Testimony of Hon. Ricardo S. Martinez Presented to the United States Sentencing Commission on February 17, 2016, on Proposed Amendments to the Sentencing Guidelines

Judge Saris and members of the Sentencing Commission,

On behalf of the Criminal Law Committee of the Judicial Conference of the United States, thank you for providing us the opportunity to comment on proposed amendments to the sentencing guidelines. The Judicial Conference has authorized the Criminal Law Committee to act with regard to submission from time to time to the Sentencing Commission of proposed amendments to the sentencing guidelines.[1]

As I discuss below, the Committee is in favor of the Commission's proposed amendments to revise, clarify, and re-arrange the conditions of probation and supervised release. These amendments are consistent with changes we recently endorsed after an exhaustive review by the Committee and Administrative Office staff with the assistance of a group of probation officers from throughout the country. The Administrative Office also distributed these proposed changes to judges, probation officers, the Department of Justice, and federal defenders, and it solicited feedback, which was used to make necessary revisions. Finally, the Committee and Administrative Office staff has worked closely with the Commission and its staff to pursue consistency between the conditions on the national judgment form and the *Guidelines Manual*. We thank the Commission and its staff for this collaboration. In addition to supporting the Commission's proposed amendments regarding the conditions of supervision, the Committee also provides brief comments below regarding the proposed amendments to the compassionate release policy statements and the child pornography guidelines.

<u>Conditions of Probation and Supervised Release</u>

Background

The conditions of supervision define the sentence to be executed, establish behavioral expectations for defendants, and provide the probation officer with tools to keep informed and bring about improvements in a defendant's conduct and condition. Discretionary conditions of supervision are differentiated into "standard" and "special" conditions. Standard conditions represent core supervision practices required in every case to fulfill the statutory duties of probation officers.[2] The current standard conditions of probation and supervised release are listed in the national judgment form (Form AO-245B, "Judgment in a Criminal Case"). Special conditions provide for additional restrictions, correctional interventions, or monitoring tools as necessary to achieve the purposes of sentencing in the individual case, and in the case of probation or parole, they provide for additional sanctions.

The Committee has had an active and ongoing role in developing, monitoring and recommending revisions to the conditions of supervision both before and after the Sentencing

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[1] JCUS-SEP 90, p.69.

[2] *See* 18 U.S.C. § 3603.

Reform Act. The standard conditions in the national judgment form were last approved by the Judicial Conference in 2011.[3] Over the past year, the Committee and Administrative Office staff, with the assistance of a group of probation officers from around the country, has reviewed the standard and most common special conditions to assess whether: (1) all of the standard conditions are required for supervision in all cases; (2) the language for some of the standard and common special conditions can be refined; and (3) additional guidance can be provided concerning the appropriate language and the legal and/or criminological purposes of the standard and most common special conditions.

This review was prompted in part by Seventh Circuit opinions in recent years expressing concern about the wording of standard and special conditions and the manner in which they are imposed. To be sure, as the Commission has written in a series of publications, defendants in all circuits have increasingly challenged conditions of supervision, particularly special conditions, for several decades.[4] The Committee has also recently monitored these trends in the area of computer-related conditions, which have increasingly been challenged by defendants and vacated by courts. Over the past two years, the Committee has been briefed on the efforts of the Administrative Office to develop policies and procedures to ensure that computer-related special conditions are legally sound and meet their intended purpose. As part of this effort, Administrative Office staff prepared an analysis of national case law. Pursuant to the Committee's request, a paper based on this analysis was recently released by the Federal Judicial Center as a resource for courts and attorneys, and it is anticipated that it will address common questions regarding computer-related and other special conditions.[5]

In May 2014, the Seventh Circuit issued an opinion, *United States v. Siegel*,[6] where it summarized the "common but largely unresolved problems in the imposition of . . . conditions [of supervised release]."[7] One of the most serious problems identified by the court is that the

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[3] JCUS-SEP 11, p. 22.

