End Notes for *Branded for Life by the Modern Scarlet Letters* By John Rhodes and Daniel Donovan

1. Go to http://www.fd.org/pdf_lib/WS2011_06/fine_print.pdf.

2. *Id.* at 8.

3. 18 U.S.C. § 3583(k).

4. U.S.S.G. § 5D1.2(b).

5. 18 U.S.C. § 3583(d)(2).

6. 18 U.S.C. § 3583(d)(1-3).

7. U.S.S.G. § 5D1.3(d)(1)-(6).

8. U.S.S.G. § 5D1.3(c).

9. *United States v. Weber*, 451 F.3d 552, 559 (9th Cir. 2006) (footnote omitted).

10. *United States v. Guagliardo*, 278 F.3d 868, 872 (9th Cir. 2002) (citation omitted); *United States v. Johnson*, 626 F.3d 1085, 1090 (9th Cir. 2010).

11. *See, e.g., United States v. Goddard*, 537 F.3d 1087, 1089 (9th Cir. 2008) (narrowly construing computer restrictions to prevent overbreadth); *United States v. Cope*, 527 F.3d 944, 957 (9th Cir. 2008) (remanding to district court to limit condition because its current language is overbroad).

12. *See, e.g., United States v. Perazza-Mercado*, 553 F.3d 65, 73 (1st Cir. 2009) (vacating total ban on home Internet use but remanding for imposition of more narrowly tailored restriction in light of technological options).

13. *Id.* at 72.

14. *See, e.g., United States v. Morais*, 670 F.3d 889, 896-97 (8th Cir. 2012); *United States v. Laureys*, 653 F.3d 27, 35 (D.C. Cir. 2011) (also approving on plain error review condition requiring defendant to log his Internet access); *United States v. Love*, 593 F.3d 1, 27-28 (D.C. Cir. 2010); *United States v. Zinn*, 321 F.3d 1084, 1093 (11th Cir. 2003); *United States v. Walser*, 275 F.3d 981, 988 (10th Cir. 2001).

15. *See, e.g.*, *United States v. Rearden*, 319 F.3d 608, 620-21 (9th Cir. 2003).

16. *See, e.g., United States v. Johnson*, 446 F.3d 272, 283 (2d Cir. 2006); *United States v. Paul*, 274 F.3d 155, 169 (5th Cir. 2001); *United States v. Crandon*, 173 F.3d 122, 127-28 (3d Cir. 1999).

17. *See, e.g., United States v. Blinkinsop*, 606 F.3d 1110, 1123 (9th Cir. 2010) (rejecting absolute ban on possessing computer with Internet access); Rearden, 349 F.3d at 621 ("The condition does not plainly involve a greater deprivation of liberty than is reasonably necessary for the purpose because it is not absolute; rather, it allows for approval of appropriate online access by the Probation Office."); *United States v. Holm*, 326 F.3d 872, 878-79 (7th Cir. 2003); *United States v. Freeman*, 316 F.3d 386, 391-

92 (3d Cir. 2003); *United States v. Sofsky*, 287 F.3d 122, 126-27 (2d Cir. 2002).

18. *United States v. Wiedower*, 634 F.3d 490, 494-95 (8th Cir. 2011); *United States v. Crume*, 422 F.3d 728, 733 (8th Cir. 2005).

19. *Crume*, 422 F.3d at 733.

20. *Id.*

21. *Crume*, 422 F.3d at 733; *see also United States v. Holm*, 326 F.3d at 877-78.

22. *United States v. Voelker*, 489 F.3d 139, 144-47 (3d Cir. 2007); *see also United States v. Miller*, 594 F.3d 172, 188 (3d Cir. 2010).

23. *Blinkinsop*, 606 F.3d at 1119-1122 (9th Cir. 2010) (court determined that Special Condition 4, stating that defendant shall not go to or loiter near school yards, parks, play grounds, arcades, or other paces primarily used by children under the age of 18, may be overbroad.).

24. *Blinkinsop*, 606 F.3d at 1122-1123 (court affirmed Special Condition 7 – prohibiting defendant from possessing camera phones or electronic devices that could be used for covert photography – and noted that the defendant "may have a cell phone, as long as it does not have a camera module, and he can have a camera, as long as it is readily identifiable as a camera").

