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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re ANDRE B., a Person Coming Under  
the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDRE B.,

Defendant and Appellant.

D060024

(Super. Ct. No. J227937)

APPEAL from a judgment of the Superior Court of San Diego County,  
Melinda J. Lasater, Judge; Carla Nassoff, Pro Tem Referee. Affirmed in part, modified  
in part, and remanded with directions.

The juvenile court (Hon. Melinda J. Lasater) found true allegations in a Welfare  
and Institutions Code<sup>1</sup> section 602 petition that 13-year-old Andre B. violated the  
personal liberty of a female minor victim (Pen. Code, § 236); willfully annoyed and

<sup>1</sup> All statutory references are to the Welfare and Institutions Code unless otherwise  
stated.

molested the victim (Pen. Code, § 647.6, subd. (a)); and willfully and unlawfully used force and violence upon her (Pen. Code, § 243.2, subd. (a)(1)). It also found true that Andre willfully committed a lewd and lascivious act upon a different minor female victim. (Pen. Code, § 288, subd. (a).) In June 2011, Pro Tem Referee Carla Nasoff adjudged him a ward and placed him on probation in the care of his mother for a maximum of 8 years 4 months.

Andre contends the juvenile court erroneously refused to suppress his statements made to police, although they were coerced in violation of the Fifth and Fourteenth Amendments of the federal Constitution and *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). He specifically contends the detective used coercive tactics during the first interrogation, which was custodial; therefore, his statements should have been suppressed because he was young and unable to fully understand his rights or the consequences of his involuntary statements. He also contends that under *Missouri v. Seibert* (2004) 542 U.S. 600 (*Seibert*), the second interrogation should have been suppressed because he involuntarily waived his *Miranda* rights. Finally, he contends certain probation conditions prohibiting his computer use and access to Internet chat rooms and certain social media, including Facebook, violate his First Amendment rights because they are vague, overbroad, and not tailored to his criminality or rehabilitation. We affirm in part, modify in part, and remand with directions.

## BACKGROUND

### *The Underlying Offenses*

The victim involved in counts one, two and three testified that in November 2010, she was a 13-year-old student in middle school. At the end of a school day, she and a friend were waiting for a ride home, when Andre, who was not a friend, approached, grabbed her arms, placed them behind her back and jokingly said something like, "I arrest you." She jokingly replied with something like, "I feel so arrested." He next turned her around, hugged her tightly and, for approximately 30 seconds, grinded his pelvis on her; she could feel his penis on her hip. She told him to stop and tried to kick him, but failed because of his tight squeeze. After a while he walked away.

Regarding count 4, Dr. Kathleen Dully testified that in December 2010, she obtained a report from San Diego County Sheriff Detective Heather Czerwinski regarding inappropriate touching of the second victim, a two-and-a-half-year-old girl. Afterwards, Dr. Dully examined the victim and concluded that, consistent with the detective's report, the victim's vagina had been touched and possibly penetrated.

### *Andre's Police Interviews*

Andre moved in limine to suppress his statements made in a December 10, 2010 police interview and in a second police interview five days later, contending the first interview violated his rights under *Miranda*. He contended the second interview violated *Seibert, supra*, 542 U.S. 600 because it was the poisonous fruit of the first interview, and the product of a deliberate police tactic of withholding *Miranda* warnings in a first interview to impermissibly obtain information, only to administer the warnings in a

second interview, during which police confirmed the information obtained from the first interview.

Detective Czerwinski testified she went to Andre's home on December 10, 2010, and asked his mother to take Andre to the police station for a recorded interview. Andre's mother did not have a car, so she agreed to let Detective Czerwinski transport him to and from the police station, without asking to accompany Andre. Detective Czerwinski and another female detective interviewed Andre for approximately 1 hour 30 minutes, and Andre never asked for his mother's companionship.

We reviewed a video recording and transcript of Andre's first interview, in which this exchange between Detective Czerwinski and Andre took place at the outset:

"[Detective:] . . . [Y]ou're not under arrest, you're not gonna be arrested today. Do you understand that?

"[Andre:] Yes.