[4] U.S. Sentencing Commission, *Supervised Release Primer* 6 (2014) ("A number of supervised release conditions have been challenged on appeal. Although circuit courts often uphold the conditions imposed, there are a number of reported cases in which circuit courts have reversed conditions. In those cases, circuit courts have provided a variety of reasons for reversing conditions imposed by sentencing courts. For example, circuit courts have reversed certain conditions, among other reasons, as vague and overbroad, insufficiently explained, not reasonably related to relevant statutory sentencing factors, and a greater deprivation of liberty than reasonably necessary."); U.S. Sentencing Commission, *Federal Offenders Sentenced to Supervised Release* 11 (2010) ("Defendants often challenge conditions of supervised release as not 'reasonably related' to the relevant factors in 18 U.S.C. § 3553(a), as required by 18 U.S.C. § 3583(d)(1), or a unconstitutional under the First, Fourth, or Fifth Amendments to the United State Constitution. Defendants also challenge procedural aspects of supervised release, such as lack of presentence notice of special conditions of supervised release and allegedly improper implementation of conditions by a probation officer.").

[5] Stephen E. Vance, *Supervising Cybercrime Offenders Through Computer-Related Conditions: A Guide for Judges* (Federal Judicial Center 2015).

[6] 753 F.3d 705 (7th Cir. 2014).

[7] *Id*. at 706.

conditions are often vague and inadequately defined.[8] A second problem is that the probation office's presentence report or sentencing recommendation generally suggests conditions of supervised release with only brief justifications. Judges then often merely repeat the recommendations and do not explain how they comport with the sentencing factors listed in in 18 U.S.C. § 3553(a), which is a determination for a judge to make.[9] One reason for this, according to the court, is that the sentencing hearing may be the first occasion on which defense counsel learns of the probation office's recommendation for conditions of supervised release. With no advance notice, counsel may have nothing to say about the conditions, and the judge may therefore be less likely to question them.[10]

An additional problem is the large number and variety of possible discretionary conditions.[11] According to the court, "[t]he sheer number may induce haste in the judge's evaluation of the probation service's recommendations and is doubtless a factor in the frequent failure of judges to apply the sentencing factors in section 3553(a) to all the recommended conditions included in the sentence."[12] Finally, because conditions are imposed at the time of sentencing, the sentencing judge has to guess what conditions are likely to make sense when the offender is released. The longer the sentence, the less likely that guess is to be accurate. Conditions that may seem sensible at sentencing may not be sensible many years or decades later.[13]

To address these problems, the court recommended a series of "best practices" for the imposition of conditions of supervision in the Seventh Circuit. First, the probation office should be required to communicate its recommendations for conditions of supervised release to defense counsel at least two weeks before the sentencing hearing.[14] Second, the sentencing judge should make an independent judgment of the appropriateness of the recommended conditions.[15] Third, the sentencing judge should determine appropriateness with reference to the particular conduct and character of the offender, rather than on the basis of loose generalizations about the

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[8] *Id*. at 708.

[9] *Id*. at 710.

[10] *Id*. at 711.

[11] *Id*. at 708.

[12] *Id*. at 708.

[13] *Id*. at 708. While conditions of supervised release can be modified at any time under 18 U.S.C. § 3583(e)(2), modification is, according to the court, a bother for the judge, especially when, as must be common in cases involving very long sentences, modification becomes the responsibility of the sentencing judge's successor because the sentencing judge has retired in the meantime. *Id*. The court emphasized that imposition of conditions at the time of sentencing is not a criticism that can be made of the sentencing judge. Rather, it is a flaw in the Sentencing Reform Act. *Id*. at 714. As discussed further below, the Judicial Conference has approved policies that encourage probation officers to defer recommending special conditions in certain situations.

[14] *Id*. at 717.

[15] *Id*.

offender's crime and criminal history, and where possible with reference also to the relevant criminological literature.[16]

Fourth, the sentencing judge should make sure that each condition imposed is simply worded, bearing in mind that, with rare exceptions, neither the offender nor the probation officer is a lawyer and that when released from prison the offender will not have a lawyer to consult.[17] Finally, the sentencing judge should require that on the eve of his release from prison, the offender attend a brief hearing before the sentencing judge (or his successor) in order to be reminded of the conditions of supervised release. That would also be a proper occasion for the judge to consider whether to modify one or more of the conditions in light of any changed circumstances brought about by the defendant's experiences in prison.[18]

Since *Siegel*, the Seventh Circuit has reiterated and expanded upon these concerns in numerous additional opinions. It has vacated or expressed concern about individual standard and special conditions for a variety of reasons including: being too vague; being overbroad; not including a knowledge requirement for violation of a condition; and not having an adequate justification for how the condition is reasonably related to the offender/offense characteristics, how they are reasonably related to the relevant statutory sentencing factors, and how they involve a minimal deprivation of liberty.[19]

