FILED
United States Court of Appeals
Tenth Circuit

November 8, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BRIAN JOSEPH NIELSEN,

Defendant - Appellant.

No. 21-8087
(D.C. No. 1:10-CR-00193-SWS-1)
(D. Wyo.)

ORDER

Before **HARTZ**, **BACHARACH**, and **EID**, Circuit Judges.

This matter is before the court *sua sponte* to convert our unpublished August 10, 2022 Order and Judgment into a published opinion. The Clerk shall replace our August 10, 2022 Order and Judgment with the attached published opinion effective *nunc pro tunc* to the date the Order and Judgment was filed. The mandate shall issue forthwith.

Entered for the Court,

CHRISTOPHER M. WOLPERT, Clerk

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PUBLISH

UNITED STATES COURT OF APPEALS

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UNITED STATES OF AMERICA,

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v.

BRIAN JOSEPH NIELSEN,

Defendant - Appellant.

No. 21-8087

Appeal from the United States District Court
for the District of Wyoming
(D.C. No. 1:10-CR-00193-SWS-1)

Leah D. Yaffe, Assistant Federal Public Defender (Virginia L. Grady, Federal Public Defender, with her on the briefs), Office of the Federal Public Defender, Denver, Colorado, for Defendant-Appellant.

Christyne M. Martens, Assistant United States Attorney (L. Robert Murray, United States Attorney, with her on the brief), Office of the United States Attorney, District of Wyoming, Casper, Wyoming, for Plaintiff-Appellee.

Before **HARTZ**, **BACHARACH**, and **EID**, Circuit Judges.

HARTZ, Circuit Judge.

Defendant Brian Joseph Nielsen pleaded guilty in 2010 to one count of interstate shipment of child pornography. One of the conditions of his supervised release prohibited him from accessing "pornographic, sexually oriented, or sexually

stimulating" materials. R., Vol. 1 at 20. After this court in *United States v. Koch*, 978 F.3d 719, 722–23 n.1 (10th Cir. 2020), raised concerns about the potential overbreadth of this language, the district court issued a general order in November 2020 stating that it amended the conditions of release of all defendants throughout the district who had the same supervised-release condition as Defendant. The only change relevant to this case is that the new language narrowed the condition to encompass only depictions of "sexually explicit conduct," as defined by 18 U.S.C. § 2256(2)(A).[1]

Defendant's supervised release was revoked in November 2021 after the district court found that he had committed four violations of the conditions of his supervised release. Two of his alleged violations were of the modified sexual-material condition. On appeal from the district court's revocation order, he argues that those violations should have been dismissed because the court failed to make certain necessary findings before modifying his sexual-material condition through the general order. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm. A defendant cannot challenge a revocation of supervised release on the ground that a condition of supervised release was not supported by adequate findings at the time it was imposed.

[1] The revised condition also prohibited accessing child pornography, as defined in 18 U.S.C. § 2256(8), and material containing the obscene visual representation of the sexual abuse of children, as defined in 18 U.S.C. § 1466A. But these provisions are not at issue on appeal.

I. BACKGROUND

In 2010 Defendant was indicted in the United States District Court for the District of Wyoming on three counts of interstate shipment of child pornography, in violation of 18 U.S.C. § 2252A(a)(1) and (b)(1), and one count of possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B) and (b)(2). The alleged conduct was that on three separate occasions he sent images and videos of child pornography to an undercover police officer from New Hampshire (posing online as an 18-year-old male from Massachusetts) who was investigating child abuse and online exploitation of children. When the officer received the emails, he captured the sender's IP address and was able to determine that it was assigned to Brian Nielsen of Mills, Wyoming. Law-enforcement officers in Wyoming obtained a warrant to search Defendant's residence in Mills. They seized Defendant's computer and three USB flash drives, which contained hundreds of videos and thousands of images, including photographs of an adolescent boy who appeared to be an inmate at the detention facility where Defendant had worked. During questioning at the police department, Defendant admitted to sending and possessing child pornography.

Defendant reached an agreement to plead guilty to one count of interstate shipment of child pornography in exchange for dismissal of the other counts. The district court sentenced Defendant in January 2011 to 135 months' imprisonment and a life term of supervised release, noting the "chilling" nature of the crimes perpetrated on the victims depicted in the images. R., Vol. 3 at 63. One of the conditions of supervised release prohibited Defendant from possessing any

"pornographic, sexually oriented, or sexually stimulating" material. R., Vol. 1 at 20.[2] Defense counsel did not object to either the condition or the adequacy of the district court's justification for it. Defendant did not appeal.

In January 2020, one month after Defendant was released on supervision, a probation officer filed a Petition for Warrant or Summons for Offender Under Supervision alleging that Defendant committed four violations of his conditions of supervised release, including one violation of his sexual-material condition. At the hearing on the charges the government agreed to dismiss Defendant's alleged violation of his sexual-material condition and he admitted the other violations. He was sentenced in February 2020 to six months' imprisonment and 15 years of supervised release. The district court also ordered that Defendant "comply with all conditions of supervision previously imposed." *Id.* at 31.

