

CASE NO. 21-1080
IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,)
)
Plaintiff-Appellee,)
)
v.)
)
RICHARD HOLZER,)
)
Defendant-Appellant.)

On Appeal from the United States District Court
for the District of Colorado
The Honorable, United States District Court Judge Raymond P. Moore
D.C. No. 1:19-CR-00488-RM-1

APPELLANT'S OPENING BRIEF

Respectfully submitted,
VIRGINIA L. GRADY
Federal Public Defender

GRANT R. SMITH
Assistant Federal Public Defender
633 17th Street, Suite 1000
Denver, Colorado 80202
(303) 294-7002

Oral argument is requested.

PDF format attachments included with digital submission

November 8, 2021

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PRIOR OR RELATED APPEALS

There are no prior or related appeals.

JURISDICTION

The United States District Court for the District of Colorado had jurisdiction in this criminal case under 18 U.S.C. § 3231. The district court entered judgment on March 2, 2021. Vol. 1 at 107.¹ Mr. Holzer filed his notice of appeal on March 5, 2021, within the 14-day period of Federal Rule of Appellate Procedure 4(b)(1)(a)(i). *Id.* at 114. This Court has jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

ISSUE PRESENTED

A special condition of Mr. Holzer's supervised release prohibits him from acquiring, possessing or using any photograph, imagery, jewelry, or literature depicting Thor's hammer, the Celtic cross, and the numbers 12, 14, 18, 88, 311, and 1488. Vol. 1 at 111. The issue is whether this condition touches on Mr. Holzer's First Amendment rights.

¹ The record will be cited by volume number and by the page number appearing in the bottom, right-hand corner of each page.

STATEMENT OF THE CASE

I. Mr. Holzer's religion.

Richard Holzer is a devout follower of the Asatru faith. Vol. 2 at 64. Asatru is a pagan, polytheistic religion based on the traditions of Iceland's pre-Christian past.² It is a decentralized religion, which means it has no predominate religious leader or governing body, but followers of the Asatru faith do subscribe to common tenets and common practices.³

As a core practice, Asatru followers worship the gods and spirits of ancient Norse mythology.⁴ This includes the worship of Thor (the god of war and fertility), Odin (the ruler of Valhalla), and Freya (the goddess of love).⁵ As part of this worship, Thor's hammer—the Mjolnir—holds significant symbolic importance.⁶ Like the crucifix to Catholicism, Thor's hammer is a sacred symbol to the followers of the Asatru

² Staff, *11 Things to Know About the Present Day Practice of Asatru the Ancient Religion of the Ancient Vikings*, Iceland Magazine (Jan. 22, 2019) available at <https://icelandmag.is/article/11-things-know-about-present-day-practice-asatru-ancient-religion-vikings>.

³ *Id.*; *Krieger v. Brown*, 496 F. App'x 322, 323 (4th Cir. 2012) (unpublished).

⁴ Sigal Samuel, *What to do When Racists Try to Hijack Your Religion*, The Atlantic (Nov. 2, 2017) available at <https://www.theatlantic.com/international/archive/2017/11/asatru-heathenry-racism/543864/>.

⁵ *Id.*

⁶ John Brownlee, *How Thor's Hammer Became an Approved Symbol by the Veteran's Administration*, The World (July 11, 2013) available at <https://theworld.org/stories/2013-07-11/how-thors-hammer-became-approved-symbol-veterans-administration>.

faith. It is incorporated into religious practices and is worn as a protective amulet.⁷ And, like the Star of David, it is the predominate symbol worn to outwardly identify the wearer as a follower of the faith.⁸ As a testament to the symbolic significance of Thor's hammer, the United States Department of Veteran's Affairs has authorized the emblem to be engraved on department-issued headstones to represent a fallen service-member's Asatru faith.⁹

II. Mr. Holzer's crime.

Mr. Holzer's biological mother was a drug addict. Vol. 2 at 263. As a result, Mr. Holzer was born addicted to heroin and cocaine. *Id.* Shortly after birth, the California Department of Child Services placed Mr. Holzer in foster care. *Id.*

As Mr. Holzer grew, he struggled with numerous medical issues and was diagnosed with Fetal Alcohol Syndrome. *Id.* at 264. This syndrome manifested in developmental delays and distinctive physical limitations. *Id.* These physical deficits, unfortunately, had a direct impact on Mr. Holzer's social development. *Id.* at 265. Other children deemed Mr. Holzer "weird" and ultimately avoided him altogether. *Id.* Mr. Holzer entered into young adulthood as a loner and an outcast. *Id.* at 262.