In response to this developing case law, individual districts in the Seventh Circuit and other circuits have re-examined their practices concerning the recommendation and imposition of standard and special conditions. Some districts have changed the wording of the conditions, reduced the number of standard conditions, and included the recommended conditions and a more comprehensive justification in the presentence report. At the national level, the DOJ has requested that the Commission amend the conditions of supervision and commentary in the

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[16] *Id*. The court noted that there is an extensive social scientific literature on the causes and cures of recidivism, but that judges are limited in their ability to look behind the recommendations because the academic studies of recidivism are unfamiliar to most judges and it can be difficult for a judge who lacks a social-scientific background to evaluate them. *Id*. at 710.

[17] *Id*. at 717.

[18] *Id*.

[19] *See, e.g.*, *United States v. Boros*, 2016 WL 231140 (7th Cir. Jan. 20 2016); *United States v. Plada*, 2016 WL 51762 (7th Cir. Jan. 5, 2016); *United States v. Poulin*, 2016 WL 51387 (7th Cir. Jan. 5, 2016); *United States v. Douglas*, 806 F.3d 979 (7th Cir. 2015); *United States v. Sanford*, 806 F.3d 954 (7th Cir. 2015); *United States v. Coleman*, 806 F.3d 941 (7th Cir. 2015; *United States v. Brewster*, 2015 WL 7295176 (7th Cir. Nov. 19, 2015); *United States v. Harper*, 805 F.3d 818 (7th Cir. 2015); *United States v. Griffin*, 806 F.3d 890 (7th Cir. 2015); *United States v. Moore*, 788 F.3d 693 (7th Cir. 2015); *United States v. Downs,* 784 F.3d 1180 (7th Cir. 2015); *United States v. Sandidge,* 784 F.3d 1055 (7th Cir. 2015); *United States v. Kappes*, 782 F.3d 828, 848 (7th Cir. 2015); *United States v. Sewell*, 780 F.3d 839 (7th Cir. 2015); *United States v. McMillan*, 777 F.3d 444 (7th Cir. 2015); *United States v. Thomson*, 777 F.3d 368 (7th Cir. 2015); *United States v. Cary*, 775 F.3d 919 (7th Cir. 2014); *United States v. Hinds*, 770 F.3d 658 (7th Cir. 2014); *United Sates v. Johnson*, 765 F.3d 702 (7th Cir. 2014); *United States v. Johnson,* 756 F.3d 532 (7th Cir. 2014); *United States v. Farmer*, 755 F.3d 849 (7th Cir. 2014); *United States v Benhoff*, 755 F.3d 504 (7th Cir. 2014); *United States v. Baker,* 755 F.3d 515 (7th Cir. 2014); *United States v. Bryant*, 754 F.3d 443 (7th Cir. 2014).

Guidelines Manual to address the concerns of the Seventh Circuit.[20] As the DOJ reasoned, "[c]ourts and litigants within the [Seventh] Circuit are addressing th[e] concerns [of the Seventh Circuit] in a variety of ways. They are spending a great deal of time and effort proposing and reviewing responses to conditions prior to sentencing and justifying those conditions at sentencing case-by-case, often struggling to find the appropriate support and justifications for various conditions of release."[21]

Some level of national uniformity in standard conditions is necessary for a variety of reasons. First, as discussed above, they represent core supervision practices required in every case. Second, approximately 20 percent of offenders under supervision were sentenced in districts other than the district of supervision. Finally, uniformity in standard conditions ensures efficient policy development and training at the national level. In February 2015, the Committee requested that the Administrative Office staff, with the assistance of a group of probation officers from throughout the country, conduct a comprehensive review of the standard and most common special conditions. As I mentioned above, the goals of the review were to determine whether: (1) all of the standard conditions are required for supervision in all cases; (2) the language for some of the standard and common special conditions can be refined; and (3) additional guidance can be provided concerning the appropriate language and the legal and/or criminological purposes of the standard and most common special conditions.