In October 2020 this court decided *Koch*, 978 F.3d 719, in which we held that a district court plainly erred by imposing at sentencing a special condition of supervised release limiting access to "sexual materials that fall within the ambit of

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[2] The condition provided:

> The defendant shall not possess, send or receive any pornographic, sexually oriented, or sexually stimulating visual, auditory, telephonic or electronic signs, signals or sounds from any source, unless part of a treatment regimen. He shall not visit bulletin boards, chat rooms or other Internet sites where any pornographic, sexually oriented or sexually stimulating images or messages are discussed. He shall not send or receive e-mail or other documents discussing any pornographic, sexually oriented, or sexually stimulating images or messages.

R., Vol. 1 at 20.

the First Amendment" without first finding that the condition was supported by compelling and particularized justifications. *Id.* at 729; *see id.* at 724–28. The condition at issue in *Koch* (which also originated in the District of Wyoming) was virtually identical to Defendant's sexual-material condition. Although the challenge in *Koch* was directed at the adequacy of the procedures employed by the district court in imposing the condition—and not at "any substantive aspects of the condition," *id.* at 722 n.1—this court noted the "exceedingly broad nature" of the condition in rejecting the government's implied request to view the condition as "a restriction on pornography alone," *id.* at 722–23 n.1.

The Wyoming federal court responded promptly to our decision in *Koch*. On November 3, 2020, the chief judge *sua sponte* issued a "General Order Amending Sexual Material Prohibition Special Condition of Supervised Release," which sought to address "concerns regarding the breadth of material potentially encompassed by the [*Koch*] special condition." General Order 2020-13 at 1 (the General Order).[3] The order purported to "amend[] all Special Conditions of Supervised Release" that were identical to Defendant's sexual-material condition to read as follows:

> The defendant shall not access, possess, send or receive any material that depicts sexually explicit conduct as defined in 18 U.S.C. § 2256(2)(A) in any format, including but not limited to images, books, writings, drawings, video games, or visual depiction of such conduct as defined in 18 U.S.C. § 2256(5); any material constituting or containing child pornography as defined in 18 U.S.C. § 2256(8), or any material constituting or containing the obscene visual representation of the sexual abuse of children as defined

[3] General Order 2020-13 is publicly available on the district court's website at https://www.wyd.uscourts.gov/sites/wyd/files/General%20Order%202020-13.pdf (last accessed July 11, 2022).

> in 18 U.S.C. § 1466A. The defendant shall not visit bulletin boards, chat rooms, or other Internet sites where any material referenced above is discussed.

Id. at 1–2. The General Order was not entered on the docket in Defendant's case, but it directed the probation office to "advise all Defendants to whom this amendment applies or will apply upon being place[d] on Supervised Release." *Id.* at 2. Defendant does not contend that he lacked notice of the General Order.

In June 2021 a probation officer reported that Defendant "accessed pornography in March 2021" and then "accessed pornographic, sexually oriented and sexually stimulating material through a variety of applications between May 1, 2021, [and] May 31, 2021." R., Vol. 1 at 33. Defendant consented to a modification of his supervised-release conditions that prohibited him from accessing the internet on any device for 90 days. He acknowledged in his consent form that he would be required to "abide by all the conditions previously imposed during the period of Supervised Release." *Id.* at 34. The record does not contain any mention of the General Order.

In August 2021 the present proceedings to revoke Defendant's term of supervised release were initiated. A probation officer reported that Defendant committed six violations of his supervised-release conditions, including several violations of the sexual-material condition as modified in the General Order. As relevant here, Violation 1 charged that Defendant "view[ed] movies depicting sexual acts that showed full adult male nudity, masturbation, and sex" in May 2021. *Id.* at 40. Violation 5 charged that Defendant was in possession of a diary containing a handwritten story that described a dream of a sexually explicit interaction between

him and another adult man. And Violation 6 stemmed from Defendant's admission that he viewed adult pornography on his cell phone between June and August 2021.

The initial revocation hearing was held on October 15, 2021. At the beginning of the hearing, defense counsel informed the court that the government had agreed to dismiss Defendant's violations of his sexual-material condition in exchange for his admitting two other violations. As the district court questioned Defendant about the factual basis for one violation—contact with a minor outside the presence of an approved adult—Defendant denied the allegation that he was alone with the minor and would admit only that he made contact in the presence of an unapproved adult. The district court decided to continue the revocation hearing, stating, "[G]iven the nature of the allegations in this matter and given the circumstances and the history of this Defendant, I am not willing to accept a dismissal of the other charges and the violations[.]" R., Vol. 3 at 89.

On October 27, before the next hearing, the government and Defendant filed a joint motion to dismiss the three charges of violations of the sexual-material condition (Violations 1, 5, and 6). The basis for the motion was that "there [were] no particularized findings justifying the imposition of the underlying sexual materials special condition on [Defendant]"—referring to the condition as modified by the General Order. R., Vol. 1 at 43. The parties stated, "Based on *Koch* and the availability of an as-applied challenge to the sexual materials special condition, the parties believe that this court must make the findings required by *Koch* before it enforces the sexual materials special condition against [Defendant]." *Id.* at 46.

