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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Honorable J. Derham Cole, Circuit Court Judge

KEVIN MARK WILLSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-000161

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred in finding counsel was effective when counsel failed to raise an objection or advise Petitioner concerning an unconstitutional total ban on internet access that was added by the solicitor as a new condition to a five-year period of probation during a "negotiated" guilty plea?

STATEMENT

Petitioner was indicted on seven different counts related to pornographic material stored on electronic devices found in his home. App. 8 - 12. Petitioner was tried before the Honorable Edward W. Miller and a Greenville County jury on December 3rd and 4th, 2018. App. 1. At trial, Petitioner was represented by James Bannister and Marcelo Torricos, with David Collier and R. Kyle Senn appearing on behalf of the state. App. 1. At the close of evidence, Petitioner entered a guilty plea to two of the charges. App. 245, l. 16 – 246, l. 16.

Before pleading guilty, the trial court informed Petitioner there was an offer on the table for "a nine-year sentence to a non-violent offense." App. 242, ll. 10 – 12. The trial court then went over some benefits of accepting this plea, including that "you won't be in violent" and that point also impacted the length of incarceration before parole eligibility. App. 242, ll. 13 – 16. The trial court then warned Petitioner that it was "a bird in the hand" and that a verdict by the jury was coming and "[i]t's not going away and it's happening today." App. 243, ll. 5 – 9.

After Petitioner spoke with Bannister (hereinafter trial counsel) and asked if the plea offer could lowered any further, the nine-year offer was reduced to eight years at which time Petitioner agreed to plead guilty. App. 306, l. 14 – 308, 15. However, during the plea colloquy, the state asserted the plea was for "20 years suspended to eight years incarceration and *five years probation* with conditions of probation to include no unsupervised contact with minors and *no Internet access*." App. 246, ll. 1 – 6 (emphasis added). The changes to the terms, from a straight nine years explained by the trial court to the eight years Petitioner believed he would receive, were altered further during the plea colloquy by the imposition of a significant suspended sentence with harsh parole conditions for an additional five years. The state also added a "no

internet" access as an additional condition on the supposedly "negotiated" plea. App. 246, ll. 1 – 6.

Despite the differences between the plea offer presented by the trial judge, and without advice or objection by trial counsel to the new terms, Petitioner indicated his agreement with these new terms. App. 246, ll. 7 – 9. The plea then became a moving target. The trial court noted the need to alter the plea as "there is no offense here which I can give him 20 years" and that the plea would need to be eight (8) years on one count and *ten years* consecutive on the second count suspended with five years of probation. App. 246, ll. 10 – 15. Rather than provide guidance on the impact of these new terms and conditions, including the internet ban and significant suspended sentence, trial counsel took no action, forcing Petitioner to respond to the plea changes without the benefit of legal advice. App. 246, l. 10 – 247, l. 19. Trial counsel admitted during the PCR hearing that he was "fuzzy" on the addition of the probation aspect of the plea and was simply happy they had some "some offer on the table that was going to reduce the amount of time [petitioner] was about to get." App. 353, ll. 2 – 5; 357, ll. 2 – 6.

Petitioner timely filed for PCR, alleging ineffective assistance of counsel regarding the alteration of the terms of his guilty plea during the plea colloquy and trial counsel's failure to object to the unconstitutional imposition of an absolute ban on the use of the internet during the period of his probation. App. 252 - 253. An evidentiary hearing was held before the Honorable J. Derham Cole on July 24, 2023. App. 294. Susanna Ross represented Petitioner, and Melody Brown appeared on behalf of the state. App. 294. Judge Cole denied relief by order of dismissal dated August 29, 2023. App. 1325.

This petition for certiorari follows.

ARGUMENT

The PCR court erred in finding counsel was effective when counsel failed to raise an objection or advise Petitioner concerning an unconstitutional total ban on internet access that was added by the solicitor as a new condition to a five-year period of probation during a "negotiated" guilty plea.

A. How the matter was raised at PCR.

In Petitioner's PCR application, one of the asserted grounds was failure of counsel to object to the unconstitutional, blanket ban on internet access. App. 253. The record of the guilty plea colloquy shows the internet ban was not mentioned when the original nine-year sentence was disclosed to Petitioner by the trial court. App. 242, l. 3 – 243, l. 11. As confirmed by Petitioner's counsel during the PCR hearing, the nine-year sentence became eight with additional probation requirements during a break in the proceedings and under time pressure since the case was ready for closing arguments and the jury charge. App. 352, l. 21 – 353, l. 5. The internet prohibition was then added as a condition of probation by the solicitor only during the explanation of the "negotiated" terms to the trial court. App. 246, ll. 1 – 6. Petitioner's trial counsel admitted he was unfamiliar with Supreme Court's decision in Packingham v. North Carolina, 582 U.S. 98, 109 (2017) (holding "the State may not enact this complete bar to the exercise of First Amendment rights on websites integral to the fabric of our modern society and culture."). He further stated that he did not request a more tailored or measured ban on internet usage since "it was at that point the fact that we had some offer on the table" that would reduce the period of incarceration as his main concern. App. 356, l. 12 – 357, l. 5.

