MICHIGAN EASTERN PROBATION DEPARTMENT RESPONSE TO SELECTED 2016 PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES

On January 15, 2016, the United States Sentencing Commission published its proposed amendments for the 2016 sentencing guidelines. The Sentencing Commission has set a deadline of March 21, 2016, for public comment on the proposed guidelines.

Senior United States Probation Officers Richard Rogala and Lee Sharp, and United States Probation Officers Julie Grewe, Marvin Burns, and Lara Catrell addressed the proposed amendments. The responses were reviewed and approved by Supervising United States Probation Officers Joseph Herd, Charmarie Green, and Thaddeus Dean, and Assistant Deputy Chief United States Probation Officer Anthony Merolla.

Proposed Amendment 2: Compassionate Release

Synopsis of the Proposed Amendment:

In August 2015, the Commission indicated that one of its policy priorities would be "possible consideration of amending the policy statement pertaining to 'compassionate release,' U.S.S.G. §1B1.13. The Commission is publishing this proposed amendment to inform the Commission's consideration of the issues related to this policy priority.

Issues for Comment Relating to Part A:

(1) The Commission seeks comment whether any changes should be made to the Commission's policy statement at U.S.S.G. §1B1.13. Should the Commission amend the current policy statement describing what constitutes "extraordinary and compelling reasons" and, if so, how?

(2) The Commission seeks comment on how, it at all, the policy statement at U.S.S.G. §1B1.13 should be revised to address the recommendations in the OIG report.

(3) Should the Commission further develop the policy statement at U.S.S.G. §1B1.13 to provide additional guidance or limitations regarding the circumstances in which sentences may be reduced as a result of a motion by the Director of the Bureau of Prisons? If so, what should the specific guidance or limitations be?

Probation Department's Response to Part A (1):

As suggested, the list of extraordinary and compelling reasons in the Guidelines Manual should closely track the criteria set for by the Bureau of Prisons in its program statement and examples of what circumstances constitute "extraordinary and compelling reasons." Examples include circumstances in which the Bureau of Prisons has previously released inmates under U.S.S.G.

§1B1.13. The Commission could also further expand the medical and non-medical criteria provided in the Bureau's program statement.

Probation Department's Response to Part A (2):

The Commission should adopt the recommendations in the OIG report as part of its revision of the policy statement at U.S.S.G. §1B1.13 including expanding on the recommendations to revise the Bureau's requirements that limit the availability of compassionate release for aging inmates. The report found that aging inmates make up a disproportionate share of the inmate population, are more costly to incarcerate, engage in less misconduct while in prison, and have a lower re-arrest rate once released. Current Bureau of Prisons policies limit the number of aging inmates who can be considered for early release, and as a result, few are actually released early. In addition, the eligibility requirements for both medical and non-medical provisions as applied to inmates 65 or older are unclear and confusing.

Probation Department's Response to Part A (3):

As suggested, the Director of the Bureau of Prisons should not withhold a motion under 18 U.S.C. § 3582(c)(1)(A) if the defendant meets any of the circumstances listed as "extraordinary and compelling reasons" under U.S.S.G. §1B1.13.

Issues for Comment Relating to Part B:

The proposed amendment would revise the list of "extraordinary and compelling reasons" for compassionate release consideration in the Commentary to U.S.S.G. §1B1.13 to reflect the criteria set forth in the Bureau of Prisons' program statement.

Probation Department's Response to Part B:

The language in this part would parallel the language in the Bureau of Prisons' program statement.

Proposed Amendment 3: Conditions of Probation and Supervised Release

Synopsis of the Proposed Amendment:

This proposal revises, clarifies, and rearranges the conditions of probation and supervised release. It is a result of the Commission's multi-year review of federal sentencing practices relating to conditions of probation and supervised release. Specifically, several of the standard condition have been found to be unduly vague, overbroad, or inappropriately applied. The proposed changes are intended to make the conditions imposed more focused and precise as well as easier for the defendant to understand and probation officers to enforce. The proposed amendment is broken down into three sections:

Issues for Comment Relating to Part A:

U.S.S.G. §§5B1.3 and 5D1.3 set forth mandatory conditions which indicate that the defendant shall make restitution/fine/special assessment payments, and shall adhere to a court-established payment schedule. Therefore, there is no need for a standard or special condition which imposes the same regulation.

