



## Help Me Help You: An Answer to the Circuit Split Over the Delegation of Post- Sentence Judicial Authority to Probation Officers

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### I. INTRODUCTION

Our criminal system routinely deals with such matters as the life and death and intertwined fates of criminals and their victims. Other than lawyers, judges, and the defendants and victims themselves, there is perhaps no one more intimate with the application of criminal justice than the probation officer. These “eyes and ears of the court”<sup>1</sup> are given considerable responsibility in two phases of the criminal justice process.<sup>2</sup> First, they are utilized between conviction and sentencing to conduct a pre-sentence investigation that, almost exclusively, is relied on by the court to determine the appropriate sentence for the defendant.<sup>3</sup> Next, the probation officer is responsible, among other things, for “aid[ing] [the] probationer . . . to bring about improvements in his conduct and condition.”<sup>4</sup> Other than the judges and juries, is there anyone so bound up with the fate of defendants than the probation officer?

Currently, a split among the circuit courts of appeals exists regarding the appropriate degree of delegable “judicial authority” to a probation officer during the post-sentence time-period.<sup>5</sup> Probation

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1 Nancy Glass, *The Social Workers of Sentencing? Probation Officers, Discretion, and the Accuracy of Presentence Reports under the Federal Sentencing Guidelines*, 46 No. 1 CRIM. L. BULL. ART 2 (2010).

2 See *infra* text accompanying notes 31-34.

3 See Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 174 (1991).

4 18 U.S.C. § 3603(3) (1996).

5 See *United States v. Turpin*, 393 F. App'x 172, 173(5th Cir. 2010) (citing *United States v. Johnson* 48 F.3d 806, 808 (4th Cir. 1995)). The Fifth Circuit noted a split in the circuit court of appeals as to whether it is appropriate for the district courts to delegate “judicial authority” to probation officers. *Id.* See also cases cited *infra* notes 49, 51; *Ex*

officers could be given limitless discretion to modify the offender's sentence in light of changing circumstances.<sup>6</sup> Conversely, officers could be given no authority to modify, change, or adapt the sentence, leaving no option but to apply for court-ordered modification.<sup>7</sup> Of course, as this Comment proposes, the proper amount of authority that should be delegated lies between these extremes.<sup>8</sup>

This issue has grown and will continue to grow in importance to the courts because the correctional population is getting significantly larger.<sup>9</sup> Between 1980 and 2007, the total estimated correctional population increased by 297%, from 1,840,400 to 7,300,000, most of which were on probation or parole.<sup>10</sup> In light of the increasing number of probationers and the already overworked judiciary, probation officers should be given the greatest permissible flexibility to respond to the needs of the offender and the needs of the community for which the officer serves.<sup>11</sup> Moreover, for probation officers to fulfill their duty to facilitate the offender's post-incarceration sentence, they must know and understand the parameters of their authority.<sup>12</sup> It is important, therefore, that courts be clear and unambiguous when they delegate authority to probation officers. This clarity will enable probation officers to satisfy the needs of the probationer and the safety needs of the community.<sup>13</sup>

This Comment will address how much post-sentencing authority, if any, courts should delegate to a probation officer to determine the

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*Parte* United States, 242 U.S. 27, 41 (1916) (stating that sentencing is a core judicial function).

6 As discussed later in this Comment, none of the circuit courts of appeals to address the issue believe the probation officer should have limitless authority to modify offenders' sentences. See cases cited *infra* notes 49-51 and accompanying text.

7 A majority of the circuit courts of appeals espouse this view. See cases cited *infra* note 51.

8 See *infra* Part III.A-F; see also cases cited *infra* notes 49, 51. Although this Comment will not address the constitutional issues implicated by grants of judicial authority to probation officers, a brief discussion would be helpful to the reader. Article III of the United States Constitution grants courts authority over the adjudication of "cases and controversies." See U.S. CONST. art. III, § 2. When a court grants any authority to non-judicial officers, the delegation must not violate the constitutional limitation contained in the Article III "cases and controversies" clause. *Id.*

9 See Heather Barklage, *Probation Conditions Versus Probation Officer Directives: Where the Twain Shall Meet*, 70-DEC. FED. PROBATION 37 (2006); *Study: 7.3 Million in U.S. Prison System in '07*, CNN JUSTICE (Mar. 2, 2009), [http://articles.cnn.com/2009-03-02/justice/record.prison.population\\_1\\_prison-system-prison-population-corrections?\\_s=PM:CRIME](http://articles.cnn.com/2009-03-02/justice/record.prison.population_1_prison-system-prison-population-corrections?_s=PM:CRIME).