25. *Blinkinsop*, 606 F.3d at 1123 (court rejected Special Condition 13 – stating that defendant shall not possess or use any computer or other electronic device that can provide access to the Internet – because "[a]s the government concedes, banning Blinkinsop's Internet usage contravenes *United States v. Riley*, 576 F.3d 1046, 1050 (9th Cir. 2009)").

26. *United States v. Little Dog*, 493 Fed App'x. 898, 900 (9th Cir. 2012) (unpublished) (overbroad to prohibit defendant from "patron[izing] any place where [sexually explicit] material or entertainment is available").

27. *United States v. Collins*, 684 F.3d 873, 880, 890-891 (9th Cir. 2012) (court found the following special condition to be possibly overbroad and arbitrary: "The defendant shall not reside within 2,000 feet of school yards, parks, public swimming pools, playgrounds, youth centers, video arcade facilities, or any other places primarily used by persons under the age of 18. The defendant's residence shall be approved by the probation officer, and any change in residence must be pre-approved by the probation officer. The defendant shall submit the address of the proposed residence to the probation officer at least 10 days prior to any scheduled move."). *United States v. Guagliardo*, 278 F.3d at 872-73 ("We remand for the court to specify a precise distance limitation for Guagliardo's residency restriction."). *Compare United States v. Laureys*, 653 F.3d at 34 (on plain error review, upholding prohibition against loitering in places where children congregate); *Crume*, 422 F.3d at 734 (approving condition barring visiting places where children under the age of 18 congregate and emphasizing condition applies only where children *actually* congregate); *United States v. Peterson*, 248 F.3d 79, 86 (2d Cir. 2001) ("it is unclear whether the prohibition applies only to parks and recreational facilities in which children congregate, or whether it would bar the defendant from visiting Yellowstone National Park or joining an adult gym. In view of the defendant's prior child sex abuse, the court had justification to impose a condition of probation that prohibits the defendant from being at educational and recreational facilities where children congregate. In our

view, however, there would be no justification to forbid the defendant from being at parks and educational or recreational facilities where children do not congregate."). *Contrast United States v. Wiedower*, 634 F.3d at 498 ("While somewhat ambiguous given the exact wording, we construe the condition to restrict Wiedower from contacting minors or entering places where minors congregate unless he obtains prior approval from the probation office."); *United States v. MacMillen*, 544 F.3d 71, 76 (2d Cir. 2008) ("[W]e conclude that the district court did not abuse its discretion in ordering MacMillen not to frequent locations where children are likely to congregate, and then appending to that formulation a nonexclusive list of exemplars."); *United States v. Paul*, 274 F.3d at 167 ("We find that there is sufficient common understanding of the types of locations that constitute 'places, establishments, and areas frequented by minors' to satisfy the constitutional requirement of reasonable certainty in this case.").

28. United States v. Preston, 706 F.3d 1106, 1123 (9th Cir. 2013) (The defendant raped an eight-year-old boy who lived next door. At sentencing, the district court applied a condition that prohibited the defendant from "being in the company of children under the age of 18" without prior approval of the probation officer. Citing *United States v. Soltero*, 510 F.3d 858, 866 (9th Cir. 2007) and *Wolf Child*, 699 F.3d at 1086, 1092, 1096, 1101-1102, the Ninth Circuit held that it was plain error to apply the condition because it had no mental state requirement. The condition was overly vague because "if, unbeknownst to Preston, one of his co-workers happens to be a mature-looking 17-year-old, Preston would be in violation of the terms of his release."). *See also United States v. Davis*, 452 F.3d 991, 996 (8th Cir. 2006) ("We therefore conclude that the district court erred in not allowing Mr. Davis to have unsupervised contact with his own children during his term of supervised release."). *Compare United States v. Loy*, 237 F.3d 251, 270 (3d Cir. 2001) (construing condition prohibiting unsupervised contact with minors not to apply to defendant's own children); *United States v. Wolf Child*, 699 F.3d 1082, 1089, 1094, 1101-1102 (9th Cir. 2012). *Contrast United States v. Roy*, 438 F.3d 140, 144-45 (1st Cir. 2006) (contact with girlfriend's children requires preapproval of probation officer); *United States v. Mark*, 425 F.3d 505, 508 (8th Cir. 2005) (contact with own children without preapproval of probation office justified under facts of the case).

29. *Wolf Child*, 699 F.3d at 1094-95.