A second revocation hearing was held on November 2. Defense counsel reiterated his *Koch*-based argument that it was unlawful to modify the sexual-material condition without individualized findings. He also argued that the General Order unlawfully modified the condition without a hearing. At issue was Federal Rule of Criminal Procedure 32.1(c), which provides that "the court must hold a hearing" before modifying conditions of supervised release, Fed. R. Crim. P. 32.1(c)(1), unless, as relevant here, "(B) the relief sought is favorable to the person and does not extend the term of probation or of supervised release; and (C) an attorney for the government has received notice of the relief sought, has had a reasonable opportunity to object, and has not done so," *id.* 32.1(c)(2). Defendant argued that this exception to the hearing requirement was inapplicable because (1) "no relief was sought" and (2) "this was not a modification that was favorable to [Defendant] as it continued to curtail constitutionally protected materials that he has a right to and not be limited by this Court without specific findings supporting such curtailing of his fundamental rights." R., Vol. 3 at 105. Finally, defense counsel argued that the modified condition was unlawful as applied to the conduct underlying two of Defendant's violations:

> [I]f that modified condition is applied [to Violation Number 1], it's improper because the definition of "sexually explicit" would preclude [Defendant] from accessing movies that have artistic value that the average person, applying a contemporary community standard, would not find that it appeals to a prurient interest and that nothing in the movies that he was viewing that are the basis for Violation Number 1—there's nothing in them that is patently offensive. And in fact, when taken on the whole, they have serious artistic value.
> So as applied, . . . we'd ask the Court to dismiss Violation 1 on that

> basis . . . ; and we'd also ask the Court to dismiss Number 5 based on the fact that it is—keeping a diary is a protected First Amendment activity and that this—application of any modified condition like this would go well beyond the scope of what would be reasonable or necessary in regards to the sentencing factors.

Id. at 106–07.

The district court denied the motion to dismiss Violations 1 and 6. With respect to the *Koch*-based challenge, the court found that "additional information and findings were not required to preclude the scope of information and materials that were limited by the special condition." *Id.* at 112. The court also rejected the notion that a hearing was required under Rule 32.1(c) before modifying the sexual-material condition through the General Order, ruling that Defendant received a favorable modification that "narrow[ed] the restriction." *Id.* at 109. This ruling is not challenged on appeal.[4] With respect to the as-applied challenges, the district court dismissed Violation 5 concerning the diary entry as it presented a "colorable issue" but let the remaining violations go forward. *Id.* at 112.

Two of Defendant's probation officers testified at the November 2 hearing. Officer Aundrea Hines supervised Defendant from the beginning of his most recent term of supervised release until June 2021. According to Officer Hines, Defendant reported that "if he starts viewing pornography, it can oftentimes lead him down to viewing child pornography, specifically involving, usually, young boys." *Id.* at 173.

[4] Nowhere in Defendant's briefs does he argue that a hearing was required under Rule 32.1(c). He characterizes the original sexual-material condition as "stricter" than the modified condition. Aplt. Reply Br. at 6.

Officer Shelby Heatherly, who supervised Defendant from June until August 2021, similarly recalled that Defendant "talked about the consequences of continuing to look at porn or sexually oriented material, which included his stance that it was a progression, and it got worse the more he kind of fed into his addiction." *Id.* at 133–34.

At a final revocation hearing on November 19, the district court found that Defendant had committed Violations 1 and 6 of the modified sexual-material condition (in addition to the two other violations Defendant admitted). The court prefaced its findings with a discussion of Defendant's history and characteristics, including (i) the conduct underlying his 2011 sentence; (ii) a clinical interview from June 2012 in which "Defendant described . . . that, quote, I got on my computer, looked at legal porn and then child porn. I sought it out, and it was not accidental," *id.* at 221; and (iii) the testimony of the probation officers from the November 2 hearing. The court reiterated its rejection of Defendant's *Koch* argument, adding that "at least since revocation in February of 2020," the record in this case "supported imposing the [sexual-material] Special Condition." *Id.* at 227. Also, the district court rejected Defendant's as-applied challenge to Violation 1, noting the graphic nature of the material accessed by Defendant.

The district court imposed a 14-month sentence, followed by 15 years of supervised release. It commented that a sentence of 12 months and one day would be appropriate if it erred with respect to the two violations of the sexual-material condition. Defendant filed a notice of appeal of the revocation order that same day.

II. ANALYSIS

Defendant's sole argument on appeal is that the two remaining violations of his sexual-material condition—Violations 1 and 6—"should have been dismissed because the district court failed to make particularized findings, at the time it imposed the applicable special condition, as to whether the intrusion on [his] fundamental First Amendment right was justified by compelling circumstances." Aplt. Br. at 1–2. As we understand his point, he is complaining that the district court purported to modify his sexual-material condition by the General Order, and that the modification was procedurally inadequate.

Defendant's argument relies primarily on our recent decisions in *Koch* and *United States v. Englehart*, 22 F.4th 1197 (10th Cir. 2022). But there is a dispositive difference between those cases and the case at hand. In *Koch* the defendant directly appealed from the district court's imposition at sentencing of a sexual-material condition. *See* 978 F.3d at 722–23. In *Englehart* the government petitioned to modify the conditions of a defendant who was already on supervised release and had committed several violations; the defendant directly appealed from the district court's order modifying his sexual-material condition and imposing new burdensome conditions. *See* 22 F.4th at 1201–02. In this case, by contrast, Defendant appeals from an order revoking his supervised release.

