

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3
4 August Term 2007
5 (Argued: November 19, 2007 Decided: January 9, 2008)
6 Docket Nos. 05-5522-cr(L) 06-1337-cr(CON)

7 -----x
8 UNITED STATES OF AMERICA,

9
10 Appellee,

11
12 -- v. --

13
14 ROBERT H. DUPES and HURSON BELIZAIRE*,

15
16 Defendants-Appellants.

17 -----x
18
19 B e f o r e : WALKER and CALABRESI, Circuit Judges, and KEENAN,
20 District Judge.**

21 Defendant appeals from a sentence imposed in the United
22 States District Court for the Southern District of New York
23 (Pauley, Judge) following a guilty plea to securities fraud and
24 conspiracy to commit securities fraud, including an order of
25 restitution pursuant to the Mandatory Victim Restitution Act and
26 special conditions of supervised release relating to defendant's
27 prior sex offenses.

28 AFFIRMED

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* 06-1337-cr(CON)CLOSED-withdrawn by stipulation filed May 30, 2006.

** The Honorable John F. Keenan, United States District Judge for the Southern District of New York, sitting by designation.

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2 United States Attorney
3 (Katherine Polk Failla,
4 Assistant United States
5 Attorney, on the brief), for
6 Michael J. Garcia, United
7 States Attorney for the
8 Southern District of New York,
9 New York, N.Y., for Appellee.

10
11 DAVID SAMEL, New York, N.Y.,
12 for Defendant-Appellant.
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15 KEENAN, District Judge:

16 **Introduction**

17 This is an appeal from a sentence imposed by William H.
18 Pauley III, United States District Judge for the Southern
19 District of New York. Following a guilty plea to securities
20 fraud and conspiracy to commit securities fraud, the district
21 court sentenced defendant-appellant Robert H. Dupes to prison for
22 thirty-eight months, to be followed by three years of supervised
23 release. The court also ordered Dupes to make full restitution
24 to his victims in an amount determined by the court pursuant to
25 the Mandatory Victim Restitution Act. On appeal, Dupes claims
26 that the imposition of special conditions of supervised release
27 relating to his prior sex offenses exceeded the district court's
28 statutory authority and violated the Double Jeopardy Clause and
29 the Tenth Amendment. Dupes also challenges his order of
30 restitution under the Sixth Amendment. For the reasons stated
31 below, we affirm the sentence imposed by the district court.

1 **Background**

2 Around June of 1999, Dupes and a co-conspirator founded
3 a company called Internet Holdings.com ("Internet Holdings"), a
4 Delaware limited liability company headquartered in New York.
5 Internet Holdings was purportedly organized to raise capital to
6 acquire privately held companies and take them public through
7 initial public offerings and other transactions. From the
8 company's establishment until September 2000, it issued
9 securities to investors from its Manhattan offices through
10 private placement memoranda and other solicitations that
11 contained material misrepresentations. Dupes, the President and
12 Chief Operating Officer of the company, and his co-conspirators
13 converted nearly all of the proceeds of the securities offering
14 to their own personal use, defrauding twenty-four investors of
15 approximately \$765,000.

16 Dupes was arrested in Colorado in August of 2000 on
17 unrelated federal charges of interstate travel to have sex with a
18 minor. Following that arrest, the federal government initiated
19 an investigation of him in New York. Officials executed a search
20 warrant at his Manhattan apartment and seized a home computer
21 containing child pornography. Dupes pled guilty to possession of
22 child pornography and received a sentence of twenty-seven months'
23 imprisonment. He also pled guilty to the charges stemming from
24 his Colorado arrest for interstate travel to have sex with a

1 minor and received a sentence of twelve months' imprisonment, to
2 run consecutively with the child pornography sentence. In
3 October of 2003, Dupes was released from prison and began serving
4 a term of supervised release.

5 In May of 2004, Dupes and five of his co-conspirators
6 in the Internet Holdings scheme were charged by indictment with
7 securities fraud and conspiracy to commit securities fraud. Dupes
8 pled guilty to both counts. At an October 2005 sentencing
9 hearing, Judge Pauley sentenced Dupes to thirty-eight months'
10 imprisonment to be followed by three years of supervised release,
11 running concurrently on both counts.¹ In addition to the
12 mandatory and standard conditions of supervised release, the
13 court imposed several special conditions relating to Dupes's
14 prior sex offenses. The court adopted these special conditions
15 from the presentence report that the probation office had
16 prepared. Special Condition 8 required Dupes to "undergo a sex-
17 offense-specific evaluation and participate in a sex offender
18 treatment/and or [sic] mental health treatment program approved
19 by the probation officer." It further required him to "waive his
20 right of confidentiality in any records for mental health

¹ It could be argued that this appeal highlights the old adage that "no good deed remains unpunished." The district court imposed a sentence below the advisory Guidelines range of fifty-seven to seventy-one months because of Dupes's distinguished record of military service, because the delay in prosecuting him allowed sex offenses committed after the Internet Holdings conspiracy to enhance his Guidelines range, and because Dupes's co-conspirator, the architect of several fraudulent securities schemes, received only a thirty-seven month sentence.

