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 9 UNITED STATES OF AMERICA

10 UNITED STATES DISTRICT COURT
 11 FOR THE CENTRAL DISTRICT OF CALIFORNIA

12 UNITED STATES OF AMERICA,
 13 Plaintiff,
 14 v.
 15 KEVIN LAMAR JAMES,
 16 Defendant.

No. SA CR 05-00214-CJC

GOVERNMENT'S POSITION ON
 MODIFICATION OF SUPERVISED
 RELEASE

Hearing Date: October 7, 2019
 Hearing Time: 11:00 a.m.
 Location: Courtroom of the
 Hon. Cormac J. Carney

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 19 Plaintiff United States of America, by and through its counsel
 20 of record, the United States Attorney for the Central District of
 21 California and Assistant United States Attorney Dennise D. Willett,
 22 hereby files its position regarding modification of supervised
 23 release for the above-named defendant.

24 This response is based upon the attached memorandum of points
 25 and authorities, the files and records in this case, and such
 26 further evidence and argument as the Court may permit.
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TABLE OF CONTENTS

<u>DESCRIPTION</u>	<u>PAGE</u>
TABLE OF AUTHORITIES.....	iii
MEMORANDUM OF POINTS AND AUTHORITIES.....	2
I. INTRODUCTION	2
II. THE GOVERNMENT SUPPORTS THE USPO’S REQUEST FOR MODIFICATION	3
A. THE DISTRICT COURT HAS BROAD DISCRETION TO MODIFY CONDITIONS OF SUPERVISED RELEASE WITHOUT AN EVIDENTIARY HEARING AND UPON RE-EVALUATION OF THE FACTORS UNDER 18 U.S.C. § 3553(A)	3
B. ALL OF THE REQUESTED SUPERVISED RELEASE CONDITIONS ARE REASONABLY RELATED TO THE APPLICABLE 3553(A) FACTORS	5
C. ALTHOUGH NOT REQUIRED TO JUSTIFY THE REQUESTED MODIFICATIONS, DEFENDANT’S POST-SENTENCE CONDUCT OVERWHELMINGLY PROVES THAT THESE MODIFICATIONS ARE ESSENTIAL TO PROTECT THE PUBLIC AND PROVIDE SUFFICIENT DETERRENCE TO FUTURE CRIME	7
1. Defendant was disciplined while in federal prison on the underlying offense.....	7
2. Defendant violated the rules over a dozen times during his six-week stay at the halfway house.....	9
3. Defendant’s penchant for lying about his behavior demonstrates the critical need to utilize objective techniques to determine supervised release compliance.....	13
III. CONCLUSION	15

Table of Authorities

Federal Cases Page(s)