"[Detective:] Okay. And uh if you don't wanna talk to me you don't have to talk me [*sic*]. Do you understand that?

"[Andre:] Yes.

"[Detective:] And um if you wanna leave, you're free to leave. If you decide I don't wanna talk to you anymore, I'll walk you out, or actually I'll have to drive you home."

Early in the interview, Detective Czerwinski told Andre, "[M]y whole point is to talk to you because I'm concerned about you. I've heard about the things that have been going on at school and you know, the things that have been going on with girls. I just

wanna make sure that doesn't happen anymore. Okay? I wanna make sure that you get the counseling so you um don't continue to do this. And uh it doesn't keep going on and get worse and worse and worse and you end up, when you're over 18, in jail or prison. You understand what I'm saying? I don't want that to happen to you cause from what everyone is told [*sic*] me, you're a really good kid. I mean even [the youngest victim's stepfather] said that you know you're always helpful. When they moved in, you helped carry stuff inside for them and you're always wanting to help and letting [the youngest victim] play with the dog and stuff and you know, her, her mom said the same thing about you; that you're a real nice kid and you're [*sic*] mom told me what a great kid you were so I know there's some problems right now but I wanna help work through those with you. Okay? I'm not gonna take you to jail today. I'm not gonna take you to [juvenile detention], nothing like that. But I definitely think you need help and I need to kinda figure out what was going on. Okay? And what was kinda going through your head. So tell me about um what happened last night?"

The detective proceeded to ask Andre about instances when he touched girls at school. Andre also eventually admitted he had touched the vagina of the youngest victim, claiming it was an accident. At some points during the interview, the detective reiterated to Andre that the purpose of truth telling was for him to get help: "And you know in order for us to get you help and make sure it doesn't happen again. . . . We need to know about what was going through your head at the time. And I know you felt bad. I know you felt sorry for what you did. You weren't trying to hurt her. You know, you made a mistake. People make mistakes all the time. But what's important is that it

doesn't happen again." The detective also told Andre at one point, "I just wanna make sure you didn't put your penis inside of her. And it was just touching for a second and then you stopped." Andre confirmed he did not put his penis inside the victim.

At the end of the interview, when the detective returned Andre home, she told his mother he would be arrested the following week. On December 15, 2010, after Detective Czerwinski had secured a forensic interview with the youngest victim, she conducted a second interview with Andre, which was preceded by *Miranda* warnings. She testified she wanted to review his earlier statement and find out if he had any additional information about the incidents.

In ruling on the suppression motion, the juvenile court rejected Andre's contention the first interrogation was custodial: "I understand that there were police officers, and I understand [Andre] was taken to the car, and I understand he was in the police station but that does not make it custodial. . . . This is not a situation where the minor's family or the minor was also all of a sudden surprised by this. They were informed of the allegation almost immediately after it happened. [¶] . . . [¶] The distance is 10 minutes between the mother's house and the station." The court noted that Andre was not handcuffed and rode in the front seat of the police car. The court added, "I depend heavily on the video. . . . I find it extremely informative to see the video to see someone when they're being questioned, and how they respond." The court noted Detective Czerwinski was dressed in plain clothes, and fostered a relaxed atmosphere in the interview room. Specifically, the detective initially told Andre that if he did not want to speak to her he could leave and go home, before correcting herself and reminding him

she was responsible for driving him home. They both laughed at that mistake. Further, Andre answered the officers' questions without any notable hesitation.

The court rejected the idea the police officers used the second interview to gain a tactical advantage over Andre: "The bottom line is the first statement did not require advisal because it was not custodial and that it was voluntary, and it was not coerced. . . . [I]t doesn't matter if the officer meant to talk to the minor at first, get more information, and then go back and arrest."

## DISCUSSION

### I.

#### A.

Andre contends the trial court erred in not suppressing his statements made in the police interview because he was in custody and, as a 13-year-old child, he would not have felt free to leave under the totality of the circumstances, which included the place of the interrogation, its duration, and the presence of two interrogators against him alone.