1 assessment and treatment imposed as a consequence of this
2 judgment to allow the probation officer to review the defendant's
3 course of treatment and progress with the treatment provider."

4 Special Condition 9 directed Dupes to

5 register with the state sex offender registration agency in
6 any state in which [he] resides, is employed, carries on a
7 vocation or is a student, as directed by the probation
8 officer. The defendant shall adhere to the registration and
9 notification procedures of the state in which [he] resides.

10

11 The presentence report had limited the registration requirement
12 with the words "if applicable." Special Condition 10 barred
13 Dupes from having deliberate contact with any child under the age
14 of seventeen and required him to stay more than one hundred feet
15 from places primarily used by children such as schoolyards,
16 playgrounds and arcades. Special Condition 11 forbade the use of
17 a computer to access child pornography or to communicate with
18 other individuals or groups for the purpose of promoting sexual
19 relations with children, and provided for monitoring of Dupes's
20 computer usage by the probation office. At sentencing, the
21 district court informed Dupes that it had "crafted this sentence
22 in an effort to take account of the good things that you have
23 done and also to protect the community from the bad things that
24 you have done."

25 The district court also imposed restitution against
26 Dupes in the amount of \$765,000, the amount recommended in the
27 presentence report as the total loss caused by the Internet

1 Holdings scheme to its twenty-four victim-investors. Dupes's
2 counsel confirmed at an earlier hearing that he had reviewed the
3 presentence report with his client and had no objections to the
4 factual matters set forth therein. Prior to this appeal, Dupes
5 never objected to the special conditions of supervised release or
6 the amount of restitution recommended in the presentence report.

7 **Discussion**

8 Dupes challenges his special conditions of supervised
9 release on three grounds. First, he claims that the imposition
10 of special conditions of supervised release relating to his prior
11 sex offenses violates the Double Jeopardy Clause. Second, he
12 asserts that the requirement that he waive therapeutic
13 confidentiality in connection with court-ordered sex offender
14 treatment exceeds the sentencing court's authority under 18
15 U.S.C. § 3583(d) and section 5D1.3(b) of the U.S. Sentencing
16 Guidelines ("U.S.S.G."). Third, he argues that the condition
17 requiring his registration as a sex offender with state agencies
18 violates the Tenth Amendment. Dupes also attacks the
19 constitutionality of his restitution order, claiming that the
20 Mandatory Victim Restitution Act ("MVRA") violates the Sixth
21 Amendment under the principles established in the Apprendi-Ring-
22 Booker-Blakely line of cases. Finally, Dupes has submitted a
23 supplemental pro se brief raising various other challenges to his
24 conviction and sentence.

1
2 I. Conditions of Supervised Release

3 A. Standard of Review

4 The propriety of conditions of supervised release are
5 judged by an abuse of discretion standard. United States v.
6 Brown, 402 F.3d 133, 136 (2d Cir. 2005). Although the district
7 court enjoys broad discretion in imposing these conditions, its
8 discretion is not “untrammelled” and “our Court will carefully
9 scrutinize unusual and severe conditions.” United States v.
10 Myers, 426 F.3d 117, 124 (2d Cir. 2005) (internal citations and
11 quotation marks omitted). Any error of law constitutes an abuse
12 of discretion. See United States v. Johnson, 446 F.3d 272, 277
13 (2d Cir. 2006). A challenge to conditions of supervised release
14 that presents an issue of law is generally reviewed de novo, id.,
15 but we review Dupes’s claims for plain error because he failed to
16 raise them before the district court at sentencing. United States
17 v. Sofsky, 287 F.3d 122, 125 (2d Cir. 2002).² Under the plain
18 error standard, before an appellate court can correct an error

² Dupes argues that we should relax the plain error standard of review as we did in United States v. Sofsky, 287 F.3d 122, 125 (2d Cir. 2002). In Sofsky, we noted that “in the sentencing context there are circumstances that permit us to relax the otherwise rigorous standards of plain error review to correct sentencing errors.” Id. We applied plain error standards less rigorously because the presentence report failed to give the defendant notice that the condition of supervised release might be imposed. Id. at 125-26. In this case, the presentence report, which Dupes reviewed with counsel, recommended the conditions to which he failed to object and now challenges on appeal. We see no circumstances warranting the relaxation of the plain error standard in this case.