1 United States v. Bainbridge,
 2 746 F.3d 943 (9th Cir. 2014) 4

3 United States v. Bee,
 4 162 F.3d 1232 (9th Cir. 1998) 4

5 United States v. Betts,
 6 511 F.3d 872 (9th Cir. 2007) 4

7 United States v. Gallaher,
 8 275 F. 3d 784 (9th Cir. 2001) 3

9 United States v. Jeremiah,
 10 493 F.3d 1042 (9th Cir. 2007) 4

11 United States v. Johnson,
 12 998 F.2d 696 (9th Cir. 1993) 3

13 United States v. Miller,
 14 205 F.3d 1098 (9th Cir. 2000) 3

15 United States v. Misraje,
 16 615 Fed. Appx. 882 (9th Cir. 2015) 6

17 United States v. Napulou,
 18 593 F.3d 1041 (9th Cir. 2010) 3-4

19 United States v. Rearden,
 20 349 F.3d 608 (9th Cir. 2003) 3, 6

21 United States v. Stoterau,
 22 524 F.3d 988 (9th Cir. 2008) 4

23 United v. T.M.,
 330 F.3d 1235 (9th Cir. 2003)..... 3

24 United States v. Weber,
 25 451 F.3d 552 (9th Cir. 2006) 4

26 United States v. Wise,
 27 391 F.3d 1027 (9th Cir. 2004) 4

Federal Statutes

18 U.S.C. § 3553 2, 3, 5

18 U.S.C. § 3583 2, 3

1 **Rules**

2 Fed. R. Crim. P. 32.1(b)..... 4

3 Fed. R. Crim. P. 32.1(c)..... 4

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On August 22, 2019, the United States Probation and Pretrial Service Office ("USPO") filed a petition to modify defendant's supervised release pursuant to 18 U.S.C. § 3583(e)(2), in accordance with 18 U.S.C. § 3553(a). In support of the modification, the USPO filed a supervision report providing facts regarding defendant's conduct since his sentencing hearing on March 6, 2009, and applied the 18 U.S.C. § 3553(a) factors in support of the modification. On September 9, 2019, a hearing was held in which defendant contested the facts related to his conduct and argued against the modification. The Court ordered a 30-day modification of defendant's supervised release conditions, pending a hearing scheduled for October 7, 2019. On September 18, 2019, the USPO prepared a supplemental report providing greater detail of defendant's conduct, and added new problematic conduct that had come to the USPO's attention.

The government concurs with the USPO's request for modification. The requested modifications are permissible under the Constitution and are reasonably related to the factors to consider under 18 U.S.C. § 3553(a). Additionally, Defendant's post-sentence conduct demonstrates his inability to live within proscribed limitations with greater freedoms. To ensure a successful transition to a law-abiding life, a more intense level of supervision is necessary.

1 **II. THE GOVERNMENT SUPPORTS THE USPO'S REQUEST FOR MODIFICATION**

2 **A. THE DISTRICT COURT HAS BROAD DISCRETION TO MODIFY CONDITIONS**
3 **OF SUPERVISED RELEASE WITHOUT AN EVIDENTIARY HEARING AND UPON**
4 **RE-EVALUATION OF THE FACTORS UNDER 18 U.S.C. §3553(A)**

5 A district court may modify a supervised release condition "at
6 any time prior to the expiration or termination of the term of
7 supervised release." 18 U.S.C. § 3583(e)(2) (emphasis added). This
8 language vests the district court with "broad discretion to alter
9 the conditions of a defendant's supervised release." United States
10 v. Miller, 205 F.3d 1098, 1100 (9th Cir. 2000). In determining
11 appropriate special conditions of supervised release, the district
12 court may set the conditions that are "reasonably related to the
13 factors set forth in 18 U.S.C. § 3553(a)." United States v. Rearden,
14 349 F.3d 608, 618 (9th Cir. 2003). "In short, conditions are
15 permissible if they are reasonably related to the goal of
16 deterrence, protection of the public, or rehabilitation of the
17 offender, and 'involve no greater deprivation of liberty than is
18 reasonably necessary for the purposes of supervised release.'" Id.
19 (quoting United States v. T.M., 330 F.3d 1235, 1240 (9th Cir.
20 2003)). These factors merely "guide the district court's discretion"
21 and are not "a checklist of requisites, each of which must be found
22 before any condition of supervised release may be prescribed."
23 United States v. Gallaher, 275 F. 3d 784, 793-794 (9th Cir. 2001)
24 (quoting United States v. Johnson, 998 F. 2d 696, 698 (9th Cir.
25 1993)).

26 The district court's decision to modify the supervised release
27 conditions is reviewed for abuse of discretion. United States v.
28

1 Napulou, 593 F.3d 1041 (9th Cir. 2010); United States v. Stoterau,
2 524 F.3d 988, 1002 (9th Cir. 2008); United States v. Jeremiah, 493
3 F.3d 1042, 1046 (9th Cir. 2007); United States v. Wise, 391 F.3d
4 1027, 1031 (9th Cir. 2004). "Considerable deference" is owed a
5 district court's "determination of the appropriate supervised
6 release conditions." United States v. Weber, 451 F.3d 552, 557 (9th
7 Cir. 2006); see also United States v. Bee, 162 F.3d 1232, 1234-35
8 (9th Cir. 1998) (district courts retain broad discretion to
9 determine what conditions of supervised release are appropriate).