A person interrogated by law enforcement officers after being taken into custody must first be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him and that he has a right to the presence of an attorney, either retained or appointed. (*Miranda, supra*, 384 U.S. 436.) Statements taken in violation of this rule are generally inadmissible. (*Stansbury v. California* (1994) 511 U.S. 318, 322.) The *Miranda* decision was premised on the perception that interrogation of a suspect in police custody is inherently coercive. (*Miranda*, at pp. 445-458.) To insure that any statement the suspect makes in that setting is a product of his free will, the

United States Supreme Court held that the interrogation must be preceded by the essential procedural safeguards in the form of the warnings.

In analyzing the question of whether a defendant is in custody for the purpose of determining if admonitions are required by *Miranda, supra*, 384 U.S. 436, the pivotal determination is whether a reasonable person in appellant's position would have felt he was in custody (*Berkemer v. McCarty* (1984) 468 U.S. 420, 442; *People v. Stansbury* (1995) 9 Cal.4th 824, 830); that is, if he or she would have felt at liberty to terminate the interrogation and leave. (*Thompson v. Keohane* (1995) 516 U.S. 99, 112.) "An accused is in custody when, even 'in the absence of an actual arrest, law enforcement officials act or speak in a manner that conveys the message that they would not permit the accused to leave.' " (*U.S. v. Kirsh* (2d Cir. 1995) 54 F.3d 1062, 1067.) Indicia of custody for *Miranda* purposes include: whether the suspect was formally arrested, what was communicated to the suspect about his detention, the length of the detention, the location, the ratio of officers to suspects, and the demeanor and nature of the officer's questioning. (See *People v. Lopez* (1985) 163 Cal.App.3d 602, 608.) The United States Supreme Court has held that a minor's age is also relevant in the custody analysis. (*J.D.B. v. North Carolina* (2011) \_\_\_ U.S. \_\_\_ [131 S.Ct. 2394, 2406].)

In *Oregon v. Elstad* (1985) 470 U.S. 298 (*Elstad*), police officers went to the defendant's home and questioned him about a burglary without first reading him *Miranda* warnings. (*Elstad*, at p. 301.) After he admitted being present at the burglary, the officers took him to the police station. One hour later, the officers informed him of his *Miranda* rights. He waived those rights and gave a full statement detailing his role in the

crime. (*Elstad*, at pp. 301-302.) The court held that "[t]hough *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made." (*Elstad*, at p. 309.) "[A]bsent deliberately coercive or improper tactics in obtaining the initial statement," the court found that "subsequent administration of *Miranda* warnings . . . ordinarily should suffice to remove the conditions that precluded admission of the earlier statement." (*Elstad*, at p. 314.) "The essence of voluntariness is whether the government obtained the statements by physical or psychological coercion such that the defendant's will was overborne." (*United States v. Rith* (10th Cir. 1999) 164 F.3d 1323, 1333.)

The United States Supreme Court revisited this issue in *Seibert*, *supra*, 542 U.S. 600. Unlike *Elstad*, where "the officer's initial failure to warn was an 'oversight,' " (*Seibert*, *supra*, at p. 614; *Elstad*, *supra*, 470 U.S. at pp. 315-316), in *Seibert* the police "used a two-step questioning technique based on a deliberate violation of *Miranda*." (*Seibert*, *supra*, at p. 620 (conc. opn. of Kennedy, J.)) The interview strategy was based on "a police protocol for custodial interrogation that calls for giving no warnings of the rights to silence and counsel until interrogation has produced a confession. Although such a statement is generally inadmissible, since taken in violation of [*Miranda*], the interrogating officer follows it with *Miranda* warnings and then leads the suspect to cover the same ground a second time." (*Seibert*, at p. 604.)

In *Seibert*, a plurality of the court reasoned: "The threshold question in this situation is whether it would be reasonable to find that the warnings could function

'effectively' as *Miranda* requires. There is no doubt about the answer. . . . When the warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and 'deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.' [Citation.] And it would be unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because *Miranda* warnings formally punctuate them in the middle." (*Seibert, supra*, 542 U.S. at p. 601.)

