UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF GOULD

UNITED STATES OF AMERICA,	)	CR No. 05-285-CFN
	)	
Plaintiff,	)	ORDER DENYING DEFENDANT'S
	)	MOTION TO SUPPRESS EVIDENCE
v.	)	
	)	
SADIE ANNE DAWSON,	)	
	)	
Defendant.	)	
	)	
_____	)	

This matter comes before the Court on Defendant Sadie Anne Dawson's motion to suppress evidence. In August 2005, United States Immigration and Customs Enforcement ("ICE") agents approached Dawson at her place of work and attempted to question her about an ongoing child pornography task force investigation, but she refused to answer their questions. Following the encounter, Dawson was charged with shipping child pornography, in violation of 18 U.S.C. § 2252A.

The issue presented is whether the prosecution's use of a defendant's prearrest silence in its case-in-chief violates the defendant's Fifth Amendment right against self-incrimination. The Court hereby finds that the use of Dawson's prearrest silence does not implicate her right against self-incrimination and, therefore, the prosecution may present evidence of her prearrest silence during its case-in-chief.

Although this issue has not been decided by the Supreme Court or the Twelfth Circuit, the Court is persuaded by the reasoning of the Eleventh, Fifth, and Ninth circuits in their decisions holding that the right against self-incrimination applies only to government-compelled speech, and for purposes of the Fifth Amendment, a defendant's prearrest silence is not government compelled.[1] See United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991); United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996); United States v. Oplinger, 150 F.3d 1061, 1066 (9th Cir. 1998). As the Ninth Circuit stated in Oplinger, exclusion of prearrest silence because of a defendant's right against self-incrimination is "simply contrary to the unambiguous text of the Fifth Amendment, which plainly states that 'no person . . . shall be *compelled* in any criminal case to be a witness against himself.'" 150 F.3d at 1067 (citing U.S. Const. amend. V). Thus, prosecutorial use of a defendant's silence as substantive evidence, even when it follows accusations of criminal behavior, does not violate the

[1] Although they have not directly ruled on this issue, the Fourth and Eighth circuits have held that the prosecution may use a defendant's post-arrest, pre-Miranda silence during its case-in-chief. See United States v. Frazier, 408 F.3d 1102, 1111 (8th Cir. 2005); United States v. Love, 767 F.2d 1052, 1063 (4th Cir. 1985). Because these circuits have held that a defendant's silence in response to questioning after arrest but pre-Miranda is not government compelled, they likely would support the contention that prearrest silence is not government compelled for the same reasons.

Constitution unless the silence occurred while the defendant was in custody or under indictment. See id. (citing United States v. Giese, 597 F.2d 1170, 1197 (9th Cir. 1979)).

Further, although the Supreme Court has not decided whether the prosecution can use a defendant's prearrest silence in its case-in-chief, the reasoning in its decisions allowing the use of a defendant's prearrest silence for impeachment supports this Court's decision to allow the substantive use of defendant's prearrest silence. See Jenkins v. Anderson, 447 U.S. 231, 238 (1980); see also Fletcher v. Weir, 455 U.S. 603, 607 (1982) (holding prosecutorial use of defendant's post-arrest, pre-Miranda silence for impeachment does not violate Fifth Amendment). In Jenkins, the Supreme Court held that the prosecution could use a defendant's prearrest silence for impeachment because a testifying defendant necessarily exposes himself to cross-examination by testifying and therefore has waived his Fifth Amendment right against self-incrimination. 447 U.S. at 238.

While the majority's waiver theory in Jenkins is not particularly helpful in deciding whether to allow substantive use of a defendant's prearrest silence, Justice Stevens's reasoning in his concurrence strongly supports this Court's decision. In his concurrence, Justice Stevens rejected the majority's waiver theory and instead found that the use of

prearrest silence for impeachment does not violate the Fifth Amendment "because the privilege against compulsory self-incrimination is simply irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak." Id. at 241 (Stevens, J., concurring). As Justice Stevens recognized, the central purpose of the right against self-incrimination is to protect a defendant from being forced to testify, and that purpose does not justify exclusion of prearrest silence used for impeachment. Id. at 242. Justice Stevens's reasoning applies equally to the question of whether the prosecution should be allowed to use a defendant's prearrest silence in its case-in-chief; the purpose of the Fifth Amendment right against self-incrimination is not served by precluding the substantive use of a defendant's noncompelled, prearrest silence.

This Court is not persuaded by the reasoning of the four circuits that have held that a defendant's prearrest silence must be excluded because the Fifth Amendment extends to the prearrest context. See Combs v. Coyle, 205 F.3d 269, 283 (6th Cir. 2000); United States v. Burson, 952 F.2d 1196, 1201 (10th Cir. 1991); Coppola v. Powell, 878 F.2d 1562, 1568 (1st Cir. 1989); United States ex rel. Savory v. Lane, 832 F.2d 1011, 1017 (7th Cir. 1987). For example, in Savory, the Seventh Circuit held that an individual's right to remain silent attaches prior

to her arrest. 832 F.2d at 1017. Therefore, the court concluded, admitting the defendant's prearrest silence at trial constitutes the same penalty for exercising a constitutional right that the Supreme Court found impermissible in Griffin v. California, 380 U.S. 609, 613 (1965), which held that a prosecutor may not ask the jury to draw a negative inference from a defendant's decision to exercise his right not to testify at trial. Id. Similarly, in Coppola, the First Circuit distinguished Jenkins, holding that if a defendant exercises the right not to testify and has therefore not waived the right against self-incrimination, the prosecution may not refer to the defendant's silence. 878 F.2d at 1567. This Court is not persuaded by the reasoning in these decisions because the plain language of the Fifth Amendment indicates that the right against self-incrimination does not extend beyond custodial interrogations. Simply put, if the right does not attach prearrest, the Griffin analysis is inapplicable.

In this case, the facts show that Dawson was under no compulsion when she was questioned by the agents. She was approached casually at her workplace. She was not in custody. She had not been Mirandized. The agents did not even view her as a suspect at that time. Thus, her silence was in no way compelled by the government. These circumstances fall well outside the scope of the Fifth Amendment.

Although there are many nonincriminating reasons why an individual may choose to remain silent, Dawson's counsel can explore those reasons on cross-examination and during closing arguments. The aims of the criminal justice system are better served by allowing the rules of evidence to dictate when the prejudicial effect of evidence outweighs its probative value, rather than requiring blanket exclusion of potentially relevant evidence.

In summary, the right against self-incrimination does not extend to speech that is not government compelled. A defendant who chooses to remain silent during the fact-finding stage of an investigation cannot reasonably claim that the government compelled her silence. Based on the foregoing, Dawson's motion to suppress is DENIED.

Dated: _____

_____
ALICIA CLOUGH
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF GOULD

UNITED STATES OF AMERICA,

Plaintiff,

v.

SADIE ANNE DAWSON,

Defendant.

HONORABLE ALICIA CLOUGH, DISTRICT JUDGE PRESIDING

REPORTER'S TRANSCRIPT OF PROCEEDINGS

SENTENCING HEARING

GOULD CITY, GOULD

JANUARY 27, 2007

APPEARANCES BY COUNSEL:

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GOULD CITY, GOULD: JANUARY 27, 2007

(COURT IN SESSION AT 10:00 AM)

THE CLERK: Calling item one, CR 05-285-CFN: United States of America v. Sadie Anne Dawson.