This review included an exhaustive analysis of case law and numerous discussions between Administrative Office staff and probation officers concerning legal, policy, and practical issues surrounding the recommendation, imposition, and execution of conditions of supervision. As a result of these efforts, AO staff proposed revisions to the standard conditions on the national judgment form. Additionally, it developed a document to provide policy guidance to the judges, probation officers, prosecutors, defense attorneys, and other criminal justice practitioners. The document describes the legal authority, model condition language, purpose (including references to criminological research, where applicable), and method of implementation for the standard conditions and most common special conditions. One purpose of the document is to provide notice to the defendant of the standard and special conditions of supervision. Additionally, it may assist the parties in determining when specific special conditions are appropriate and in providing individualized justifications for the conditions. Finally, the document may aid appellate courts when reviewing the imposition of conditions in individual cases.

In November 2015, Administrative Office distributed drafts of the proposed standard conditions and guidance document to judges, probation officers, the DOJ, and federal defenders, and it solicited feedback, which was used to make necessary revisions. Additionally, Administrative Office staff collaborated with the Sentencing Commission staff with the intent of harmonizing the conditions listed in the *Guidelines Manual* with those on the national judgment form. At its December 2015 meeting, the Committee reviewed and endorsed proposed changes

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[20] Letter from Jonathan J. Wroblewski to Hon. Patti B. Saris dated July 29, 2014; Letter from Jonathan J. Wroblewski to Hon. Patti B. Saris dated July 24, 2015.

[21] Letter from Jonathan J. Wroblewski to Hon. Patti B. Saris dated July 24, 2015.

to the standard conditions. The Committee agreed to share the proposed language with the Commission for it to consider whether to include the revised standard condition language in the *Guidelines Manual*. At its June 2016 meeting, the Committee will consider whether to approve the issuance of the new guidance document and amend the national judgment forms.

Proposed Changes to Standard Conditions

Standard conditions represent core supervision practices required in every case to fulfill the statutory duties of probation officers to keep informed as to the conduct and condition of the defendant, report his or her conduct and condition to the court, and to aid the defendant in bringing about improvements in his or her conduct and condition.[22] The expectations set by these conditions include avoidance of risk-related factors such as criminal associations and the strengthening of prosocial factors such as employment. The standard conditions allow probation officers to employ basic supervision strategies such as requiring the offender to report to the probation officer as directed, to provide notification of changes in residence or employment, and to seek permission to travel outside of the district.

The Committee supports the Commission's proposed amendments to revise, clarify, and re-arrange the standard conditions of probation and supervised release. The proposed language is more clear and plainly worded. Additionally, many of the proposed conditions include a requirement that the defendant knowingly violate the conditions. Finally, the proposed amendments remove a number of requirements from the list of standard conditions because they are not applicable in every case or are addressed by other conditions. These requirements are: supporting dependents and meeting other family obligations, refraining from excessive use of alcohol, possession/use of controlled substances, and frequenting places where controlled substances are sold/used.

Of course, the court may impose these requirements as a special condition if it uses language that is sufficiently clear and it determines that the conditions are appropriate in the individual case. As you know, discretionary conditions of supervision may be imposed to the extent that they are: (1) reasonably related to the applicable sentencing factors listed at 18 U.S.C. § 3553(a) including the nature and circumstances of the offense and the history and characteristics of the defendant; (2) involve only such deprivations of liberty or property as are reasonably necessary for the applicable sentencing purposes listed at 18 U.S.C. § 3553(a); and (3) are consistent with any pertinent policy statements issued by the Sentencing Commission.[23]

Indeed, the Senate Report accompanying the Sentencing Reform Act makes clear that the list of possible conditions in the statute, which includes supporting dependents, meeting family responsibilities, and refraining from excessive use of alcohol, is only suggestive:

> Most of the conditions set forth in [18 U.S.C. 3563(b)] have been used and sanctioned in appropriate cases under the current statute

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[22] *See* 18 U.S.C. § 3603.

[23] 18 U.S.C. §§ 3563(b), 3583(d).

