UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
v.	:	**Cr. No. 01-239-xx (RMU)**
xxxxxxxxxxxxxx	:	

DEFENDANT'S MOTION FOR CLARIFICATION OF SENTENCE, FOR CLARIFICATION OF DIRECTIONS RECEIVED FROM PROBATION OFFICER, FOR RE-ISSUANCE OF JUDGMENT, AND FOR ORDER DIRECTING PROBATION OFFICE TO STOP INTERFERING WITH DEFENDANT'S FREE EXERCISE OF RELIGION

Defendant xxxxxxxxx xxxxxxxx, by his attorneys, moves this court to issue a new judgment clarifying his special conditions of probation and to direct his probation officer to stop interfering with his free exercise of religion. In support of these requests defendant states the following:

Defendant entered pleas of guilty to conspiracy to distribute and possess with intent to distribute five grams or more of methamphetamine, transfer of a false identification document to facilitate a drug trafficking crime and possession of fifteen or more unauthorized access devices. On December 17, 2002 the court sentenced Mr.xxxxxx to five years of probation, with numerous special conditions. Only the first two conditions are at issue in this motion: (1) the requirement that the defendant serve thirteen months of home detention with electronic monitoring ("EM"); and (2) the condition that the "defendant shall

not use the internet in any way, shape or form until further order of the court."

FACTS

1. Facts regarding church attendance.

The defendant does not question the legal validity of the imposition of home detention. It is the manner in which Edward xxxx, his probation officer, is supervising the home detention that runs afoul of the Constitution.[1] Specifically, Mr. Xxxx has infringed on the defendant's free exercise of religion, guaranteed by the First Amendment, by denying him leave to attend the church of his choice.

Defendant has investigated the standard rules governing the EM program. He has conferred at length with Danny Thomas, the U.S. Probation Officer in the District of Columbia who is responsible for administering EM. Mr. Thomas has informed the defendant that there are four categories of commitment for which the probationer must be allowed to leave the house: work, legal, health and religious.

Mr.xxxxxx has, for the last eighteen months, attended a Native American Church. His normal service takes place on Sunday mornings. He provided Mr. Shaw with the necessary information concerning the timing of the services. The probation officer denied the defendant permission to attend the service, ostensibly on the ground that there is no telephone line at the church.

The stated reason was a pretext. There is no requirement that a probationer on EM

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[1] Mr.xxxxxx was allowed to return to his home in Memphis, Tennessee. The supervision of his probation has been transferred to the Western District of Tennessee.

can only travel to locations that have a telephone land line. As Mr. Thomas has explained to the defendant, there are numerous people on EM who have jobs at construction sites or other locations with no telephone hook-up. There is no limitation on the probationer's traveling to such a location. Mr. Shaw's stated basis for denying Mr.xxxxxx's access to his regular religious services makes no sense when one considers that the monitoring device with which the defendant has been fitted has no ability to read the phone number at any location other than his home. The presence of a phone line at the church would not provide any monitoring capability.

If there were ever any doubt about the bad faith of the probation officer in denying Mr.xxxxxx leave to attend his regular church, it has been eliminated by recent events. Taking the probation officer at his word, Mr.xxxxxx located another branch of the Native American Church in Memphis that holds Wednesday evening services and does have a phone line at the church. He presented this information to the probation officer so that he could attend the Wednesday services. Mr. Shaw forbade the defendant to attend these services as well, making manifest that the former's reliance on the absence of a phone line at the first church was a sham. It is clear that Mr.xxxxxx is being deprived of the right to engage in the worship of his choice because the probation office in Memphis simply does not approve of his choice of church.

2. Facts regarding Internet use.

The second issue addressed in this motion centers on the court's directive that the defendant not use the Internet during his probation. Recent interpretations of this condition have confused the defendant and left him unsure of the extent of the proscription.

As already noted, the condition in the judgment is that the defendant may not use the Internet. The defendant has not done so since the date of his sentencing. He has allowed his housemate to send some e-mails on his behalf. As the court is aware, Mr.xxxxxx writes poetry and had previously self-published some softbound volumes of poems; he has also had his poetry posted on-line at a site called xxxxxxxx.org. His housemate has e-mailed some of his poetry to this site since the sentencing.

On April 10, 2003 defense counsel received a telephone call from chambers. The law clerk asked counsel whether she had informed the defendant that he was allowed to have intermediaries send e-mails on his behalf. Counsel responded that she had instructed the defendant to that effect. She was told that the court considered such an action to be a violation of the special condition and that any such action in the future would be considered a violation of probation.