MS. GARVEY: Erin Garvey for the United States. Good morning, your Honor.

MR. LONG: Good morning, your Honor. Ryan Long present with Ms. Dawson.

COURT: We are present this afternoon for sentencing. Ms. Dawson was convicted at trial of knowingly shipping child pornography.

MR. LONG: That is correct, your Honor.

COURT: For the record, the court has reviewed the parties' sentencing papers and the Presentence Report. Based on my review of the parties' papers, I believe the parties have no objections to the facts described in the Presentence Report. The parties also agree that the probation officer's guidelines calculations are fair and accurate. Using Section 2G2.2, the probation officer calculated Ms. Dawson's offense level to be a base offense level 22, adjusted upward five levels because Ms. Dawson distributed the images for pecuniary gain, adjusted upward two levels for use of a computer, and adjusted upward two more levels because her offense involved 10-150 images. Using those calculations, Ms. Dawson has

a total adjusted offense level 31, with an advisory sentencing range of 108 to 135 months. The probation office recommends a sentence at the low end, meaning 108 months in custody. Is that correct, counsel?

MS. GARVEY: Yes, your Honor.

MR. LONG: Your Honor, 108 months is a harsh penalty, but Ms. Dawson agrees that the sentencing calculations in the PSR are correct, and because 108 months is the low end of the advisory guideline range, my client is not disputing the imposition of that term.

COURT: Thank you, Mr. Long. The PSR also recommends that the court impose certain special conditions during the three-year period of supervised release. I would like to hear from both sides on the necessity and propriety of the recommended conditions. Ms. Garvey?

MS. GARVEY: Your Honor, the government is asking the Court to impose a special supervised release condition because defendant has been convicted of shipping child pornography using the Internet. Specifically, the government is asking the Court to order that Ms. Dawson is not to possess, procure, purchase, or otherwise obtain access to any computer network, bulletin board, Internet, or exchange format involving computers, unless specifically approved by the Probation Office.

COURT: Ms. Garvey, why is this a reasonable condition to place on the defendant after her release?

MS. GARVEY: Well, your Honor, the Internet played a crucial role in the defendant's ability to commit this crime. The defendant was directly involved in the creation and maintenance of a website that allowed subscribers access to images of child pornography. The nature of the defendant's offense, coupled with her extensive knowledge of computers and the Internet, make this ban especially appropriate.

COURT: What about a less restrictive alternative?

MS. GARVEY: The government does not believe that less restrictive alternatives would be effective. Although the Twelfth Circuit has not ruled on the appropriateness of this type of restriction, several other circuits have accepted similar restrictions. In doing so, the courts focused on the nature and circumstances of the crime committed. Here, the use of the Internet was fundamental to the crime committed. The defendant is a sophisticated computer user who could circumvent less restrictive conditions. Additionally, the defendant profited enormously in a relatively short period of time. The government strongly feels that this condition is necessary to deter defendant from committing the same type of offense once she is released.

COURT: Thank you, Ms. Garvey. Mr. Long?

MR. LONG: Thank you, your Honor. This restriction on Ms. Dawson's Internet use is improper under 18 U.S.C. § 3583(d) because it is not reasonably related to legitimate sentencing considerations, and it unreasonably burdens Ms. Dawson's constitutional rights. Ms. Garvey neglected to mention that many circuit courts have found restrictions like the proposed one impermissible because they impose too high a cost on a defendant's liberty. These circuits have rejected identical conditions in similar cases.

COURT: Can you give the Court one example, Mr. Long?

MR. LONG: The Second Circuit's decision in Sofsky, your Honor. In that case, the defendant used the Internet to download child pornography and exchange it with others. The Second Circuit found that banning the defendant from using the Internet was too broad a restriction because it cut the defendant off from benign as well as illegal uses of the Internet. Your Honor, if the concern is preventing my client from using the Internet in illegal ways, why not just impose random searches of her computer? A less burdensome restriction would allow my client access to email, to read the newspaper online, and to access sports scores --

COURT: Couldn't the defendant just make a phone call or pick up a print version of the newspaper to accomplish those things? And, if she has a demonstrated need, couldn't she simply ask her probation officer for permission?

MR. LONG: Yes, your Honor, however, the Internet has become a basic, everyday tool, meaning that cutting my client off from all Internet use is akin to taking away all access to the outside world. It is simply too burdensome to require Ms. Dawson to get a note from her probation officer every time she wants to write an email to her mother. More importantly, this restriction also places too high a burden on my client in the future because it will prevent her from pursuing her career as a web consultant.

COURT: Was your client doing other Internet-related work at the time of her arrest?

MR. LONG: Just her work for Wild Images, your Honor.

COURT: Alright. Thank you, Mr. Long. I am ready to rule on defendant's sentence. In addition to the mandatory conditions of supervised release outlined in Sentencing Guideline § 5D1.3(a)(7) and the standard supervised release conditions set forth in § 5D1.3(c), the court will impose a special condition of supervised release prohibiting Ms. Dawson from unrestricted use of a computer and the Internet. Ms. Dawson is not to

possess, procure, purchase or otherwise obtain access to any form of computer network, bulletin board, Internet, or exchange format involving computers, unless specifically approved by the Probation Office.

MR. LONG: Your Honor, I have to object. This is just --

COURT: Mr. Long, I understand your objections. I've come to my decision after careful review of the record and having considered all of your arguments.

MR. LONG: Yes, your Honor, but this is -- this restriction places such a great burden on my client that --

COURT: This restriction is fair based on the heinous nature of your client's crime. I understand that there are differing opinions among the courts that have dealt with this issue, but I find this condition to be reasonably related to the crime of conviction. Your client used the Internet to exploit children. She used the Internet to exchange pictures of victimized children for money. While this restriction may pose challenges for Ms. Dawson after her release, on balance, we must protect society from those who would use the computer to harm children. Ms. Dawson has demonstrated her willingness to use her skills and talents to create a business that hurt countless children. Further, Ms. Dawson has proven herself able to find employment in non-

Internet-related fields -- she worked as a waitress before her arrest. I do not feel that restricting her use of computers and the Internet will cause more harm than good. Under the facts of this case, I find that this condition is necessary to deter a public threat to children. Furthermore, if Ms. Dawson should happen to have a legitimate need to use the Internet she may ask her probation officer.

Ms. Dawson, you are hereby advised that you have the right to appeal your sentence. Do you understand that right?

DEFENDANT: Yes, your honor.

COURT: Thank you, counsel.

IN THE UNITED STATES COURT OF APPEALS

FOR THE

TWELFTH CIRCUIT

Case No. 07-1843

Decided Aug. 7, 2007

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

v.

SADIE ANNE DAWSON,

Defendant/Appellant.

APPEAL from a judgment of the United States District Court for the District of Gould. Before Keogh, Castillo, and DeFuria. OPINION BY DEFURIA, J. Reversed.

