IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

Jason Steven Kokinda,	:	Case No._____
V.	:	
United States, [Inc.]	:	

MOTION TO MODIFY CONDITIONS OF SUPERVISION

Movant, Jason Steven Kokinda, Certified Paralegal, hereby moves for the court to modify or suspend the conditions of supervision, in part or in whole, and represents:

1. Mr. Kokinda was sentenced on October 13, 2022, to 63 months in prison and lifetime supervision for an alleged violation of 18 U.S.C. § 2250(a), Failure to Register as a Sex Offender.
2. Mr. Kokinda was released from prison on July 23, 2024, and was told to stay in Martinsburg, WV, or nearby towns in Maryland until he has a residence approved elsewhere.
3. Mr. Kokinda had provided sufficient notice before his release from prison that he planned to reside in the Dunkard Avenue apartment he had leased in Westover, WV, while he was on pre-trial bail. Yet, he was errantly marked as “homeless” and designated to a shelter near Martinsburg.
4. Mr. Kokinda reasonably refuses to stay in a homeless shelter and has been forced to spend thousands of dollars on hotels, travel, and dining out each day in a high-inflation economy.

5. On or about July 25th, 2024, Mr. Kokinda had again provided the U.S. Probation with confirmation that the landlord would lease him said apartment in Westover. And he was told that they would go to verify it the following week.
6. The following week came and went with no verification because the officers would not wait for the landlord to drill out the old locks to access the apartment.
   (a) And they allegedly slandered Mr. Kokinda so badly that the landlord said no one would ever rent to him if approached by the officers in this unprofessional manner.
7. Nevertheless, the landlord agreed to make the apartment available for a showing on August 5th, but Mr. Kokinda was only told that they have up to thirty days to approve his apartment.
8. Although the probation officers are busy with a large caseload of probationers, this condition is proving itself to be punitive and unworkable. The reality is that Mr. Kokinda does not have ANY options on where to live, and anywhere must be better than a homeless shelter or a hotel.
   (a) By reason of this thirty-day policy, Mr. Kokinda will likely never find housing if the apartment in Westover is taken or he is not approved for it.
   (b) The demand for rental property is competitive, and most apartments are booked up months in advance.
      (1) Why would any landlord wait thirty days and hold an apartment for someone that is presented in such a defamatory and materially misleading false light in the press? It defies logic and is an unworkable, punitive condition, as applied to the circumstances.

9. Furthermore, the case that the conditions are based upon could not be on thinner ice. The prosecutor recently agreed that the case should be remanded in light of the *Loper Bright v. Raimondo*, 603 U.S. __ (2024) ruling overturning the *Chevron* doctrine that this court and the Fourth Circuit explicitly relied upon to "displace the statutory text and change the essential elements" in petit and grand jury instructions, *inter alia*.

10. In addition, on November 1st, the Sentencing Commission will likely ratify the proposed removal of "acquitted conduct" from the province of sentencing considerations.

    (a) Mr. Kokinda was deprived of the opportunity to obtain an acquittal on the Elkins charges, and should not, as a matter of principle, be prejudiced by lack of acquittal.

    (b) And he would have sought acquittal on the merits of the possession of child pornography charge because the nationwide definition of "possession" requires "access and control of the contraband images themselves, (not just the device)" for which there is zero evidence by what *actus reus* such data came to be found on a chip that was admittedly corrupted and "inaccessible" to him.[1]

    (c) Therefore, these charges should not have been considered by the Court in any regard.

11. Mr. Kokinda is sick and tired of the courts acting deliberately obtuse to target him and commit grievous injustice against him above all others, out of spite.

MEMORANDUM OF LAW

[1] The .pdf document containing keywords is not evidence that anyone actually used keywords to access such content. In fact, it is well known that search engines use software, such as Microsoft DNA software, to filter out such content from keyword web searches. Even considering demonizing stereotypes and framing the evidence in the light most favorable to the Govt., the evidence is highly speculative at best (anyone's guess) as to what *actus reus* led to the image data ever tainting the device. A virus, files mixed in with other files, a trojan web link, or any misleading advertisement could just as easily result in residual data, requiring no manual act or awareness on part of the owner. It's a highly technical question that cannot be determined in any way absent specific, technical *actus reus* evidence.

SCOPE AND STANDARD OF REVIEW:

This Court "retains the power to modify [the] conditions to eliminate ambiguity and to adjust the conditions in response to changed circumstances." United States v. Cruz, 586 F. App'x 36, 41 (2d Cir. 2014); see also McClamma, 676 F. App'x at 947 (noting that new or unforeseen circumstances can justify a modification of supervised release conditions).

