UNITED STATES DISTRICT COURT

For The

Eastern District of Kentucky

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| UNITED STATES OF AMERICA, Plaintiff, | Case No. 5:16-062-DCR |
| v. | MOTION TO MODIFY OR VACATE CONDITIONS OF SUPERVISED RELEASE (18 U.S.C. § 3583(e)) |
| DERIC LOSTUTTER, Defendant. | |

NOW COMES THE DEFENDANT, appearing pro se, and respectfully moves this Honorable Court to modify or vacate the following Special Conditions of Supervised Release pursuant to 18 U.S.C. § 3583(e): Conditions (1), (3), (7), (9), (11), and (12).

As grounds for this request, the Defendant respectfully offers the following:

## Timeline and Introduction

The Defendant was indicted in the summer of 2016 on charges related to the Defendant's role in the defacement of a privately owned football fan website that occured three and one-half years prior to the Defendant's indictment, December 25, 2012.

The Defendant plead guilty to counts one (1) and four (4) of the indictment in the fall of 2016, shortly after the premature birth of the Defendant's daughter. Count one (1) charged the Defendant with Conspiracy in violation of 18 U.S.C. § 371, and Count four (4) charged the Defendant with a false or misleading statement to federal agents during the subsequental raid on the Defendant, which took place on April 16, 2013, in violation of

18 U.S.C. 1001(a)(2).

Despite being a first-time offender with virtually no criminal history, the Defendant was sentenced to the maximum term of imprisonment under each count, and the maximum term of supervised release under each count, under the United States Sentencing Guidelines. A fine of $5,000 was imposed, and as no victim or monetary damages were alleged or identified by the federal government, no restitution was ordered. Up to and through sentencing, the Defendant remained free on bond.

Immediately after sentencing, the Defendant timely filed a Notice of Appeal, planning to challenge the Conditions of Supervised Release contested herein. Permission was granted by this Court to proceed in forma pauperis. Due to lack of compliance with Appellate Court procedures and mandates, the Defendant's retained counsel was removed from representation, and the Sixth Circuit Court of Appeals appointed the Defendant an attorney.

The Defendant directed his new counsel to: (1) Send any filing to include but not be limited to Briefs, that the Counsel planned to file on the Defendant's behalf to the Defendant for review and approval prior to filing; and (2) to proceed with claims of ineffective assistance of counsel and challenge the conditions that the Defendant is now challenging with this motion. The Court appointed counsel failed to adhere to both requests, instead submitting a 25-page brief without alleging ineffective assistance of counsel, and instead of asking the Court to vacate the conditions addressed herein, only challenged conditions (3), (6), (9), and (11), and asked for a remand and resentencing.

The Brief was filed on November 10, 2017 (See Case No. 17-5337, 6th Cir. 2018), and the Government moved to dismiss on the basis of the language of the plea waiver on November 21, 2017, an argument which if Counsel had acted as directed, would have possibly been overcome with claims of ineffective assistance of counsel.

Counsel for the Defendant filed a response to the Government's motion to dismiss on December 12, 2017, with an argument that the plea waiver was ambiguous. The Defendant was not provided a brief nor notified of this strategy prior to filing as requested. Moreover, the Defendant was not permitted to call counsel and discuss appellate strategy, because Counsel informed the Defendant via letter that their office did not accept phone calls from Defendant's, instead directing the Defendant to contact the Counsel by letter only. Consequently, the Court of Appeals for the Sixth Circuit dismissed the Defendant's appeal on January 23, 2018. The Defendant has not petitioned the Sixth Circuit for a review en Banc, and instead holds that this Honorable Court has the authority to grant the relief requested despite plea waiver under 18 U.S.C. 3583(e) and Fed. R. Crim. P. 32.1 at any time.

As such, and in the interests of fairness, integrity, and justice, the Defendant, who is scheduled for release on April 12, 2018, respectfully moves this Honorable Court to vacate or modify the conditions addressed herein to help facilitate a successful, positive re-entry into society.