Justice Kennedy concurred, reasoning that if the interrogators deliberately employ the two-step strategy, the trial court must suppress postwarning statements unless the interrogators take curative measures to apprise the defendant of his rights. If the two-step method is not deliberate, the postwarning statements are admissible if voluntarily made. (*Seibert, supra*, 542 U.S. at p. 622 (conc. opn. of Kennedy, J.); *see also United States v. Williams* (9th Cir. 2006) 435 F.3d 1148, 1157-58 (*Williams*) [concluding that Justice Kennedy's concurrence in *Seibert* is the court's holding because it is narrowest grounds with which a majority of the court would agree].)

Deliberateness may be found if "objective evidence and any available subjective evidence, such as an officer's testimony, support an inference that the two-step interrogation procedure was used to undermine the *Miranda* warning." (*Williams, supra*, 435 F.3d at p. 1158.) Objective evidence includes "the timing, setting and completeness of the prewarning interrogation, the continuity of police personnel and the overlapping content of the pre- and postwarning statements." (*Ibid.*)

When the court finds no deliberateness, the admissibility of postwarning statements should be governed by the principles stated in *Elstad, supra*, 470 U.S. 298, 301, which held that "although a *Miranda* violation made the first statement inadmissible, the postwarning statements could be introduced against the accused because 'neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence would be served by suppression.'" (*Seibert, supra*, 542 U.S. at pp. 620, 622 (conc. opn. of Kennedy, J.), citing *Elstad*, at p. 308.)

It is the trial court's responsibility to resolve disputed facts about the circumstances surrounding the challenged statement and then determine whether the protections of *Miranda's* admonitions were required. On appeal, this court must accept the trial court's resolution of disputed facts, including the credibility of witnesses, as long as that resolution is supported by substantial evidence. " 'Considering those facts, as found, together with the undisputed facts, we independently determine whether the challenged statement was obtained in violation of *Miranda's* rules.' " (*People v. Farnam* (2002) 28 Cal.4th 107, 178.)

Based on our review of the first interrogation, and evaluating the indicia of custody for *Miranda* purposes, we agree with the juvenile court that Andre was not in custody during the first interview. Andre was not formally arrested. Detective Czerwinski told him he was not obligated to speak with her, he could stop the interview at any time, and she would drive him home. The length of the detention was approximately two hours total, including twenty minutes travel time. The interview was conducted in a room at the police station. Two police officers were present, but one was

mostly quiet, only occasionally asking clarifying questions. We conclude that the detectives took into account Andre's young age, and treated him politely. They expressed their concern for his well-being and their belief he was experiencing adolescent curiosity. They told him they believed he was not malicious. They also stated their willingness to help him avoid further trouble with law enforcement. There was nothing intimidating or coercive about the interview, and he did not appear to be intimidated.

The first interview was not custodial. The second interview—which took place after the detective had conducted further investigation—was preceded by *Miranda* warnings and there was no evidence of physical or psychological coercion in either interview. Accordingly, we conclude there was no violation of *Miranda* or *Siebert*.

#### B.

Andre contends, "The totality of the circumstances, including the coercive tactics used by Detective Czerwinski, and [his] youth, inexperience, and limited capacity to understand his rights or the consequences of his statements, rendered his statements involuntary." He specifically contends that "by promising [him] counseling and help if he confessed, and implying that he may be accused of worse crimes if he did not, Detective Czerwinski employed impermissibly coercive interrogation tactics." Andre adds, "considering the facts that [he] was very young, was separated from his mother and interrogated for over an hour in a police station by two detectives, and suffered from numerous disorders including [attention deficit hyperactivity disorder], memory problems, and an extreme speech impediment, [his] admissions were involuntary as a matter of law. Finally, he claims, the detective "employed minimizing tactics, suggesting

that the [youngest victim] initiated the touching, or that it was an accident, which combined with the promises and threats to elicit an involuntary admission used by the court in finding all counts true."

Where the voluntariness of a confession is raised on appeal, the reviewing court should examine the uncontradicted facts to determine independently whether the trial court's conclusion of voluntariness was proper. If conflicting testimony exists, the court must accept that version of events that is most favorable to the People to the extent it is supported by the record. (*People v. Anderson* (1990) 52 Cal.3d 453, 470.)