Defendant-appellant Sadie Anne Dawson appeals her conviction and sentence following a jury trial for shipping child pornography over the Internet, in violation of 18 U.S.C. § 2252A(a)(1).[2] Dawson contends that the district court violated her Fifth Amendment right against self-incrimination by allowing the prosecution to offer testimony regarding her prearrest silence as substantive evidence of her guilt. We agree. Deciding an issue of first impression in this circuit, we hereby hold that the prosecution may not use a defendant's prearrest silence in its case-in-chief when the defendant does not testify. Such use constitutes a penalty for exercising a Fifth Amendment right and impermissibly burdens the policy underlying the Fifth Amendment without furthering a legitimate governmental practice. We further hold that the admission of Dawson's prearrest silence was not harmless error in this case; the other evidence against Dawson was not overwhelming, creating a question as to whether the jury relied on her prearrest silence in finding her guilty of shipping child pornography.

Dawson also challenges the district court's imposition of a special supervised release condition that prohibited her from possessing, procuring, purchasing, or otherwise obtaining access

[2] 18 U.S.C. § 2252A criminalizes the actions of "(a) [a]ny person who - (1) knowingly mails, or transports or ships in interstate or foreign commerce by any means, including by computer, any child pornography[.]"

to any form of computer network, bulletin board, Internet, or exchange format involving computers, unless specifically approved by her Probation Officer. Having invalidated Dawson's conviction on constitutional grounds, we need not reach the sentencing issue but choose to do so because the Supreme Court may disagree with our holding on the constitutional issue, and the sentencing issue is an issue of first impression in this circuit as well as the subject of a circuit split. Accordingly, in the interest of judicial economy, we hereby hold that the district court erred in imposing the special condition of supervised release because it was overly broad and resulted in a greater deprivation of liberty than was reasonably necessary to deter Dawson from future criminal conduct and to protect the public. Accordingly, we reverse Dawson's conviction and sentence.

I. FACTUAL AND PROCEDURAL SUMMARY

A. Investigation and Arrest of Dawson

This case arises from a child pornography task force investigation conducted by United States Immigration and Customs Enforcement (ICE) agents and Gould County Police Department (GCPD) detectives into the dealings of Wild Images, Inc., an Internet-based company owned by Jason Vu, Dawson's boyfriend and roommate. Wild Images maintained several paid membership adult websites, including at least one that offered images of child

pornography. Although Wild Images was operated by Vu from his modest home-office, the company had grown rapidly during its brief existence into a profitable business venture.

While working undercover in a chat room known for attracting pedophiles, federal agents encountered Vu, who had posted to an Internet group, alt.binaries.pictures.sillystring, images described as "not quite yet legal" boys and girls and indicated that he had more images to share. Posing as collectors of child pornography, agents contacted Vu in an internet chat room and asked if he would send more images to them. Vu offered to send pictures of young girls. He also told the agents that images containing graphic child pornography were available at Wild Images's websites with the purchase of a special password.

Soon after their initial interaction with Vu, the agents launched a large-scale investigation into Wild Images, hoping to uncover a network of buyers, sellers, and creators of child pornography. The agents were frustrated to find that Vu had disappeared from the chat rooms and changed the URL of Wild Images's websites to make them more difficult to access. The agents decided to approach Dawson to see if she would be willing to cooperate with their investigation.

At trial, ICE Agents George Algar and William Campbell testified that before they approached Dawson, they looked into

her personal and professional background. Agent Campbell testified that Dawson's 2003 and 2004 tax returns listed her occupation as "freelance web consultant." Agent Campbell was, however, unable to find any Internet or web company other than Wild Images that had employed Dawson. Agent Campbell noted that Dawson showed no outward signs of financial problems, as she wore designer clothes and jewelry and recently had purchased a new Toyota Prius.

Agent Algar testified that, given Dawson's clean record and the large amount of legal pornography on Wild Images's websites, the agents were uncertain if Dawson knew about the websites' child pornography and decided to question her to see if she would be willing to cooperate with their investigation. According to Agent Algar's testimony at trial, he approached Dawson on a Friday evening at the restaurant where she worked part time as a waitress, and they had the following conversation:

Agent Algar: Hello Ms. Dawson. This is Agent Campbell, and I am Agent Algar. How are you doing tonight?

Dawson: I'm fine, but I'm very busy right now. What is this about?

Agent Algar: We are conducting an investigation into some potentially serious criminal activity, and we think you may be able to help.

Dawson: What kind of activity?

> Agent Algar: Well, we believe child pornography is being illegally distributed from a website headquartered in this town. Do you know anything about that?

Agent Algar testified that instead of responding to his question, Dawson looked at him, hesitated, and then walked away. He further testified that throughout his conversation with Dawson, she seemed uncomfortable, frequently looking around at fellow employees and patrons in the restaurant. Later that same day, Agent Campbell attempted to contact Dawson on her cellular telephone, but she did not answer and never called back.

Shortly after their attempt to interview Dawson, the agents arrested Vu. They also executed a search warrant at Wild Images's offices. Agent Algar testified that they moved quickly after the interview because they were worried that Dawson might warn Vu and evidence would be destroyed. During the search, the agents discovered pay stubs from Wild Images, Inc. for both Vu and Dawson as well as the webmaster's version of several Wild Images's websites, including one with links to child pornography.

After his arrest, Vu quickly accepted a cooperation plea agreement in which he promised to provide information about other people's involvement in child pornography in exchange for a reduced sentence. Vu informed the agents that Dawson was involved in the creation and maintenance of all of Wild Images's

websites and that he had paid her about $200,000 for her work. He claimed that he and Dawson often discussed the content of the sites, and Dawson definitely knew that their most profitable websites contained child pornography.

The agents arrested Dawson and charged her with shipping images of child pornography in interstate commerce using a computer, in violation of 18 U.S.C. § 2252A(a)(1).

At trial, after overruling an objection by Dawson's attorney, the court allowed Agent Algar to testify regarding Dawson's prearrest silence. Aside from that testimony, the prosecution's evidence against Dawson was limited to Vu's testimony, the documentary evidence found during the search, and evidence of her lavish spending habits. Vu testified consistent with his statements to the agents and added that Dawson had chosen all of the computer programs utilized by Wild Images's websites.

In closing, the prosecutor made the following comments concerning Dawson's failure to answer Agent Algar's question about child pornography:

> What kind of person is silent when asked to help uncover a child pornography ring? What kind of person turns her back on hundreds of suffering children? A person with something to hide. A person who feels the noose tightening around her neck. A guilty person!

In response, Dawson's defense counsel argued that Dawson was involved only in the websites' legal, adult content and had

no idea that Wild Images's websites contained child pornography. The defense presented several witnesses who claimed that Dawson was extremely embarrassed by her boyfriend's career as a pornographer. Her friend Stacy Mikita testified that she rarely brought up the subject of pornography with Dawson because Dawson was so uncomfortable with it. On one occasion, Dawson told Mikita that the only way she was able to work for Vu was to avoid looking at any of the provocative images. Mikita stated that Dawson also told her that she loved working at the restaurant, Big Sam's, because it felt good to do "honest work." Similarly, the restaurant manager, "Big" Sam Koharski, testified that Dawson was a very honest woman who took pride in her hard work at the restaurant. He stated that Dawson willingly stayed late to help clean the diner and often agreed to cover shifts for other waitresses. In closing, the defense argued that Dawson's silence when confronted by the agents was natural and certainly too ambiguous to be considered probative of her guilt.