On April 14, 2003 Mr.xxxxxx was ordered by Mr. Shaw to report to the probation office, where he was hand-served with a letter. The letter instructed the defendant to render two e-mail addresses and a "website" inoperable by April 25, 2003.[2] The e-mail address xxxx.@xxx.com is not, and never has been, the defendant's account. It is his housemate's address. The e-mail address xxxxx.xxx.com was the defendant's address before his conviction, but that account was transferred to his housemate after his sentencing and he has not used it since. In compliance with the court's order, Mr.xxxxxx has requested that the proprietor of the "xxxxxxxx" website remove both of these e-mail addresses from the posting, so that no communications will be sent to him, directly or indirectly, from that

[2] A copy of that letter is attached to this motion.

website. Additionally, all messages sent to either of the e-mail addresses now receive an automatic response stating: "This account may no longer be used to contact xxxxxx. If this message is for xxxxx, he will neither receive nor respond to it." If Mr.xxxxxx closes the e-mail account, he will lose the right to the name "xxxxxxxxx", and anyone else will be free to use it. That is the identifier by which he and his poetry have become known to his readers. Indeed, he has a common law trademark in the use of that name in connection with his poetry. To force him to close the account entirely will deprive him of this important property right.

As to www.xxxxxxxx.xxx.html, that is not a website operated by Mr.xxxxxx, but one page of a site ("xxxxxx.org") operated by a third party. The defendant did not create that website and has no power to shut it down. Mr.xxxxxx also believes that the probation officer has not supplied the court with all the relevant facts concerning that web page – for example, the fact that the vast majority of the postings were submitted and published long before the sentencing date. The defendant prays that the court schedule a hearing on this motion so that he may present evidence that is critical to the court's decision-making.[3]

ARGUMENT

1. The probation officer's instructions prohibiting the defendant from attending services at the church of his choice violate the First Amendment.

The probation officer's refusal to allow Mr.xxxxxx to worship at the church of his

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[3] This case is already set for a review of probation on May 15, 2003. If the court and the government are agreeable, the issues raised in this motion could be litigated at that time.

choice is an arrant violation of the First Amendment. Mr. Shaw will not allow the defendant out of the house to go to church because he does not approve of the church that Mr.xxxxxx attends. It is truly frightening that a federal official would arrogate unto himself the right to approve certain religions and proscribe others.[4] To the contrary, "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente,* 456 U.S. 228, 244 (1982).

Indeed, Mr.xxxxxx is being afforded less religious liberty than if he were incarcerated. Federal Bureau of Prisons policy statement 5360.08(3.b) provides that the "religious rights of inmates of all faiths will be protected within the parameters of the secure and orderly running of the institution." That is no more than the Constitution requires, for "[i]t is well established that prisoners retain constitutional rights in prison, including free exercise rights under the First Amendment." *Levitan v. Ashcroft,* 281 F.3d 1313, 1317 (D.C. Cir. 2002). Even in prison, an inmate's practice of religion may be restricted only when the restriction "is reasonably related to legitimate penological interests." *Id.,* at 1318 [quoting *Turner v. Safley,* 482 U.S. 78, 89 (1987)]. Mr.xxxxxx could engage in the religious worship of his choice in prison, but he is being denied that right on probation. The offense to the Constitution is too patent to require further explication.

2. The restrictions on the defendant's use of the Internet are overly broad and vague.

The court's prohibition of the defendant's use of the Internet – and its apparent prohibition of Internet use by third parties acting on Mr.xxxxxx's behalf – presents a more

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[4] According to Mr. Shaw, his decision has been ratified by his supervisor.

complex picture.

As stated by the court at the sentencing and as reflected in the judgment, the defendant was prohibited from *using* the Internet. It was on that basis that counsel advised Mr.xxxxxx that others could use the Internet on his behalf. An order that the defendant may not use a certain instrumentality does not provide notice that others may not make use of that instrumentality on his behalf, any more than the suspension of one's right to drive means that one cannot travel in a car that someone else is operating. The loss of the right to drive "in any way, shape or form" does not mean that one cannot ride.

It was only on April 10, 2003 that the defendant was orally informed that the court meant to proscribe his "riding" as well as "driving" on the Internet. Defendant could not possibly have understood – and indeed did not understand – the court's statement at sentencing to carry the meaning that is now being attributed to it. Further, the gloss now being placed on that special condition exceeds the court's legal authority by impermissibly infringing on the defendant's First Amendment right to freedom of speech.

18 U.S.C. § 3563(b) provides that the court may impose discretionary conditions of probation "to the extent that such conditions are reasonably related to the factors set forth in section 3553(a)(1) and (a)(2) and to the extent that such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 3553(a)(2). . . ."