Probation Department's Response to Part A:

The probation department for the Eastern District of Michigan routinely utilizes the special condition "The defendant shall make monthly installment payments on any remaining balance of the (restitution, fine, special assessment) at a rate and schedule recommended by the probation department and approved by the Court" in cases where the defendant has been ordered to pay restitution or a fine. However, as stated in the amendment, it is repetitive as the mandatory condition establishes that requirement. Therefore, the probation department for the Eastern District of Michigan supports the amendment.

Issues for Comment Relating to Part B:

The standard and special conditions contained in U.S.S.G. §§5B1.3(c) and 5D1.3(c) have been revised, simplified, and some conditions have been reclassified. Specifically, the "special" condition (possession of a firearm or dangerous weapon) has been moved to the "standard" condition list, and the "standard" condition relating to family responsibility has been moved to the "special" condition list. The standard condition for paying the special assessment has been absorbed by the mandatory condition list, and the standard condition relating to frequenting places where controlled substances are sold is deleted.

Probation Department's Response to Part B:

The probation department supports the change which moves the condition of family responsibility to the "special" condition list and the change which eliminates the standard condition for paying the special assessment (see response to Section 1), and the removal of the

standard condition relating to frequenting places where controlled substances are sold. This standard condition mimics numerous state and local laws and is covered by the mandatory conditions.

However, the probation department disagrees with moving the "special" condition (possession of a firearm or dangerous weapon) to the "standard" condition list. If the goal of the amendment is to revise, clarify, and rearrange conditions of probation and supervised release, then in accordance with the same principle applied in Section 1, "possession of a firearm", in the case of a felony conviction has already been established in the mandatory condition, "The defendant shall not commit another federal, state or local crime". It would appear a condition which prohibits the possession of dangerous weapons (objects designed or used for inflicting bodily harm or physical damage) would offer more clarity. In addition, it would seem appropriate for this special condition to be available (in the case of misdemeanor) if deemed appropriate; however, it is redundant in the case of a felony.

Issues for Comment Relating to Part C:

The amendments add two provisions to the special condition list set forth in U.S.S.G. §§5B1.3(d) and 5D1.3(d). The first provision would add a special condition prohibiting the use or possession of alcohol, and the second provision would add a standard condition which specifies that if a defendant has one or more dependents, or is court-ordered to make child support payments, or to make payments to support a person caring for the child, the defendant must make payments and/or comply with the terms of the order.

Probation Department's Response to Part C:

The probation department in the Eastern District of Michigan routinely utilizes the following special condition: "The defendant shall not use or possess alcohol in any consumable form, nor shall the defendant be in the social company of any person whom the defendant knows to be in possession of alcohol or illegal drugs or frequent an establishment where alcohol is served for consumption on the premises, with the exception of restaurants." Therefore the inclusion of a condition which prohibits the use of alcohol is supported.

The addition of a standard condition which specifies that if a defendant has one or more dependents, or is court-ordered to make child support payments, or to make payments to support a person caring for the child, the defendant must make payments and/or comply with the terms of the order, appears to clarify the "family responsibilities" condition and requires it to be enforced on a case specific status. However, as it is currently worded, any defendant that has child support arrearage would be violation of the standard condition at sentencing. A large number of defendants have child support arrearage and addition of this condition would put them in immediate violation at sentencing or following their release from custody.

