a period of supervised release. *United States v. Voelker*, 489 F.3d 139, 143 (3d Cir. 2007). However, these conditions must be “tangibly related to the circumstances of the offense, the history of the defendant, the need for general deterrence, or similar concerns.” *Id.* at 144 (quoting *United States v. Pruden*, 398 F.3d 241, 248 (3d Cir. 2005)).

To ensure that the sentencing court has considered the appropriate nexus between conditions and the aforementioned factors, the court must “set forth factual findings to justify special probation conditions.” *Id.* (quoting *United States v. Warren*, 186 F.3d 358, 366 (3d Cir. 1999)). Despite this requirement, a court of appeals may affirm special conditions if there is a “viable basis for the... restriction in the record...” *Voelker*, 489 F.3d at 144 (citing *Warren*, 186 F.3d at 367).

Whereas I can discern a reasonable basis for imposing an Internet restriction in this case, namely because I agree that the Internet was the instrumentality of the crime at issue, the length and scope of the Internet restriction is so broad that the district court could not have adequately considered the factors of §§ 3553 and 3583. The absolute ban on Internet and computer access for a period of three years, followed by a period of seven years of restricted access, which period is subjected to the potential vagary of a probation officer, is certainly a greater than necessary burden on a person who relies on the Internet for both personal and professional prosperity.

**\*140** Perhaps this condition would be appropriate for a repeat offender with a serious history of abusing the Internet and with an insatiable addiction to child pornography. In the present case, Baggins has neither a criminal history nor was there evidence produced to show that he has a sexual addiction. Therefore, the condition seems draconian in nature and unfitting for the special circumstances in this case.

For the general population, the Internet is a convenient tool. For Baggins, it is a necessary mechanism to navigate everyday life. For him, the restriction on Internet access is an extreme limitation upon his ability to work and function. The majority glosses over Baggins' special needs because they state that the offense is egregious and that society's need for protection outweighs Baggins' liberty interests. No one could seriously doubt that

public safety concerns are an important governmental interest. But there is no showing in this case that Baggins is a serious safety concern. Baggins neither directly contacted children, nor did he use the Internet to communicate with other people interested in child pornography. Without this showing, or at the very least without some greater explanation from the district court, I cannot concur that the public safety concern *in this case* is more substantial than Baggins' interest in using the Internet to function in his everyday life.

Although the current conditions of Baggins' supervised release are not as severe as the lifetime ban in *Voelker*, I would agree with the *Voelker* court's analysis that a lack of "careful and sensitive individualized assessment..." is a sufficient basis to remand the case back to the district court for further explanation. *Voelker*, 498 F.3d at 144 (quoting *United States v. Johnson*, 446 F.3d 272, 282 n. 2 (2d Cir. 2006)).

**GANDALF, J., Dissenting:**

This Court should adopt the analysis of the Third Circuit because it is a complete and thorough framework that provides district courts with the necessary direction to ensure consistent and narrowly tailored sentencing.

The Third Circuit uses a continuum approach that analyzes the extent and scope of the condition at issue. On the one end of the spectrum, the Third Circuit holds, as do most circuit courts, that an absolute ban on both computer

and Internet access is a greater than necessary \*141 burden that is "rarely...tailored to the §3553(a) factors." *United States v. Albertson*, 645 F.3d 191, 197 (3d Cir. 2011).

The next restrictive category on the continuum allows the conditioning of solely Internet access, which may be subject to the express authority of a probation officer. These restrictions are allowed when the circumstances of an offense show that the defendant possessed a "willingness to use the internet as a direct instrument of physical harm." *Id.*

When an offense does not involve a direct communication with a child or victim, the court allows for narrowly tailored "internet limitation[s]." *Id.* at 198. An absolute ban on Internet access is not permitted in situations that do not involve the "direct communication" aggravating factor. *Id.*

The court in *Albertson* established a four-factor test to ascertain whether a condition is overbroad. The court considered 1) the scope and 2) the duration of the condition, and 3) the underlying criminal conduct including the specific facts of each case with a "focus on whether the defendant used a computer or the internet to solicit or otherwise personally endanger children." *Id.* at 198. Finally, the court analyzed the relationship between the imposition of a period of incarceration and a term of supervised release. *Id.* This framework is well structured and incorporates the factors set forth in § 3553. It encourages district courts to apply particularized analysis to these

points and prevents the imposition of unfair or disjointed sentences.