The ban on Internet use as now being interpreted is not in accord with the dictates of §§ 3553 and 3563. The restrictions on Mr.xxxxxx's liberty are not reasonably related to the offense. They also fail to take account of "the nature and circumstances of the offense"

inasmuch as the defendant did not commit any of his crimes via the Internet. Although Mr.xxxxxx did engage in an act of identity theft, he committed that crime by stealing someone's driver's license. He then produced false identification documents, again without any recourse to on-line data. There is therefore no logical nexus between the defendant's offenses and the restrictions on his liberty.

The complete ban on Mr.xxxxxx's use of the Internet actually frustrates the provisions of 18 U.S.C. § 3553(a)(7), which admonishes the court to consider "the need to provide restitution to any victims of the offense" in crafting a sentence. There is no office job available today that does not require the use of the Internet. Mr.xxxxxx has been rejected for every office job for which he has applied since being placed on probation specifically because of his inability to work on-line. Despite his college degree and his eagerness to find employment, there are no jobs now open to him except for minimum wage jobs at fast food restaurants. Limited to such employment, he will be unable to make more than a small portion of his court-ordered restitution of $17,578.53 over the five years of his probation.

Several courts have had occasion to consider a ban on Internet use as a condition of supervised release.[5] Almost all the reported cases that the defendant has been able to identify involve convicted sex offenders who had used the Internet to commit their offenses. Most courts considering the issue have nevertheless struck down the prohibition as unconstitutionally overbroad and unreasonable under 18 U.S.C. § 3563(b). *United States*

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[5] Defendant has been unable to find any reported cases that considered such a ban in the context of probation, rather than supervised release.

v. Holm, 2003 WL 1844823 (7th Cir. April 9, 2003); *United States v. Freeman,* 316 F.3d 386 (3d Cir. 2003); *United States v. Sofsky,* 287 F.3d 122 (2d Cir. 2002); *United States v. White,* 244 F.3d 1199 (10th Cir. 2001). All of the preceding cases involved defendants who were convicted of possessing or trafficking in child pornography. In all these cases the defendants had downloaded the offending material from the Internet. In each case the Court of Appeals found a total ban on Internet use to be impermissibly overbroad, even though the Internet had been the instrumentality of the crime and even though the crimes in question posed a much greater danger to the community than those committed by the defendant.

Mr.xxxxxx has been able to identify only two cases in which a general ban on Internet use has been upheld: *United States v. Crandon,* 173 F.3d 122 (3d Cir. 1999), and *United States v. Paul,* 274 F.3d 155 (5th Cir. 2001). Both those cases concerned sexual predators who had used the Internet to gain access to their minor victims. Paul had used the Internet to advise other pedophiles on how to gain access to children. Crandon had arranged a sexual rendezvous with a minor via e-mail. It is manifest that the facts of these cases cannot be compared to those presented by Mr.xxxxxx.

Even if the original order denying the defendant use of the Internet was not unconstitutionally overbroad and violative of 18 U.S.C. § 3563(b) – a position the defendant does not concede – the flourish placed on it by the court's oral instructions and the letter from the probation officer have rendered it so. To prohibit use of the Internet by others on Mr.xxxxxx's behalf goes even further than the limitations placed on the predatory pedophiles in *Crandon* and *Paul.*

As now understood, for example, the restrictions imposed on the defendant mean

not only that a friend cannot send Mr.xxxxxx's poetry to others by e-mail, but that Mr.xxxxxx cannot send hard copies of his poetry via postal mail to any journal that will then post the poems on-line. It means that he would be in violation of his probation if he mailed a poem to a friend who then posted it on his personal website. Indeed, under the court's most recent instructions, Mr.xxxxxx is apparently prohibited from mailing a letter to the editor of *The Washington Post,* for all published letters automatically appear on the newspaper's website. Such a restriction not only severely limits the defendant's freedom of speech, but it requires him to control the actions of others – something he obviously cannot do.

The oral amendments to the sentence also offend the Constitution on vagueness grounds. If a friend receives a joke by e-mail and prints it out for the defendant, has he violated the court's order? It is impossible to define exactly what use of the Internet by others would transgress the court's intent.

WHEREFORE the defendant prays that the court immediately order the probation officer to allow Mr.xxxxxx to attend the religious service of his choice and that the court issue a new judgment explicitly enumerating those uses of the Internet that it intends to prohibit. He further prays a hearing on this motion so that he may provide the court with evidence relevant to the determination of the issues he has raised. Proposed orders are attached.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was sent by facsimile transmission and by first-class mail, postage prepaid, to Jay Bratt, Office of the U.S. Attorney, 555 Fourth Street, N.W., Washington, D.C. 20530, this 23rd day of April, 2003.

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Cheryl D. Stein