> [in effect prior to the Sentencing Reform Act]. The list is not exhaustive, and it is not intended at all to limit the court's options – conditions of a nature very similar to, or very different from, those set forth may also be imposed. . . . None of the[se] conditions . . . [are] required to be imposed. The conditions . . . are simply designed to provide the trial court with a suggested listing of the available alternatives which might be desirable in the sentencing of a particular offender. It is anticipated that, in determining the conditions upon which a defendant's [supervision] is to be dependent, the court will review the listed examples . . ., weigh other possibilities suggested by the case, and, after evaluation, impose those that appear to be appropriate under all the circumstances. It is certainly not intended that all the conditions in [18 U.S.C. 3563(b)] be used for every defendant, but rather that conditions be tailored to each defendant to carry out the purposes of [sentencing] in his case.[24]

It may be helpful to provide a more detailed discussion regarding several of the proposed changes. First, the Committee supports the proposal to remove the current standard condition requiring that the defendant "support his or her dependents and meet other family responsibilities." This condition would not be reasonably related to the history and characteristics of the defendant if the defendant had no dependents or family obligations. Additionally, the scope of the term "meet other family responsibilities" is unclear. In fact, the group of probation officers that assisted with the review of standard conditions unanimously agreed that the term is vague leads to uncertain and inconsistent enforcement. Of course, if a probation officer or court determines that a condition requiring support of dependents[25] or the satisfaction of other family responsibilities is necessary, the probation officer and court may recommend and impose such a requirement as a special condition.

Second, the Committee is in favor of the proposal to remove the current standard condition requiring that the defendant "shall refrain from excessive use of alcohol." The Senate report accompanying the Sentencing Reform Act made clear that "[i]t is not intended that this condition . . . be imposed on a person with no history of excessive use of alcohol," and that "[t]o do so would be an unwarranted departure from the principle that conditions . . . should be reasonably related to the general sentencing [factors]."[26] To be sure, alcohol use may in individual cases have a criminogenic effect or inhibit the satisfaction of other conditions such as maintaining employment or supporting families. If a probation officer or court determines that an alcohol restriction condition is necessary, the probation officer and court may recommend and impose such a requirement as a special condition in the individual case.

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[24] S. Rep. No. 98-225, at 94-95 (1983).

[25] This may include children, spouses, ex-spouses, co-parents, or caretakers of dependent children.

[26] *Id*. 97.

It is also noteworthy that the probation officers that assisted with the review of standard conditions unanimously agreed that the current standard condition prohibiting excessive use of alcohol is vague, difficult to enforce, and not valuable as a supervision tool. In fact, the officers opined that it is more common and effective to request alcohol treatment and a complete alcohol ban if it is determined in the individual case that such a condition is reasonably related to the nature and circumstances of the offense and the history and characteristics of the defendant.

Third, the Committee agrees with the proposal to add as a standard condition the requirement that the defendant "not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon."[27] This condition promotes the public safety and reduces safety risks posed to the probation officer. To the extent that the nature and circumstances of the offense or the history and characteristics of the defendant indicate that a prohibition on possessing other types of weapons is necessary, probation officers may recommend a special condition.

Fourth, with regard to the current standard condition requiring that the defendant "answer truthfully" questions of the probation officer, the Commission seeks comment on whether the defendant should "answer truthfully" or, instead, "be truthful when responding to" the questions of the probation officer. The Commission requests feedback on both the policy and Fifth Amendment implications of these options. The purpose of the current "answer truthfully" condition is to build positive rapport and facilitate an open and honest discussion between the probation officer and the defendant. Accurate and complete information about the nature and circumstances of the offense and the history and characteristics of the defendant is necessary to implement effective supervision practices. The probation officer attempts to develop and maintain a positive relationship with the defendant through transparent communication and the implementation of evidence-based correctional practices.[28]

Under Judicial Conference policy, the initial interview with the defendant is focused on orienting the defendant to the supervision process, establishing rapport, exploring the defendant's goals, establishing initial expectations regarding the defendant's conduct and responsibilities, and developing supervision objectives.[29] Through the initial interview and follow-up interviews, the probation officer identifies other members of the defendant's social network who should be interviewed and, as appropriate, enlisted as partners in the supervision process.[30] Family members, friends, and other people who are important to the defendant can be

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[27] A similar weapon prohibition is currently included in the preamble section of the national judgment form and as a special condition in the *Guidelines Manual.* For the proposed standard condition, the term "firearm" is defined at 18 U.S.C. § 921(a)(3). The term "ammunition" is defined at 18 U.S.C. § 921(a)(17)(A). The term "destructive device" is defined at 18 U.S.C. § 921(a)(4). The term "dangerous weapon" is defined as anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person (e.g., nunchakus or tasers).