ARGUMENT:

A. The Apartment Approval Policy is Unworkable

1. The apartment situation of the supervision conditions as applied is both serious and punitive. It has the strong potential to force Mr. Kokinda to live many months or years at a hotel, as he struggles to overcome the defamatory press that rental properties now use systematically to screen people out.
2. Mr. Kokinda is also being obstructed from obtaining employment because he needs access to the law library in Morgantown to focus on his freelance paralegal work, and a permanent mailbox to advertise his services. He is also unable to find stable employment locally without any certain idea of where he will be living.

(a) The current terms of supervision and application are in every respect punitive and counterintuitive to the prospect of successful re-entry. They are, instead, deliberate attempts to set Mr. Kokinda up for failure by taxing him, obstructing him, and applying policies rigidly in an attempt to make him homeless, jobless, and broke.

See United States v. Trotter, 321 F. Supp. 3d 337 (2nd Cir. (E.D.N.Y.) 2018) (“The Supreme Court has recognized that "supervised release fulfills *rehabilitative ends,* distinct from those served by incarceration." *United States v. Johnson,* 529 U.S. 53, 59, 120 S.Ct.

1114, 146 L.Ed.2d 39 (2000) (emphasis added). "Supervised release, in contrast to probation, *is not a punishment* in lieu of incarceration." *United States v. Granderson,* 511 U.S. 39, 50, 114 S.Ct. 1259, 127 L.Ed.2d 611 (1994) (emphasis added).

Supervised release is not an alternative to incarceration, but a separate and additional period of monitoring concerned with facilitating the *reintegration of the* 346*346 *defendant into the community* . . . supervised release must follow imprisonment; it cannot be imposed on its own. These differences reflect the rehabilitative character of release by fully disaggregating the punitive and transitional phases of a defendant's sentence.

Moore, *supra,* at 2263 (emphasis added).

A congressional statement of policy accompanying the SRA succinctly stated the rehabilitative purpose of supervised release:

[T]he primary goal of [Supervised Release] is to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release.")

B. It May be Presumed without Deciding that Mr. Kokinda is Innocent

3. The instant case meets all of the shortcomings generally cited by *Loper Bright*, *supra*, as the basis for overruling Chevron. Chevron "displaces the statutory text" instead of interpreting its meaning, *see Loper Bright*, 603 U.S. at pg. 31; Id. at pg. 28, noting how "courts do not always heed the various steps and nuances of" the evolving *Chevron* doctrine.

4. Id. at pg. 22, noting how *Chevron* also undermines the principle that "every statute's meaning is fixed at the time of enactment", a very dangerous principle creating "an eternal fog of uncertainty", especially when applied to criminal law (Id. at pg. 33); Id. at pg. 26, noting how the Framers disallowed judges from construing the law "with an eye to policy preferences that had not made it into the statute."; Id. at pg. 33, "Chevron ... has undermined the very "rule of law" values that stare decisis exists to secure."

5. By using *Chevron* deference as the Wild Card, the lower courts became hopelessly misguided and ultimately failed to give respect to the binding judicial precedents of the Supreme Court, both general rules of law and the firmly settled construction of Sec. 2250 clarified in *Nichols v. United States, infra*.
6. This District Court may no longer use the confusion surrounding *Chevron* as a license to rewrite the statute and criminalize innocent conduct. And it should take immediate steps to mitigate the damages of the wrongful conviction.
7. The simple fact is that the U.S. Supreme Court found the pivotal “change of residence” element “unambiguous,” and narrowly applied it to only orthodox situations where someone may readily understand what is and isn’t a “change of residence” in ordinary English usage, a judicial construction that is binding on this court.[2]

[2] It is not lawful for the courts to reinterpret the elements as applied to a particular case. If a “stay of several days at temporary lodging” does not constitute a “change of residence” when the offender has a final destination in mind (a strict construction), the lack of a firm and final destination when faced with the realities of offender-housing-bans cannot warrant new elements (a liberal construction) in pursuit of alleged statutory purpose. *See Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1814, 204 L. Ed. 2d 139 (2019)("[L]egislative history is not the law"); *see also Lewis v. City of Chicago*, 560 U.S. 205, 215, 130 S. Ct. 2191, 176 L.Ed.2d 967 (2010) ("It is not for us to rewrite the statute ... to achieve what we think Congress really intended."); *see also Crespo v. Holder*, 631 F.3d 130, 136 (4th Cir. 2011) ("[The Supreme Court] ha[s] repeatedly stated time and again that courts must presume that a legislature says in a statute what is means

See Cf. Ohio v. Becerra, 87 F.4th 759, 787-88 (6th Cir. 2023) ("The majority correctly recognizes that the Supreme Court has already answered the Chevron Step One question-the language of [the statute section] is ambiguous." ... "The Supreme Court's holding is binding on this court, and we must therefore proceed to Chevron Step Two.")