10 See Barklage, *supra* note 9; *U.S. Prison System*, *supra* note 9.

11 See *United States v. Knight*, 534 U.S. 112, 119 (2001) (stating that "primary goals of probation" are "rehabilitation and protecting society from future criminal violations"); see also *United States v. Weinberger*, 268 F.3d 346, 362 (6th Cir. 2001) (Cohn, J., concurring).

12 See generally 18 U.S.C. § 3603(3) (1996).

13 See generally Barklage, *supra* note 9.

contours of a defendant's sentence.<sup>14</sup> More specifically, this Comment will address the most effective way to resolve the circuit split over whether it is appropriate to delegate to the probation officer "judicial" authority to be used during the post-sentence period.<sup>15</sup> Part II of this Comment examines the probation officer by focusing on his pre-sentence duties as investigator and his authority in the sentencing process. Part III of this Comment analyzes the split among the circuit courts of appeals as to whether it is appropriate for district courts to delegate judicial authority to probation officers.<sup>16</sup> The majority of the circuits have held that delegation of sentencing authority to the probation officer is impermissible,<sup>17</sup> while the minority side of the split maintains that courts can delegate sentencing authority to the probation officer in certain limited ways.<sup>18</sup>

Finally, the Analysis section of this Comment posits a solution to the circuit split, arguing that courts should delegate to probation officers the authority to determine, within a range, the timing, amount, and monthly installment restitution payments as well as the number of drug tests and mental health treatments to which the offender must submit.<sup>19</sup>

## II. BACKGROUND

As noted, several circuit courts of appeals have addressed the issue of whether it is proper to delegate judicial post-sentencing authority to probation officers, and, of course, not all of them agree on the proper delegation of authority to the probation officer post-sentencing.<sup>20</sup> To get a better grasp, and to get up to speed on what issues the court must sift through in making the determination of whether delegation is proper, this Comment discusses the role and function of the probation officer before delving into the circuit split and the circuits' differing reasoning.

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<sup>14</sup> See *infra* Part III.

<sup>15</sup> This Comment will not include an in-depth discussion of the constitutional underpinnings and issues relating to the Article III's "cases and controversies" grant of authority to courts and that clause's limitations on grants of authority to non-judicial officers. This constitutional issue is avoided because this Comment's assertion leaves ultimate decision-making authority with the court and recommends that courts sentence the maximum restitution and the number of tests or treatments, and sees no problem with setting a maximum and minimum amount of restitution or number of drug tests or treatment sessions, thereby creating a range outside of which the probation officer cannot exercise authority.

<sup>16</sup> See *infra* Part II.C.

<sup>17</sup> See cases cited *infra* note 51.

<sup>18</sup> See cases cited *infra* note 49.

<sup>19</sup> See *infra* Part III.A-E.

<sup>20</sup> See cases cited *infra* notes 49, 51.

First, this section will detail the general statutory duties of the probation officer, on which all the circuits agree.<sup>21</sup> Generally, the probation officer is tasked with supervising the defendant post-sentence and aiding his rehabilitation, but the probation officer also exercises an important pre-sentence authority.<sup>22</sup> Accordingly, the pre-sentencing investigatory role of the probation officer is then explored through a focus on the pre-sentence report developed by the probation officer. Lastly, this section explains the existing circuit split between the majority group of circuits that hold that the delegation of judicial authority to the probation officer is impermissible<sup>23</sup> and a minority group that holds that limited delegation is permissible in particular circumstances.<sup>24</sup>