Thus, in September of 2019 when Mr. Holzer was 27 years old, it was likely a rare occurrence when a stranger reached out to talk to him on Facebook. *Id.* at 9. The

⁷ *Id.*; *Krieger*, 496 F. App'x at 323.

⁸ *Id.*

⁹ *Id.*

stranger went by the screenname “Missy” and presented herself as a supporter of white supremacy. *Id.* at 9, 270. Mr. Holzer had recently found acceptance in the white supremacy movement after becoming re-acquainted with his biological father who Mr. Holzer believed to be a “highly respected member” of the Aryan Brotherhood. *Id.* at 268.

Mr. Holzer responded to Missy and sent her photos of swastikas. *Id.* at 10. The two continued to chat online and eventually began discussing attacking a synagogue in Pueblo, Colorado. *Id.* Missy told Mr. Holzer that she had friends who would be in Colorado and might be interested in such a plan. *Id.* Mr. Holzer agreed to meet with them. *Id.* What Mr. Holzer did not know was that “Missy” was an undercover FBI agent.

On October 17, 2019, Mr. Holzer met with three undercover FBI agents posing as Missy’s friends. *Id.* at 11. During the meeting, the group discussed placing explosives inside a synagogue and drove to Pueblo to scout out the site. *Id.* The undercover agents agreed to provide Mr. Holzer with pipe bombs to be used in the attack. *Id.*

A few weeks later, Mr. Holzer again met with the three undercover agents at a motel. *Id.* at 12. The agents brought along inert pipe bombs and dynamite. *Id.* They told Mr. Holzer that the devices were active. *Id.* Mr. Holzer stated that the group should carry out their attack on the synagogue at 2:30 or 3:00 a.m. the next morning. *Id.* The undercover officers then arrested Mr. Holzer. *Id.*

A grand jury indicted Mr. Holzer on the following three counts: attempting to obstruct religious exercises by force using explosives and fire, in violation of 18 U.S.C. § 247(a)(2) and (d)(3) (Count One); attempting to damage and destroy a building used in interstate commerce by means of fire and explosives, in violation of 18 U.S.C. § 844(i) (Count Two); and using fire and explosives to commit a federal felony, in violation of 18 U.S.C. § 844(h)(1) (Count Three). Vol. 1 at 22.

Mr. Holzer entered into a Federal Rule of Criminal Procedure 11(c)(1)(B) plea agreement with the government. *Id.* at 62. He agreed to plead guilty to Counts One and Two of the indictment; and, in exchange, the government would dismiss Count Three. *Id.* at 63. Mr. Holzer also agreed to a limited waiver of his appellate rights and expressly reserved the right to appeal if his “sentence exceeds the maximum penalty provided in the statute of conviction.” *Id.*

III. Mr. Holzer is prohibited from possessing Thor’s hammer, the Celtic cross, and the numbers 12, 14, 18, 88, 311, and 1488.

A presentence investigation report was prepared in anticipation of Mr. Holzer’s sentencing. Vol. 2 at 5. The probation officer’s sentencing recommendations were attached to the report. *Id.* at 33. These recommendations included a list of proposed special conditions of supervision. *Id.* at 34. Relevant here, proposed condition number three read:

You shall not possess, view, access or otherwise use material that is primarily associated with extremist views or organizations (including but not limited to anti-Semitic material).

Id. at 35.