## LEGAL STANDARD

A District Court has discretion to modify a defendant's conditions of supervised release. 18 U.S.C. § 3583(e)(2); United States v. Johnson, 529 U.S. 53, 60, 120 S. Ct. 1114, 146 L. Ed. 2d 39 (2000). Section 3583(e)(2) provides in pertinent part:

> (e) Modifications of Conditions or Revocation -- The court may, after considering the factors set forth in § 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7), -- (2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision[.] 18 U.S.C. 3583(e)(2).

The Section 3553(a) factors to be considered include the nature and circumstances of the offense; the history and characteristics of the Defendant; the need for the sentence to be imposed; the type of sentence and the applicable sentencing range; any pertinent policy statement; the need to avoid unwarranted sentencing disparities; and the need to provide restitution to any victims. See 18 U.S.C. § 3553(a).

Under 18 U.S.C. 3583(d), the conditions imposed must be "reasonably related to the sentencing factors" set forth in 18 U.S.C. § 3553, and involve no greater deprivation of liberty than is "reasonably necessary", and be consistent with any

Policy Statements issued by the Sentencing Commission. See 18 U.S.C. § 3583(d)(1)-(3). Additionally, Federal Rule of Criminal Procedure 59 requires the Court set aside or modify any part of an order that is contary to law or clearly erroneous.

ARGUMENT

I. Ineffective Assistance of Counsel

Claims of ineffective assistance of counsel present mixed questions of Law and fact and are reviewed de novo on appeal. See Mallet v. United States, 334 F.3d 491, 497 (6th Cir. 2003) and to establish ineffective assistance of counsel, a Defendant must show "(1) his trial counsel's performance was deficient, and (2) that the deficient performance prejudiced the Defendant." (Quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052 8 L. Ed. 2d 674 (1984).

Defendant holds that he was unfairly prejudiced during his March 8, 2017 Sentencing hearing because his retained counsel failed to object to the imposition of special conditions that are an unconstitutional restriction of free speech or otherwise have nothing to do with the sentencing factors set forth in § 3553 and involve a greater deprivation of liberty than reasonably necessary. A failure to object to the imposition or application of enhancements, guidelines, and arguably conditions when the Counsel representing the Defendant should clearly have known that there were grounds to object on are so prejudicial, in fact, the United States Supreme Court recently ruled in Glover v. United States, 531 U.S. 198 S. Ct. (2001), that a Defendant may establish prejudice under Strickland even if only a slight increase in a

Defendant's sentence occured that resulted from a deficient performance of counsel. Id. at 700. In Glover, the counsel failed to object to an improper application of the sentencing guidelines.

Even if the application or imposition of the special conditions challenged herein are not "plain error", that does not mean the Defendant's counsel's failure to object to their imposition was not ineffective and a Sixth Amendment violation. See, e.g., United States v. Carthorne, 2017 BL 457544, 4th Cir. No. 16-6515, 12/21/2017. A failure to object to an enhancement, or, arguendo, the imposition of questionably unconstitutional supervised release conditions, demonstrates that the Defendant's counsel was not even aware of the analysis required to make an objection, as the presiding judge in Carthorne held, "There are no strategic reasons that could have justified counsel's failure to object...".

Like Glover and Carthorne, in the instant matter, the Defendant's counsel should have known that the conditions challenged herein were either improper or constitutionally questionable, and Defendant's counsel failed to object to the impositions of said conditions, which prejudiced the Defendant.

**II. The Special Conditions of Supervised Release are Ripe For Review.**

Defendant contends that because his release on April 12, 2018 is imminent, and his probation begins September 11, 2018, the Special Conditions of Supervision imposed are ripe for review.

Indeed, the Defendant challenged, and directed his counsel

to challenge said conditions "immediately following their imposition at sentence" via Direct Appeal. United States v. Lee, 502, F.3d 447, 449-50 (6th Cir. 2010). The Sixth Circuit "ordinarily reviews for abuse of discretion of a District Court's imposition of Supervised Release." United States v. Carter, 463 F.3d 526, 528 (6th Cir. 2006).