#### A. *Duties of the Probation Officer*

The duties of a probation officer are defined statutorily.<sup>25</sup> Officers are charged with the duty to (1) “instruct a probationer or a person on supervised release, who is under the officer’s supervision, as to the conditions specified by the sentencing court;”<sup>26</sup> (2) “use all suitable methods, not inconsistent with the conditions specified by the court, [(3)] to aid a probationer or a person on supervised release who is under his supervision; and [(4)] to bring about improvements in his conduct and condition. . . .”<sup>27</sup> Additionally, the officer must “perform any other duty that the court may designate.”<sup>28</sup>

Inevitably, the court’s authority to delegate to the probation officer duties other than those explicitly listed in the statute has greatly increased the officers’ role.<sup>29</sup> In most criminal cases, the probation officer furnishes information, conducts investigations, and submits a presentence report (PSR) based on his findings to the court.<sup>30</sup> In some jurisdictions, probation officers can make arrests when the power to do so is “incidental or necessary to the performance of the officer’s duties.”<sup>31</sup> Furthermore, in spite of the fact that probation officers do not

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21 See *infra* Part II.A.

22 See *infra* text accompanying notes 34-47.

23 See *infra* text accompanying note 51.

24 See *infra* text accompanying note 49.

25 See generally 18 U.S.C. § 3603 (1996).

26 See 18 U.S.C. § 3603(1) (1996).

27 *Id.* § 3603(3).

28 *Id.* § 3603(10).

29 See *id.* § 3603(10) (giving the sentencing court virtually carte blanche power to delegate duties to the probation officer not explicitly listed in the statute) The officer must “perform any other duty that the court may designate.” *Id.*

30 See 21 C.J.S. *Courts* § 141 (2010).

31 *Id.* (citing State *ex rel.* Hall v. Monongalia Cnty. Ct., 96 S.E. 966 (1918)).

have a duty to prevent probationers from harming others,<sup>32</sup> when an officer is charged with monitoring a probationer to maintain compliance with the terms of his sentence, a duty of reasonable care may be applied during the supervision of the probationer if he poses a reasonably foreseeable danger to others.<sup>33</sup>

### *B. Investigatory Function of the Probation Officer*

The probation officer, in his investigatory role, has been called the “eyes and ears of the court[.]”<sup>34</sup> and in most cases, the court does not question the perception of the probation officer.<sup>35</sup> Probation officers write a PSR for the court that includes “related cases, . . . [the defendant’s] impact on victims, . . . defendant’s criminal history and personal characteristics . . . ‘significant problems’ in the family history, marital status, children, physical and mental health, history of alcohol or drug abuse, . . . and financial status.”<sup>36</sup>

Probation officers are bound by the rules of criminal procedure dealing with presentence reporting.<sup>37</sup> Federal Rule of Criminal Procedure 32<sup>38</sup> states that the probation officer is treated as a neutral party who is particularly and specially situated to report to the court any information pertinent to the court’s sentencing analysis.<sup>39</sup> The probation officer decides what facts will be included in the PSR, and the court

32 See *id.* (2010) (citing *McIntyre v. St. Tammany Parish Sheriff*, 844 So. 2d 304 (La. Ct. App. 2003)).

33 See *id.* (citing *Bishop v. Miche*, 973 P.2d 465 (1999)).

34 Glass, *supra* note 1.

35 See Heaney, *supra* note 3, at 168-69.

36 Glass, *supra* note 1.

37 See *id.*

38 FED. R. CRIM. P. 32(c), (d). “The probation officer must conduct a presentence investigation and submit a report to the court before it imposes [a] sentence. . . .” *Id.* The presentence report must:

identify all applicable guidelines and policy statements of the Sentencing Commission; . . . calculate the defendant’s offense level and criminal history category; . . . state the resulting sentencing range and kinds of sentences available; . . . identify any factor relevant to . . . the appropriate kind of sentence, or . . . the appropriate sentence within the applicable sentencing range[.] . . . and contain . . . the defendant’s history and characteristics, including . . . any prior criminal record[.] . . . the defendant’s financial condition[.] and . . . any circumstances affecting the defendant’s behavior that may be helpful in imposing sentence or in correctional treatment[.] . . . information that assesses any financial, social, psychological, and medical impact on any victim; . . . [and] when the law provides for restitution, information sufficient for a restitution order[.]