Moreover, trial counsel acknowledged he was "fuzzy" on the addition of probation as an aspect of the plea. App. 353, ll. 2 – 5. In contrast, the record shows probation was not

mentioned as a condition of the original nine-year offer. App. 242, ll. 9 – 25. Petitioner testified that probation was first presented to him as a part of plea while was pleading guilty and that trial counsel had neither disclosed that aspect of the plea nor given any legal advice regarding its potential impact on his active period of incarceration nor the potential problems completing a probationary sentence with the added burden of a complete ban on access to the internet and a significant sentence hanging over his head if he failed to complete probation. App. 308, l. 19 – 309, l. 2.

B. How the PCR Court addressed the matter.

In its order of dismissal, the PCR court found that the internet ban was redundant to the general conditions put in place by the Department of Probation, Parole, and Pardon (hereinafter PPP). The PCR court ruled the constitutional concerns in Packingham v. North Carolina, 582 U.S. 98 (2017) were not present, since the ban was not permanent (lasting five-years instead of a lifetime) and was a condition of probation for a crime that actively used the internet. App. 383 – 386. In finding the ban was not a total ban as examined in Packingham, the PCR court noted that it was not of indefinite duration and that Petitioner was "allowed assistance to access the internet, but he could not personally touch the keyboard." App. 386. In addition, the PCR court found Petitioner "received the benefit of the agreement for which he bargained" and rejected the testimony that petitioner "did not understand the benefits for which he bargained." App. 382.

C. The PCR court erred in finding counsel was effective, since the internet ban was an improper violation of Petitioner's First Amendment rights and counsel made no objection or request for a more narrowly tailored restriction.

Broad internet bans present a significant infringement on First Amendment rights. As noted by the Supreme Court:

> While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of

> views, today the answer is clear. It is cyberspace—the "vast democratic forums of the Internet" in general, Reno v. American Civil Liberties Union, 521 U.S. 844, 868, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997), and social media in particular. . .
>
> Social media offers "relatively unlimited, low-cost capacity for communication of all kinds." Reno, *supra*, at 870, 117 S. Ct. 2329. On Facebook, for example, users can debate religion and politics with their friends and neighbors or share vacation photos. On LinkedIn, users can look for work, advertise for employees, or review tips on entrepreneurship. And on Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner. Indeed, Governors in all 50 States and almost every Member of Congress have set up accounts for this purpose. *See* Brief for Electronic Frontier Foundation 15–16. In short, social media users employ these websites to engage in a wide array of protected First Amendment activity on topics "as diverse as human thought." Reno, *supra*, at 870, 117 S. Ct. 2329 (internal quotation marks omitted).

Packingham v. North Carolina, 582 U.S. 98, 104–05 (2017).

When the government imposes restrictions on internet usage, it invades a fundamental liberty interest protected by the First Amendment. See Packingham, 582 U.S. as 108 (noting that to "foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights."). However, those convicted of serious crimes or serving probation may be subject to narrowly tailored laws that, for example, "prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor." Packingham, 582 U.S. at 107.

The restriction of internet access must be "narrowly tailored to serve a significant governmental interest." McCullen v. Coakley, 573 U.S. 464, 486 (2014). "Where certain speech is associated with particular problems, silencing the speech is sometimes the path of least resistance. But by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily 'sacrific[ing] speech for efficiency.'" McCullen, 573

U.S. at 485 (quoting Riley v. National Federation of Blind of N. C., Inc., 487 U.S. 781, 795 (1988)). For a content-neutral restriction to be "narrowly tailored" it must not "burden substantially more speech than is necessary to further the government's legitimate interests" such that it places a "substantial portion of the burden on speech" that "does not serve to advance its goals." Ward v. Rock Against Racism, 491 U.S. 781, 799–800 (1989).