III. Special Condition of Supervised Release Number 1 should be vacated or modified as this Court deems just and proper.

Defendant's indictment and conviction of instant offense relate to a defacement of a football fan's website, and has nothing to do with, nor do the charges or conviction stem from, the consumption of alcohol. The restriction here has nothing to do with the sentencing factors set forth as prescribed in § 3553. Indeed, the Defendant was allowed to consume alcohol post indictment, while on bond, and up to and through sentencing, and did so responsibly and without legal incident.

Arguably, if the Defendant was to have a glass of wine at an anniversary dinner, or participate in communion at church, the Defendant would indeed violate this condition and run the risk of having his probation revoked. The Defendant is a responsible adult, and there is nothing in the record to support a 3 year prohibition on the consumption of an otherwise legal libation, and thus the condition should either be modified or vacated in full. United States v. Modena, 302 F.3d 626, 636-37 (6th Cir. 2002) (holding that the District Court's requirement for the Defendant to abstain from the use of alcohol was an abuse of discretion

since there was nothing in the record to (57 Fed. Appx. 614) substantiate the imposition of such a condition.).

Alternatively, if the Court would be willing to compromise, the Defendant would concede to a similar language as that used on his pre-trial release conditions, wherein the Defendant was allowed to consume alcohol, but not in excess. However, the Defendant maintains that this Court should see it reasonable that this condition serves no purpose in relation to the instant offense and sentencing factors set forth and prefers if this Court would vacate the condition in its entirety.

IV. Special Condition of Supervised Release number 8 is overbroad, vague, and contradicts the United States Sentencing Guidelines on which it is based.

Under United States Sentencing Guideline § SF1.5: Occupational Restrictions, the Court may (a) impose a condition of probation or supervised release prohibiting the defendant from engaging in a specified occupation, business, or profession, or limiting the terms on which the defendant may do so, only if it determines that: (1) a reasonably direct relationship existed between the Defendant's occupation, business, or profession and the conduct relevant to the offense of conviction; and (2) the imposition of such restriction is reasonably necessary to protect the public, because there is reason to believe that absent such restriction, the Defendant will continue to engage in unlawful conduct similar to that for which the Defendant is convicted.

However, "If the Court decides to impose a condition of probation or supervised release restricting a Defendant's engagement in a

specified occupation, business, or profession, the Court shall impose the condition for the minimum time and to the minimum extent necessary to protect the public." U.S.S.G. § SF1.5(a)(2)(b).

During the sentencing proceedings and upon the imposition of this condition of supervised release, the District Court did not "state in open court, the reasons for it's imposition of the particular sentence, including any terms of supervised release" under 18 U.S.C. § 3553(c). United States v. Carter, 463 F.3d 526, 528-29 (6th Cir. 2006). The Court also did not establish that when the Defendant engaged in his criminal offense, that he was employed or otherwise worked in the "I.T. Field". Indeed, in December of 2012, the Defendant was employed at a restaraunt as a server. The Defendant did not engage in any further acts that would further violate the laws under which he was charged after the date of his instant offense, December 25, 2012, and was allowed to seek any work and maintain any employment that he saw fit, to include in the information technology field for the 3 years after.

The Defendant led a law-abiding life, founded a successful company, and proceeded to use computers without further criminal legal incident. The Comprehensive Crime Control Act authorizes the imposition of occupational restrictions as a condition of probation. See 18 U.S.C. § 3563(b)(5), (a court may "[R]equire a defendant to refrain in the case of an individual, from engaging in a specified occupation, business, or profession, bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business,

or profession only to a stated degree or under stated circumstances".).

The Court did not state a degree or circumstance. The Senate Judiciary Committee Report on the Comprehensive Crime Control Act explains that the provision was "inteded to be used to preclude the continuation or repitition of illegal activities while avoiding a bar from employment that exceeds that needed to achieve that result." S. Rep. No. 225, 98th Cong., 1st Sess. 96-97.