[28] The Administrative Office has developed a program titled Staff Training Aimed at Reducing Re-Arrest (STARR) to encourage the use of practices demonstrated to reduce recidivism. The STARR skills include specific strategies for active listening, role clarification, effective use of authority, effective disapproval, effective reinforcement, effective punishment, problem solving.

[29] *Guide to Judiciary Policy*, Vol. 8E, § 340.10.

ongoing sources of information for probation officers on emerging risk issues and can support the defendant in accomplishing supervision objectives.[31]

Through follow-up interviews with the defendant, the probation officer also gains additional knowledge about the level and type of supervision required to facilitate desired outcomes.[32] Often, what probation officers learn in the process will require them to arrange additional meetings with the defendant to review the information, discuss objectives that may differ from those explored at the initial interview, and/or provide more detail on the specific requirements of certain conditions.[33] Follow-up interviews also provide opportunities to discuss obstacles to desired outcomes and ways of addressing them and to provide information about what can be expected (and when) in terms of positive incentives for progress and disincentives for lack of progress.[34] Under Judicial Conference policy, probation officers are also to respond immediately to indications of heightened risk by formulating strategies designed to prevent or ameliorate the effects of behavior that is not in compliance with the conditions of supervision. Among the early warning signs that a defendant may be at risk to recidivate are that the defendant is evasive or not truthful.[35]

The Committee believes that a condition requiring that that the defendant "answer truthfully" the questions of probation officers, along with policy guidance directing probation officers how to ensure that Fifth Amendment rights are not violated, satisfies constitutional requirements.[36] The Committee does not support the alternative proposal to require only that the defendant "be truthful when responding to" the questions of the probation officer. Such a condition would interfere with the probation officer's ability to establish open communication with the defendant, and it would allow defendants to refuse to answer questions about compliance with conditions of supervision.[37]

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[30] *Id*. at § 340.30.

[31] *Id*.

[32] *Id*. at § 350.30.

[33] *Id*.

[34] *Id*.

[35] *Id*. at § 370.10.

[36] For an overview of Fifth Amendment issues in the context of federal supervision, including an analysis of the seminal Supreme Court case—*Minnesota v. Murphy*, 465 U.S. 420 (1984)—*see* David N. Adair, *The Privilege against Self-Incrimination and Supervision*, 63 Fed. Probation 73 (June 1999).

[37] For instance, if it is determined that the defendant has several risk factors for recidivism, including negative social networks, antisocial cognitions, and educational or vocational deficits, the probation officer may arrange a meeting with the defendant and ask questions such as: "Who were you hanging out with last night?" "Why were you yelling at your wife?" "Why didn't you go to work today?" If the defendant refuses to answer, and he is subject to a condition to "be truthful when responding" to questions, the probation officer would only be able to note in the file that the defendant refused to answer, criminogenic risk factors would not be addressed, and the court would not be informed. If the defendant is subject to a condition requiring him to "answer truthfully" questions, the probation officer could submit a report to the court that the defendant declined to answer questions. The court could then schedule a hearing and question the offender *in camera* about why he declined to answer the questions. If the

The Commission also requests comment about whether it should clarify that an offender's legitimate invocation of the Fifth Amendment privilege against self-incrimination in response to a probation officer's question shall not be considered a violation of this condition. The Committee supports including such a clarification in the commentary of the *Guidelines Manual*, the *Guide to Judiciary Policy*, and the guidance document that the Committee will consider endorsing at its June 2016 meeting.

In April 2011, the Committee approved this type of guidance for defendants convicted of sex offenses when it endorsed a new sex offender management procedures manual for probation and pretrial services officers. Under the approved guidance, if the defendant refuses to answer a specific question during an interview on the grounds that it is incriminating, the probation officer is instructed not to compel (e.g., through threat of revocation) the defendant to answer the question. If there is uncertainty about whether the invocation of the privilege against self-incrimination is valid (i.e., whether the specific question may lead to a realistic chance of incrimination), the probation officer is instructed to refer the matter to the court to make this determination.[38] The Committee believes that adding this guidance to policies concerning all types of offenders would address any Fifth Amendment concerns without having unintended consequences on the ability of probation officers to effectively supervise defendants.