This distinction controls the outcome. As we declared in *United States v. LeCompte*, 800 F.3d 1209, 1214 n.6 (10th Cir. 2015), "Courts have consistently said that a defendant cannot challenge the condition [of supervised release] on its face at a

revocation hearing." *Accord United States v. Helton*, 612 F. App'x 906, 909 (10th Cir. 2015) ("We are in alignment with other circuits in holding that a supervisee cannot challenge a condition itself when responding to a petition to revoke supervised release."). The typical way to challenge an improper condition of supervised release is by an appeal. *See United States v. Wayne*, 591 F.3d 1326, 1334 (10th Cir. 2010) (The supervisee "should have challenged the legal and factual basis of the initial supervised release condition on direct appeal from the sentencing court's judgment."); *United States v. Preacely*, 702 F.3d 373, 376 (7th Cir. 2012) ("The primary problem with [the defendant's] argument is that he raises it too late. The time for [him] to challenge the condition was at sentencing or on direct appeal, not at his revocation hearing.").[5]

The dissent is correct that one reason to bar a challenge to a condition of supervised release at a revocation hearing is that the challenge would amount to an untimely appeal of the sentence imposing the condition. But there is an additional, perhaps more deeply rooted, reason: such a challenge would violate the general proposition that court orders are to be obeyed. "The orderly and expeditious administration of justice by the courts requires that an order issued by a court with

[5] We do not foreclose the possibility of seeking relief through a collateral attack under 28 U.S.C. § 2255, or by a motion to modify conditions under 18 U.S.C. § 3583(e)(2), *cf. United States v. Begay*, 631 F.3d 1168, 1169–71 (10th Cir. 2011). We note that this court has yet to squarely rule on the proper scope of a § 3583(e)(2) motion in a precedential opinion. *But cf. United States v. Grigsby*, 737 F. App'x 375, 378 & n.5 (10th Cir. 2018) (citing *United States v. Lussier*, 104 F.3d 32, 35 (2d Cir. 1997), for the proposition that the "legality of condition[s] of supervised release may only be challenged on direct appeal or as collateral attack under § 2255").

jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings." *Maness v. Meyers*, 419 U.S. 449, 459 (1975) (internal quotation marks omitted); *see Kellogg v. Watts Guerra LLP*, 41 F.4th 1246, 1269 (10th Cir. 2022) (rejecting appellants' argument challenging monetary sanctions because they had "legitimate grounds . . . to refuse to participate [in a court-ordered discovery conference] until [this court] decided their interlocutory appeal": "If the [appellants] had questioned the validity of the district court's order for a discovery conference, they could have sought reconsideration or a writ; but they could not violate the order." (internal quotation marks omitted)). It follows from this rule that even if a condition of supervised release is appealed, compliance is required while appeal is pending unless a stay is granted. *See Maness*, 419 U.S. at 458 ("If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal.").[6] It is important to note, however, that the supervisee may, of course, still dispute the factual basis for an asserted violation of his condition. And the supervisee may raise at the revocation hearing an as-applied claim that the condition cannot

[6] This proposition in *Maness* begins the discussion of a leading opinion holding that a condition of probation cannot be challenged at a revocation hearing. *See United States v. Stine*, 646 F.2d 839, 845 (3d Cir. 1981). *Stine* is the only case authority relied on by *United States v. Nolan*, 932 F.2d 1005, 1007 (1st Cir. 1991); and *Stine* and *Nolan* are the only cases cited by *United States v. Johnson*, 138 F.3d 115, 118 (4th Cir. 1998), while *Nolan* is one of the two cases cited by *United States v. Key*, 832 F.3d 837, 840 (8th Cir. 2016), for the bar to challenging a condition of release at a revocation hearing. *See* Dissent at 3–4, citing *Johnson* and *Key*.

properly be applied to the particular circumstances of the alleged violation. *See LeCompte*, 800 F.3d at 1213–14.

The problem for Defendant is that he is not making an as-applied challenge to his condition of supervised release and the condition of supervised release purportedly imposed by the General Order had not been set aside or stayed at the time he violated it. He claims that he has timely appealed from the General Order because it was never entered on the docket in his case. *See United States v. Mendoza*, 698 F.3d 1303, 1308–09 (10th Cir. 2012) ("[W]e conclude that a judgment is not 'entered on the criminal docket' for purposes of Fed. R. App. P. 4(b)(6) unless judgment is noted on the docket in a publicly accessible manner. . . . Because the criminal docket in [the defendant's] case does not reflect the entry of final judgment, we deny the government's motion to dismiss [the appeal as untimely]."). But even if the appeal from that order is timely, he did not obtain, or even seek, a stay of the order before violating the challenged condition of supervised release. And he has never argued that he lacked notice before he committed the violations that the court had ordered the conditions of supervised release.

The dissent suggests that this did not matter because Defendant was unable to appeal the General Order before it was entered in the docket of his case. But this suggestion is misconceived.

To begin with, taking an appeal does not provide a free pass to violate a condition of supervised release. Any violation can be prosecuted if it occurs before the condition is overturned or stayed. (This is generally not an issue because the

defendant often is still serving the term of imprisonment while the appeal is pending.) In other words, even if Defendant had appealed the condition of supervised release, he could not challenge the validity of the condition as a defense to a charge that he violated the condition unless the condition had been stayed or reversed by the time of the violation. *See Maness*, 419 U.S. at 458. The dissent cites no authority to the contrary.