The Defendant avers that there are no grounds to use such a condition to "preclude the continuation or repitition of illegal activities", because the Defendant was allowed to work unrestricted in the field of his choice, to include information technology, for 3 years after the F.B.I. had raided him and had all evidence to indict him, and did so without further criminal incident. The Court has a duty to "avoid a bar from employment that exceeds" the need to achieve the Defendant leading a law abiding life. Thus, the Court has a need to avoid imposition of a blanket three year restriction on a field of employment where the Defendant has spent years specializing his studies and work in, which provides for his family, to include his infant daughter, when the Defendant has not shown a propensity to reoffend. Such a condition would hamper the Defendant's ability to seek gainful employment and a successful re-entry after completion of incarceration because almost every job requires some form of information technology, such as data input, social media analysis and marketing, repair, or otherwise. Thus, the condition includes a more limiting condition of supervised release than the maximum established in the guideline.

The appellate review provisions permit a defendant to challenge the imposition of a probation condition under 18 U.S.C. § 3563(b)(5) if the sentence includes a more limiting condition of probation or supervised release than the maximum established in the guideline. See 18 U.S.C. § 3742(a)(3). Thus, as the condition is broad and encompasses arguably most employment within the current time period that we live in, the Defendant respectfully requests that this Court vacate this condition.

V. Special Conditions of Supervised Release numbers 6 and 7 should be vacated.

The Defendant contends that Supervised Release Special Condition 6 should not have been imposed because the Defendant's offense of conviction is not monetarily related. With the wording of the condition as it stands, the Defendant would have to seek permission of the Probation Officer for simply taking out a business loan, using or applying for an emergency line of credit to save his infant daughter with a needed surgery, financing a mode of transportation, etc.. Though this condition is common in the Sixth Circuit, it is most often applied to those who have committed some kind of financial fraud. See, e.g., United States v. Hammond, U.S. App. LEXIS 22701, No. 96-5746 (1997).

Further, the condition was imposed without explanation in open court, and thus imposed in plain error. Carter, supra. Thus, Condition 6 should be vacated.

Condition 7, however, requires the Defendant to disclose all financial information to Probation. This condition is also not reasonably related to the sentencing factors set forth. Again,

the Defendant is not charged with a financial crime. The condition is an unwarranted invasion of the Defendant's privacy, disclosing sensitive business records to the scrutiny of those who would otherwise never have review of them, and questionably violates consumer privacy. The Condition essentially violates the Defendant's Fourth and Fifth Amendment rights under the United States Constitution. See, e.g., United States v. Stafford, 983 F.2d 25 (5th Cir. 1993). The condition is overbroad, and unwarranted, and the District Court did not explain the reasoning for its imposition in open Court (Carter, supra), and thus the condition should be vacated.

VI. Special Condition 9 has been rendered unconstitutional by the United States Supreme Court.

In a stunning and published 8-0 decision regarding the rights of sex offenders to access websites such as Facebook, Twitter, and other Bulletin-Board style systems, the United States Supreme Court ruled that N.C.G.S. § 14-202.5 was unconstitutional. Packingham v. North Carolina, 2017 BL 298387 U.S. No. 15-1194 (6/19/2017).

The unconstitutional North Carolina statute was so broad and vague, that it mimicks the language of the Defendant's Special Condition of Supervised Release number 9. Specifically, the condition imposed on the Defendant in the instant matter restricts the Defendant from "possess[ing]" or use of a "computer or any device with access to any 'on-line' computer service at any location (to include place of employment)", and goes on to restrict the Defendant's access to "any internet service provider, bulletin board system, or any other public or private network or e-mail system." The condition is essentially

meant to restrict the Defendant's access to social media, for which he is known to express political views on social injustices.

Even if the stance of the District Court and the United States Government is the Defendant did libel the webmaster of the website he defaced, the premise for the interstate commerce application, the United States Government and the District Court cannot restrict access to the internet to prevent further libel. The Government "may not supress lawful speech as a means to supress unlawful speech". Ashcroft v. Free Speech Coalition, 535, U.S. at 255.