Absolute internet bans, like those imposed on Petitioner in connection with his guilty plea, have been rejected as neither "narrowly tailored" nor advancing the goals of protecting the public or rehabilitating the offender. *See* United States v. Eaglin, 913 F.3d 88, 96 (2d Cir. 2019)(rejecting total internet ban on sex offender since "Eaglin has a First Amendment right to be able to email, blog, and discuss the issues of the day on the Internet while he is on supervised release. Moreover, one of the conditions of supervised release is that he remain employed: to search for a job in 2019, the Internet is nearly essential, as the Court in Packingham recognized."); United States v. Holena, 906 F.3d 288, 295 (3d Cir. 2018) (rejecting total internet ban following conviction for enticing minor for sex since it "sweep too broadly, preventing [accused] from reading the news or shopping online. And they limit his First Amendment freedoms beyond what is reasonably necessary or appropriate.").

Likewise, restrictive internet terms have been upheld when they are not "total" bans but were more narrowly tailored, such as requiring monitored use of the internet, prior approval of probation officers, or other appropriate safeguards. *See* United States v. Rock, 863 F.3d 827, 831 (D.C. Cir. 2017) (upholding a supervised release term prohibiting "possessing or using a computer, or having access to any online service, *without the prior approval of the probation office*."); State v. Johnson, 487 P.3d 893, 896 (Wash. 2021) ("We conclude that the community custody condition here is significantly narrower than the statute struck in Packingham. Johnson

is not prohibited from accessing any particular social media site. Instead, *he is required to use the Internet only through filters approved by his community custody officer."* (emphasis added)).

The PCR court relied upon cases that followed this type of tailored internet restriction (requiring approval for use through probation officer and appropriate filters and consents to search devices) in holding the ban on Petitioner was not a violation of his First Amendment rights. App. 384 – 385. Contrary to supporting the PCR court's decision, United States v. Arce, 49 F.4th 382 (4th Cir. 2022) noted a "complete internet ban is almost always excessive for 'non-contact child pornography activity, or similar conduct' where there was no actual contact with the victim." Id. 49 F.4th at 396. In United States v. Bobal, 981 F.3d 971 (11th Cir. 2020), also relied upon by the PCR court, the restriction against internet use contained exceptions for "work and with the prior permission of the district court." Id., 981 F.3d at 976. In upholding the restriction, the Eleventh Circuit noted "computer restrictions are not overly broad when a sex offender on supervised release can 'still use the Internet for valid purposes by obtaining his probation officer's prior permission.'" Id. Rather than supporting the PCR court's ruling, both Bobal and Arce would dictate a finding that the total ban on the use of the internet was a constitutional violation.

South Carolina courts have addressed unreasonable and disproportional elements of a probationary sentence in the context of PCR actions. *See* Beckner v. State, 296 S.C. 365, 366, 373 S.E.2d 469, 469 (1988) ("The burden imposed on petitioner by this condition [not be in a place that sells alcohol] is greatly disproportionate to any rehabilitative function it may serve. Therefore, it is our opinion that the condition is unreasonable."). Moreover, this Court has noted that:

> [v]arious conditions of probation generally have been upheld unless (1) *the condition is so unreasonable or overly broad that*

> *compliance is virtually impossible and the burden imposed on the probationer is greatly disproportionate to any rehabilitative function the condition might serve*; (2) the condition has no relationship to the crime of which the offender was convicted; (3) the condition requires or forbids conduct which is not reasonably related to future criminality; (4) the condition relates to conduct which is not in itself criminal unless the prohibited conduct is reasonably related to the crime of which the offender was convicted or to future criminality; (5) the condition violates due process because it is overly broad or void for vagueness; or (6) *the condition unnecessarily or excessively tramples upon First Amendment rights of free association.*

State v. Allen, 370 S.C. 88, 97–98, 634 S.E.2d 653, 657 (2006) (emphasis added).

In the present case, trial counsel admitted he was unfamiliar with Packingham, decided more than a year before Petitioner's trial, and raised no objection to the complete, unconstitutional internet ban. App. 356, ll. 12 – 23. Trial counsel also admitted being "fuzzy" on the addition of the probationary aspect of the negotiated plea. App. 353, ll. 2 – 5. While counsel is not expected to be clairvoyant, an effective counsel is expected to act reasonably and conform to professional norms. *See* Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) ("We have never required an attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial"). "When evaluating the reasonableness of counsel's conduct, 'the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.'" Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (*quoting* Strickland v. Washington, 466 U.S. 668 (1984)). Allowing an unconstitutional internet ban to be added on the fly as a condition of probation, for a five-year period, that makes successfully completing probation a practical impossibility falls below professional norms and is ineffective assistance of

counsel. The PCR court erred in finding counsel was effective in handling this aspect of the guilty plea.

D. The standard terms and conditions of the Department of Probation, Parole, and Pardon (PPP) regarding internet restrictions do not make this issue harmless.