30. *Id.* at 1088.

31. *Id.* at 1088-1089.

32. *Id.* at 1089.

33. *Id.*

34. *Id.*

35. *Id.* at 1096-1097.

36. *Id.* at 1100 (emphasis by the court).

37. *Id.* at 1103.

38. *Id.*

39. *Id.*

40. Docket No. 20 in No. 11-30204.

41. *Id.*

42. *United States v. Plumage*, No. CR-11-06-GF-DLC, docket No. 59 at 4 (D. Mont.).

43. 451 F.3d 552 (9th Cir. 2006).

44. *Id.* at 562 (internal quotations and citations omitted).

45. *Id.* at 568 (internal quotations and citations omitted). *Contrast United States v. Dotson*, 324 F.3d 256, 261 (4th Cir. 2003) (approving penile plethysmograph condition without specific findings); *United States v. Lee*, 502 F.3d 447, 450 (6th Cir. 2007) (challenge not ripe for review).

46. *Preston*, 706 F.3d at 1122.

47. 395 F.3d 1128 (9th Cir. 2005).

48. *Weber*, 451 F.3d at 568, n.17. *See also United States v. Begay*, 631 F.3d 1168, 1176 (10th Cir. 2011) ("Begay has not explained how polygraph testing constitutes a significant further deprivation of his liberty. The district court did not abuse its discretion by imposing the condition."); *United States v. Dotson*, 324 F.3d at 261 ("The use of a polygraph test here is not aimed at gathering evidence to inculpate or exculpate Dotson. Rather, the test is contemplated as a potential treatment tool upon Dotson's release from prison – as witnessed by the district court's direction that the results of any polygraph testing not be made public.") (citations omitted); *United States v. Zinn,* 321 F.3d at 1092 ("If and when appellant is forced to testify over his valid claim of privilege, he may raise a Fifth Amendment challenge. In the meantime, we can only decide whether requiring polygraph testing as a condition of supervised release generally violates the Fifth Amendment so as to amount to plain error. We hold it does not."); *United States v. Lee*, 315 F.3d 206, 217 (3d Cir. 2006) ("Since appellant is already directed to report periodically to the probation officer and provide truthful answers after he is released from imprisonment … the additional requirement that Lee undergo polygraph testing does not place a significantly greater demand on him.").

49. *United States v. Esparza*, 552 F.3d 1088, 1090-1092 (9th Cir. 2009) (emphasis by court).

50. *Id.* at 1091. See also *id.* n.5 ("We hold only that a district court may not delegate to the probation officer the decision whether a defendant must be committed to in-patient treatment.").

51. *See United States v. Mohammad*, 53 F.2d 1426, 1438 (7th Cir. 1995).

52. *Loy*, 237 F.3d at 266 (citation omitted).

53. *Loy*, 237 F.3d at 266.

54. *Antelope*, 395 F.3d at 1141-42.

55. *Guagliardo*, 278 F.3d at 872; *see also Riley*, 576 F.3d at 1048 (striking as impermissibly overbroad condition prohibiting accessing via computer any material that relates to children).

56. *Loy*, 237 F.3d at 263.

57. *Guagliardo*, 278 F.3d at 872.

58. *Wiedower*, 634 F.3d at 496; *United States v. Stults*, 575 F.3d 834, 854-55 (8th Cir. 2009); *United States v. Ristine*, 335 F.3d 692, 694-95 (8th Cir. 2003).

59. *United States v. Mike*, 632 F.3d 686, 701 (10th Cir. 2011); *United States v. Brigham*, 569 F.3d 220, 234 (5th Cir. 2009).