Prosecution may be problematic if the defendant has no avenue to promptly seek a stay of the condition, particularly if the condition restricts a constitutional right. But Defendant had several avenues available here. For one, once Defendant learned of the new condition imposed by the General Order (due process would prohibit prosecution for violation of a condition that Defendant had not been informed of), he could have appealed to this court under Federal Rule of Appellate Procedure 4(b)(2), which states: "A notice of appeal filed after the court announces a decision, sentence, or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry."[7,8] Even if additional steps would

[7] The dissent declares that "the district court didn't *announce* the modification of [Defendant's] conditions." Dissent at 5 n.1 (emphasis added). What was missing? Defendant has never claimed lack of notice of the General Order. The dissent speculates that the General Order may not have been added to the court's website. But Defendant committed his violations more than six months after the issuance of the General Order; and we presume the regularity of the actions of government agencies, *see United States Postal Service v. Gregory*, 534 U.S. 1, 10 (2001).

[8] The Supreme Court has limited Federal Rule of Appellate Procedure 4(a)(2)—the civil counterpart to Rule 4(b)(2), which has identical language—to apply only to decisions "that *would be* appealable if immediately followed by the entry of judgment." *FirsTier Mortg. Co. v. Investors Mortg. Ins. Co.*, 498 U.S. 269,

need to be taken before we would consider the merits, *but see Mendoza*, 698 F.3d at 1309 n.3 ("Although final judgment was never properly entered, we nevertheless have jurisdiction over this appeal. As long as no question exists as to the finality of the district court's decision, defects in the proper entry of judgment do not affect our appellate jurisdiction." (internal quotation marks omitted)), Defendant could have acted to be sure those steps would be taken so that his appeal could be promptly addressed by this court. In particular, he could have filed with us a petition for writ of mandamus to require the district court to enter the General Order on his docket; if the petition noted that Defendant wished to challenge the condition of supervised release and could not appeal until entry on the docket, there is little doubt that this court would have taken prompt action. *See United States v. West*, 240 F.3d 456, 461–62 (5th Cir. 2001) (The defendant appealed before entry of judgment; circuit court held case in abeyance and remanded for entry of judgment and then return of case to

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276 (1991); *see Constien v. United States*, 628 F.3d 1207, 1210 (10th Cir. 2010). But an order imposing a new condition of release would unquestionably be treated as final upon entry. *See United States v. Harper*, 545 F.3d 1230, 1232 (10th Cir. 2008) ("[A] final decision is one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." (internal quotation marks omitted)). "Few problems of appeal jurisdiction arise from orders entered after final judgment. Ordinarily the conclusion of a post-judgment proceeding establishes a new final decision. Appeal is appropriate in part because there is no obvious opportunity for taking an appeal at a later time." 15B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 3918.9, at 589 (2d ed. 1992). Thus, we have unhesitatingly exercised "jurisdiction to review rulings on the post-judgment modification of supervised release." *United States v. Von Behren*, 822 F.3d 1139, 1141 n.1 (10th Cir. 2016); *see Englehart*, 22 F.4th at 1201–02; *see also United States v. Sterling*, 959 F.3d 855, 858 n.1 (8th Cir. 2020) ("[A]n order modifying supervised release conditions is, in substance, the entry of a new appealable sentence.").

circuit court); *see also United States v. Von Behren*, 822 F.3d 1139, 1142–43 (10th Cir. 2016) (District court ordered a supervisee to take a polygraph examination over his objection that it would violate his Fifth Amendment privilege against self-incrimination; less than 24 hours before the exam, the district court denied a stay, but this court granted an emergency stay in time to halt the exam).

As an alternative, Defendant could have pursued relief in district court. He could have filed a motion challenging the General Order and seeking a stay pending further proceedings in district court or on appeal. And he could, of course, have requested the district court to enter the General Order on his docket so that he could appeal.

The one thing that Defendant could not do is take the law into his own hands and decide to disobey an undisturbed order of a court with jurisdiction.

The dissent raises a red herring by pointing out that Defendant did not *have to* appeal when the General Order was handed down. (Since the condition was less severe than it had been, he would have no great motive to appeal.) It is also true that Defendant would not have had to seek a stay if he did appeal. But that would not excuse a violation of the condition before the condition was considered on appeal. The relevant point is that he *could have* sought relief from the General Order quite soon after it was imposed. Therefore, he had no excuse for violating a court order that had not been stayed or reversed. Sure, he had the "right" to delay his appeal but that did not give him the "right" to violate the court's order in the interim.

In the above discussion, we have assumed that the General Order was a valid order of the district court. We think, however, that Defendant would have a strong argument that the district court acted beyond its authority in modifying a special condition of his supervised release by means of a general order.[9] But Defendant has