B. Trial and Sentencing

On January 24, 2007, the jury convicted Dawson of shipping child pornography, in violation of 18 U.S.C. § 2252A(a)(1). The district court sentenced her to 108 months imprisonment, to be followed by a three-year term of supervised release. The court imposed various standard supervised release conditions, along with one special condition prohibiting Dawson from "possessing,

procuring, purchasing, or otherwise obtaining access to any form of computer network, bulletin board, Internet, or exchange format involving computers, unless specifically approved by her probation officer."

Dawson timely appealed.

II. DISCUSSION

Dawson raises two challenges. First, she argues that the district court erred by allowing her prearrest silence to be used as part of the government's case-in-chief and that such error was not harmless. Second, she argues that the district court abused its discretion by imposing a condition of supervised release prohibiting Dawson from accessing the Internet without the permission of her probation officer. We agree with both contentions.

A. The District Court Erred by Allowing the Prosecution to Use Evidence of Defendant's Prearrest Silence During Its Case-In-Chief

The constitutionality of a district court's decision to deny a motion to suppress evidence is a legal question that is reviewed de novo, United States v. Meek, 366 F.3d 705, 711 (9th Cir. 2004), but the factual findings underlying the denial are reviewed only for clear error. United States v. Bynum, 362 F.3d 574, 578 (9th Cir. 2004); see also First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 948 (1995) (appellate courts

"accep[t] findings of fact that are not 'clearly erroneous' but decide[e] questions of law de novo"). If a defendant's constitutional rights were violated, the conviction must be overturned unless the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967).

The Fifth Amendment to the U.S. Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The U.S. Supreme Court has identified several contexts in which the Fifth Amendment right against self-incrimination applies and others when it does not. See, e.g., Raffel v. United States, 271 U.S. 494, 499 (1926) (prosecution may impeach defendant's trial testimony with defendant's silence at prior proceeding); Griffin v. California, 380 U.S. 609, 615 (1965) (prosecution may not comment on defendant's decision not to testify during trial); Doyle v. Ohio, 426 U.S. 610, 619 (1976) (prosecution may not impeach defendant's testimony with evidence of post-Miranda silence); Jenkins v. Anderson, 447 U.S. 231, 238 (1980) (prosecution may impeach defendant's testimony with defendant's prearrest silence).[3] Yet, the Supreme Court has not decided the

[3] In Doyle, the Supreme Court held that the prosecution's use of the defendant's post-Miranda silence for impeachment violated the defendant's due process rights because it was fundamentally unfair to mislead the defendant by advising him of his right to remain silent and then use his silence against him. 426 U.S. at 619. For two reasons, we have not addressed the issue of

exact issue before us today: that is, whether the prosecution should be allowed to make substantive use of a defendant's prearrest silence. Our sister circuits are split on the issue.

Having considered the Supreme Court's decisions on related Fifth Amendment issues, general constitutional principles, and the reasoning of our sister circuits, we hold today that a defendant's prearrest silence may not be used by the prosecution in its case-in-chief because such use penalizes the defendant for exercising a constitutional right, impermissibly burdens the policies underlying the Fifth Amendment, and does not enhance the reliability of the criminal process.

1. A defendant may not be penalized for exercising the Fifth Amendment right against self-incrimination

The Supreme Court's rulings regarding the right against self-incrimination in other contexts support our holding today that a defendant's prearrest silence may not be used by the prosecution as substantive evidence against the defendant without violating the defendant's Fifth Amendment right against self-incrimination.

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whether the prosecution's use of Dawson's silence violated her due process rights. First, Dawson did not raise the issue. Second, even if she had raised the issue, we do not believe that her due process rights were violated because Dawson's failure to speak occurred before she was taken into custody and given Miranda warnings. Accordingly, the fundamental unfairness present in Doyle is not implicated in this case. See Jenkins, 447 U.S. at 240.

In Griffin, the Supreme Court held that the prosecution may not comment on a defendant's decision not to testify at trial because courts may not impose penalties on defendants for exercising constitutional rights. 380 U.S. at 614. The Court explained that allowing prosecutorial comment on a defendant's silence at trial would eviscerate the right against self-incrimination because its assertion would be costly in that the defendant would likely be penalized with negative inferences from that silence. Id. The Court concluded that such a condition impermissibly violates the Fifth Amendment. Id.

While the Supreme Court has never expressly held that the right against self-incrimination extends to prearrest contexts, see Jenkins, 447 U.S. at 236 n.2, it has held that the privilege against self-incrimination extends to any disclosures an individual reasonably believes may be used against the individual in a criminal prosecution. Kastigar v. United States, 406 U.S. 441, 444 (1972).

Applying that reasoning, four circuits have held that prosecutorial use of a defendant's prearrest silence violates the Fifth Amendment. See Combs v. Coyle, 205 F.3d 269, 283 (6th Cir. 2000); United States v. Burson, 952 F.2d 1196, 1201 (10th Cir. 1991); Coppola v. Powell, 878 F.2d 1562, 1568 (1st Cir. 1989); United States ex rel. Savory v. Lane, 832 F.2d 1011, 1017 (7th Cir. 1987). For example, in Burson, the Tenth Circuit held

that once a defendant invokes the right against self-incrimination, the prosecution may not refer to any Fifth Amendment rights the defendant has asserted. 952 F.2d at 1201. Similarly, in Coppola, noting the broad scope traditionally given to the Fifth Amendment, the First Circuit held that when a defendant does not testify at trial, his silence, even during the investigatory stage of a criminal proceeding, may not be used against him. 878 F.2d at 1567.

In contrast, three circuits have narrowly interpreted the term "compelled" in the Fifth Amendment and held that the right against self-incrimination does not extend to prearrest contexts. United States v. Oplinger, 150 F.3d 1061, 1066 (9th Cir. 1998); United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996); United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991). In Zanabria, the defendant was arrested at an airport on drug charges. 74 F.3d at 592. At trial, for the first time, the defendant raised a duress defense. Id. To refute the defense, the prosecution offered evidence of the defendant's prearrest silence and argued that his failure to raise his defense sooner showed that he was lying. Id. at 593. The Fifth Circuit held that the prosecution's actions were permissible because the Fifth Amendment does not extend to "every communication or lack thereof" by a defendant, and the

defendant's silence in the face of arrest was not government compelled. Id.

We disagree with that narrow interpretation of the Fifth Amendment. Instead, we believe that the language of the Fifth Amendment must be broadly interpreted to extend the right against self-incrimination to the prearrest context. Defendants must not be penalized for asserting their right against self-incrimination at any time; there is no meaningful distinction between a defendant's silence at trial and prearrest silence. If the right against self-incrimination is going to be effective, it must be effective in all contexts. See Jenkins, 447 U.S. at 250 (Marshall, J., dissenting).

Here, if Dawson knew her prearrest silence could be used against her, her choices were (1) to remain silent and allow a negative inference to be made at trial, (2) to answer the agents' questions and almost certainly incriminate herself, or (3) to lie. Thus, Dawson would be cast in the "cruel tri-lemma of self-accusation" the Fifth Amendment privilege is intended to avoid. See Combs, 205 F.3d at 285 (holding that prearrest silence may not be used as substantive evidence against a defendant) (citing Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964)). While Dawson may not have been subject to compulsion as the Eleventh, Fifth, and Ninth circuits define it, when her prearrest silence was used against her she certainly was subject

to a form of compulsion no less unjust – the "cruel tri-lemma of self-accusation." To fully preserve the right against self-incrimination, a defendant's silence, whether it occurred prearrest or at trial, must not be admitted as substantive evidence.