Proposed Amendment 5: Child Pornography

Synopsis of the Proposed Amendment:

The proposed amendment is a result of circuit conflicts and application issues which have arisen when applying the guidelines to child pornography offenses. Specifically, the Commission addressed the enhancement for offenses involving unusually young and vulnerable minors as it relates to the specific guideline (§2G2.1; §2G2.2; or §2G2.6) with an additional enhancement under §3A1.1; issues related to the tiered enhancement for distribution in §2G2.2; and the five-level distribution enhancement pursuant to §2G2.2(b)(3)(B). The proposed amendments contain three parts and are as follows:

Issues for Comment Relating to Part A:

The first proposed change adds an additional Application Note to §2G2.1; §2G2.2; and §2G2.6 for offenses involving unusually young and vulnerable minors. Each guideline contains a specific offense characteristic for an enhancement due to age (under 16 years or under 12 years of age); however, as it stands, there is no enhancement for an unusually young or vulnerable victim such as an infant or toddler. The proposed change would allow the Court to apply §3A1.1(b) if the minor's extreme youth and small physical size made the minor especially vulnerable compared to most minors under the age of 12 years.

Probation Department's Response to Part A: The probation department for the Eastern District of Michigan supports the proposed amendment which is consistent with the 9th Circuit Decision in United States v. Wright and the 5th Circuit Decision in United States v. Jenkins. The proposed amendment appears to solidify that the application of the age enhancement does not preclude application of the vulnerable victim adjustment. For ease of application, we believe that additional of a specific offense characteristic for unusually young or vulnerable victim should be considered under §2G2.1, §2G2.2, §2G2.6 or §3A1.1. In addition the proposed amendment takes into consideration the qualifying requirements for the application of §3A1.1(b) as the defendant knew or should have known of the vulnerability.

Issues for Comment Relating to Part B:

The second proposed change relates to the distribution enhancement under §2G2.1(b)(3) and §§2G2.2(b)(3)(A) – (F). The proposed change would provide the two-level enhancement requires "knowing" distribution by the defendant.

Probation Department's Response to Part B:

The probation department is opposed to the proposal. The probation department for the Eastern District of Michigan takes the position that the proposed changes would all but remove the

distribution enhancement entirely. Furthermore, the probation department agrees with the unpublished 6th Circuit Decision in United States v. Conner as there is a "presumption that users of file sharing software understand others can access their files." Additionally, the foundation of peer-to-peer file sharing allows the user to be the provider and the provider to be the administrator. Ultimately, each individual's computer acts similar to a server in that a dedicated server is not required. The end result is each individual user has the ability to monitor or deny access to their server from any other user; therefore, each defendant has the ability to only obtain files and not distribute them.

Issues for Comment Relating to Part C:

The third proposed change revises §2G2.2 (b)(3)(B) to clarify the enhancement applies if the defendant distributed in exchange for any valuable consideration. Specifically, the defendant agreed to an exchange with another person under which the defendant knowingly distributed to the other person for the specific purpose of obtaining something of valuable consideration from the other person, such as other child pornographic material, preferential access to child pornographic material, or access to a child.

Probation Department's Response to Part C:

The probation department for the Eastern District of Michigan supports the proposed amendment which is consistent with the 4th Circuit Decision in United States v. McManus. The Commission essentially requires a higher standard for the five-level enhancement to apply which would help prevent unwarranted sentencing disparities. This would require an overt or specific agreement by both parties.

Proposed Amendment 6: Immigration

Synopsis of the Proposed Amendment:

This proposed amendment is the result of the Commission's study of the guidelines applicable to immigration offenses and related criminal history rules, particularly in response to the recent Johnson decision. The proposed amendment contains two parts. The first revises the alien smuggling guideline at §2L1.1, while the second revises the illegal reentry guideline at §2L1.2.

Probation Department's Comments Regarding Proposed Changes to §2L1.1:

The probation department for the Eastern District of Michigan supports the proposed amendment, under Option 2, at §2L1.1(a). Option 2 adds an alternative Base Offense Level of [16] if the defendant smuggled, transported, or harbored an unlawful alien as part of an ongoing commercial organization. This allows the Court to differentiate between different types of alien trafficking offenses. Further, regarding the proposed amendment regarding smuggling,

transporting, or harboring unaccompanied minors; our district does not encounter enough cases of this type to offer meaningful insight. We agree that the suggested change appears appropriate for that type of case. Our department supports the revision of the definition of minor for purposes of the enhancement under §2L1.1(b)(4).