"In general, a confession is the defendant's declaration of his or her intentional participation in a criminal act. [Citations.] A confession constitutes an acknowledgment of guilt of the crime charged. [Citations.] [¶] In order for a confession to be admissible as evidence, the confession must have been made voluntarily and without coercion. [Citations.] Admitting an involuntary confession as evidence against a defendant violates a defendant's due process rights under both the California and United States Constitutions. [Citations.] Use of such confessions in a criminal prosecution is prohibited because 'it offends "the community's sense of fair play and decency" to convict a defendant by evidence extorted from him . . . .' [Citations.] [¶] A confession is involuntary if an individual's will was overborne. [Citations.] A coerced confession is not 'the product of a rational intellect and a free will.' [Citations.] [¶] In deciding if a defendant's will was overborne, courts examine 'all the surrounding circumstances—both the *characteristics of the accused* and the *details of the interrogation*.' [Citations.] [¶] Characteristics of the accused which may be examined include the accused's age,

sophistication, prior experience with the criminal justice system and emotional state.' " (In re Shawn D. (1993) 20 Cal.App.4th 200, 208-209.)

"While the use of deception or communication of false information to a suspect does not alone render a resulting statement involuntary [citation], such deception is a factor which weighs against a finding of voluntariness." (*People v. Hogan* (1982) 31 Cal.3d 815, 840-841, disapproved on another ground in *People v. Cooper* (1991) 53 Cal.3d 771.) " It is well settled that a confession is involuntary and therefore inadmissible if it was elicited by any promise of benefit or leniency whether express or implied. [Citations.] However, mere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary. . . . Thus, "[w]hen the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct," the subsequent statement will not be considered involuntarily made. [Citation.] On the other hand, "if . . . the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible . . . ." (*People v. Holloway* (2004) 33 Cal.4th 96, 115.)

Here, the detective did not threaten Andre or offer him leniency in exchange for his truthful testimony, therefore we do not believe Andre's statements were involuntary. The detective merely explained to him that the logical consequence of his speaking the truth was a better grasp of his problems, and improvement of his life through counseling.

Conversely, if he does not get help, in five or six years, when he becomes an adult, it might be too late for him to change his behavior, and he might commit a criminal act and face prison punishment. The detective did not indicate that she was going to be lenient with Andre by offering him counseling in lieu of punishment; and she did not imply that any consequence of his untruthful statements would be immediate punishment in prison or otherwise.

We conclude that any use that Detective Czerwinski made of a tactic of minimizing was not enough to render Andre's statements involuntary, because deceptive tactics are not prima facie proof of involuntariness, although they may be a factor in finding involuntariness. (*People v. Hogan, supra*, 31 Cal.3d at pp. 840-841.)

Even if we were to assume that Andre's confession was obtained in violation of *Miranda*, we would conclude under the circumstances of the present case that its admission was harmless beyond a reasonable doubt. (*People v. Cunningham* (2001) 25 Cal.4th 926, 994.) Here, the evidence by the two girls regarding the incident at school was overwhelming, and the court found it credible. Regarding the separate crime against the youngest victim, the testimony from the parents and Dr. Dully were overwhelming and therefore we conclude beyond a reasonable doubt that Andre still would have been convicted absent his statements in the police interviews. Accordingly, the juvenile court did not err in declining to suppress Andre's statements made in the two police interviews.

## II.

Andre contends that certain probation conditions have no relationship to his conduct or rehabilitation, and must therefore be stricken or modified to protect his First

Amendment rights. He relies on *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*) (abrogated by Proposition 8 on another ground as noted in *People v. Wheeler* (1992) 4 Cal.4th 284, 290-292), in which the court ruled: "A condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality. . . .' [Citation]. Conversely, a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality." (*Lent*, at p. 486, fn. omitted.)

Here, under the probation terms, Andre is barred from accessing pornographic material, including computer files and disks, and any adult sexually explicit website. Further, the court extended his Fourth Amendment waiver to any computer he uses or to which he has access. Andre does not challenge those probation conditions; instead, he challenges other conditions banning him from: (1) knowingly using "a computer that contains any encryption, hacking, cracking, keystroke monitoring, security testing, or steganography, Trojan or virus software"; (2) having or using "a MySpace page, a Facebook page, or any other similar page"; (3) "participating in chat rooms, using instant messaging such as ICQ, MySpace, Facebook, TWITTER, or other similar communication programs"; and (4) using "a computer for any purpose other than school related assignments", while requiring him "to be supervised when using a computer in the common area of his/her residence or in a school setting."