2. Use of a defendant's prearrest silence as substantive evidence creates an unacceptable incentive for police misconduct

The development of the right against self-incrimination was intended, in part, to deter police from manipulating, badgering, or intimidating defendants into incriminating themselves. Miranda v. Arizona, 384 U.S. 436, 442 (1966) (quoting Brown v. Walker, 161 U.S. 591, 596 (1896)). Allowing prosecutors to make substantive use of a defendant's prearrest silence opens the door to police misconduct by creating an incentive to delay arresting and giving defendants Miranda warnings, with the goal of obtaining admissible evidence from a de facto defendant. See Tortolito v. Wyoming, 901 P.2d 387, 390 (Wyo. 1995) (holding, based on state Constitution, that use of defendant's prearrest silence as substantive evidence is impermissible).

In this case, while there is no evidence that the agents acted in bad faith when they questioned Dawson, there is a potential for abuse whenever police question a person suspected of wrongdoing. When the ICE agents questioned Dawson, they knew

that she might have been involved in wrongdoing. Given that there is no way to know the agents' exact state of mind, there is a possibility that the agents delayed arresting Dawson because they wanted to interrogate her to obtain either incriminating statements or an incriminating refusal to answer questions. The danger of this type of improper motivation justifies the suppression of Dawson's prearrest silence.

3. Use of a defendant's prearrest silence impairs the reliability of the criminal process because that silence is intrinsically ambiguous

In Jenkins, the Supreme Court held that the use of a defendant's prearrest silence for impeachment purposes is a legitimate governmental practice because it enhances the reliability of the criminal process in that confronting a testifying defendant with prior silence is an effective means of testing the defendant's credibility. 447 U.S. at 238. That rationale does not apply to the substantive use of a defendant's prearrest silence; there is no need to test the credibility of a nontestifying defendant. When used by the prosecution during its case-in-chief, a defendant's silence serves only to create an inference of guilt. Yet, this inference is often unreasonable and inaccurate. See Combs, 205 F.3d at 285. As the Sixth Circuit noted in Combs, there are many nonincriminatory reasons a defendant may remain silent in the

face of police questioning, including knowledge of his Miranda rights and fear that he will not be believed. Id. Therefore, we believe that there are no circumstances under which a defendant's silence bears sufficient indicia of guilt to make admission permissible. In fact, substantive use of prearrest silence may subvert the truth-finding process because a defendant is forced to offer an exculpatory explanation or suffer an inference of guilt from his silence. Id.

The case at hand provides a good example of how ambiguous silence can be. Dawson remained silent when approached in her workplace, a busy restaurant on a Friday night, by two government agents who wanted to discuss pornography with her. She had no warning they would be coming. Testimony at trial indicated that she was extremely uncomfortable discussing pornography. While it may be curious that Dawson remained silent when questioned by the agents, it is hardly indicative of her guilt. She may have been embarrassed by her boyfriend's occupation, she may have been too busy to talk, or she may have been afraid of the police. In any case, a guilty conscience is just one of many possible explanations for Dawson's silence, and because this is almost always the reality when interpreting silence, we believe that the substantive use of a defendant's prearrest silence is not a legitimate governmental practice.

4. The prosecution's use of Dawson's prearrest silence was not harmless because the other evidence did not establish her guilt beyond a reasonable doubt

When a defendant's constitutional rights have been violated, the conviction must be overturned unless the error was harmless beyond a reasonable doubt. Chapman, 386 U.S. at 24.

Courts have considered the following factors in determining whether comment concerning a defendant's silence was harmless error: the prosecution's use of the silence, the other evidence suggesting the defendant's guilt, the intensity and frequency of the reference to the silence, and the availability to the trial judge of an opportunity to grant a motion for mistrial or to give curative instructions. See, e.g., Burson, 952 F.2d at 1201; Williams v. Zahradnick, 632 F.2d 353, 361 (4th Cir. 1980).

In this case, the government conceded that, if the admission of Dawson's silence was error, it was not harmless. We agree. Applying the factors discussed in Burson, we conclude that admission of Dawson's prearrest silence was not harmless error. The prosecution twice brought Dawson's silence to the attention of the jury. First, it procured the testimony of Agent Algar, who recounted statement by statement his interaction with Dawson. Then, in closing, the prosecution forcefully reminded the jury of Dawson's silence, explicitly suggesting that only a "guilty person" would have remained

silent. Dawson's attorney moved to suppress the evidence of her silence, but the motion was denied, and the jury was given no instruction as to the proper inferences it could make from the evidence. Most importantly, the other evidence against Dawson was largely circumstantial. The only direct evidence was the testimony of her boyfriend, an individual convicted of possessing child pornography whose testimony was given subject to a plea agreement holding out the promise of a reduced sentence. Dawson's knowledge of Internet technology, her association with her boyfriend and his business, and her apparent financial security do not establish beyond a reasonable doubt that Dawson would have been convicted without evidence of her silence. Therefore, defendant's conviction must be reversed.

B. The District Court Abused Its Discretion by Imposing a Condition of Supervised Release Prohibiting Dawson from Using a Computer Network or the Internet

This case raises an issue of first impression in this circuit concerning the appropriateness of a special condition of supervised release. At sentencing, the district court ordered Dawson not to possess, procure, purchase, or otherwise obtain access to any form of computer network, bulletin board, Internet, or exchange format involving computers during her term

of supervised release unless specifically approved by the Probation Office.

Appellate courts considering similar restrictions have reached different conclusions. Compare United States v. Paul, 274 F.3d 155, 169 (5th Cir. 2001) (upholding restriction placed on defendant who produced child pornography and used the Internet to distribute it), and United States v. Crandon, 173 F.3d 122, 127-28 (3d Cir. 1999) (upholding condition imposed on defendant who was convicted of receiving child pornography in the form of photos of himself having sex with a young girl), with United States v. Crume, 422 F.3d 728, 733 (8th Cir. 2005) (vacating special condition of supervised release because it was a greater deprivation of defendant's rights than necessary), and United States v. Sofsky, 287 F.3d 122, 126 (2d Cir. 2002) (vacating condition because it was a greater deprivation on defendant's liberty than reasonably necessary). After reviewing the facts and law in this area, we are convinced that the district court abused its discretion by imposing the special condition in this case because the condition, as written, was overly restrictive, and the court could have crafted a more narrowly tailored condition that would have sufficiently deterred Dawson from future crimes and protected the public.

1. The district court abused its discretion by imposing an overly restrictive condition of supervised release

A sentencing judge is afforded wide discretion when imposing terms of supervised release, and we review a decision to impose special terms of supervised release for abuse of discretion. Crume, 422 F.3d at 732; United States v. Zinn, 321 F.3d 1084, 1087 (11th Cir. 2003). A sentencing court may order a special condition of supervised release only if it is "reasonably related" to the statutory facts governing the selection of sentences and involves no greater deprivation of liberty than is reasonably necessary. 18 U.S.C. § 3583(d); Crandon, 173 F.3d at 127.