At the PCR hearing, the state seemed to adopt the view that, due to the standard conditions imposed by PPP, any ineffective assistance of counsel claim related to the internet ban was harmless or moot. App. 366, ll. 7 – 16. The PCR court order also makes note of the conditions imposed by PPP as a basis to reject relief. App. 383.

However, conditions established by PPP are derived from statutory authority. *See* S.C. Code Ann. § 24-21-430 (2010 as amended) (allowing PPP to "develop policies and procedures for imposing conditions of supervision on probationers. *These conditions may enhance but must not diminish court imposed conditions.* (emphasis added)). The complete internet ban at issue here was created by judicial authority as part of the sentence and may not be altered or amended by PPP. PPP is allowed to "develop policies and procedures for imposing conditions of supervision on probationers. *These conditions may enhance but must not diminish court imposed conditions.* S.C. Code Ann. § 24-21-430 (2010 as amended) (emphasis added).

Moreover, contrary to the argument before the PCR court, the Standard Sex Offender Conditions maintained by PPP do not contain an absolute internet ban. In fact, the provisions specifically provide that sex offenders may be "permitted by the Department to have computer and internet access" and that offenders "will abide by the Computer/Internet Use Agreement for Sex Offenders."[1] However, since Petitioner was subjected to a complete internet ban by court order, PPP would have no power to authorize such internet usage. *See* State v. Stevens, 373 S.C.

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[1] PPP maintains public access to its Standard Sex Offender Conditions on its website. See https://www.dppps.sc.gov/content/download/52770/1230497/file/1401+Standard+Sex+Offender+Conditions+.pdf.

595, 598, 646 S.E.2d 870, 871–72 (2007) ("It is well-settled that the determination of [probation] conditions is a judicial function which cannot, consonant with S.C. Const. art. I, § 8, be delegated to an executive agency such as DPPPS."). Arguing that the standard conditions for sex offenders on active probation supervision serves as an independent ban on all internet access is incorrect.

E. Prejudice.

Petitioner testified regarding the hardships created by the complete ban on the use of the internet on successfully completing his probationary sentence. At the PCR hearing, Petitioner testified at length on the problems created by the total internet ban. It creates a barrier to employment since job applications are typically completed over the internet. App. 311, ll. 21 – 24. Without physically visiting a person designated by PPP to both look up job opportunities and apply over the internet for those jobs, Petitioner is unable to search for or apply for any employment that is advertised online or requires an electronic application. App. 313, l. 9 – 314, l. 21. Working at a location equipped with active internet access to members of the public or to employees would violate the terms of Petitioner's probation (which contains no exception for internet access required as a condition of employment). App. 314, ll. 8 – 18. Petitioner may not attend technical college or any other educational or job training program that provides internet access to students or participants. App. 312, ll. 4 – 11. Use of the internet for shopping, entertainment, or news gathering would violate the terms of Petitioner's probation. App. 315, ll. 13 – 25.

As noted by the Second Circuit Court of Appeals:

> [I]mposing an Internet ban would arguably impair [petitioner]'s ability to receive 'needed educational or vocational training, medical care, or other correctional treatment in the most effective manner'—one of the goals of sentencing. Today, as we observed

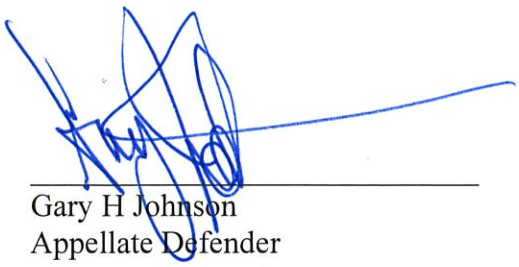
> above, access to the Internet is essential to reintegrating supervisees into everyday life, as it provides avenues for seeking employment, banking, accessing government resources, reading about current events, and educating oneself. Yet when imposing the sweeping Internet ban challenged here, the District Court did not address on the record the likely adverse impact of isolating [petitioner] from these important positive uses of the Internet or engage in any explicit balancing of these competing interests.

United States v. Eaglin, 913 F.3d 88, 98 (2d Cir. 2019) (internal citations omitted).

Petitioner, due to the ineffective assistance of trial counsel, has suffered prejudice from the unconstitutional, total ban on the use of the internet that makes compliance with the terms of his probation and reintegration into society unlikely. In addition, petitioner was required to plead guilty to a moving target "negotiated" plea that made significant changes to the terms and conditions of the plea agreement without the assistance of trial counsel, who was satisfied that some offer had been made and made no effort to intercede and advise petitioner about the impacts of those changes.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order further briefing on the issue presented.



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This 5th day of June, 2024.