In fact, the restriction is so broad, it seems to have very little to do with the sentencing factors. In United States v. Phillips, 370 F. App'x 610 (6th Cir. 2010), the District Court imposed a special condition of supervised release prohibiting the defendant from "owning or possessing a computer or any internet-capable electronic device without written permission from the probation officer." Id. at 620. However, Phillips was sentenced for illegal sexual contact with a minor outside the United States and violated an (443 Fed. Appx. 143) earlier condition of supervised release of that sentence. Id. at 612. The Defendant has "no prior history of his crime". United States v. Demers, 634 F.3d 982 (8th Cir. 2011).

Requiring the Defendant to seek permission to use and possess a computer or any other electronic online capable communication device in essence causes the Defendant to waive his right to First Amendment protected speech, placing the permission to engage in the exercise of First Amendment protected activity in the hands of the United States Probation Office.

Many courts[1] have struck down similar conditions that required permission from probation. Even with the Government's assumptions about the scope of the restrictions, the restriction here enacts a prohibition unprecedented in the scope of the First Amendment speech that it burdens.

"On Facebook, for example, users can debate religion and politics with friends and neighbors or share vacation photos. On Linkedin, users can look for work, advertise for employees, or review tips on entreprenuership, and on Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner. Indeed Governors in all 50 states and almost every member of Congress have set up accounts for this purpose." Brief For Electronic Frontier Foundation, 15-16. (Quoting Justice Kennedy's Opinion in Packingham, holding that a restriction on a Defendant's access to online communications restricts a Defendant's First Amendment rights to religion, thought, communication, political expression, and a Defendant's ability to seek and gain meaningful employment).

The Special Condition of Supervised Release number 9 imposed on the Defendant "affects substantial First Amendment rights to recieve information." Reno v. American Civil Liberties Union, 521 U.S. 844, 874, 117 U.S. S. Ct. 138 L. Ed. 2d 874 (1997).

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1. See United States v. Miller, 594 F.3d 172, 176 (3d Cir. 2010) wherein the court struck down a computer restriction that required the permission from the Defendant's probation officer; see also, e.g., Voelker, 489 F.3d 139, wherin the court struck down an overbroad condition prohibiting the Defendant from "accessing (443 Fed. Appx. 144) computer equipment or any 'on-line' computer service at any

Social media allows users to gain access to information and communicate with one another on any subject that comes to mind. With one broad stroke, the District Court bars access to what for many are the principle sources for knowing current events, checking ads for employment, speaking and listening in the modern public square and otherwise exploring vast realms of human thought and knowledge, foreclosing access to social media altogether, thus prevents the Defendant from engaging in the legitimate exercise of the First Amendment protected rights he is entitled to. A fundamental principle is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more.

Today, one of the most important places to exchange views is cyberspace. Particularly on social media, which offers relatively "unlimited low-cost capacity for communication of all kinds". Reno, supra, 521 U.S. 844, 870. Communication "to users engaged in a wide array of protected First Amendment activity on any number of diverse topics. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an internet connection to become "a town crier with a voice that resonates farther than it could from any soapbox." Reno, 521 U.S., at 870. In short, social media users employ these websites in a wide array of First Amendment protected activity "as diverse as human thought". Reno, supra, at 870. (internal quotation marks omitted).

The Defendant asserts that if this condition is permitted to stand, his First Amendment rights will be severely impacted

and permission to use those rights will be in the hands of the federal government. Quoting Justice Kennedy, "The forces of the internet are so new, so protean, and so far reaching, that courts must be conscious that what they say today might be obsolete tomorrow.