60. *See Perazza-Mercado*, 553 F.3d at 75-79 (holding that district court plainly erred in imposing a "ban on the possession of adult pornography as a condition of supervised release, without any explanation and without any apparent basis in the record for the condition"); *United States v. Voelker*, 489 F.3d at 150-153 (citation and quotation omitted) (holding on review for abuse of discretion that "[t]he district court] ignored our caution that the deprivation of liberty can be no greater than necessary to meet the goals [of 18 U.S.C. § 3583(d)(2)] … [and] failed to provide an analysis or explanation to support this broad restriction"). *But see United States v. Daniels*, 541 F.3d 915, 927-28 (9th Cir. 2008) (holding that district court "did not plainly err in limiting [defendant's] possession of materials depicting sexually explicit conduct because the condition furthered the goals of rehabilitating him and protecting the public" where defendant was convicted of possession of child pornography and could "slip into old habits of amassing child pornography") (quotations and citations omitted); *Rearden*, 349 F.3d at 611 (upholding similar condition on plain error review); *United States v. Carpenter*, 280 F. App'x 866, 869 (11th Cir. 2008) ("With regard to the ban on possessing sexually explicit materials, neither this court nor the Supreme Court has held a lifetime condition prohibiting a similarly situated sex offender from possessing any sexually explicit materials is overly broad. Accordingly, the district court did not plainly err in prohibiting [defendant convicted of sex trafficking of a minor and enticing a minor to engage in prostitution] from possessing sexually explicit materials.").

61. *Antelope*, 395 F.3d at 1131-32.

62. *See, e.g.*, U.S.S.G. § 5D1.3(d)(7)(A) (advising sex offender treatment as a special condition); *United States v. York*, 357 F.3d 14, 27-28 (1st Cir. 2004) (upholding sex offender treatment and polygraph conditions but recognizing right to assert valid Fifth Amendment privilege).

63. *Garner v. United States*, 424 U.S. 648, 654 (1976) (footnote omitted). *See also Minnesota v. Murphy*, 465 U.S. 420, 427-29 (1984).

64. *Murphy*, 465 U.S. at 429.

65. *Id.* (citing *Garner*, 424 U.S. at 657).

66. *Id.* at 429-34.

67. *See generally* John Matthew Fabian, *To Catch a Predator, and Then Commit Him for Life: Analyzing the Adam Walsh Act's Civil Commitment Scheme Under 18 U.S.C. § 4248 – Part One*, 33 THE CHAMPION 44

(February 2009).

68. 536 U.S. 24.

69. *Id.* at 29-48.

70. *Id.* at 54-72.

71. *Id.* at 48-54.

72. *Id.* at 501-51 (O'Connor, J., concurring).

73. *See also Allen v. Illinois*, 478 U.S. 364 (1986) (Illinois sexually dangerous persons proceedings are civil rather than criminal, so that federal constitutional privilege against self-incrimination does not apply in civil proceedings).

74. If a defendant is required to register under the Sex Offender Registration and Notification Act, 18 U.S.C. § 3583(d) mandates a supervision condition that the person comply with the Act.

75. *United States v. Goodwin*, 717 F.3d 511, 523-27 (7th Cir. 2013). *See also United States v. Windless*, 719 F.3d 415 (5th Cir. 2013) (district court cannot rely on "bare arrest records" to impose conditions of supervised release).

76. *United States v. McLaurin*, 731 F.3d 258, 264 (2d Cir. 2013).

77. *See, e.g.*, *United States v. Sebastian*, 612 F.3d 47 (1st Cir. 2010); *United States v. Dupes*, 513 F.3d 338 (2d Cir. 2008); *United States v. Ross*, 475 F.3d 871 (7th Cir. 2007); *United States v. Smart*, 472 F.3d 556 (8th Cir. 2006); *United States v. Prochner*, 417 F.3d 54 (1st Cir. 2005); *United States v. York*, 357 F.3d 14 (1st Cir. 2004).

78. *United States v. Carter*, 463 F.3d 526 (6th Cir. 2006) (sex offense 17 years old); *United States v. T.M.*, 330 F.3d 1235 (9th Cir. 2003) (sex offense accusation 40 years old and conviction 20 years old); *United States v. Scott*, 270 F.3d 632 (8th Cir. 2001) (sex offense 15 years old).

79. *Preston*, 706 F.3d at 1122; *United States v. Cope*, 527 F.3d at 943 (9th Cir. 2008); *United States v. Wise*, 391 F.3d 1027, 1033 (9th Cir. 2004) ("Where a condition of supervised release is not on the list of mandatory or discretionary conditions in the sentencing guidelines, notice is required before it is imposed, so that counsel and the defendant will have the opportunity to address personally its appropriateness."); *United States v. Scott*, 316 F.3d 733, 736 (7th Cir. 2003). *Contrast United States v. Moran*, 573 F.3d 1132, 1138 (11th Cir. 2009) ("The district court was not required to notify Moran before it imposed special conditions to address his proclivity for sexual misconduct.").