"The state, when it asserts jurisdiction over a minor, stands in the shoes of the parents" (*In re Antonio R.* (2000) 78 Cal.App.4th 937, 941 (*Antonio R.*)), thereby occupying a unique role in caring for the minor's well-being. In keeping with this role, section 730, subdivision (b) provides that the court may impose "any and all reasonable [probation] conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced."

We review facial challenges to probation conditions de novo. (*In re Sheena K.* (2007) 40 Cal.4th 875, 885-888 (*Sheena K.*)) "A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*Id.* at p. 889.) "A state may restrict a constitutional right, but only when narrowly drawn to serve a compelling state interest." (*In re Stevens* (2004) 119 Cal.App.4th 1228, 1237 (*Stevens*)). The court in *Stevens* explained: "Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.'" (*Id.* at p. 1236, quoting *Reno v. American Civil Liberties Union* (1997) 521 U.S. 844, 870.) As the *Stevens* court observed, "Two hundred years after the framers ratified the Constitution, the Net has taught us what the First Amendment means.'" (*Stevens*, at p. 1236, quoting Lessig, *Code and Other Laws of Cyberspace* (1999) p. 10.)

"Restrictions [on Internet use] should be narrowly tailored to achieve that objective [i.e., deterring future criminality]." (*People v. Harrison* (2005) 134

Cal.App.4th 637, 647.) "The state's power to inhibit free speech is limited. ' "[T]he government may enforce reasonable time, place, and manner regulations as long as the restrictions 'are content-neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication.' " ' " (*Stevens, supra*, 119 Cal.App.4th at p. 1237.)

"[B]ecause a minor's constitutional rights are more circumscribed" (*Antonio R., supra*, 78 Cal.App.4th at p. 941), a probation condition that would be unconstitutional or otherwise improper for an adult probationer may be permissible for a juvenile probationer. (*Sheena K., supra*, 40 Cal.4th 875 at p. 889.) Here, we conclude that four probation conditions fail to satisfy these requirements.

#### *Technical Ways to Evade Computer Monitoring*

We first reject Andre's challenge to the probation condition barring him from knowingly using a computer that contains any encryption, hacking, cracking, scanning, keystroke monitoring, security testing, steganography, Trojan or virus software. This condition is reasonably related to permitting probation officers to verify Andre's compliance with other unchallenged probation conditions relating to the ban on pornographic images and the extension of his Fourth Amendment waiver to any computer he uses.

#### *Supervised Computer Use and Non-School-Related Computer Use*

Next, both state and federal courts have rejected the total ban on the First Amendment right to Internet use by a probationer or parolee. (See, e.g., *Sheena K., supra*, 40 Cal.4th at p. 890; *Stevens, supra*, 119 Cal.App.4th at pp. 1234-1235; *U.S. v.*

*Holm* (7th Cir .2003) 326 F.3d 872, 877-878 (*Holm*.) The *Holm* court observed that "such a ban renders modern life—in which, for example, the government strongly encourages taxpayers to file their returns electronically, where more and more commerce is conducted on-line, and where vast amounts of government information are communicated via website—exceptionally difficult." (*Holm*, at p. 878.) As noted, "[a] probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.)

In *Holm*, the court rejected as overbroad a blanket ban on Internet access as a condition of Holm's supervised release. (*Holm*, *supra*, 326 F.3d. at pp. 876-877.) Holm was an information system technologist who pleaded guilty to possessing child pornography on his home computer. (*Id.* at pp. 873-874.) He presented undisputed evidence at sentencing that he had not used workplace computers in committing his crimes. (*Id.* at p. 878.) On appeal, the court directed the district court to more carefully tailor the parole condition on remand, stating: "We are confident that the district court can fashion precise restrictions that protect the child victims used in Internet pornography and at the same time reflect the realities of Holm's rehabilitation prospects." (*Id.* at p. 879.)