Finally, the Commission seeks comment on the condition of supervised release requiring that the defendant "shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay any unpaid amount of restitution, fines, or special assessments." This condition is currently listed as a standard condition in the *Guidelines Manual* but not on the national judgment form. The Commission seeks comment on whether this condition should be made a special condition rather than a standard condition. The Committee supports classifying this obligation as a special condition because it may not be applicable in all cases. In many cases, there is no fine or restitution imposed, and the special assessment is paid while the defendant is in the Bureau of Prisons. For those defendants who are released to the community with outstanding criminal monetary penalties, a requirement to notify the probation officer of a change in economic circumstances can be addressed by requesting a special condition or general language in the judgment/restitution order.[39]

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court determines that the invocation of the privilege is not valid because there is no realistic chance of incrimination from the question, the court could instruct the defendant to answer those questions.

[38] For a more thorough description of the guidance in the Sex Offender Management Procedures Manual, Stephen E. Vance, *Looking at the Law: An Updated Look at the Privilege Against Self-Incrimination in Post-Conviction Supervision*, 75 Fed. Probation 33, 37 (June 2011).

[39] *See* 18 U.S.C. § 3572(d)(3) ("A judgment for a fine which permits payments in installments shall include a requirement that the defendant will notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay the fine."); 18 U.S.C. § 3663A(k) ("A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution.").

Proposed Guidance Document

At the national level, some guidance currently exists concerning the imposition of standard and special conditions of supervision. For instance, under 18 U.S.C. §§ 3563(d) and 3583(f), the court is required to direct that the probation officer provide the offender with a written statement that sets forth all the conditions to which the sentence is subject, and that is "sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required." Under Judicial Conference policy, in recommending a unique special condition, probation officers should "ensure that the recommended wording is clear, legally sound, and meets the intended purpose."[40]

The federal supervision model is founded on the conditions of supervision and comprised of strategies that are sufficient, but no greater than necessary, to facilitate achievement of the desired outcomes.[41] Every supervision activity should be related to the statutory purposes for which the term of supervision was imposed and the related objectives established for the individual case.[42] Special conditions are to be sought by probation officers "only when the deprivation of liberty or property they entail are tailored specifically to address the issues presented in the individual case."[43] Before recommending special conditions, probation officers should consider all of the mandatory and standard conditions that may already address a particular risk or need. If the officer determines that the mandatory and standard conditions do not adequately address the defendant's risks and needs, he or she should consider recommending a special condition.[44]

Under Judicial Conference policy, courts are further discouraged from adding additional conditions to the list of standard conditions, such as substance abuse testing and/or treatment, since they impose an obligation on the probation office that has implications for both staffing and funding.[45] When considering special conditions, probation officers should avoid presumptions or the use of set packages of conditions for groups of offenders and keep in mind that the purposes vary depending on the type of supervision. Officers should ask first whether the circumstances in this case require such a deprivation of liberty or property to accomplish the relevant sentencing purposes at this time.[46] For defendants facing lengthy terms of imprisonment, probation officers should consider whether the risks and needs present at the time of sentencing

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[40] *Guide to Judiciary Policy*, Vol. 8D, § 530.20.30(d).

[41] *Id*. at Vol. 8D, § 150(c). *See also* 18 U.S.C. § 3601 (requiring that a person sentenced to probation or supervised release be "supervised by a probation officer to the degree warranted by the conditions specified by the sentencing court").

[42] *Id*. at Vol. 8E, § 420(a).

[43] *Id*.

[44] *Id*. at Vol. 8D, § 530.20.30(a).

[45] *Id*. at § 345.30.10(f).

[46] *Id*. at § 530.20.30(b).

will be present when the defendant returns to the community. In some cases, it may be appropriate to avoid recommending special conditions until such time as the defendant is preparing to re-enter the community from prison.[47]

Despite the existing national guidance, it may be necessary to provide further guidance concerning the language and justification for standard and special conditions to assist the courts with ensuring that condition language is clear and legally sound, providing the required justification for conditions, and providing proper notice to defendants about the types of conditions that may be imposed. AO staff is in the process of finalizing a document to provide guidance to the judges, probation officers, prosecutors, defense attorneys, and other criminal justice practitioners. The document describes the legal authority, model condition language,[48] purpose (including references to criminological research, where applicable), and method of implementation for the standard conditions and most common special conditions. At its June 2016 meeting, the Committee will consider whether to approve the issuance of the new guidance document.

