UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

LUKE WENKE,

Defendant.

22-CR-35-JLS

DEFENSE'S POST-REVOCATION HEARING BRIEF

Violations of supervised release must be intentional. The Second Circuit has plainly stated that "supervised release provisions are read to exclude inadvertent violations." United States v. Johnson, 446 F.3d 272, 281 (2d Cir. 2006); see also United States v. Romero, 676 F.2d 406, 407 (9th Cir. 1982) ("If and when probation is revoked, we will examine the findings to insure that probationer's due process right to notice of prohibited conduct has been observed and *to protect him from unknowing violations*) (emphasis added); State v. Alves, 174 Ariz. 504, 506 (Ct. App. 1992) ("A violation of probation must be willful"); Villabol v. State, 595 So. 2d 1057, 1059 (Fla. Dist. Ct. App. 1992) ("Should the state later seek to revoke Villabol's probation for violating these conditions, they recognize that any such violation must be willful"). The rationale behind this rule is rooted in the Due Process Clause of the Fifth Amendment, as conditions of supervised release must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." United States v. Balon, 384 F.3d 38, 43 (2d Cir. 2004).

The Court has identified two separate means in which a violation may have occurred in this case: (1) indirect contact with Ryan Garry and (2) direct contact with Garry's place of employment. However, under Johnson, Mr. Wenke's *mens rea* – his knowing and intentional

violation of the condition – is central to both of these purported violations. Johnson, 446 F.3d at 281. Accordingly, the Government's wholesale lack of proof that Mr. Wenke had any knowledge of the extent of Garry's and Birrell's relationship – that they apparently share office space, or that they are "close" in the Government's estimation – is fatal to their argument that Mr. Wenke knowingly and intentionally made contact with Mr. Garry, whether directly or indirectly.

As Special Agent Brown acknowledged on cross-examination, nothing in her investigation suggested that Mr. Wenke was aware that Garry and Birrell shared an office space, or even worked in the same building. Based on Mr. Wenke's knowledge at the time of the May 13, 2023 email to Birrell, the only connection between Garry and Birrell was that at one time three years ago, they both represented the same client. Indeed, in the second line of the May 13, 2023 email, Mr. Wenke confirmed precisely this understanding of Birrell: he refers to "your client Benjamin Ryan Teeter." Gov't Hearing Exhibit 3 at 2. At no point does he refer to any relationship between Garry and Birrell, other than calling Garry "your comrade;" notably, he does not call him a "coworker," a "partner," an "associate" or even a "friend." Gov't Hearing Exhibit 3. Similarly, the Government's repeated assertions that Mr. Wenke *knew* that Garry and Birrell were "close" is simply unsupported by any evidence in the record: neither Government witness testified to Mr. Wenke's knowledge that Garry and Birrell are "close." The Government appears to be imputing its own collective knowledge – the knowledge of its agents and Garry himself (see Gov't Hearing Exhibit 3 at 1) – onto Mr. Wenke, without any attempt to satisfy its burden of proof in this regard.

Indirect Contact with Ryan Garry

Although the issue of indirect contact with a victim as the basis for revoking supervised release appears to be a matter of first impression in the Second Circuit,[1] two separate lines of cases provide helpful context for evaluating whether intentional indirect contact occurred in this case. First, in United States v. Johnson, 446 F.3d 272 (2d Cir. 2006), the Second Circuit discussed a condition prohibiting "indirect contact with a person under age 18." In that case, the Court skeptically noted the "indeterminacy of the word 'indirect'" and only upheld the condition because the district court had taken affirmative steps to limit and clarify the condition:

> The district court agreed with Johnson that 'the word indirect casts too broad of a net' and modified Johnson's conditions to require that he 'reasonably avoid and/or remove himself from situations in which he has indirect contact with a minor.'
>
> Id. at 276.

No such clarifying[2] or limiting action was taken in Mr. Wenke's case, and the principle set forth in Johnson that "supervised release provisions are read to exclude inadvertent violations" is

[1] There do not appear to be any appellate or trial court cases within the Second Circuit in which a federal supervisee was violated for indirect contact with an individual. This fact alone weighs heavily in favor of finding that no violation occurred here, as Mr. Wenke was not on reasonable notice that sending an email to Birrell would constitute intentional "indirect contact" with Garry. The defense submits that finding a violation occurred under this novel theory would violate the Due Process Clause of the Fifth Amendment. See United States v. Maloney, 513 F.3d 350, 357 (3d Cir. 2008) ("a condition of supervised release violates due process and is void for vagueness if it either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application"); United States v. Balon, 384 F.3d 38, 43 (2d Cir. 2004) (conditions of supervised release must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly").