*Id.*

39 See Glass, *supra* note 1.

ordinarily accepts the officer's version of the facts and his sentencing range calculations.<sup>40</sup>

Each district takes a different approach in how it assigns presentence investigation reports to its officers.<sup>41</sup> In some, probation officers are "presentence specialists" and work only on PSRs, while in others officers supervise offenders in addition to writing the occasional report.<sup>42</sup> In other districts, the officers receive PSR assignments on a rotating basis.<sup>43</sup>

When preparing the PSR, the officer does not simply recite the government's or the offender's version of the story but "makes the value judgments necessary to reach [legal] and factual conclusions."<sup>44</sup> Since the Sentencing Guidelines were enacted, legal analysis has become an integral part of the probation officer's presentence investigation because the officer must apply the law to the facts of the case to calculate the recommended sentence portion of the PSR.<sup>45</sup>

In a majority of cases, the court accepts the PSR and its recommended sentence range.<sup>46</sup> The sentencing guidelines, therefore, have shifted discretion and some sentencing power to the probation officer, placing the power to frame, and sometimes resolve, factual disputes in the officer's hands.<sup>47</sup>

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40 See Heaney, *supra* note 3, at 168-69; see also Gregory W. Carman & Tamar Harutunian, *Fairness at the Time of Sentencing: The Accuracy of the Presentence Report*, 78 ST. JOHN'S L. REV. 1, 1 (2004) (citing *United States v. Cesaitis*, 506 F. Supp. 518, 520-21 (E.D. Mich. 1981)); Timothy Bakken, *The Continues Failure of Modern Law to Create Fairness and Efficiency: The Presentence Investigation Report and Its Effect on Justice*, 40 N.Y.L. SCH. L. REV. 363, 364 (1996); Keith A Findley & Meredith J Ross, *Comment, Access, Accuracy and Fairness: The Federal Presentence Investigation Report Under Julian and the Sentencing Guidelines*, 1989 WIS. L. REV. 837, 837-38 (1989).

41 See Heaney, *supra* note 3, at 200.

42 See *id.*

43 See *id.*

44 See *id.* at 173; see also Glass, *supra* note 1.

45 See FED. R. CRIM. P. 32(c). The probation officer must "calculate the defendant's offense level and criminal history category . . . [and] state the resulting sentencing range and kinds of sentences available. . . ." *Id.* See also Glass, *supra* note 1.

46 See Heaney, *supra* note 3, at 174.

47 See *id.* at 200. The PSR also plays an important role in the defendant's fate after sentencing and during incarceration. See Glass, *supra* note 1. The Bureau of Prisons (BOP), in determining the defendant's confinement conditions, relies heavily on the PSR. *Id.* When sentenced to imprisonment, the prisoner is immediately classified, dictating the prisoner's "level of security, access to programs, and privileges during confinement." *Id.* Drawing extensively from the PSR to make factual determinations, the BOP classifies the prisoner based on certain factors, including those designated as public safety factors such as sex offender status or belonging to a gang. *Id.* (citing U.S. DEPT. OF JUSTICE, BUREAU OF PRISONS, Program Statement P5100.08, 5-12 (Sept. 2006), available at [http://www.bop.gov/policy/progstat/5100\\_008.pdf](http://www.bop.gov/policy/progstat/5100_008.pdf)).