While a district court has wide discretion in imposing terms and conditions of supervised release, this discretion is limited by 18 U.S.C. § 3583(d), which provides that a court may impose special conditions of supervised release only when the conditions meet certain criteria. The factors to be considered in imposing a sentence are set out in 18 U.S.C. § 3553(a), which states, in relevant part,

> The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider – (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed – (A) to reflect the seriousness of the offense to provide just punishment of the offense;

(B) to afford adequate deterrence to criminal conduct;
(C) to protect the public from further crimes of the defendant[.]

It is not necessary for a special condition to be supported by every factor enumerated in § 3553(a), but each factor is an independent consideration to be weighed. Zinn, 321 F.3d at 1089.

a. *A total ban on Internet use is appropriate only in extreme cases and should not be applied in this case*

One factor courts consider when reviewing the appropriateness of a restrictive supervised release condition is the severity of the particular defendant's crime. For example, in Crandon, the Third Circuit affirmed a condition completely restricting a defendant's Internet access where the defendant had used the Internet to contact a young girl and solicit sexual contact with her. 173 F.3d at 125. The court determined that the defendant's use of the Internet as a means of developing an illegal sexual relationship with a minor necessitated the more burdensome restrictions. Id. at 127. In contrast, the same court rejected a ban on the use of the Internet in another case because there was no evidence to suggest that the defendant used the Internet to contact children. See United States v. Freeman, 316 F.3d 386, 392 (3d Cir. 2003).

Similarly, in United States v. Johnson, the Second Circuit upheld an absolute ban on the defendant's Internet access

because the court found that he was a sexual predator and the ban was necessary to control that behavior. 446 F.3d 272, 281 (2d Cir.), cert. denied, 127 S. Ct. 425 (2006). Yet, in another case, the same court found that an outright ban was more restrictive than needed because unannounced inspections and monitoring would exert sufficient control over the actions of a defendant convicted of mere possession of child pornography. Sofsky, 287 F.3d at 126-27.

We find these distinctions, as outlined above, to be helpful. The seriousness of the offense has been a crucial factor in deciding whether a restriction on Internet use is appropriate in a given case, and we do not find Dawson's crime egregious enough to justify the harsh restriction of her Internet use. Like the defendant in Freeman, Dawson has no history of using the Internet to personally contact children. And, unlike the defendant in Johnson, Dawson is not an unrepentant sex offender. Accordingly, less restrictive conditions, such as monitoring by her probation officer or the use of Internet filtering programs, would suffice to protect the public in this case.

b. *The condition denying use of the Internet without prior approval is overly broad and causes a greater deprivation of liberty than reasonably necessary*

The special supervised release condition imposed by the district court forbidding Dawson from accessing computer networks or using the Internet without written approval of her probation officer was overly broad and resulted in a greater deprivation of liberty than was reasonably necessary to deter Dawson from future criminal conduct and protect the public. See 18 U.S.C. § 3553(a)(2); see also Freeman, 316 F.3d at 391-92 (vacating restriction on Internet use for defendant who possessed child pornography but did not use Internet to contact children); Sofsky, 287 F.3d at 124 (vacating condition that would require probation officer to approve computer and Internet access by defendant who pled guilty to receiving child pornography over Internet). The Internet has become "virtually indispensable" in today's world. Sofsky, 287 F.3d at 126. A total ban on a defendant's Internet access prevents the defendant from communicating by email and using the computer for other commonplace purposes, such as getting a weather forecast or reading the newspaper online. See id.

In the instant case, the restrictions that the district court imposed go far beyond mere inconvenience. Dawson would not be able to access her bank statements or credit cards online

or complete a job application online without her probation officer's approval. It is not necessary to completely cut Dawson out of society as she tries to rehabilitate herself.

2. The total ban is not justified simply because Dawson used the Internet to commit her crime

The fact that the Internet was used to commit the crime of conviction is not enough to justify a ban on Dawson's access to the Internet. See Sofsky, 287 F.3d at 126; United States v. Peterson, 248 F.3d 79, 82-83 (2d Cir. 2001). In Peterson, the district court imposed a probationary condition quite similar to the one in this case on a defendant who was convicted of larceny but had a prior conviction for incest and had accessed adult pornography on his home computer. 248 F.3d at 82-83. The Second Circuit reversed the district court's decision, noting that "[c]omputers and Internet access have become virtually indispensable in the modern world of communications and information gathering." Id. at 83.

For similar reasons, the Second Circuit rejected a ban on Internet use for a defendant who had received more than 1,000 images of child pornography and used the Internet to exchange images with other individuals. Sofsky, 287 F.3d at 124. The court noted that "[a]lthough the condition prohibiting Sofsky from accessing a computer or the Internet without his probation officer's approval is reasonably related to the purposes of

sentencing, in light of the nature of his offense, we hold the condition inflicts a greater deprivation on Sofsky's liberty than is reasonably necessary." Id. at 126. The court rejected the government's argument that the restriction must be complete because a restriction limited to accessing pornography would be too difficult for the probation officer to enforce without constant monitoring of the defendant's computer. Id.

Here, while Dawson's crime was serious, it is not reasonable to completely ban her from using the Internet simply because she used it when committing her crime. As the Peterson court noted, "[a]lthough a defendant might use the telephone to commit fraud, this would not justify a condition of probation that includes an absolute ban on the use of telephones." 248 F.3d at 83. Such less restrictive alternatives as monitoring and the use of filters can adequately achieve the appropriate sentencing objectives.

III. CONCLUSION

The Fifth Amendment right against self-incrimination is based upon this society's well-founded faith in the adversarial nature of the criminal process. Admission of a defendant's prearrest silence as substantive evidence violates the right against self-incrimination because this practice turns defendants into sources of evidence for prosecutors, something the adversarial process forbids. Substantive use of silence

encourages police misconduct and fails to further the truth-finding goals of the criminal process.

The district court also was wrong to completely prevent Dawson from having any access to email and other benign uses of the Internet. No punishment should be more punitive than necessary. Preventing Dawson from participating in the exploitation of children can be accomplished through a more focused restriction, such as forbidding her access to pornography and monitoring her computer use. If Dawson does not abide by more limited conditions on her Internet use, then it may be appropriate to ban all of her use. However, based on the record before us, we believe the district court abused its discretion when it imposed a total ban on Dawson's internet use. We have reviewed Dawson's objections to the district court's decision and find that her arguments have merit. For the foregoing reasons, the decision of the district court is REVERSED.

CASTILLO, J., dissenting.

I respectfully dissent. Unlike the majority, I conclude that Dawson's prearrest silence was properly used against her in the prosecution's case-in-chief and that the special supervised release condition imposed by the district court was not overbroad.

I. DISCUSSION

A. The District Court Correctly Allowed Dawson's Prearrest Silence to Be Used as Part of the Government's Case-In-Chief

Consistent with Justice Stevens's concurrence in Jenkins v. Anderson, I believe that the majority is incorrect when it holds that a defendant's choice to remain silent prior to arrest is government compelled for purposes of the Fifth Amendment. 447 U.S. 231, 243 (1980) (Stevens, J., concurring). Because there is no compulsion involved in the prearrest scenario, it does not impermissibly burden a defendant's Fifth Amendment right against self-incrimination when the prosecution presents substantive evidence of a defendant's prearrest silence. See id. at 238.