In *Albertson*, a panel of the Third Circuit held that a twenty-year ban on accessing the Internet without the approval of a probation officer was unduly restrictive. *Id.* at 199. The court determined that the defendant in that case did not “actively contact a child or solicit sexual contact” and that the trial court did not explain the basis for rendering such a restrictive condition. *Id.* \*142

Likewise, in *White*, the Tenth Circuit held that a three-year period of supervised release with a ban on possessing a computer with Internet access was overly restrictive because it would have prohibited the defendant from using a computer at a library, reviewing a weather report, or obtaining and reading an online newspaper. *White*, 244 F.3d at 1206. The court determined that conditions on Internet usage “must reflect... [the modern realities of the Internet] and permit reasonable monitoring by a probation officer.” *Id.* at 1207.

When applying the Third Circuit framework to the instant case, the Internet conditions imposed in Baggins’ situation cannot survive the threshold factor. The first condition of Baggins’ release amounts to an absolute three-year ban on any Internet or computer access. This complete ban is essentially *per se* unreasonable because absent the most egregious scenario, it is overly broad and insufficiently tailored to the specific

circumstances of the case. It is unnecessary to attempt to sketch what the most egregious scenario might entail, because surely the present fact scenario is not the most egregious on the spectrum of sexual offenses.

First, Baggins has no criminal history. He also has no history of other acts, non-criminal, that might persuade a court to consider him a danger to society. He possessed twenty-five pictures of illicit photographs over the course of one and half years. Granted, twenty-five images of child pornography is twenty-five too many. However, there is considerable evidence in the record that Baggins might not have even known that the pictures were of teenagers. The record reflects that the children in the photographs were between the ages of fifteen and seventeen years of age. It is not implausible that he may not have been aware of the children’s age. Though this factor is certainly speculative, his potential lack of intent does bear on our analysis of his threat level to society. Without diminishing the seriousness of his offense, he made no direct communication or threat to children and his actions certainly do not fall in the category of cases where an absolute ban on all Internet and computer usage would be permissible.

Baggins’ case may be easily distinguished from other cases where an absolute ban was permitted. In *United States v. Maurer*, the Third Circuit upheld a five-year Internet condition that required approval from a probation officer. 639 F.3d 72 (2011).

In that case, the defendant used the Internet to personally contact and solicit an eighteen-year old “boy.” (The “boy” was in fact an undercover law enforcement agent.) *Id.* at 75. The defendant exchanged nude pictures with the boy. He also directed the boy to a website that contained video of himself performing sexual acts. *Id.* In that case, the five-year condition imposed was not an absolute ban, but instead a conditional ban, subject to probation officer approval. *Id.* at 74.

Most recently, the Fifth Circuit upheld a twenty-five year conditional ban on Internet and computer use that was subject to a probation officer’s approval. *United States v. Miller*, 665 F.3d 114, 133 (5th Cir. 2011). In *Miller*, the defendant used the Internet to personally contact underage girls and he solicited one of them to have sexual contact. *Id.* at 117-18. Unlike in *Maurer* and *Miller*, Baggins had no personal contact with any children. Nor does he have a history of behavior that is dangerous to the public. Even in the more egregious examples of criminal sexual behavior such as in *Maurer* and *Miller*, the Internet restrictions were conditional and not absolute. Without a showing of some type of direct communication with children or a more egregious sexual offense, the three-year ban on all computer and Internet equipment is a greater than necessary burden on Baggins’ freedom.