Strikingly, even deviant sexual conduct for which the prisoner has not been convicted, but that is "clearly indicate[d]" in the PSR, can be the basis for classifying the

### C. Circuit Split

This Section discusses the circuit split over delegation of judicial authority to probation officers using the courts' analyses and language. The circuit courts of appeals can be divided into two distinct categories with respect to the propriety of the delegation of judicial authority.<sup>48</sup> Comprising the minority position, the Sixth, Ninth, and Eleventh Circuits have held consistently that it is permissible to delegate to the probation officer the authority to determine, within a range, the total amount of restitution to be paid by the defendant based on his or her circumstances during the post-sentence period.<sup>49</sup> Additionally, the Eleventh Circuit has held that the court may delegate to the probation officer the authority to determine the amount of drug tests, within a range, to which the offender must submit.<sup>50</sup>

To the contrary, the Second, Third, Fourth, Fifth, and Seventh Circuits have held that the court must, pursuant to its Article III duties, set details of restitution, including the total, the timing, and the schedule of monthly installments.<sup>51</sup> Additionally, the Second and Third Circuits have held it impermissible to delegate to the probation officer the authority to determine whether the offender must attend mental or other

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prisoner with a "sex offender" public safety factor, relegating him to confinement somewhere other than a prison camp, possibly a high security facility. *Id.* Interestingly, in response to the BOP's reliance on PSRs, the Advisory Committee to the Federal Rules of Criminal Procedure recommended amending Rule 32 to include a provision requiring courts to rule on all factual disputes at sentencing. *See* FED. R. CRIM. P. 32 advisory committee's note ("The amendment was considered because an unresolved objection that has no impact on determining a sentence under the Sentencing Guidelines may affect other important post-sentencing decisions. For example, the [BOP] consults the [PSR] in deciding where a defendant will actually serve his or her sentence of confinement."). The advisory committee rejected the proposed amendment citing the fact that it would "unduly burden[]" the court. *See id.* The advisory committee's rejection is important to note because it implies congressional acquiescence to the exercise of authority by non-judicial officers post-sentence in determining the fate of the offender. *See id.*

48 *See* cases cited *infra* notes 49-51 and accompanying text.

49 *See* *United States v. Weinberger*, 268 F.3d 346, 359-60 (6th Cir. 2001) (citing *United States v. Gray*, 121 F.3d 710, at \*4 (6th Cir. 1997) (per curiam) (unpublished)); *see also* *United States v. Fuentes*, 107 F.3d 1515, 1528 n.25 (11th Cir. 1997) (citing *United States v. Stinson*, 97 F.3d 466, 468 n.1 (11th Cir. 1996)); *United States v. Barany*, 884 F.2d 1255, 1260 (9th Cir. 1989) (citing *United States v. Signori*, 844 F.2d 635, 642 (9th Cir. 1988)).

50 *See* *United States v. Melendez-Santana*, 353 F.3d 93, 103 (1st Cir. 2003).

51 *See* *United States v. Coates*, 178 F.3d 681, 684-85 (3d Cir. 1999); *see also* *United States v. Miller*, 77 F.3d 71, 78 (4th Cir. 1999); *United States v. Mohammed*, 53 F.3d 1426, 1438-39 (7th Cir. 1995), *overruled by* *United States v. Sawyer*, 521 F.3d 792, 792 (7th Cir. 2008) (overruling *Mohammed* on grounds different from which I have cited the case); *United States v. Porter*, 41 F.3d 68, 71 (2d Cir. 1994); *United States v. Albrow*, 32 F.3d 173, 174 n.1 (5th Cir. 1994).

treatment sessions, or how many of these sessions they must attend.<sup>52</sup> One note of dissonance is worth mentioning, however. The Seventh Circuit, which forbids the delegation of restitution authority to a probation officer, allows the delegation of authority to the probation officer to determine, within a range, the number of drug tests an offender must submit to during supervised release.<sup>53</sup>

# 1. The Pro-Delegation Circuits: The Sixth, Ninth, and Eleventh Circuit Courts of Appeals

The circuits discussed in this section are amenable to limited delegations of judicial authority to probation officers for use during the probationary period.