The court in *Stevens* reached a similar resolution after reviewing both federal and state cases involving parole conditions limiting a child molester's access to the Internet. (*Stevens*, *supra*, 119 Cal.App.4th at pp. 1231, 1236-1239.) Stevens had befriended the victim in a youth program. After his arrest, police seized an incriminating photo album

and a video recording. A search of Stevens's home computer showed that he had not used it to download child pornography, contact the victim, or commit any other crime. Stevens pleaded guilty to one count of lewd conduct upon a child under the age of 14 and served time in prison. A special condition of his parole stated: " 'You shall not possess or have access to computer hardware or software including the [I]nternet.' " (*Id.* at p. 1231.) Stevens sought habeas corpus relief and the Board of Prison Terms (BPT) modified the condition to allow limited use of the Internet. (*Id.* at p. 1232.) In the face of BPT's claim that the case was moot, the court addressed the merits, ruling that the special condition was unconstitutionally overbroad. (*Id.* at p. 1240.) It noted that "BPT was legitimately concerned that a released child molester's unfettered access to a computer might result in criminal conduct. [However, in contrast with cases upholding bans on Internet use], the broad prohibition on use of the computer and Internet bore no relation to Stevens's conviction for child molestation and imposed a greater restriction of his rights than was reasonably necessary to accomplish the state's legitimate goal." (*Id.* at p. 1239.)

In this case, the probation conditions prohibiting Andre all computer use "unless supervised by a responsible adult over the age of 21 who is aware that the minor is on probation and of his charges"; and all non-school-related use of computers—and resulting ban on Internet access—suffer from the same constitutional defect as the conditions in *Holm* and *Stevens*. They are not tailored to Andre's convictions for violating another's personal liberty, willfully annoying and molesting another, unlawful use of force, and lewd and lascivious conduct, or the juvenile court's dual goals of rehabilitation and public

safety. (Accord, *In re Babak S.* (1993) 18 Cal.App.4th 1077, 1084.) And absent any connection between Andre's criminal history and the blanket Internet ban, there is no support for the People's claim that it is properly related to future criminality.

Accordingly, we strike the condition as unconstitutionally overbroad.

We also strike those probation terms forbidding him from using "a computer for any purpose other than school related assignments"; and requiring him "to be supervised when using a computer in the common area of his/her residence or in a school setting."

These probation conditions suffer from the same defect as *Holm, Stevens* and the ban on Andre using the Internet for non-school-related purposes.

*Use of Internet Chat Rooms, Instant Messaging and Social Media*

There is no evidence or indication in the record that Andre used Internet chat rooms or social media to contact his victims or to learn how to carry out his actions underlying the true findings. We conclude that prohibiting Andre from using social media is overbroad and, as phrased, the prohibition has no bearing on his possible rehabilitation. At oral argument, defense counsel conceded that in light of the fact a minor's constitutional rights are circumscribed, the probation terms prohibiting him from having or using social media accounts can be more narrowly tailored to fit his sexual crimes and foster his rehabilitation. Accordingly, we remand for the trial court to narrowly tailor the probation terms banning him from having or using "a MySpace page, a Facebook page, or any other similar page," and from "participating in chat rooms, using instant messaging such as ICQ, MySpace, Facebook, TWITTER, or other similar communication programs."

DISPOSITION

We modify the judgment as follows: We strike those terms banning Andre from: (1) all computer use "unless supervised by a responsible adult over the age of 21 who is aware that the minor is on probation and of his charges"; and (2) using "a computer for any purpose other than school related assignments." We also strike the probation term requiring that he be supervised "when using a computer in the common area of his/her residence or in a school setting." We remand for the trial court to modify the probation terms banning Andre from "having or using a MySpace page, a Facebook page or any other similar page," and from "participating in chat rooms, using instant messaging such as ICQ, MySpace, Facebook, TWITTER, or other similar communication programs." The judgment is otherwise affirmed.

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O'ROURKE, J.

WE CONCUR:

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NARES, Acting P. J.

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HALLER, J.