[2] From the text of the condition, it is not even entirely clear whether "indirect" contact means contact through a third party, or simply non-face-to-face contact with Garry himself, as the clause "including through social media, telephone, text, mail, or email," can be read as an illustrative list of examples of "indirect contact." Indeed, the model language used by United States Probation and Pretrial Services for this condition eschews the word "indirectly," instead

particularly relevant here. Just as the defendant in Johnson could not fairly be found to have violated his conditions unless he had taken actions to *intentionally* have indirect contact with a minor, similarly Mr. Wenke cannot be said to have violated his conditions without intentionally having indirect contact with the Garry.

The May 13, 2023 email to Birrell lacks any indicia of intent to communicate with Garry. Most importantly, at no point does he ask or tell Birrell to relay a message to Garry, or indicate that it was his intention to send a message to Garry. Cf. United States v. Riekenberg, 448 Fed.Appx. 643, 645 (8th Cir. 2011) (finding probation violation for indirect contact with an ex-girlfriend, where the defendant located a male friend of his ex-girlfriend on Facebook and messaged him, after posting nude images of the ex-girlfriend on the internet, and "stated that he had contacted the male friend *in an effort to apologize to his ex-girlfriend* for what he had done") (emphasis added). Nor did Birrell ever indicate to Mr. Wenke that he would pass the communication along to Garry. Critically, as there is no evidence that Mr. Wenke was aware that Garry and Birrell were close – either physically in their office space or socially – the simple act of writing to Birrell and using Garry's name cannot be said to be intentional indirect contact. In the absence of any evidence of Mr. Wenke's knowledge of the "close" nature of Garry's and

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opting for a more explicit prohibition on communication through a third party:

> You must not communicate, or otherwise interact, with [name of victim], either directly or *through someone else*, without first obtaining the permission of the probation officer.
>
> United States Probation and Pretrial Services Forms, Association and Contact Restrictions (Probation and Supervised Release Conditions), available at https://www.uscourts.gov/services-forms/association-contact-restrictions-probation-supervised-release-conditions (emphasis added).

Birrell's relationship, this case is firmly distinguishable from other cases in which a third-party communication was sent to the protected party's significant other (United States v. Thompkins, 58 M.J. 43 (U.S. Court of Appeals for the Armed Forces 2003)), or in which multiple threatening voicemails were left for multiple coworkers of the protected party (Palmer v. Johnson, 2008 WL 3992327, at *2 (E.D. Va. Aug. 27, 2008)).

Although Birrell ultimately chose to forward that email communication to Garry, the Government has made no showing that Mr. Wenke knew or should have known that this would happen. Finding that Mr. Wenke violated the condition against indirect communication with Garry under these circumstances would be tantamount to creating a retroactive condition prohibiting Mr. Wenke from invoking Garry's name to *any* third parties; this would raise a host of Constitutional issues, from unreasonable restrictions on speech in violation of the First Amendment, to a lack of reasonable notice under the Due Process clause of the Fifth Amendment.

Similarly instructive are several out-of-circuit cases relating to prohibitions on associating with convicted felons. See, e.g., United States v. LanFranca, 955 F.Supp. 1167, 1168-69 (W.D. Mo. 1997) (declining to adopt a "literal reading of the condition of release" and instead adding the requirement that the supervisee must *know* an individual he associates with is a convicted felon); United States v. Ucciferri, 133 F.Supp.2d 1330, 1338 (M.D. Fla. 2001) (finding that no violation occurred because the government "failed to show by a preponderance of the evidence that Ucciferri associated with *known* felons" or that "Ucciferri *knew* that he was associating with felons") (emphasis in original); United States v. Vega, 545 F.3d 743. 750 (9th Cir. 2008) (based on the "well-established jurisprudence under which we presume prohibited criminal acts require an element of *mens rea*" the Court "read[s] the condition to prohibit

knowing association with members of a criminal street gang"). Notwithstanding the plain language of the condition at issue in these cases – which simply prohibits any association with a felon – courts have consistently inferred a knowledge requirement . Similarly, in Mr. Wenke's case, he cannot be found to have intentionally violated a condition based on information he was unaware of at the time of the May 13th email.

As the Government has failed to prove beyond a preponderance of the evidence that Mr. Wenke intended to indirectly communicate with Garry through Birrell, the Court should dismiss the violation petition in this case.

Direct Contact with Garry's Place of Employment

For many of the same reasons set forth above, the defense submits that Mr. Wenke did not *knowingly* have direct contact with Garry's place of employment. Special Agent Brown acknowledged that her investigation did not indicate that Mr. Wenke was aware that Garry and Birrell shared office space. Indeed, they run separate and distinct law firms (each bearing their own respective name). The communication was not mailed to Birrell's physical address, but rather was an email sent to his "birrell.law" address. Gov't Hearing Exhibit 3. As the Government has failed to prove beyond a preponderance of the evidence that Mr. Wenke knew Garry and Birrell shared office space, the Court should dismiss the violation petition in this case.

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Respectfully submitted,

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