Mr. Holzer filed a written objection to this condition and argued that the condition was impermissibly vague as it allowed the United States Probation Office to determine what is “extremist” and what is “primarily associated with” extremism. *Id.* at 61. Mr. Holzer also argued that the condition represented a “severe and unjustified limitation on his First Amendment rights, most notably his “freedoms of religion and thought.” *Id.* at 62. As counsel pointed out, any condition that intrudes on such protected rights must be especially “fine-tuned to achieve the goals set forth in [18 U.S.C. §] 3553(a)(2)(B), (C), and (D).” *Id.* at 61 (citing *United States v. Edgin*, 92 F.3d 1044, 1049 (10th Cir. 1996)). And such a condition can only be imposed when it is justified by “compelling circumstances” and supported by “particularized findings” set forth in the record. *Id.* (citing *United States v. Pacheco-Donelson*, 893 F.3d 757, 760 (10th Cir. 2018)).

Mr. Holzer proposed a less restrictive condition which would prohibit him from “possessing or accessing material that promotes racial or ethnically-motivated violence or violent criminal activity.” *Id.* Such a condition would not infringe on Mr. Holzer’s First Amendment rights but would still prevent “his exposure to material . . . that promotes violence.” *Id.*

The government responded to Mr. Holzer’s objection and did “not oppose narrowing the wording to better accomplish the goal of restricting the defendant’s

access to materials that tend to promote, support, advocate, encourage, or incite violence and/or unlawful activity related to his hateful ideology.” *Id.* at 101. The government suggested that the condition be modified to read:

You shall not possess, access, create, or otherwise use material that promotes bias-motivated violence or any other bias-motivated unlawful activity (including but not limited to anti-Semitic bias).

Id.

The district court determined that neither party was right in their proposals. Less than ten days before sentencing, the court created its own set of special conditions and distributed them through probation. Vol. 2 at 841. The court’s re-working of condition number three, now labelled condition nine, swept far wider than either the government or probation had proposed. *Id.* It barred Mr. Holzer from possessing any picture, image, or literature containing Thor’s hammer, the Celtic cross, and the numbers 12, 14, 18, 88, 311, and 1488. *Id.* In full, the condition read:

You shall not knowingly acquire, possess or otherwise use any photograph, flag, clothing, patch, imagery, jewelry, literature, or other material depicting support for or association with anti-Semitism or white supremacy. Specifically included in this prohibition, without limitation, are: Mein Kampf, swastikas, iron crosses, other Nazi memorabilia or symbolism; Thor’s hammer; KKK symbolism; numeric symbols: 12, 14, 18, 88, 311, or 1488; the Aryan Fist; 14 words; the Celtic cross; the Sonnenrand; the Valknut; and the Blood Drop Cross.

Id.

Mr. Holzer was able to file a formal objection to the proposed condition a few days before the scheduled sentencing. *Id.* at 842. In this written objection, Mr. Holzer

incorporated and reiterated his previous objections. *Id.* Again, Mr. Holzer argued that the proposed condition would violate his First Amendment rights “without serving the statutory purposes of supervised release.” *Id.* at 844.

At Mr. Holzer’s sentencing hearing, the court read aloud some additional minor revisions that it had made to the proposed conditions and gave counsel 15 minutes to discuss the matter. Vol. 3 at 99-100. After the quick recess, Mr. Holzer renewed his objection and argued that the proposed condition would violate his First Amendment rights including his right to freely exercise his religious beliefs. *Id.* at 100-01.

The district court interrupted counsel mid-argument and categorically denied that the condition would interfere with Mr. Holzer’s rights. *Id.* at 102. The court stated that Mr. Holzer’s claim to the contrary “was a big old strawman” and that the condition in no “way, shape or form” prevented Mr. Holzer from practicing “Asatruism, Odinism, Christianity, Buddhism” or even, in the court’s words, “pastafarianism.” *Id.* The court found it “remarkable” that Mr. Holzer was even arguing that the condition would “inhibit the practice of his religion, when he is trying to blow up a synagogue and preclude Jews from the practice of theirs.” *Id.* at 107.

Thus, without asking for any additional input from the government, the court overruled Mr. Holzer’s objection and imposed the condition. *Id.* The court also sentenced Mr. Holzer to 235 months’ imprisonment and 15 years of supervised release. Vol. 1 at 108-09. Mr. Holzer timely appealed. *Id.* at 114.