10 Unlike revocation decisions, the district court may modify a
11 supervised release condition without any predicate fact-finding or
12 violation.¹ In fact, "a district court can modify a defendant's
13 conditions of supervised release" upon a moment of "further
14 reflection." United States v. Bainbridge, 746 F.3d 943, 950 (9th
15 Cir. 2014). In this case, because defendant is still "serving" his
16 criminal sentence on supervised release, United States v. Betts, 511
17 F.3d 872, 876 (9th Cir. 2007), the district court has "broad
18 discretion in setting conditions of supervised release, including
19 restrictions that infringe on fundamental rights," Bee, 162 F.3d at
20 1234.

23 ¹Federal Rule of Criminal Procedure 32.1(c) provides a right to
24 a hearing and representation by counsel, but not an evidentiary
25 hearing. (Compare with Fed.R.Crim.P. 32.1(b), providing an
26 evidentiary hearing for revocation of supervised release.) The
27 comments to Rule 32.1(c) provide, "Probation conditions should be
28 subject to modification, for the sentencing court must be able to
respond to changes in the probationer's circumstances as well as new
ideas and methods of rehabilitation." Fed. R.Crim. Pro. 32.1(b)
Advisory Committee Notes (1979) (Rule 32.1(c) was added in 1993.)

1 **B. ALL OF THE REQUESTED SUPERVISED RELEASE CONDITIONS ARE**
2 **REASONABLY RELATED TO THE APPLICABLE 3553(A) FACTORS**

3 The USPO asks that the court impose conditions that allow for
4 warrantless search of the defendant, his property, residence and
5 possessions, to include computers, digital devices, internet
6 accounts, cellular phones, and other media. The USPO also requests
7 that defendant be ordered to participate in electronic monitoring.
8 An application of the 3553(a) factors to the defendant provide ample
9 justify these conditions.

10 Defendant was convicted of Conspiracy to Levy War Against the
11 United States through Terrorism. Of greatest relevance to the
12 requested conditions is the manner in which defendant carried out
13 this crime. Defendant was the founder and leader of a Muslim
14 extremist group who recruited others to carry out violent attacks on
15 the public. His specific targets included United States military
16 locations and Jewish synagogues. Defendant laid out his plans in
17 writing which was distributed to others, and through personal
18 contact, he persuaded other felons to join his crusade. He was able
19 to accomplish this crime even while his freedoms were restricted in
20 state custody. The USPO's ability to search defendant, his
21 possessions, and various modes of communication (phones, computers,
22 and other digital devices) are essential to preventing any attempts
23 to commit similar crimes in the future and address the reemergence
24 of any extremist views early on. Electronic monitoring will allow
25 the USPO to confirm that defendant is not associating with other
26 members of JIS, or other prior felons that may be vulnerable to
27 recruitment.
28

1 Thus, although warrantless searches and GPS monitoring may
2 implicate defendant's privacy rights, these conditions are
3 "reasonably related to the goal of deterrence, protection of the
4 public, or rehabilitation of the offender, and involve no greater
5 deprivation of liberty than is reasonably necessary for the purposes
6 of supervised release." Rearden, 349 F.3d at 618. The court and
7 society have a strong interest in ensuring that defendant does not
8 reoffend - an interest that is served by verifying that defendant is
9 not expounding extremist propoganda to recruit others to commit
10 terrorist acts, contacting others with extremist views to engage in
11 terrorist acts, reviewing terrorist material that provide blueprints
12 for criminal activity, and associating with others who are members
13 of JIS, during his supervised release term. Rather than impede
14 defendant's rehabilitation, warrantless searches and GPS monitoring
15 will remind him to obey the law and to not engage in any conducted
16 prohibited by the other conditions of his supervised release. See,
17 e.g., United States v. Misraje, 615 Fed. Appx. 882, 882 (9th Cir.
18 2015) ("[I]n light of Misraje's history and need to protect the
19 public, the district court did not abuse its discretion by imposing
20 the GPS monitoring condition.").

21 Finally, the USPO has requested a condition requiring defendant
22 provide financial information. While defendant does not have a
23 restitution order, he has sought public assistance while in custody
24 at the halfway house, contrary to its rules and while he was not
25 legally eligible to obtain such assistance. As a result, defendant's
26 financial situation should be monitored to ensure defendant receives
27 only those public benefits to which he is entitled.