## a. Sixth Circuit

In *Weinberger v. United States*,<sup>54</sup> the defendant, convicted of mail fraud and tax evasion, was sentenced to forty-one months of imprisonment, followed by three years of supervised release and over a million dollars in restitution payments.<sup>55</sup> Knowing that payment would not be made immediately, the court stipulated that after being released from prison, the defendant must make the restitution payments “according to an installment plan developed by the defendant and his probation officer.”<sup>56</sup> The defendant argued on appeal that the district court erred by delegating the terms of his restitution installment plan to the probation office.<sup>57</sup>

Citing two unpublished opinions in its circuit,<sup>58</sup> the Sixth Circuit Court of Appeals held that the district court acted properly when it set the total amount of restitution and delegated determination of the

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52 See *United States v. Pruden*, 398 F.3d 241, 251 (3d Cir. 2005); see also *United States v. Allen*, 312 F.3d 512, 516 (1st Cir. 2002) (“When we examine the record, it becomes evident that Judge Hornby was merely directing the probation officer to perform ministerial support services and was not giving the officer the power to determine whether Allen had to attend psychiatric counseling. . . . The extensive evidence of Allen’s mental illness indicates that the court was imposing mandatory counseling and delegating the administrative details to the probation officer, actions constituting a permissible delegation.”); *United States v. Peterson*, 248 F.3d 79, 85 (2d Cir. 2001).

53 See *United States v. Tejada*, 476 F.3d 471, 472 (7th Cir. 2007).

54 *Weinberger v. United States*, 268 F.3d 346 (6th Cir. 2001).

55 See *id.* at 350.

56 *Id.* at 359.

57 See *id.* at 358.

58 See *United States v. Gray*, 121 F.3d 710, at \*4 (6th Cir. 1997) (per curiam) (unpublished); *United States v. Ferguson*, 98 F.3d 1343, at \*5 (6th Cir. 1996) (unpublished table decision).



payment schedule to the probation officer.<sup>59</sup> The court held that as long as the district court sets the total amount of restitution to be paid by the defendant, it does not “abrogate its judicial authority when it delegates the setting of a restitution-payment schedule” to the probation officer.<sup>60</sup> The court further explained that it retains the authority to “revoke or modify any condition of probation” after the probation officer makes a decision regarding the restitution schedule and before the probationary period ends.<sup>61</sup>

In his concurrence, Senior District Judge Cohn emphasized the practical and functional importance of the court’s ability to delegate some authority to determine the schedule of restitution payments to the probation officer.<sup>62</sup> He cited the presentence investigatory role of probation officers and a judge’s general deference to the probation officer’s findings and recommendations as evidence that the sentencing roles of the probation officer and the judge are already deeply intertwined.<sup>63</sup>

Furthermore, Judge Cohn argued that in all practicality the judge has no way of knowing at sentencing what the defendant’s financial condition will be years into the future, especially if he must serve time in jail in the interim.<sup>64</sup> In fact, he stated that “[t]he defendant’s evolving ability to pay is best known by the probation officer during

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59 See *Weinberger*, 268 F.3d at 359-60. The Sixth Circuit held “that the district court acted properly by setting the total amount of restitution Weinberger is required to pay and by delegating the schedule of payments to the Probation Office.” *Id.*

60 See *id.* (quoting *Gray*, 121 F.3d 710, at \*4).

61 *Id.* at 360 (quoting 18 U.S.C. § 3651 (repealed 1987)). The court notes in n.4 that at the time of the opinion, 18 U.S.C. § 3651 had been repealed. *Id.* at 360 n.4. It also notes, however, that the current 18 U.S.C. § 3563(c) (2008) includes similar language:

The court may modify, reduce, or enlarge the conditions of probation at any time prior to the expiration or termination of the term of probation, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the conditions of probation.” Federal Rule of Criminal Procedure 32.1(b) gives the procedures for the modification of probation stating, “A hearing and assistance of counsel are required before the term or condition of probation . . . can be modified, unless the relief to be granted to the person on probation . . . upon the person’s request or the court’s own motion is favorable to the person, and the attorney for the government, after having been given notice of the proposed relief and a reasonable opportunity to object, has not objected. An extension of the terms of probation . . . is not favorable to the person for the purposes of this rule.

FED. R. CRIM. P. 32.1(b).