SUMMARY OF THE ARGUMENT

District courts have limited authority to impose special conditions of supervised release. This authority is even narrower for conditions that touch on constitutional rights. Such conditions must be fine-tuned to advance the statutorily prescribed aims of sentencing and they must be justified by particularized findings. Any special condition that touches on constitutional rights, and is not supported by particularized findings, constitutes an impermissible infringement.

Here, the district court did not make any particularized finding to support special condition number nine. Instead, the court denied that the condition touched on Mr. Holzer's First Amendment rights at all. But this is not true.

By prohibiting any depiction of Thor's hammer, the condition impacts Mr. Holzer's right to freely practice his religion. And by prohibiting the possession of any depiction of the Celtic cross and the numbers 12, 14, 18, 88, 311, and 1488, the condition infringes on Mr. Holzer's right to receive information and on his freedom of thought. Because the condition touches on Mr. Holzer's constitutional rights—and because it is not supported by any particularize findings—it is impermissible. Accordingly, reversal is warranted so that the condition can be stricken from Mr. Holzer's sentence.

ARGUMENT

Mr. Holzer's sole claim on appeal is that the supervised release condition at issue impermissibly infringes on his First Amendment rights. As the condition is unconstitutional, the district court lacked any statutory basis for its imposition. *See United States v. Groves*, 369 F.3d 1178, 1182 (10th Cir. 2004) (noting that an "unconstitutional sentence" is an "illegal sentence"). Thus, on de novo review, this Court should reverse. *United States v. Burghart*, 810 F. App'x 622, 625 (10th Cir. 2020) (unpublished) ("[C]onstitutional challenges to supervised release conditions" are reviewed de novo.) (citing *United States v. Cabral*, 926 F.3d 687, 697 (10th Cir. 2019)).

I. The condition is an impermissible infringement on Mr. Holzer's rights.

A district court's authority for imposing special conditions of supervised release is statutorily derived and statutorily restricted. Under 18 U.S.C. § 3583(d), a sentencing court may only impose special conditions of supervised release that are consistent with the general sentencing aims of 18 U.S.C. § 3553 and are not "a greater deprivation of liberty than is necessary."

Important here, special conditions that touch on constitutional rights are "qualitatively different" from all other conditions. *United States v. Bear*, 769 F.3d 1221, 1229 (10th Cir. 2014); *United States v. Malone*, 937 F.3d 1325, 1328-29 (10th Cir. 2019). To that end, such conditions must "be especially fine-tuned" to achieve the statutory purposes of sentencing. *Bear*, 769 F.3d at 1229. A condition that touches on a

constitutional right can only be imposed in “compelling circumstances,” and its imposition must be supported by “particularized findings” made on the record.

Malone, 927 F.3d at 1329 (“[T]he district court must ensure that its conditions conform to the Constitution.”).

Here, the district court did not make any particularized findings explaining how special condition number nine would advance the aims of § 3553(a), nor did the court identify any compelling circumstances that would warrant such a condition. Instead, the court repeatedly, and forcefully, denied that the special condition would impact Mr. Holzer’s First Amendment rights in any way. Vol. 3 at 102-113. This is error. The condition does impact Mr. Holzer’s First Amendment rights in several ways. Thus, the “condition, on its face, is an impermissible infringement into [Mr. Holzer’s] significant liberty interests without the justifying support of particularized findings. *Malone*, 937 F.3d at 1328.

The condition at issue touches on Mr. Holzer’s First Amendment rights in at least two ways. First, the condition intrudes on his right to freely exercise his religious beliefs. *See United States v. Meyers*, 95 F.3d 1475, 1480 (10th Cir. 1996) (Referencing the Free Exercise Clause of the First Amendment of the United States Constitution). As noted, Thor’s hammer carries significant symbolic importance to Mr. Holzer as a follower of the Asatru faith. It is incorporated into the practice of his religion and, as any online search reveals, it is ubiquitous in Asatru-related discussions and literature.