Whereas, for the aforementioned reasons, and because the government sought no reason to restrict the Defendant during a 3 year interim from raid to indictment, and because Defendant excercised such freedom without further legal criminal incident, and because the mandatory conditions of supervision already mandate that the Defendant not commit another crime, the Defendant respectfully prays that this Court vacate this condition to reflect the Supreme Court's findings. (The Supreme Court has set new precedent recognizing that the lives of Defendants are directly impacted by society's dependency on technology and social media. The High Court recognizes the First Amendment rights mentioned herein as applicable to cyberspace and the use of those mechanisms to access cyberspace, and that the government should not and can not interfere with those First Amendment protections. The Court also recognizes that the access and ability to use platforms in cyberspace is essential to a Defendant's ability to achieve a healthy re-entry into society.).

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1. (continued) (including place of employment or education). This includes, but is not limited to, any internet service provider, bulletin board system, or any other public or private computer network." Id. at 143.

VII. Special Condition of Supervision number 12 is unconstitutionally vague, overbroad, violates the First Amendment, and implicates itself in a court matter not subject to this Court's jurisdiction, and therefore must be vacated.

As previously discussed in the Packingham decision by the United States Supreme Court, the High Court held that the "government may not supress lawful speech as a means to supress unlawful speech." Ashcroft, supra. Here, the sentencing transcripts widely reflect that the prime and arguably sole complainant to the District Attorney's Office and United States Probation Office was none other than Alexandria Goddard, the Defendant in a North Carolina federal lawsuit, No. 16cv1098, wherein the Defendant is seeking damages in excess of $1,000,000.00 for Ms. Goddard's role in stalking and libeling the Defendant and her contributions to an illegal website, DericLostutter.org, which defames and libels the Defendant, his wife, and even his infant child. The Probation Officer, when questioned, admitted that the majority of Ms. Goddard's tips were without merit.

It was publicly stated by Ms. Goddard, in one context or another, via her social media accounts, that she wanted the Defendant incarcerated to hinder his ability to litigate the lawsuit against her. Instead, the Defendant (the Plaintiff in 16cv1098), who is litigating pro se, has prevailed at every turn of the matter, established a prima facie showing of the facts against the complainant, Ms. Goddard, and her counsel has withdrawn from the matter.

Recognizing that Ms. Goddard's complaints to the probation office, which require subsequent investigation, take up a vast amount of resources and time, the Defendant states that this condition was imposed as a way to abate the incessant complaints of Ms. Goddard and those that she associates with, who hope to avoid the Discovery process. However, as stated before, the Defendant's interest in this matter, 16cv1098, is not without merit, and the Defendant states that the condition imposed is an unlawful restriction on his First Amendment protected speech and right to litigate in a matter outside of this Honorable Court's jurisdiction.

As it sits, the language of this condition is so broad, that the Defendant would violate the condition if, for example, he stated to someone who was libeling them: "Remove the post, or I will sue you for "x" amount of damages and attorney's fees." ("Threatening, harassing, or intimidating communications include any communication that has the intent to inflict punishment, loss, pain, or damage to another individual (to include individual's family), a corporation, or an organization, or to the individual's (to include the individual's family's), corporation's, or organization's property...is meant to coerce into action... whether it be emotionally, physically, or financially,...individual, ...corporation, or organization." (Special Condition of Supervision 12, Doc. 109)).

Even if this Court construes a communication such as the one above a threat, it is a threat protected under the First Amendment. If such a communication was illegal, prisons would be bursting at

the seams with pro se litigants and attorneys alike. (Black's Law Dictionary defines threat as "1. A communicated intent to inflict harm or loss on another or on another's property, esp. one that might diminish a person's freedom to act voluntarily or with lawful consent. (Black's Law Dictionary, Abridged Seventh Edition, 1983, 1991, 2000, West Publishing Co.).

Indeed, as it sits, should the Defendant issue forth a subpoena in the North Carolina matter, he would be "diminish[ing] a person's freedom to act voluntarily" id. and would stand the risk of having his probation revoked for an otherwise lawfully protected act. The same would run true if the Defendant engaged or initiated talks of settlement, or if the Defendant motioned the Court pursuant to Fed. R. Civ. P. 37 for sanctions for Ms. Goddard failing to cooperate in discovery under Court order, which indeed has already happened. The Defendant would be restricted from asking for a refund, or leaving a review on a business page of a local diner who served subpar food that made him sick with food poisoning. Should the Defendant ever divorce during a term of probation, the Defendant would essentially violate this condition if he sought alimony or custody of his child.