62 See *Weinberger*, 268 F.3d at 362 (Cohn, J., concurring).

63 See *id.*

64 See *id.* at 363.

supervision.”<sup>65</sup> Judge Cohn also cited the legislative history of 18 U.S.C. § 3572,<sup>66</sup> which states that the statute was intended to “eliminate[] the . . . requirement that the specific terms of an installment schedule [] be fixed by the court. In the Sixth Circuit, the court is thus able to delegate the responsibility for setting specific terms to a probation officer.”<sup>67</sup>

b. Ninth Circuit

Similarly, the Ninth Circuit Court of Appeals has taken a practical approach to the delegation of sentencing authority to the probation officer and allows the officer to determine the manner of restitution payment in light of the offender’s post-sentence financial situation.<sup>68</sup> In *United States v. Barany*,<sup>69</sup> the Ninth Circuit held that the court must determine the amount of restitution that the defendant must pay, and that the sentencing court may delegate the authority to determine the defendant’s ability to pay and the timing and manner of payment to the probation officer.<sup>70</sup>

The Ninth Circuit appears to be the most amenable to delegations of sentencing authority to the probation officer. For example, in *United States v. Bowman*<sup>71</sup> the defendant appealed a condition on his supervised release received after pleading guilty to possession of child pornography.<sup>72</sup> The challenged delegation authorized the probation officer to “determine, in consultation with the treatment counselor, whether to recommend that Bowman be allowed to have *unsupervised* contact with his son and grandson. . . .”<sup>73</sup>

Referencing the sentencing transcript, the Ninth Circuit held that there was not an improper delegation of its sentencing authority to the probation officer because the district court had expressly retained final

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65 *Id.* (quoting *Criminal Monetary Penalties: A Guide to the Probation Officer’s Role IV-1*, Monograph 114, Federal Corrections and Supervision Division, Administrative Office of the United States Courts).

66 18 U.S.C. § 3572 (1996). This statute gives the power to courts to sentence defendant’s to restitution. *See id.*

67 *Weinberger*, 268 F.3d at 363 (Cohn, J., concurring) (quoting H.R. REP. NO. 100-390, at 7 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2137, 2143).

68 *See* *United States v. Barany*, 884 F.2d 1255, 1260 (9th Cir. 1989).

69 *See id.*

70 *See id.* at 1260. Although the court relied on the text of a statute that was later amended to support its holding, 18 U.S.C. § 3663-3664 (1994), *amended by* 18 U.S.C. § 3556, 3663-3664 (2000), the analysis would be the same under the current version of the statute, the Mandatory Victims Restitution Act of 1996. 18 U.S.C. § 3556, 3663-3664 (2000).

71 *United States v. Bowman*, 175 F. App’x 834 (9th Cir. 2006) (unpublished).

72 *Id.* at 836.

73 *Id.* at 838.

authority to modify the order.<sup>74</sup> In addition to the express reservation of authority by the district court, the court noted that the defendant was free to seek relief under 18 U.S.C. § 3583(e)(1)<sup>75</sup> if the probation officer unfairly or arbitrarily denied him a fair recommendation.<sup>76</sup>

The Eleventh Circuit Court of Appeals holds similarly by allowing the probation officer to have some judicial authority.<sup>77</sup> The Eleventh Circuit permits district courts to delegate the authority to probation officers to set the offender's restitution payment schedule in light of his ability to pay.<sup>78</sup>

c. Eleventh Circuit

In *United States v. Fuentes*,<sup>79</sup> the Eleventh Circuit reviewed a claim by the defendant that the district court impermissibly delegated the duty to set a payment schedule for restitution to the probation officer.<sup>80</sup> The Eleventh Circuit relied on circuit precedent and held that delegating the authority to set restitution payment schedules is permissible.<sup>81</sup>

In *United States v. Heath*,<sup>82</sup> the defendant pled guilty to one count of distributing crack cocaine and was sentenced to eighty-four months of imprisonment and five years of supervised release.<sup>83</sup> The district court placed the following condition on the defendant's supervised release: "The defendant shall participate if and as directed by the probation officer in such mental health programs as recommended by a psychiatrist or psychologist . . . [and] outpatient treatment, and psychotropic medications as prescribed by a doctor."<sup>84</sup> The defendant challenged this condition, contending that it was an impermissible delegation of judicial

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74 See *id.* (citing *United States v. Stephens*, 424 F.3d 876, 880 (9th Cir. 2005) (explaining that "where the court makes the determination of *whether* a defendant will be subjected to the condition, it is permissible to delegate to the probation officer the details of where and when the condition will be satisfied")).