Our department agrees that the four-level enhancement at §2L1.1(b)(7)(B) adequately accounts for cases in which the offense covered by this guideline involved sexual abuse of an alien who was smuggled, transported, or harbored, as explained in the proposed application note 2.

Probation Department Comments Regarding Proposed Changes to §2L1.2:

Our department agrees with the proposed amendment to subsection (a) of §2L1.2 to provide alternative Base Offense Levels of [14] and [12] if the defendant had one or more prior convictions for illegal reentry offenses under 8 U.S.C. § 1253, § 1325(a), or § 1326, although we question the need, in cases involving defendants without such prior convictions, to increase the otherwise applicable base offense level from 8 to [10]. The alternative base offense levels at subsection (a) apply without regard to whether the prior conviction receives criminal history points.

Our department is concerned that introducing a criminal history dichotomy, based upon the defendant's "first deportation or first order of removal" may serve to unnecessarily complicate the guideline calculations, as this serves to introduce a whole new level of complexity to the offense level computations. Our department envisions disputes about what would constitute a defendant's first deportation or first order of removal. We suggest the previous wording "If the defendant previously was deported, or unlawfully remained in the United States after— "is preferable to establishing a new level of analysis into the offense level computations.

Our department agrees with the principle of considering prior offenses, not on the type of offense (e.g., "crime of violence") but on the length of the sentence imposed for a felony conviction.

Regarding the proposed amendment permitting prior convictions to be considered under subsection (b)(1) only if they receive criminal history points under Chapter Four, our department feels it would be confusing to have different rules regarding the applicability of criminal history, based on age of offense, within the same offense level determination. The rules for use of the criminal history for determination of the offense level should be consistent with the use of the criminal history for determination of the criminal history category. Our department is of the opinion that either the criminal history is stale and should not be scored in offense level and criminal history calculations, or it is sufficiently recent to be applied to both calculations.

Our department suggests that it is unnecessarily punitive to apply complementary criminal history adjustments to the offense level calculations. This system with a pre-conviction/post-conviction criminal history analysis will serve to significantly increase penalties for offenders. While our district agrees with the amendment to the base offense level in §2L1.2, we do not

agree with the suggested changes to the specific offense characteristics in §2L1.2 or in application note §2L1.2, comment (n.(1(B)).

Regarding the Commission's question whether it should amend how the enhancements under §2L1.2 work, our district suggests that the enhancements already contained in §2L1.2 provide sufficient punishment for increasing severe criminal history on the part of defendants. Should the Commission include not only for pre-deportation convictions, but also other aggravating factors relevant to a defendant's culpability, Courts will find themselves in a quagmire similar to child pornography cases, in which they find themselves applying a whole host of specific offense characteristics in the majority of cases, in which there is little variation between cases, and the majority of cases see higher guideline ranges than they have historically.

Our district does not agree with the need to divide a defendant's criminal history into two time periods, in which the first subsection would reflect the convictions that the defendant sustained before his or her first deportation or order of removal, while the second subsection would reflect the convictions that the defendant sustained after that event. Our department finds no advantage to be gained from using a particular deportation or order of removal as the determining event for whether a prior conviction qualifies for an enhancement under subsection (b)(1) or subsection (b)(2). It is unclear to our district why a prior conviction sustained before any deportation would qualify for an enhancement for pre-deportation convictions. This would create confusion in the application of the guidelines when multiple time frames are used.

Our district does not agree with deleting the departure based on time served in state custody.

Our district agrees that, in the event that the Commission does not promulgate the proposed amendment, and retains the term "crime of violence" in §2L1.2, the Commission should incorporate all of the changes to the definition of "crime of violence" provided in the recently amended §4B1.2 into §2L1.2, in order to make §2L1.2 conform to the new definition in §4B1.2(a), for consistency.