To "harass" someone or "threaten" someone outside the confines of the First Amendment, the Defendant argues that he would first half to be criminally charged with harassment or communicating threats, and then found guilty by local law enforcement. As the condition sits presently, the due process of the Defendant would be violated by a simple complaint from Ms. Goddard or those she associates with. Complaints which would needlessly exhaust

federal resources to prosecute otherwise protected First Amendment activity.

The Magistrate in the instant matter, during a bond violation hearing, was notifed of this lawsuit and the context therein. The Probation Officer noted that on most of Alexandria's complaints, aside from a photo the Defendant's wife posted of the Defendant and her in a vehicle to her own Instagram account, had no merit, and the Defendant was not believed to have violated his pre-trial release. This Court noted that it did not want to serve as a precedent for the North Carolina civil matter, but in imposition of this overbroad condition, it has done just that. Indeed, Honorable Judge Reeves said he intended the condition to be overly broad, and believed that the Defendant would "violate it within the first six months of release." Such a comment is prejudicial to the Defendant, however, the Defendant agrees with Honorable Judge Reeves, as the condition stands, it is so broad that it could be construed by this Court or the Probation Office on virtually any grounds, and the Defendant would run the risk of a violation simply by engaging in constitutionally protected First Amendment activity and protected litigation.

As such, and because the Mandatory Conditions of Supervised Release mandate the Defendant not commit another state, local, or federal crime, the Defendant avers that this Honorable Court would not be prejudicing itself or the interests of the public by striking or vacating this condition in its entirety, because if the Defendant was afforded Due Process, and found guilty of communicating threats, the Defendant would violate the Mandatory

Condition aforementioned, and thus, this condition serves no further purpose. With respect to the United States Constitution, the need to promote fairness, integrity, and public confidence in the judicial system, the rights of the Defendant to be free from First Amendment restrictions, and the need to avoid unnecessary expense of federal resources, the Defendant respectfully requests that this Honorable Court vacate this condition in its entirety.

## CONCLUSION

The Defendant states that he brings this motion for good cause and it is not without merit. He states that unless the conditions are modified or vacated as requested in this motion, he stands the risk of having his probation revoked for engaging in otherwise lawful and constitutionally protected activity. The Defendant has not been found guilty, nor charged with, a similar crime since the crime he has committed for the instant offense, when given unrestricted freedom by the federal government for the three-and-a-half year interim preceding indictment.

The Defendant has shown positive growth, founding his own company which engaged in legal activities, married, fathered children, and moved away from Kentucky to lead a law abiding life. The Defendant sought higher education, promoted positive self-growth by voluntarily seeking therapy for his past hardships, and put his best foot forward.

In prison, the Defendant has shown growth, participating in various educational and therapeutic programs, earning high remarks from prison officials in his record, and qualified for

CERTIFICATE OF SERVICE

I, Deric Lostutter, Defendant pro se, hereby swear and affirm that I served a true and accurate copy of the foregoing motion to modify or vacate conditions of supervised release on the Plaintiff in this matter, by placing said copy in a post-paid envelope and mailing it to:

United States Attorney
260 W. Vine Street
Suite 300
Lexington, KY 40507

by placing said envelope in the inmate legal-mail system on the undersigned date for delivery. This action is deemed "FILED" on the undersigned date upon deposit into the inmate legal-mail system at F.C.C. Petersburg-Low pursuant to the Supreme Court ruling in Houston v. Lack, 487 U.S. 266, 101 L. Ed. 2d 245 68 S. Ct. 2379 (1988).

This, the 12th day of February, 2018.

Respectfully Submitted,

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Defendant, Pro Se