NOT FOR PUBLICATION

FILED

JAN 14 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOHNSTON BLACKHORSE, Defendant-Appellant.	No. 17-10505 D.C. No. 2:14-cr-00340-APG-PAL-1 MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Andrew P. Gordon, District Judge, Presiding

Submitted December 21, 2018**
San Francisco, California

Before: M. SMITH, NGUYEN, and BENNETT, Circuit Judges.

Johnston Blackhorse appeals the district court's imposition of a special condition of supervised release (Special Condition 4), as well as its finding that Blackhorse violated federal obscenity statutes during supervised release. We affirm.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

1. The district court did not plainly err in fashioning Special Condition 4. We have repeatedly affirmed similar conditions of supervised release. *See, e.g.*, *United States v. Daniels*, 541 F.3d 915, 927–28 (9th Cir. 2008); *United States v. Rearden*, 349 F.3d 608, 618–20 (9th Cir. 2003); *United States v. Bee*, 162 F.3d 1232, 1234–35 (9th Cir. 1998). Thus, the district court could not have plainly erred. *See United States v. Gnirke*, 775 F.3d 1155, 1164 (9th Cir. 2015). And because Special Condition 4 extends to material depicting and/or describing simulated sexually explicit conduct involving children *but not adults*, it does not suffer from the overbreadth concerns that we articulated in *Gnirke*. *See id.* at 1163. For substantially the same reasons articulated in *Daniels*, *Rearden*, and *Bee*, we affirm the district court's imposition of Special Condition 4.[1]

2. The district court did not abuse its discretion in finding by a preponderance of the evidence that Blackhorse violated the obscenity statutes. Before the district court, Blackhorse did not clearly argue that his drawings are not obscene under *Miller v. California*, 413 U.S. 15, 24–25 (1973). Nor did Blackhorse make an evidentiary objection concerning the district court's obscenity finding. *See United States v. Sesma-Hernandez*, 253 F.3d 403, 409 (9th Cir. 2001). In any event, the district court clearly articulated its findings that Blackhorse's drawings are obscene

[1] We also hold that the word "describing"—as used in Special Condition 4—is not unconstitutionally vague.

and that Blackhorse violated the obscenity statutes during supervised release. *See id.* Even assuming the district court did not sufficiently articulate these findings, any such error was harmless. *See United States v. Perez*, 526 F.3d 543, 547 (9th Cir. 2008).

AFFIRMED.