1 **C. ALTHOUGH NOT REQUIRED TO JUSTIFY THE REQUESTED MODIFICATIONS,**
2 **DEFENDANT'S POST-SENTENCE CONDUCT OVERWHELMINGLY PROVES THAT**
3 **THESE MODIFICATIONS ARE ESSENTIAL TO PROTECT THE PUBLIC AND**
4 **PROVIDE SUFFICIENT DETERRENCE TO FUTURE CRIME**

5 **1. Defendant was disciplined while in federal prison on the**
6 **underlying offense**

7 Defendant's initial long-term placement in custody was to the
8 FCC in Terra Haute, Indiana. See Exhibit 1. Defendant was placed in
9 a Communications Management Unit ("CMU"), a "general population
10 housing unit where inmates ordinarily reside, eat, and participate
11 in all educational, recreational, religious, visiting unit
12 management, and work programming, within the confines of CMU." See
13 Exhibit 2. While at that facility, defendant engaged in prison
14 violations resulting in internal discipline. See Exhibit 3.

15 On July 13, 2010, defendant was found with inmates,
16 participating in a group prayer, contrary to specific procedures
17 proscribed for inmates in the CMU. See Exhibit 4. CMU procedures
18 allowed inmates to participate in regular Friday Jumah prayer and
19 other special holiday events as prescribed and approved by the
20 chaplain, but they were prohibited from participating in group
21 prayer or leading group training, teaching or instruction. Id.
22 Defendant was found guilty of refusing to obey an order and
23 participating in an unauthorized meeting and received a sanction of
24 loss of phone privileges for thirty days.²

25
26 ² Although prison officials described the violation as "group
27 prayer", James himself later referred to this incident as "classes"
28 he was holding with other inmates. See Exh. 7 at 1.

1 On October 20, 2012, defendant engaged in a confrontation with
2 prison staff. See Exhibit 5. Defendant yelled at a nurse regarding
3 another inmate's medication, causing other inmates to gather around
4 staff. Id. As a result, a Lieutenant and additional staff were
5 called to the unit. Defendant argued with an officer, stating, "who
6 are you to tell us to be quiet", angering other inmates and stated
7 that the staff were "cowards" who hid behind their uniforms. Id.
8 Defendant was found guilty of insolence toward staff and was
9 sanctioned with loss of phone and commissary privileges for 60 days,
10 and loss of visitation privileges for 30 days. See Exh. 3.

11 As a result of these incidents, and in light of defendant's
12 prior record, defendant was given notice of a hearing on the
13 prison's referral for his transfer to ADX Florence's general
14 population. See Exhibit 6. A hearing was held April 2, 2014, where
15 defendant was present and provided evidence on his own behalf. See
16 Exhibit 7. The hearing officer found that defendant met the criteria
17 for placement in the ADX-GP for two reasons, namely, that
18 defendant's conduct within correctional institutions created a risk
19 to the institution security, good order, and the safety of staff,
20 inmates, others, and/or the public safety and because of inmate's
21 status either before or after incarceration, he may not be safely
22 housed in the general population of a regular correctional
23 institution. Id. at 2. Defendant was provided with the placement
24 decision on May 7, 2014. See Exhibit 8.

1 **2. Defendant violated the rules over a dozen times during his**
2 **six-week stay at the halfway house**

3 On July 30, 2019, defendant was released from the Metropolitan
4 Detention Center and reported to a halfway house in Garden Grove to
5 complete his sentence. The day of his arrival, defendant was
6 provided with the facility rules and regulations and the resident
7 handbook. See Exhibit 9. On July 31, 2019, his halfway house case
8 manager conducted an orientation with defendant, and he agreed to
9 abide by the halfway house rules. See Exhibit 10.

10 On August 5, 2019, defendant called the halfway house staff
11 upon arrival at the DMV, as required, but failed to do so from a
12 landline. Defendant was required to call from a landline in order to
13 confirm he was, in fact, at the DMV. When defendant called again,
14 upon leaving the DMV, he used the same cellular phone. When
15 questioned by staff as to which phone he was using, defendant stated
16 that he was using a random person's cellphone because he was not
17 allowed to use a landline. However, staff recognized the phone
18 number defendant used as one he had previously called from on August
19 3, 2019, negating the possibility that he was using a stranger's
20 cellphone. See Exhibit 11.