Krieger, 496 F. App'x at 32. Just as if the court had prohibited a practicing Catholic from possessing any image or depiction of a crucifix, the prohibition against possessing Thor's hammer, at minimum, touches on Mr. Holzer's ability to freely exercise his religious beliefs. As the condition is not supported by any particularized findings, it constitutes an "impermissible infringement." *Malone*, 937 F.3d at 1328.

Likewise, the condition at issue touches on Mr. Holzer's freedom of thought and his right to receive information. It is well-established that "the Constitution protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). Enshrined in this right is the fundamental desire "to protect Americans in their beliefs, their thoughts, their emotions and their sensation." *Id.*

The condition in this case undoubtedly infringes on this right. The condition cuts a large swath as it prohibits Mr. Holzer from possessing any photograph or image of Thor's hammer or the Celtic cross. It prevents Mr. Holzer from possessing the New York Times bestselling book on Norse Mythology,¹⁰ nearly any book on Celtic art,¹¹ or even a bible emblazoned with the Celtic cross. As relates to modern culture and media, the condition bans Mr. Holzer from owning an Avengers action film, a Marvel comic book featuring Thor, or a CD from the band "Celtic Cross." But the condition's impact does not end there.

¹⁰ Neil Gaiman, *Norse Mythology*, W.W. Norton & Co. (2017).

¹¹ See, e.g., George Bain, *Celtic Art*, Dover Publications Inc. (1973).

The condition expressly prohibits Mr. Holzer from possessing the numbers 12, 14, 18, 88, 311, and 1488. By its plain terms, Mr. Holzer violates the condition by receiving a check in the amount of \$ 88. He violates the condition by owning a sports jersey with the number 18. And he violates the condition by printing out and reading a news article about the spread of disinformation on social media. Shannon Bond, *Just 12 People are Behind Vaccine Hoaxes on Social Media, Research Shows*, NPR (May 14, 2021) available at <https://www.npr.org/2021/05/13/996570855/disinformation-dozen-test-facebooks-twitthers-ability-to-curb-vaccine-hoaxes>. The litany of items that the condition prohibits Mr. Holzer from possessing is seemingly endless. As such, the condition undoubtedly touches on Mr. Holzer's First Amendment rights.

In sum, the condition touches on Mr. Holzer's First Amendment rights and it is not supported by any particularized findings. Thus, it is an "impermissible infringement." *Malone*, 937 F.3d at 1328. Accordingly, this Court should reverse.

II. The condition cannot be justified.

As this Court acknowledged in *Malone*, when a condition impermissibly infringes on a constitutional right, this Court has at least two options for remand. It can (1) remand for the district court to make the requisite findings to support the imposition of the condition, or (2) remand with a narrow mandate for a clerical amendment to strike out the condition. *Malone*, 937 F.3d at 1328-29. Here, there is nothing in the record that would support any necessary findings to support the imposition of the

condition. Thus, this Court should remand with the instruction that the condition be stricken.

A condition that touches on constitutional rights needs to be “fine-tuned” to advance the aims of § 3553(a). *Bear*, 769 F.3d at 1229. Here, like in *Malone*, there is nothing in the record that would justify imposing the wide-sweeping condition. For example, there is nothing in the record that would justify prohibiting Mr. Holzer from ever possessing the number 311 as a means of protecting the public, or deterring future criminal conduct. *See* § 3553(a). Nor is there anything in the record that supports an outright ban on Mr. Holzer’s possession of Thor’s hammer in order to foster rehabilitation or, for that matter, advance any of the other aims contained in § 3553(a). The particularized findings needed to justify special condition number 9 cannot be made on this record. As such, this Court should remand with instructions for the court to enter a clerical amendment striking the condition. *See Malone*, 937 F.3d at 1329.

CONCLUSION

This Court should remand with instructions to vacate special supervised release condition number nine.

STATEMENT REGARDING ORAL ARGUMENT

Counsel requests oral argument because he believes it would significantly aid this Court in deciding this case.

Respectfully submitted,

VIRGINIA L. GRADY
Federal Public Defender

By: /s/ Grant R. Smith
GRANT R. SMITH
Assistant Federal Public Defender
633 17th Street, Suite 1000
Denver, Colorado 80202
(303) 294-7002
Email: Grant_Smith@fd.org