The present case should be analyzed under the Third Circuit’s third category on the continuum, in which offenses do

not involve “direct communication with a child.” Here, Baggins only observed sexually illicit photographs in his home. Unlike in *United States v. Freeman* where the defendant had a history of prior sexual offenses against children, Baggins has absolutely no prior criminal history of any kind. 316 F.3d 386, 392 (3d Cir. 2003). Further, unlike in *United States v. Russell* where the defendant solicited sex from a “child” (in reality the “child” was an officer with the D.C. Police Department), Baggins made no attempt to personally contact children or solicit in-person sexual gratification. Thus, the court may condition Baggins’ supervised release, but only in a way that tailors the conditions so as not to be a greater burden than necessary. *See United States v. Voelker*, 489 F.3d 139, 146 (3d Cir. 2007). This test \*143 acknowledges the “ubiquitous” nature of the Internet in modern society. *Voelker*, 489 F.3d at 146.

Unconditional Internet restrictions are inconsistent with the policy goals of encouraging individuals on supervised release to maintain employment, to seek out and obtain therapy or medical help, and to live independently in the community. It is unreasonable to expect individuals participating in supervised release programs to assimilate into society and be productive members of the community without reasonable access to computers or the Internet. The court places substantial barriers to a defendant’s employability by conditioning the supervised release with unreasonable Internet and computer prohibitions.

Even low paying or non-technical fields require the use of computers and/or the Internet. A salesperson at a local superstore may need to use a computer to look up sales merchandise or ascertain the availability of a certain product. In modern society, even mundane tasks such as looking up a phone number often take place via an Internet inquiry. Such information is increasingly unavailable in hard copy format. Thus, the Internet has become so entrenched in society that restricting access to its information substantially hinders a person's ability to among other things, register with the DMV, pay taxes, sustain employment, pay bills, and manage a bank account. Absolute bans are unduly burdensome absent unequivocal evidence that a defendant could not be supervised by a less restrictive alternative. *See Albertson*, 645 F.3d at 197.

Even under the third category of offenses, where conditional Internet access is appropriate, the conditions set forth in Baggins' case fail to satisfy the applicable four-factor test.

First, the 1) scope and 2) duration of the supervised release period is overly burdensome. The total ban on Internet and computer access is itself beyond the scope of permissible restriction because it allows for absolutely no access to computer equipment, phones, or any Internet-accessible \*144 device. This restriction prohibits the defendant from living at home with the aid of his web-based technological services. He will no longer be able to use these devices to assist him with opening

doors and ordering groceries. Certainly these innocent and mundane tasks were not the activities that the Sentencing Commission envisioned prohibiting. The district court could easily provide for a more narrowly tailored condition that might allow Baggins to effectively function within the confines of his home.

Additionally, the ban is for a period of three years. If allowed to stand, the condition would be one of the longest periods of absolute prohibition on Internet access litigated amongst the circuit courts to date. Such a drastic condition is not required in a case where the defendant at issue has no prior criminal history and made no attempt at in-person solicitation of children. The circumstances of this case simply do not require such a lengthy and draconian condition.

When analyzing the underlying criminal conduct at issue, the defendant did use the Internet as the instrumentality of the crime. However, Baggins possessed only a limited amount of child pornography. He also made no direct communication with any other individual or with any children. Although Baggins' actions are certainly reprehensible and warrant a tailored limitation on his use of the Internet, they do not require the absolute total ban at issue. \*145

The final factor, an analysis of the relationship between the total period of incarceration and the period of supervised release, is inconclusive. The district court sentenced the defendant

to the minimum period of incarceration. However, ten years of supervised release is a substantial and lengthy punishment. The relationship between the sentence and the supervised release suggests that the district court did not believe that Baggins' conduct was deserving of the maximum period of incarceration. Instead, the court imposed a less restrictive period of supervised release. However, this period effectively eliminates Baggins' ability to pursue his chosen career and to function in his home without assistance. Certainly, the court could have decided that such a sentence was warranted. However, the court failed to explain its sentence on the record and we are left to guess as to the court's intentions. Because the conditions set forth in the sentencing order act as a total ban on Baggins' ability to access the Internet for a period of three years, the case should be remanded to the district court to ascertain a more narrowly tailored approach that satisfies the four-factor test and the requirements set forth in § 3553.