1 not raised below, there must be (1) an error, (2) that is plain
2 and (3) that affects substantial rights. If these conditions are
3 met, an appellate court may then exercise its discretion to
4 correct the error, but only if it seriously affects the fairness,
5 integrity or public reputation of judicial proceedings. See id.
6 at 125 n.2 (citing Jones v. United States, 527 U.S. 373, 389
7 (1999)).

8 B. Merits

9 1. The Double Jeopardy Claim

10 The Double Jeopardy Clause protects a defendant from
11 successive punishments for the same criminal offense. United
12 States v. Dixon, 509 U.S. 688, 696 (1993). Dupes claims that the
13 district court violated the prohibition against double jeopardy
14 by imposing a punishment relating to the two sex offenses for
15 which he previously had been sentenced. We cannot agree. The
16 challenged conditions of supervised release are an authorized
17 punishment for Dupes's securities fraud conviction, not a
18 successive punishment for his prior sex offense convictions.

19 The district court has broad authority pursuant to 18
20 U.S.C. § 3583(d) to impose any condition of supervised release
21 that it considers to be appropriate, provided such condition
22 ;4107;4108;4107;4108is "reasonably related" to certain statutory
23 sentencing factors listed in section 3553(a) (1) and (a) (2) of
24 that title, "involves no greater deprivation of liberty than is
25 reasonably necessary" to implement the statutory purposes of

1 sentencing, and is consistent with pertinent Sentencing
2 Commission policy statements. 18 U.S.C. § 3583(d); Myers, 426
3 F.3d at 123-124. The factors of section 3553(a)(1) and (a)(2) to
4 which conditions of supervised release must be reasonably related
5 are also set forth in U.S.S.G. § 5D1.3(b)(1):

6 (A) the nature and circumstances of the offense and the
7 history and characteristics of the defendant; (B) the
8 need for the sentence imposed to afford adequate
9 deterrence to criminal conduct; (C) the need to protect
10 the public from further crimes of the defendant; and
11 (D) the need to provide the defendant with needed
12 educational or vocational training, medical care, or
13 other correctional treatment in the most effective manner.
14

15 U.S.S.G. § 5D1.3(b)(1);4152;4152. A condition of supervised
16 release need only be reasonably related to any one of these
17 factors. United States v. Abrar, 58 F.3d 43, 46 (2d Cir. 1995).

18 It was within the district court's authority to impose
19 the challenged special conditions as part of Dupes's sentence for
20 his securities fraud offense. Each of the conditions—that Dupes
21 attend sex offender treatment, register as a sex offender, keep a
22 distance from children and the places where they usually
23 congregate, and refrain from using the internet to download child
24 pornography or promote sexual relations with children—is
25 reasonably related to Dupe's history and characteristics as a sex
26 offender, his need for treatment, and the public's need for
27 protection from him. Moreover, the conditions are neither
28 excessively restrictive nor inconsistent with the statutory
29 purposes of sentencing. We have previously found section 3583(d)

1 to authorize the imposition of similar conditions following a
2 conviction for a non-sex offense, provided such conditions are
3 not overly broad or vague. In United States v. Peterson, 248
4 F.3d 79, 84-86 (2d Cir. 2001), we stated that a district court
5 had authority to require a defendant, following his conviction
6 for bank larceny, to undergo sex offender treatment and to stay
7 away from places where children typically congregate, based on
8 the defendant's prior conviction for sexually abusing a child.³
9 Similarly, in United States v. Rosario, 386 F.3d 166 (2d Cir.
10 2004), we affirmed a special condition requiring sex offender
11 registration following the defendant's conviction for a drug-
12 related offense where he had previously been convicted of
13 sexually abusing a child. Because the conditions imposed upon
14 Dupes are a lawful punishment for his current securities fraud
15 offense, the conditions cannot be considered a successive
16 punishment for his prior sex offense convictions and there is no
17 Double Jeopardy violation. Accord United States v. Sines, 303
18 F.3d 793, 801 (7th Cir. 2002).

19 2. Waiver of Therapeutic Confidentiality

20 In connection with the requirement that Dupes attend a
21 sex offender and/or mental health treatment program approved by
22 his probation officer, the district court ordered him to waive

³ In Peterson, we nonetheless vacated the conditions on grounds that they delegated too much discretion to the probation officer and contained ambiguous language making them potentially over-broad. 248 F.3d at 84-86. These infirmities are not present in the conditions imposed upon Dupes.