1. The trial court's admission of Dawson's prearrest silence did not violate her right against self-incrimination because the right applies only to government-compelled speech

The right against self-incrimination has its origins "in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons. . . ." Miranda v. Arizona, 384 U.S. 436, 442 (1966). In Miranda, the Supreme Court held that a defendant's statements made during custodial interrogation may not be used against the defendant unless procedural safeguards ensuring preservation of the right against

self-incrimination are employed. Id. at 444. The Court explained that its holding was aimed at shielding the accused from the "third degree" -- incommunicado interrogation in a police-dominated atmosphere, under a cloak of secrecy and intended to erode the accused's psychological firmness to the point where the accused confesses. See id. at 445. The Court concluded that the privilege against self-incrimination must be provided protection when an individual is subject to police interrogation "while in custody or otherwise deprived of his freedom of action in any significant way" because that is when our adversary system of criminal proceedings begins. Id. at 477. The Court explained that its holding did not extend to general questioning in a prearrest context because "it is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement," and in the prearrest context, the compulsory atmosphere of custodial questioning generally is absent. Id.

Consistent with its finding in Miranda that warnings are not needed in the prearrest context because no atmosphere of compulsion exists, the Supreme Court has avoided extending the right against self-incrimination to prearrest, precustodial interrogation contexts. See Jenkins, 447 U.S. at 236 n.2 ("Our decision today does not consider whether or under what

circumstances prearrest silence may be protected by the Fifth Amendment.")

Even when police approach and question a person who they believe has committed a crime, the person's responses or lack thereof are not government compelled. See United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996); United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991). In Rivera, the defendants were approached by a customs agent while collecting their luggage from baggage claim. Id. at 1565. The agent suspected the defendants of smuggling drugs. Id. The agent testified at trial that when he approached the defendants and began questioning them, they were expressionless, showed no signs of agitation, and did not react when he began inspecting their suitcases. Id. at 1567. Relying on Jenkins, the court held that the agent's testimony "did not raise constitutional difficulties" because the government was permitted to comment on a defendant's silence that occurs prior to arrest and administration of the Miranda warnings. Id. at 1568. The court noted that, even if the defendants had been in custody when they remained silent, as long as the silence was pre-Miranda, the government could comment on it. Id.

Here, Dawson's silence when confronted by the agents was not government compelled because she was not in custody, not vulnerable to coercion, and not accused of any crime. The

circumstances out of which Dawson's prearrest silence arose are far less suggestive of compulsion than the circumstances in Rivera. In Rivera, the defendants were clearly suspects who were asked questions directly related to their crimes, yet the court still found them not to be under any government compulsion to speak. Dawson was in a familiar and nonthreatening setting when she refused to speak to the agents. She was not subject to isolation, intimidation, or other tactics meant to weaken her free will. Silence arising from a casual conversation with government agents in a busy restaurant cannot implicate the right against self-incrimination without disregarding the plain language of the Fifth Amendment. Quite simply, the realities underlying the enactment of the Fifth Amendment "are a far cry from the subject matter of the case before us." Griffin v. California, 380 U.S. 609, 620 (1965) (Stewart, J., dissenting).

2. Use of prearrest silence as substantive evidence of guilt does not impermissibly burden the exercise of Fifth Amendment rights

In Jenkins, the Supreme Court applied a two-part analysis to determine whether impeachment use of a defendant's prearrest silence impermissibly burdens Fifth Amendment rights, weighing (1) the burden placed on the policies underlying Fifth Amendment rights against (2) the extent to which the practice furthered legitimate governmental goals. 447 U.S. at 236. While

substantive use and impeachment use of prearrest silence implicate different considerations, I believe the Jenkins test is appropriate for evaluating whether a defendant's prearrest silence may be used as substantive evidence.

a. *The policies underlying the Fifth Amendment are not infringed upon by substantive use of prearrest silence*

As stated in Miranda, 384 U.S. at 442, the policy underlying the right against compelled self-incrimination is disapproval of the coercive, intimidating, and even inhumane tactics inherent in the inquisitorial approach to the criminal process. I do not believe that allowing substantive use of a defendant's prearrest silence infringes on this policy. When a witness is not in custody, not isolated, and not subject to manipulation, the Fifth Amendment is simply not implicated. The right against self-incrimination is not based on the belief that defendants' statements should never be used against them, but rather that they should not be used when obtained through illegitimate means. See Zanabria, 74 F.3d at 593.

b. *Admission of a defendant's prearrest silence as substantive evidence enhances the reliability of the criminal process*

As the Supreme court recognized in Jenkins, impeachment of a defendant with the defendant's prior silence may enhance the reliability of the criminal process because the defendant's

credibility can be tested. 447 U.S. at 238. Likewise, I believe that allowing prearrest silence to be used substantively can enhance the reliability of the criminal process. "We need not hold that every citizen has a duty to report every infraction of law that he witnesses in order to justify the drawing of a reasonable inference from silence in a situation in which the ordinary citizen would speak out." Id. at 243 (Stevens, J., concurring). Dawson's interaction with Agents Campbell and Algar certainly suggests that she was not an innocent woman caught in a bad relationship. After being told she might be able to help with a child pornography investigation, Dawson did not ask why the agents thought she would be able to help, nor did she express any concern for the children. Instead, she simply refused to talk. Of course, there may be innocent explanations for her conduct, but allowing both sides to argue whether her silence was probative of guilt will only enhance the reliability of the criminal process. For this reason, I believe that admission of prearrest silence in the prosecution's case-in-chief is a legitimate governmental practice.

Finally, while I believe the facts before us present a clear case in which Dawson's prearrest silence was probative of her guilt, my position does not require a defendant's prearrest silence to be admitted at trial in every case. Courts still

have the discretion to make a case-by-case determination whether a defendant's prearrest silence is sufficiently probative to allow its admission. However, because the privilege against self-incrimination applies only to government-compelled speech, I do not believe that prearrest silence should be categorically excluded on Fifth Amendment grounds, as the majority has done here.

B. The District Court Did Not Abuse Its Discretion by Imposing a Condition of Supervised Release Prohibiting Dawson from Accessing any Computer Network or the Internet

Dawson argued that the supervised release condition that the district court imposed in this case prohibiting her from using computers and the Internet was excessively broad and unjustified. The majority agrees. I dissent from that holding because I believe that the special supervised release condition imposed in this case was reasonably related to Dawson's criminal activities, to the goal of deterring future criminal conduct, and to the goal of protecting the public. The district court did not abuse its discretion when it imposed a supervised release condition banning Dawson's Internet use because the condition was "relatively narrowly-tailored" and balanced the protection of the public with other sentencing goals. See United States v. Zinn, 321 F.3d 1084, 1093 (11th Cir. 2003)

(citing United States v. Walser, 275 F.3d 981, 988 (10th Cir. 2001)).

