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The Honorable Kiyo A. Matsumoto
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: [redacted]

Dear Judge Matsumoto:

I write in opposition to the government's renewed motion for modification of [redacted] conditions of supervised release. The Court did not impose polygraph testing as a special condition at sentencing, declined to impose it following the government's first motion for modification, and should decline to impose it now.

We are in absolute agreement with the government that [redacted] court-ordered treatment is central to achieving the goals of sentencing. And [redacted] is indeed fully engaged in this treatment. In a supplemental psychiatric evaluation prepared in January 2016 during the pendency of [redacted] Dr. Sasha Bardey noted the progress [redacted] had made since his initial evaluation in 2014:

> As a result of my second evaluation, I remain of the opinion with a reasonable degree of medical certainty, that [redacted] remains at low risk of recidivism for the offense conduct, that he remains no danger to the community at large or to minor children in particular. His thinking, insight, and understanding of the criminal and immoral nature of his offense has deepened and the punishment he has received to date has furthered his resolve to address these issues and further mitigates any risk of recidivism. I believe that [redacted] is currently even less at risk of recidivating than he was when I first examined him.

Exhibit A (Supplemental Evaluation, Dr. Sasha Bardey) at 15. Dr. Bardey further noted that [redacted] "fit in the lowest risk group for recidivism," does not display interest in sexual violence, does not have an interest in minors under 13, and instead "fit a normal profile for a normal male." *Id*. at 12. He found no evidence that would suggest a future contact offense, *id.* at 13, and found that the offense was not likely to have been borne out of a need to satisfy a sexual urge, *id.* at 14. [redacted]

The government's expert, Dr. Berrill, agreed, initially at least, with Dr. Bardey's conclusions. For his June 20, 2016 intake report Dr. Berrill conducted a psychosexual screening, which revealed the following: "a review of [redacted] reflects that he is sexually interested in both adult and adolescent males. *There is no indication that he is sexually attracted to underage males or females.* It is not uncommon for an adult heterosexual or homosexual male to be attracted to adolescents." Gov't Attachment A at 6 (emphasis added). Moreover, Dr. Berrill wrote that "[redacted] performance on the Bumby Cognitive Distortion Scale yielded unremarkable results, indicating that he does not endorse items which suggest that it is permissible for underage males or females to have sex with adults." *Id.* at 7.

Dr. Berrill further noted that [redacted] "reported that he has identified as homosexual for quite some time and has only had sexual relations with adult males." *Id*. at 8. [redacted] "indicated that he does not have a sexual interest in children, nor has he ever had sex with a child in the past. *Test results support this contention*." *Id.* (emphasis added). "*There is no indication that he is sexually attracted to prepubescent males or females*, for that matter, nor is there evidence to suggest that [redacted] is, by nature, a sadistic or predatory individual." *Id.* (emphasis added). And [redacted] looked forward to engaging with his treatment, indicating that "he is open to being seen in ongoing mental health treatment and is hopeful that treatment will also provide some support . . . ." *Id*. at 5.

Now, several months later, coinciding with the government's motion to add polygraphy as a supervised release condition, Dr. Berrill takes a starkly different position and tone in his supplemental letter.[1] *See* Gov't Attachment B. "Owing to his complete denial regarding culpability and/or interest in this population," Dr. Berrill writes, "a clinical polygraph was recommended to obtain a complete evaluation of him and to help guide his treatment at this site. In this case, the polygraph examination would be used to *break through* [redacted] *denial and resistance* as well as help monitor his behavior and risk factors." *Id.*

[1] Notably, Dr. Berrill is the executive director of New York Forensic, which contracts with the Probation department to provide both sex offender referrals and treatment in response to those referrals. According to Supervisory Probation Officer Lawrence Andres, Jr., "[i]n 2009, the probation department solicited vendors for sex offender treatment . . . . The only response to New York City solicitation came from New York Forensic. . . . New York Forensic has been working with the probation department and our sex offender population for the last ten years and currently treats the bulk of our sexual offenders." *United States v. C.R.*, 09-cr-155 (JBW), Dkt. No. 99 (Nov. 30, 2010). It is in no way clear from the record whether Dr. Berrill tailors his polygraphy recommendations to the treatment needs of individual patients, or whether he recommends it as a matter of course.

On December 2, 2016, at the request of defense counsel, Dr. Bardey submitted a letter that specifically addresses and refutes the ostensible therapeutic framework posited in Dr. Berrill's supplemental letter. *See* Exhibit C (Supplemental Letter, Dr. Sasha Bardey). Dr. Bardey agrees that polygraph testing could play a role in supervision, from a probationary perspective, but he does not see a "therapeutic value." Polygraphy "should not be used by therapists to 'break through' any apparent resistance to treatment. Using it in that fashion will only break what little, fragile therapeutic alliance there is." *Id.* Even if [redacted] were resistant to treatment—he is not, and there is no serious allegation that he is—the government has failed to cite any clinical authority for the use of polygraphy as a therapeutically sound modality. Here, Probation's desire to use the polygraph machine as a supervision compliance tool—even for a supervisee who is in the lowest recidivism risk category—comes cloaked in the language of medical necessity.[2]

Finally, though the government points to two cases where polygraphy was imposed as a special condition, *see* Gov't Br. at 3, the government does not mention that those cases involved aggravating factors well beyond what is present in [redacted] case.[3]

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[2] *See United States v. McLaurin*, 731 F.3d 258, 263 (2d Cir. 2013) (finding in a case about the imposition of penile plethysmography as a condition of supervised release that "even if the machine could accurately monitor and record the extent or intensity of a convict's prurient interests (a proposition about which we have serious doubts), the goal of correctional treatment during supervised release is properly directed at conduct, not at daydreaming").

[3] *See United States v. Johnson*, 446 F.3d 272, 278 (2d Cir. 2006) ("The district court crafted supervised release conditions for a serial offender who apparently resisted honest self-assessment. Johnson's treatment provider labeled Johnson's attitude 'superficial and not adequately engaged in the recovery process. He has an increasingly antagonistic attitude . . . [featuring an] inadequate level of accountability for his offenses.'"); *United States v. Parisi*, 821 F.3d 343, 349 (2d Cir. 2016) (defendant was convicted of four counts of sexual exploitation of a minor and one count of witness tampering, and exhibited "deceptive behavior"); *see also Gjurovich v. United States*, No. 01-CR-215, 2009 WL 3232139, at *2 (N.D.N.Y. Oct. 1, 2009) (imposing Computerized Voice Stress Analysis, a "truth verification" tool similar to the polygraph, the court pointed to defendant's difficulty complying with the terms of supervision, tampering with computer monitoring software, communications with another sex offender, use of cocaine while on supervision, and possession of sexually stimulating images in a magazine). It should also be noted that at least one other circuit has found a polygraph condition to be violative of the Fifth Amendment's privilege against self-incrimination. *United States v. Von Behren*, 822 F.3d 1139, 1142 (10th Cir. 2016)

The Court should deny the government's second motion for imposition of the special polygraph condition.

Respectfully Submitted,

/s/
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cc: AUSA Drew G. Rolle (via ECF)
U.S. Probation Officer Craig G. Schneider (via Email)