1 therapeutic confidentiality in "any records for mental health
2 assessment and treatment . . . to allow the probation officer to
3 review the defendant's course of treatment and progress with the
4 treatment provider." Dupes claims that the court abused its
5 discretion by ordering this waiver pursuant to section 3583(d)
6 because it is not reasonably related to his rehabilitation or the
7 protection of the public. Treatment will not be effective
8 without the assurance of confidentiality, Dupes asserts, and the
9 public will not be protected by requiring him to undergo
10 ineffective treatment. See generally Jaffee v. Redmond, 518 U.S.
11 1 (1996) (recognizing the psychotherapist-patient privilege and
12 noting that effective psychotherapy depends upon
13 confidentiality).

14 While it could be argued that the waiver condition may
15 retard Dupes's treatment, it very well may advance his treatment
16 by allowing the probation officer to monitor Dupes's progress
17 and, if necessary, make adjustments to his court-ordered therapy
18 program. See United States v. Lopez, 258 F.3d 1053, 1057 (9th
19 Cir. 2001) (upholding a condition requiring release of records of
20 mental health evaluations and treatment because "[t]he sentencing
21 judge could well conclude that disclosure to the court and to the
22 probation officer of information about [defendant's] status was
23 necessary for successfully supervising his reintegration into
24 society"). Moreover, allowing the probation officer access to
25 information about Dupes's treatment could reasonably further

1 public safety regardless of whether the treatment is effective or
2 not. Cf. United States v. Cooper, 171 F.3d 582, 587 (8th
3 Cir.1999) (upholding condition granting probation officer full
4 access to defendant's psychiatric and medical records because it
5 "reasonably amplifie[d]" the standard condition of answering the
6 probation officer's questions truthfully). Therefore, we cannot
7 conclude that the district court's determination that the waiver
8 reasonably relates to Dupes's rehabilitation and the public
9 safety is an abuse of discretion seriously affecting the
10 fairness, integrity or public reputation of the judicial
11 proceedings.

12 3. The Tenth Amendment Claim

13 We have recognized that a federal court in the exercise
14 of its considerable discretion to impose sentence may not
15 transgress the principles of federalism inherent in the Tenth
16 Amendment. United States v. Rosario, 386 F.3d 166, 171 (2d Cir.
17 2004) (citing United States v. A-Abras, Inc., 185 F.3d 26, 33 (2d
18 Cir. 1999)). In Rosario, we held that a condition of supervised
19 release requiring registration as a sex offender with state
20 registration agencies "where applicable" does not violate the
21 Tenth Amendment because it merely required the defendant to meet
22 his state-imposed obligations and involved no undue intrusion
23 upon state authority. Id. at 172. In this case, the absence of
24 the words "where applicable" in the condition requiring Dupes's
25 registration creates no conflict with federalism. The condition

1 orders Dupes to register as directed by his probation officer and
2 to “adhere to the registration and notification procedures of the
3 state in which [he] resides.” We interpret this to mean, as does
4 the Government, that Dupes must notify the relevant agencies of
5 his status as a convicted sex offender. The condition imposes no
6 obligation upon state agencies to maintain Dupes on their
7 registries if applicable state law would not so require. If a
8 state has no sex offender registration agency, the condition
9 obviously would not require that state to set one up just for
10 Dupes. Because the condition merely directs Dupes to take action
11 to register and demands no action of any state beyond that which
12 the state has elected to undertake whenever a sex offender
13 complies with its registration laws, the condition does not run
14 afoul of the Tenth Amendment. See id.

15 II. The Sixth Amendment Challenge to the Restitution Order

16 The MVRA makes full restitution mandatory for certain
17 crimes, including securities fraud, 18 U.S.C. § 3663A, and
18 requires a court to determine the total amount of loss to each
19 victim. Id. § 3664 (f) (1) (A). Dupes argues that the Sixth
20 Amendment, as interpreted in the line of cases from Apprendi
21 through Booker, requires that the amount of loss serving as the
22 basis of a restitution order be found by a jury beyond a
23 reasonable doubt or admitted by the defendant. We have already
24 held in United States v. Reifler, 446 F.3d 65, 116 (2d Cir. 2006)
25 that “there is no constitutional requirement that the facts

1 needed for the district court's fashioning of a restitution order
2 be found by a jury beyond a reasonable doubt." Dupes concedes
3 that Reifler "squarely rejected" his Sixth Amendment claim but
4 urges us to reconsider our holding in that case. Pet'r Br. at 16.

5 As no intervening Supreme Court decision has called our decision
6 in Reifler into doubt, we are without authority to overrule it.
7 See Veltri v. Bldg. Serv. 32B-J Pension Fund, 393 F.3d 318,
8 327 (2d Cir. 2004).

9 **Conclusion**

10 We have considered the additional challenges to his
11 conviction and sentence that Dupes has raised in a pro se brief
12 and find them to be without merit. For the reasons stated above,
13 the district court is affirmed in all respects.

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