[9] The term *general order* (or *standing order*) refers to "orders . . . adopted by district courts . . . as district-wide or division-wide orders, without an opportunity for notice or public comment." Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Report and Recommended Guidelines on Standing Orders in District and Bankruptcy Courts* at 1 (2009). But the power to issue such orders is limited. To be sure, a court has "inherent authority to regulate the practice of litigants before it." *United States v. Ray*, 375 F.3d 980, 992 (9th Cir. 2004). This authority is recognized in Federal Rule of Criminal Procedure 57(b), which states that a "[a] judge may regulate practice in any manner consistent with federal law, [the Federal Rules of Criminal Procedure], and the local rules of the district." General Order 2020-13, however, does not regulate practice or procedure—it purports to substantively modify existing special conditions of supervised release for a class of defendants. We are not aware of any law authorizing such a modification by general order rather than by proceeding in each applicable case. One could therefore assume that the General Order was a nullity. Perhaps a viable alternative would have been a general order instructing probation officers on the enforcement of the supervised-release condition. *See* 18 U.S.C. § 3602(a) (Probation officers serve "under the direction of the court making the appointment."). This approach has been used to restrict the application of already-imposed conditions in response to changes in the law governing supervised-release conditions. *See, e.g.*, *In the Matter of: Enforcement and Imposition of Standard Conditions of Supervised Release and Probation No. Twelve*, No. 19-MC-00004-27 (D.N.M. July 10, 2019) ("In accordance with [*United States v. Cabral*, 926 F.3d 687, 691 (10th Cir. 2019)], the United States Probation Office . . . shall cease enforcing the risk-notification condition for those Defendants already under supervision, unless Court approval is first obtained."); *Standing Order Pursuant to 18 U.S.C. § 3583(e)(2) Ordering the Probation Office to Construe the Thirteen Standard Conditions of Supervised Release* (N.D. Ill. May 24, 2015) (Reinhard, J.) ("Based on recent caselaw authority from the Seventh Circuit regarding the impermissible vagueness of certain conditions of supervised release, the court hereby orders the probation office to construe and apply the above thirteen conditions as hereinafter modified to defendants currently on supervised release or sentenced but not yet on supervised release in the following manner . . . ." (citations omitted)).

not pursued this argument and we dispose of his appeal on other grounds. We do note, though, that even if the General Order was a nullity and could supply him with an excuse for not complying with the sexual-material condition as modified, then his original sexual-material condition would still have been in effect. Because the conduct underlying his revocation would have violated both conditions—he has not argued otherwise—the outcome here would remain the same.

III. CONCLUSION

We **AFFIRM** the sentence imposed by the district court upon revocation of Defendant's term of supervised release.

United States v. Brian Joseph Nielsen, No. 21-8087
BACHARACH, J., dissenting

I respectfully dissent.

The district court broadly prohibited Mr. Nielsen from viewing adult pornography. After entering this broad prohibition, the court issued a general order modifying the conditions of supervised release for many defendants. Instead of telling the defendants about this modification or filing the general order in any criminal cases, the court instructed the probation office to notify the defendants.

The probation office apparently complied and told Mr. Nielsen of the changes to his conditions. When the probation office petitioned for revocation of supervised release, Mr. Nielsen and the government jointly moved to dismiss the petition, agreeing that the modified conditions were improper because they lacked particularized findings. Faced with this concession and joint motion, the district court tried to cure its error by conducting a hearing and making new findings. The resulting question is whether the new findings cured the error.

The majority declines to answer this question, reasoning that we don't consider facial challenges that were initiated in revocation proceedings. That is usually true, but we decline to consider those challenges only when the defendant could have appealed the conditions earlier.

That's not the case here. Mr. Nielsen couldn't appeal the conditions any earlier than he did because the district court hadn't entered the disputed conditions in his criminal case. Because Mr. Nielsen brought his facial challenge as early as he could, I would consider the merits of Mr. Nielsen's challenge to the conditions.

In considering this challenge, I would reverse because the district court didn't cure its failure to make particularized findings when entering the general order.

1. Mr. Nielsen appealed the disputed conditions at his first opportunity.

Defendants can challenge supervised release conditions in two ways: facially and as-applied. The parties agree that Mr. Nielsen could raise an as-applied challenge now even though he didn't appeal when the district court modified the conditions. But at oral argument, Mr. Nielsen disavowed an as-applied challenge. The only challenge left would be a facial challenge.

As the majority points out, a defendant can't ordinarily wait until a revocation proceeding to make a facial challenge to the conditions. The majority attributes this restriction to the need for compliance with a condition while it's in place. Maj. Op. at 12–13.[1]

[1] For this proposition, the majority relies on *Maness v. Meyers*, 419 U.S. 449 (1975), and *Kellogg v. Watts Guerra LLP*, 41 F.4th 1246 (10th Cir. 2022). These cases addressed the availability of sanctions or contempt

But we've never given this as a reason for our restriction on facial challenges. Instead, we and other circuits have attributed this restriction to the defendant's opportunity to appeal the supervised release conditions when they were imposed. *See, e.g.*, *United States v. Helton*, 612 F. App'x 906, 909 (10th Cir. 2015) (unpublished) (attributing the bar on facial challenges in revocation proceedings to the presumed opportunity of the supervisee to "timely challenge a condition 'on direct appeal from the sentencing court's judgment'" (quoting *United States v. Wayne*, 591 F.3d 1326, 1334 (10th Cir. 2010))); *see also Wayne*, 591 F.3d at 1334 (concluding that the defendant was time-barred from making a facial challenge to a supervised release condition at a compliance hearing because she had failed to appeal the judgment imposing the sentence); *accord United States v. Johnson*, 138 F.3d 115, 117–18 (4th Cir. 1998) (declining to review the defendant's facial challenges to his conditions of supervised release after revocation of his supervised release because "he should have raised his objections in a timely appeal of that initial

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for disobedience of orders. *See Maness*, 419 U.S. at 458–59 (contempt); *Kellogg*, 41 F.4th at 1268–70 (sanctions). In *Maness*, the Supreme Court explained that parties must comply with orders absent a stay, pointing out that for a party who believes an order is incorrect, "the remedy is to appeal." *Maness*, 419 U.S. at 458. The Courts in *Maness* and *Kellogg* said nothing about supervised release or the ability to appeal a condition at the defendant's first opportunity. This difference matters here because Mr. Nielsen couldn't appeal the general order just because the probation office had told him about it. *See* pp. 6–8, below.

sentence"); *United States v. Preacely*, 702 F.3d 373, 376 (7th Cir. 2012) (concluding that a supervisee couldn't wait until the revocation hearing to challenge a condition of supervised release because the time "to challenge the condition [had been] at [the] sentencing or on direct appeal"); *cf. United States v. Key*, 832 F.3d 837, 840 (8th Cir. 2016) ("We are skeptical that a defendant who failed to appeal the imposition of a condition of release can bring a facial challenge to the condition following revocation."). As the majority explains, "[t]he typical way to challenge an improper condition of supervised release is by an appeal." Maj. Op. at 12. But what if the defendant couldn't have appealed the supervised release conditions when they were imposed? That's the situation here.