21 Also on August 5, 2019, defendant informed the halfway house he
22 had obtained a cellular phone. Defendant was then provided with the
23 Resident Cell Phone Agreement, which he signed. See Exhibit 12. Each
24 condition of the agreement was initialed by defendant. Id. Among the
25 conditions included prohibitions from possessing any unauthorized
26 cellphones, lending a phone to another resident, taking pictures of
27 other residents, and "use of the camera is strictly prohibited
28

1 inside the facility or its grounds."³ At 7:32 p.m. that day,
2 defendant posed for a picture of himself taken in the facility,
3 utilizing his cellphone. See Exhibit 14.

4 On August 9, 2019, defendant left the facility, after filing an
5 approved itinerary that listed two destinations: the DMV in Stanton,
6 California, and the Masjid Al-Ansar (also known as the West Coast
7 Islamic Center) in Anaheim. See Exhibit 15. Six photos located on
8 defendant's phone, date stamped August 9, 2019, showed defendant was
9 at a location he had not listed on his stated itinerary. See Exhibit
10 16. Among those photos were four photos defendant had taken of
11 another resident of the halfway house. Id. The phone contained
12 contact information for another resident. See Exhibit 17. All of
13 these actions were violations of halfway house rules.

14 In spite of halfway house rules which prohibit the taking of
15 photos in the facility, and photos of others in the facility,
16 multiple photographs taken by defendant were located on his phone.
17 Specifically, on August 11, 2019, defendant took a photo of himself
18 at the facility, with a woman depicted in the background. See
19 Exhibit 18. On August 16, 2019, defendant posted a photograph of
20 himself at the facility on social media. See Exhibit 19. On August
21 16, 2019, defendant posted another photo of himself on social media,
22 with the comment, "Getting ready for jum'ah in the land of dogs and
23 pigs. May Allah free me from it soon." See Exhibit 20. On August
24

25
26 ³The agreement stated that failure to comply with the conditions
27 would result in loss of cell phone privileges. The facility uses
28 guidelines to determine sanctions for cellphone violations. See
Exhibit 13.

1 23, 2019, defendant took yet another photograph of himself using a
2 mirror at the halfway house. See Exhibit 21. On August 24, 2019,
3 defendant's cellphone privileges were revoked for two weeks for
4 violations of the cellphone agreement. See Exh. 17.

5 On August 30, 2019, defendant was terminated from his
6 employment due to defendant's excessive use of a cellular phone on
7 the job. See Exhibit 22. Defendant had only reported one cellphone
8 to the halfway house, which had been confiscated for two weeks on
9 August 24th. On August 30, 2019, defendant's case worker specifically
10 asked him if he had a cellphone that had not been authorized.
11 Defendant denied having an unauthorized phone.⁴ Id. On September 1,
12 2019, defendant left the facility, having filed an approved
13 itinerary to go to the Mashjid Al-Ansar in Anaheim. See Exhibit 23.
14 A video located on defendant's cellphone depicts defendant inside a
15 residence with others, timestamped September 1, 2019. See Exhibits
16 24 and 25.

17 Halfway house rules prohibit the possession of state-issued
18 welfare (cash or food) EBT cards. See Exh. 9 at 4. On September 5,
19 2019, defendant received a California EBT card in the mail. See
20 Exhibit 26. The EBT card was confiscated pending his release.

21 On September 8, 2019, defendant was caught with an unauthorized
22 cellphone by halfway house staff. See Exhibit 27. Defendant's
23 authorized phone had been returned to him after a two-week
24 suspension and was also in his possession at the time. When
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26 ⁴Defendant was found with an unauthorized cellphone on September
27 9, 2019. Id.