(a) By contrary-facts analog, why didn't the lower courts recognize the Supreme Court's holding in Nichols v. United States, 578 U.S. ___, 136 S. Ct. 1113; 194 L. Ed. 2d 324, that the elements of a § 2250 prosecution are "unambiguous" and foreclosed them from proceeding to Step Two or making any reinterpretation?

See also Payne v. Taslimi, 998 F.3d 648, 654 (4th Cir. 2021) ("[A]s an inferior court, the Supreme Court's precedents do constrain us. *See Agostini v. Felton*, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997). In looking up to the Supreme Court, we may not weigh the same factors used by the Supreme Court to evaluate its own precedents in deciding whether to follow their guidance. We must simply apply their commands. So even were we to correctly conclude that a Supreme Court precedent contains many "infirmities" and rests on "wobbly, moth-eaten foundations," it remains the Supreme Court's "prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997) (quoting *Khan v. State Oil Co.*, 93 F.3d 1358, 1363 (7th Cir. 1996) (Posner, J.)). It is beyond our

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and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete."); s*ee also* United States v. Pate, 84 F.4th 1196 (11th Cir. 2023) (collecting cases) (holding that it is well established by U.S. Supreme Court precedent that a court may not enlarge the plain text of a statute to achieve its presumed purpose and citing Nichols, *supra*, itself where Justice Alito said "The most formidable argument concerning the presumed purpose of the statute cannot be overcome by the clarity we find in the text.")

power to disregard a Supreme Court decision, even if we are sure the Supreme Court is soon to overrule it.")

8. There is no room for agency discretion when the Supreme Court has construed a statute and has thereafter failed to discover a grievous ambiguity in the text. *See* Nat'l Cable Telecomm. Assoc. v. Brand X Internet Servs., 545 U.S. 967, 982, 125 S. Ct. 2688, 162 L.Ed.2d 820 (2005) (explaining that a binding judicial construction of an unambiguous statute "leaves no room for agency discretion."), cited by *Loper Bright*, *supra*, as a bar to the use of guidelines.
9. The pivotal 20913(c) "change of residence" element cannot be declared "ambiguous as applied" to allow for *ad hoc* standards on a case-by-case basis. It is unimportant of whether "habitually lives" appears ambiguous as applied or in isolation.[3]

See Clark v. Martinez, 543 U.S. 371, 378, 125 S. Ct. 716, 160 L.Ed.2d 734 (2005))"[T]he meaning of words in a statute cannot change with the statute's application." ... "To hold otherwise 'would render every statute a chameleon' and 'would establish within our jurisprudence ... the dangerous principle that judges can give the same statutory text different meanings in different cases.'" Id. at 382, 386); *see also* Patel v. Napolitano, 706 F.3d 370, 376 (4th Cir. 2013) (applying the Clark v. Martinez rule to also foreclose the inconsistent use of guidelines in some cases and not in others.)

[3] "Statutory construction ... is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme — because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." United Savings Assn. of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371, 108 S.Ct. 626, 630, 98 L.Ed.2d 740 (1988) (citations omitted).

10. After removing the gray fog of *Chevron*, this Court should mitigate the damages by in the very least suspending the burdensome and presumably unlawful supervision conditions pending acquittal as dictated by so many major rules of precedent.

11. An appropriate rebuttal by the Govt. would be ridiculous. This Court would have to decide that *Chevron* is still good law, or that *Nichols* found the text of § 2250 "ambiguous" and the *Brand X* bar cited in *Loper Bright* is inapplicable. Such would be nothing short of malicious lies!

12. The rulings of the U.S. Supreme Court herein, especially as clarified and changed by *Loper Bright*, *supra*, eternally overrule and nullify any misguided opinion to the contrary. The Govt. should merely concede that they lost this case and diminish the picture of malice that continues to grow.

THEREFORE, for each of the foregoing reasons, this Court is requested to suspend the supervision conditions, all or in part, pending reversal of the conviction. In the alternative, the Court is requested to find the address verification requirement unworkable as applied and punitive in effect by reason of the desperate housing dilemma imposed on Mr. Kokinda.

Executed:_____ **X**_____