In every criminal case, the district court must enter its orders in the defendant's criminal docket. Fed. R. Crim. P. 55. Entry in the docket is essential to start the appeal deadline. *See United States v. Mendoza*, 698 F.3d 1303, 1305 (10th Cir. 2012) ("Under [Federal Rule of Appellate Procedure 4(b)], . . . the deadline to appeal begins to run not at sentencing but upon entry of judgment." (citing Fed. R. App. P. 4(b)(1)(A)(i))); *id.* at 1308 (stating that "a judgment is not 'entered on the criminal docket' for purposes of [Federal Rule of Appellate Procedure 4(b)(6)] unless judgment is noted on the docket in a publicly accessible manner" (quoting Fed. R. App. P. 4(b)(6))). The time to appeal thus begins with entry of an appealable order in the docket of the criminal case. Fed. R. App. P.

4(b)(1); *see* Fed. R. App. P. 4(b)(6) ("A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.").

Until the order is entered in the criminal case, an appeal is premature. *See United States v. West*, 240 F.3d 456, 458–59 (5th Cir. 2001) (concluding that the defendant's appeal of her criminal judgment was premature because the district court had not yet entered the judgment (under review) in the docket). So a defendant can't appeal until the district court has entered an appealable order in the criminal case. *See Constien v. United States*, 628 F.3d 1207, 1210 (10th Cir. 2010) ("When prematurity of a notice of appeal cannot be 'cured' by [Federal Rule of Appellate Procedure 4(a)(2)], the aggrieved party must await a final judgment before filing a notice of appeal to challenge the allegedly erroneous ruling.").

The only reason that we have jurisdiction now is that upon revocation of supervised release, the district court reimposed the modified conditions and entered the new order in Mr. Nielsen's criminal case. He filed a notice of appeal the same day. But he couldn't have appealed the conditions until the district court had entered the modified conditions in his criminal case.

In these unusual circumstances, we shouldn't fault Mr. Nielsen for waiting until the revocation proceeding to challenge the modified conditions. He needed to wait because any prior appeal would have been premature. I would thus address the merits of Mr. Nielsen's challenge.

The majority doesn't suggest that Mr. Nielsen could have appealed the general order. The majority instead speculates on a series of possible events that might have led to an appealable order:

1. Under a federal rule, the district court's "announcement" of the modifications meant that the appeal would have been treated as filed upon entry of the general order in Mr. Nielsen's criminal case. Fed. R. App. P. 4(b)(2).

2. Because of this federal rule, we could not have considered Mr. Nielsen's appeal until the district court entered the general order in Mr. Nielsen's criminal case.

3. Mr. Nielsen could have requested a writ of mandamus to require entry of the general order in his criminal case.

The majority rests its speculation on Federal Rule of Appellate Procedure 4(b)(2), which provides that when a party files a notice of appeal "after the court *announces* a decision, sentence, or order—but before the entry of the judgment or order—[the notice of appeal] is treated as filed on the date of and after the entry." Fed. R. App. P. 4(b)(2) (emphasis added). The majority suggests that this rule would allow Mr. Nielsen to take other steps that would enable us to consider the merits. Maj. Op. at 15.

But this rule wouldn't apply if Mr. Nielsen had prematurely appealed the general order. The rule applies only when a district court "announces" a ruling in the defendant's criminal case; and the government hasn't suggested that the court "announced" its general order, much less announced it as a decision in Mr. Nielsen's criminal case.

Though the government hasn't suggested that the general order triggered Rule 4(b)(2), the majority suggests what might have happened if Mr. Nielsen had prematurely appealed. These suggestions stem from the majority's assumption that the district court's general order constituted an announcement to Mr. Nielsen. This assumption is misguided, for the district court didn't say anything to Mr. Nielsen about the general order or its modification of his conditions.

The majority notes that the general order is now publicly available on the district court's website. Maj. Op. at 5 n.3. But the record doesn't say when the court published its general order on the website. We know only that the general order is on the website now.

But let's suppose, despite the absence of any evidentiary support, that the district court did immediately publish its general order on its website. The general order was never docketed in Mr. Nielsen's criminal case. So he'd learn about the general order only if he had monitored the court's website for actions unrelated to his own case.

The district court recognized this reality and the need to communicate the general order to defendants who'd be affected. So the court required the *probation office* to "advise all [d]efendants to whom th[e] amendment applies or will apply." General Order 2020–13 at 2. But the probation office is not the court, so

- the probation office's statement didn't constitute an announcement from the court in Mr. Nielsen's case and
- the probation office's actions couldn't trigger Rule 4(b)(2).

Given the lack of a court announcement to Mr. Nielsen, an appeal from the general order would never have ripened under Rule 4(b)(2).