1 questioned about the unauthorized phone, defendant initially claimed
2 it belonged to his roommate. After a staff member searched the
3 phone, and found nothing that suggested that it belonged to his
4 roommate, defendant admitted it the phone belonged to him.⁵

5 On September 10, 2019, defendant was questioned by his case
6 manager regarding the hidden phone found on him two days earlier.
7 See Exhibit 28. The case manager asked defendant why he had lied to
8 her when she asked him whether he had an unauthorized phone on the
9 August 30, 2019, the day he was fired from his job. Defendant
10 replied that he obtained the hidden phone after their August 30th
11 conversation. However, on the unauthorized phone was a text message
12 written on August 24, 2019, (the day his authorized phone was
13 confiscated) to "Brian" which stated: "Bro. Dont call my phone i
14 lost it for two weeks because I took a pic. Of myself in here. So
15 ill call you fro. The payphone till I get it back. Dont call this
16 number either for now. Love ya!"

17 Finally, on September 16, 2019, defendant was stopped by
18 California Highway Patrol at 7:18 p.m. for driving without his
19 headlights on after dark. See Exhibit 30. Defendant was cited for a
20 misdemeanor offense of Driving without a License, in violation of
21 California Vehicle Code Section 12500(a). Defendant was required by
22 halfway house rules to report his possession of any vehicles.
23 Defendant failed to report this vehicle to staff. See USPO amended
24 report. At the time of this violation, defendant was in possession
25

26 ⁵The unauthorized phone contained the aforementioned 9/1/2019
27 video of defendant inside a private residence.
28

1 of two phones. Halfway house records show that defendant only had
2 one phone authorized for use at the time, meaning that he had yet
3 another unauthorized phone in his possession.

4 **3. Defendant's penchant for lying about his behavior**
5 **demonstrates the critical need to utilize objective**
6 **techniques to determine supervised release compliance**

7 Defendant's post-sentence conduct is of great concern. Equally
8 disturbing is defendant's willingness to lie about his behavior.
9 These lies included affirmative misrepresentations and intentional
10 omissions. Defendant has shown he cannot be taken as his word that
11 he will abide by the terms and conditions of his supervised release--
12 --he must be consistently monitored for compliance. He lies about
13 where he intends to go; he lies when confronted about his conduct;
14 and he lies about the underlying facts that result in his
15 discipline. To illustrate, if we focus exclusively on defendant's
16 behavior in the last two months, we know:

- 17 (1) Defendant lied when he said he used a random person's phone
18 calling from the DMV.
- 19 (2) Defendant intentionally failed to report a second phone in
20 his possession at the halfway house, which was found on
21 September 8, 2019.
- 22 (3) Defendant lied when he was confronted about the possibility
23 that he had a hidden phone after his phone was confiscated
24 and he was fired for excessive phone use.
- 25 (4) When defendant was found with the unauthorized phone, he lied
26 and said it was belonged to his roommate.

1 (5) When confronted with his prior denial of a hidden phone, he
2 lied again, claiming he did not have the hidden phone at the
3 time of the confrontation.

4 (6) On September 9, 2019, defendant personally told this court
5 that he had his cellphone taken away from him at the halfway
6 house because "I don't know how to use a cell phone, so I was
7 playing with the cell phone, snapped a picture of myself.
8 When they asked to review it, they found a picture of
9 myself", suggesting that somehow he accidentally took a photo
10 of himself with the cellphone. See 9/9/19 Hearing Tr., pp.
11 17-18. Exhibits 14, 16, 18, 19, 20, and 21 are conclusive
12 proof that did not take a photo of himself accidentally, and
13 that he lied to the court at his last hearing.

14 (7) At the last hearing, defendant denied deviating from his
15 itinerary by going to a residence, claiming that he "took a
16 picture in front a car in front of my job". 9/9/19 Hearing
17 Tr. at 18. He stated that when halfway house staff saw his
18 photo in front of this truck, they determined he was
19 deviating from the itinerary. While this statement was quite
20 convincing at the time, it too was a lie, as the evidence is
21 to the contrary. Exhibit 25 is a video, clearly depicting
22 defendant at a residence on September 1, 2019, when his
23 itinerary only listed Masjid Al-Ansar as his intended
24 destination.

25 (8) Defendant intentionally failed to report a vehicle he
26 possessed when he was driving unlawfully on September 16,
27 2019.