Other Initiatives

There are a number of other Criminal Law Committee initiatives related to the imposition of discretionary conditions of supervision. First, the Committee will assess whether to recommend any changes to policies or procedures to provide defendants with sufficient notice and justification for discretionary conditions before and during the sentencing hearing. Additionally, it will assess whether to endorse or recommend changes policies and procedures regarding the imposition and modification of discretionary conditions at the time the defendant is released from prison. Finally, any changes in condition language, policies, and procedures requires training for effective implementation. The Committee will collaborate with the Federal Judicial Center to provide necessary training for judges and probation officers.

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[47] *Id*. § 530.20.30(b).

[48] While the document includes model language for special conditions that is intended to be clear and legally sound, there may be case law in individual circuits requiring variations from the model language. For instance, circuits vary in the level of specificity required in conditions to prevent over-delegation of authority to probation officers. Each district should fashion special conditions that comport with circuit case law requirements.

Other Proposed Amendments to Sentencing Guidelines

Compassionate Release

The Commission requests comment on whether any changes should be made to the Commission's policy statement at §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons). The Committee defers to the Commission and does not offer any comment about what changes, if any, should be made to the compassionate release policy statement. However, if the Commission determines that it is necessary to expand the range of circumstances that may be considered "extraordinary and compelling reasons" warranting a reduction in the term of imprisonment, the Committee suggests that it consider the effect of any changes on the administration of supervised release in the community. Federal probation officers develop and implement supervision plans for inmates compassionately released to the community. The federal supervision program is designed to address criminogenic risks and needs rather than general medical or geriatric care. Supervision of these offenders poses dramatically different and resource-intensive challenges that should be considered.

It is also noteworthy that the Judicial Conference has approved seeking legislation that would expand the ability to terminate supervision terms early for inmates compassionately released to the community. Although these inmates would make good candidates for early termination of supervision, 18 U.S.C. § 3583 requires that they complete at least one year of supervision and specifies that early termination may occur only when "warranted by the conduct of the defendant released and the interest of justice." Since the supervision program is not designed to address general medical or geriatric care, it makes little policy or financial sense to keep such offenders under supervision. Accordingly, the Committee has recommended, and the Judicial Conference has approved, seeking legislation that permits the early termination of supervision terms, without regard to the limitations in section 3583(e)(1) of title 18, U.S. Code, for an inmate who is compassionately released from prison under section 3582(c) of that title.[49]

Child Pornography Circuit Conflicts

The Commission also requests comments on proposed amendments that address circuit conflicts and application issues that have arisen when applying the guidelines to child pornography offenses. In particular, the proposed amendments resolve circuit conflicts that arise when the offense involves victims who are unusually young and vulnerable and when the offense involves a peer-to-peer file-sharing program or network. Though we defer to the Commission's judgment with regard to the specific amendments, the Committee reiterates the importance of a sentencing guideline system that establishes sentences proportionate to the offense severity. As Judge M. Casey Rodgers testified before the Commission:

> [I]t must be stressed that child sex crimes are gravely serious offenses, involving unspeakable acts by the offenders and unimaginable harm to the child victims, and thus, are deserving of severe punishment. With that understanding, it must also be

[49] JCUS-SEP 13, p. 18.

> recognized that within the spectrum of child sex crimes there are a number of offenses, ranging from child sexual abuse offenses at one end to child pornography offenses at the other, all representing varying degrees of harm and levels of culpability. As a result, the punishment for child sex crimes, while deservingly severe, must be measured and proportionate to the seriousness of the particular offense. Meaningful distinctions must be made between offenders and their conduct as judges attempt to mete out sentences that do justice in each case in light of the statutory range of penalties and the pertinent sentencing factors set forth in the Sentencing Reform Act, which include consultation of the United States Sentencing Commission's *Guidelines Manual*.[50]

Conclusion

Once again, the Criminal Law Committee thanks the Sentencing Commission for providing us the opportunity to comment on proposed changes to the sentencing guidelines. As we have in the past, the members of the Criminal Law Committee look forward to working with the Commission to ensure that our sentencing system is consistent with the central tenets of the Sentencing Reform Act.

[50] *Federal Hearing on Child Pornography Offenses, Hearing Before U.S. Sentencing Commission,* February 15, 2012 (statement of Hon. M. Casey Rodgers).