1. The supervised release condition imposed in this case was related to § 3553's sentencing objectives and did not impose a greater deprivation of liberty than necessary

As the majority discussed, a supervised release condition must relate to the sentencing purposes set forth in 18 U.S.C. § 3553 and must impose no greater restraint on liberty than reasonably necessary to accomplish those objectives. 18 U.S.C. § 3553(a). The restriction imposed by the district court in this case served § 3553's sentencing objectives, as discussed below.

a. *The seriousness of Dawson's offense necessitates the restriction of her Internet use*

The conditions of supervised release should reflect the seriousness of the offense, promote respect for the law, and provide just punishment. 18 U.S.C. § 3553(a)(2)(A). I do not agree with the majority decision in this case because I believe that the majority incorrectly discounted the seriousness of Dawson's offense and erroneously relied on past cases that involved mere possession of child pornography. See, e.g., United States v. Crume, 422 F.3d 728, 733 (8th Cir. 2005); United States v. Sofsky, 287 F.3d 122, 126 (2d Cir. 2002). The majority ignored the fact that "selling" child pornography is a

more serious offense than mere possession. See United States v. Fields, 324 F.3d 1025, 1027 (8th Cir. 2003); see also Sofsky, 287 F.3d at 126-27.

In this case, Dawson was deeply involved in the creation of Wild Images websites that sold child pornography; Vu testified that Dawson helped create all the company's websites. Her skills were necessary for the maintenance of the sites, even if she was not involved in actively posting images to the websites. Thus, Dawson's offense was more serious than mere possession of child pornography offenses because she was instrumental in distributing child pornography to others. And, in further aggravation, she committed the offense for pecuniary gain; she was well paid for her work. See U.S.S.G. § 2G2.2(B)(3)(A) (increasing a defendant's advisory offense level if offense committed for pecuniary gain).

b. *The restriction on Dawson's Internet use was necessary to deter her from committing a similar crime in the future and to protect the public*

Section 3553(a)(2) further directs sentencing courts to consider the need for the sentence imposed to deter future criminal conduct and to protect the public. 18 U.S.C. § 3553(a)(2)(B) and (C). When determining what conditions of release are reasonably necessary to protect the community, a court may consider the hazard presented by recidivism. See

United States v. Paul, 274 F.3d 155, 169 (5th Cir. 2001) (upholding restriction placed on defendant who produced child pornography and used the Internet to distribute it). Several courts have upheld supervised release conditions that implicate fundamental rights, as long as the conditions were reasonably tied to preventing future crime and protecting potential victims. See, e.g., United States v. Crandon, 173 F.3d 122, 128 (3d Cir. 1999) (upholding condition that completely restricted defendant's Internet access because defendant had used Internet to contact young children and solicit sexual contact); United States v. Schecter, 13 F.3d 1117, 1118 (7th Cir. 1994) (upholding condition that required defendant to notify all employers of his past crimes because defendant had stolen $95,000 from employers); United States v. Bortels, 962 F.2d 558, 559-60 (6th Cir. 1992) (upholding condition that prohibited defendant from associating with her fiancée because she had endangered the community during high-speed chase while trying to protect her fiancée from arrest).

In this case, Dawson is a sophisticated computer user who has worked as a web consultant for several years. I am not persuaded that monitoring her Internet use would provide adequate protection to the community because a person with her skills could easily circumvent the monitoring software. See United States v. Johnson, 446 F.3d 272, 282 (2d Cir.) (upholding

a complete ban on Internet use where defendant was a former engineer and sophisticated computer user because he likely could circumvent the software needed for monitoring), cert. denied, 127 S. Ct. 425 (2006); United States v. White, 244 F.3d 1199, 1206-07 (10th Cir. 2001) ("A sophisticated Internet user can circumvent any barrier with knowledge of programming.").

Accordingly, a less restrictive monitoring condition would not provide the public with sufficient protection. As with the defendant in Crandon, there is too great a danger that Dawson would repeat her crime without the more restrictive ban that was imposed in this case.

c. *Given Dawson's crime, the restriction on her Internet use is not a greater deprivation of liberty than necessary*

Limits on the use of computers or the Internet must not involve a greater deprivation of liberty than is reasonably necessary to advance the statutory interests. See United States v. Ristine, 335 F.3d 692, 696 (8th Cir. 2003) (affirming restriction of offender's use of a computer and Internet access as condition of supervised release because of severity of crime); Fields, 324 F.3d at 1027. Like Dawson, in Fields, the defendant ran a child pornography website and the court imposed a condition of supervised release banning the defendant from Internet access without the probation officer's approval. 324

F.3d at 1026. The Eighth Circuit upheld the condition, finding that it did not constitute an abuse of discretion because the defendant was still able to use a computer with the permission of his probation officer. Id. at 1027.

Furthermore, Internet restrictions do not unnecessarily restrict career opportunities and freedom of speech. Crandon, 173 F.3d at 128. Supervised release conditions restricting employment and First Amendment freedoms are permissible if they are sufficiently narrowly tailored. Id.

The special condition of Dawson's supervised release that banned her from accessing computers and the Internet without her probation officer's consent did not represent a greater deprivation of her rights than reasonably necessary. Like the defendant in Fields, Dawson was able to create a profitable web-based business based on the exploitation of children. The goal of preventing Dawson from using the Internet for illegal activity could not be met through monitoring her Internet use or restricting the sites she accesses. Thus, I do not think the district court abused its discretion when it found that there was too great a risk that a more narrowly tailored restriction would not be effective.

2. The special condition imposed was directly related to the crime committed

The district court's order prohibiting Dawson from using a computer or the Internet also was reasonably related to her offense; there is a "strong link between child pornography and the Internet, and the need to protect the public, particularly children." Zinn, 321 F.3d at 1092. As in Fields, the ban on Dawson's use of computers and the Internet was "obviously related to the circumstances of [her] offense -- running a child pornography website for profit." 324 F.3d at 1027. Dawson's crime was directly dependent on her ability to use the Internet and her knowledge of developing web pages. Dawson did not just happen to use the Internet to sell child pornography. On the contrary, selling child pornography was easy for Dawson because of her knowledge of the Internet and computers. Accordingly, the condition imposed by the court in this case was directly related to Dawson's offense.

II. CONCLUSION

The Fifth Amendment right against self-incrimination applies only to government-compelled speech. The U.S. Supreme Court has never extended the right to the prearrest, precustodial interrogation context, and I disagree with the majority's decision to do so here.

I also believe that because the district court carefully considered the relevance of the conditions of supervised release to the crime of conviction, the court did not abuse its discretion when it prohibited Dawson from accessing the Internet without prior approval from the U.S. Probation Office. I would affirm the imposition of the Internet ban as crafted by the district court in this case.

For these reasons, I respectfully dissent. I would affirm the orders of the district court.

IN THE SUPREME COURT OF THE UNITED STATES

October 2007 Term

No. 07-65

UNITED STATES OF AMERICA,

Petitioner,

v.

SADIE ANNE DAWSON,

Respondent.

The petition for writ of certiorari is granted, limited to consideration of the following questions presented by the petition:

1. Whether the prosecution's use in its case-in-chief of a defendant's prearrest silence in response to police questioning violates the defendant's Fifth Amendment right against self-incrimination.
2. Whether, under 18 U.S.C. § 3583(d), a district court can impose a restriction prohibiting a defendant who has been convicted of selling child pornography from using the Internet without the permission of a probation officer.