But let's suppose that

- we would have applied the rule anyway and waited for Mr. Nielsen to take further steps,
- Mr. Nielsen would have requested mandamus to require entry of the general order in his docket, and
- we'd have granted mandamus.

Why would this theoretical set of possibilities bear on Mr. Nielsen's right to challenge his conditions? Regardless of what might have happened, he appealed the conditions at his first actual opportunity. So there's no reason to prohibit consideration of his facial challenge.

2. Mr. Nielsen's other alleged options shouldn't affect our disposition.

The majority relies not only on speculation about what might have happened if Mr. Nielsen had prematurely appealed, but also on the availability of two other options:

1. challenge the conditions in district court and move for a stay of the conditions while those proceedings remained pending or
2. ask the district court to enter the general order in his criminal case so that he could appeal.

Under either option, Mr. Nielsen would have had to comply with the allegedly unconstitutional conditions.

The majority theorizes that Mr. Nielsen could have challenged the conditions in district court and sought a stay while he appealed. But Mr. Nielsen *did* challenge the conditions in district court. In making that challenge, he even obtained the government's agreement that the conditions were unconstitutional based on the lack of particularized findings. *See* p. 1, above.

The majority's theory supposes that Mr. Nielsen could have asked us for a stay while he challenged the conditions in district court. But there was nothing to stay because he couldn't have appealed.

The majority theorizes further that Mr. Nielsen could have asked the district court to enter the general order in his criminal case so that he could appeal. He could have done that, but he decided instead to join the government's motion recognizing the invalidity of the modified conditions. What more should he have done?

Despite his effort to challenge the conditions in district court, the majority faults Mr. Nielsen for "tak[ing] the law into his own hands and decid[ing] to disobey an undisturbed order of a court with jurisdiction." Maj. Op. at 17. As the majority points out, "court orders are to be obeyed." *Id.* at 12. I agree. The district court conceivably could have revoked supervised release based on Mr. Nielsen's disobedience of the conditions

even if they were unconstitutional. If the court had done so, we'd need to confront a knotty constitutional issue, for the majority acknowledges that "[p]rosecution may be problematic if the defendant has no avenue to promptly seek a stay of the condition, particularly if the condition restricts a constitutional right." *Id.* at 14.

But the parties haven't briefed that issue, and we don't need to decide it because the district court told us what it would have done if the disputed conditions were deemed unconstitutional: The revocation sentence would have been twelve months and a day rather than fourteen months. R. vol. III, at 242 ("[J]ust so it's clear, to the extent a court would somehow unreasonably conclude that the Special Condition was not enforceable at the time the violations occurred in this matter as noted in 1 and 6, then the sentence would be 12 months and a day . . . [rather than] 14 months."). So even if the district court had discretion to punish Mr. Nielsen for "taking the law into his own hands," the court didn't exercise that discretion. The majority's concern is thus academic.

3. The district court erred by failing to make particularized findings when modifying Mr. Nielsen's conditions.

On the merits, I believe that the district court erred by imposing the modified conditions without particularized findings.

The parties appear to agree that

- the district court conducted the revocation proceedings based on alleged violations of the modified conditions that were stated in the general order,
- the district court applied the general order to Mr. Nielsen without particularized findings, and
- the lack of particularized findings constituted an error.

Despite agreeing that the district court erred, the government argues that the court cured the error by later making the required findings. I disagree.

The district court did make particularized findings when revoking supervised release. In making those findings, however, the district court relied in part on events taking place in 2021—after the court had imposed the condition from the general order on Mr. Nielsen. R. vol. III, at 222, 226. A court cannot support a decision based on evidence that didn't exist at the time of the decision. So the district court's new findings couldn't have cured the lack of particularized findings when the court had imposed the modified conditions.

4. The district court's error wasn't harmless.

The government argues that even if the court had erred in entering the modified conditions, any error would have been harmless.

Nonconstitutional errors are harmless unless they "had a 'substantial influence' on the outcome or leave[] one in 'grave doubt' as to whether [they] had such effect." *United States v. Griffin*, 389 F.3d 1100, 1104 (10th Cir. 2004) (quoting *United States v. Mejia-Alarcon*, 995 F.2d 982, 990

(10th Cir. 1993)). For constitutional errors, the government must prove harmlessness beyond a reasonable doubt. *See Chapman v. Cal.*, 386 U.S. 18, 24 (1967); *Malone v. Carpenter*, 911 F.3d 1022, 1029 (10th Cir. 2018).

Regardless of which standard applies, the error wasn't harmless. The district court said that Mr. Nielsen's sentence would have been shorter by about two months without reliance on the disputed conditions. *See* p. 10, above. The district court's statement shows that the error was not harmless. *See United States v. Serrano-Dominguez*, 406 F.3d 1221, 1224 (10th Cir. 2005) (finding that the district court's announcement of an alternative sentence under the methodology proposed by the defendant "eliminates any need to speculate about what it would do on remand"); *see also United States v. Gieswein*, 887 F.3d 1054, 1061 (10th Cir. 2018) (stating that a procedural error is harmless only if "the district court would have imposed the same sentence" without the error (quoting *United States v. Kieffer*, 681 F.3d 1143, 1165 (10th Cir. 2012))). So I would reverse and remand with instructions to vacate the disputed conditions and resentence Mr. Nielsen for the revocation of supervised release.