75 18 U.S.C. § 3583(e)(1) (2008) ("The court may . . . (1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice. . . .").

76 See *Bowman*, 175 F. App'x at 838.

77 See *United States v. Fuentes*, 107 F.3d 1515, 1529 n.25 (11th Cir. 1997).

78 See *id.*

79 *United States v. Fuentes*, 107 F.3d 1515 (11th Cir. 1997).

80 See *id.* at 1528-29.

81 See *id.* (citing *United States v. Stinson*, 97 F.3d 466, 468 n.1 (11th Cir. 1996)).

82 *United States v. Heath*, 419 F.3d 1312 (11th Cir. 2005).

83 *Id.* at 1312.

84 *Id.* at 1314.

authority to the probation officer in violation of Article III of the Constitution.<sup>85</sup>

The Eleventh Circuit held that the district court improperly vested the probation officer with the final decision-making authority as to whether the defendant would participate in a mental health program.<sup>86</sup> Therefore, the circuit court held that the court must decide whether the defendant will participate in mental health treatment, but the probation officer may be given the authority to determine related administrative details.<sup>87</sup>

## 2. The Anti-Delegation Circuits: The Second, Third, Fourth, Fifth, and Seventh Circuit Courts of Appeals

The circuits discussed in this section generally hold that the delegation of judicial authority to a probation officer for use during the probationary period is impermissible.

### a. Anti-Delegation: Restitution Case Law

This sub-section discusses the case law from several circuits regarding the delegation of judicial authority to probation officers in the area of restitution. The cases discussed give an overview of the current thinking from circuits that hold such delegations are impermissible and unwise.

In *United States v. Porter*,<sup>88</sup> the Second Circuit held that it is not permissible for the sentencing court to delegate to the probation officer the authority to determine the amount of restitution that must be paid, even when the court has given the maximum amount, nor can the court delegate the authority to schedule restitution installment payments or the installment amount.<sup>89</sup>

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<sup>85</sup> See *id.* at 1315.

<sup>86</sup> See *id.* at 1315.

<sup>87</sup> See *id.*; see also *United States v. Fields*, 324 F.3d 1025 (8th Cir. 2003). In *Fields*, the defendant pled guilty to selling child pornography over the internet and was sentenced to prison time as well as supervised release. *Id.* at 1026. One condition of supervised release did not allow the defendant to possess a computer unless he received permission from his probation officer to do so. *Id.* On appeal, the Eighth Circuit upheld the special condition and found nothing improper in delegating to the probation officer the authority to decide, during supervised release, whether the defendant could have a computer. *Id.* at 1027-28.

<sup>88</sup> *United States v. Porter*, 41 F.3d 68 (2d Cir. 1994).

<sup>89</sup> See *id.* at 71 (2d Cir. 1994); accord *United States v. Coates*, 178 F.3d 681, 684-85 (3d Cir. 1999) (citing *United States v. Graham*, 72 F.3d 352, 357 (3d Cir. 1995) (holding that "the fixing of restitution payments is a judicial act that may not be delegated to a probation officer")); *United States v. Mohammed*, 53 F.3d 1426, 1438-39 (7th Cir. 1995), overruled by *United States v. Sawyer*, 521 F.3d 792, 792 (7th Cir.

In *United States v. Miller*,<sup>90</sup> the Fourth Circuit held, similarly to the Second, Third, Fifth, and Seventh Circuits, that a district court may not delegate to the probation officer the final authority to set the amount and timing of restitution payments unless the court retains “ultimate authority” over the probation officer’s decisions.<sup>91</sup> This holding seems to let in a glimmer of light that the district courts in this circuit could cling to in order to delegate this authority.<sup>92</sup> However, the *Miller* court then severely limited any possibility that the probation officer could be delegated sentencing authority by defining “ultimate authority” to mean “all and final authority[,]” meaning that the probation officer could only “recommend restitutionary decisions for approval by the court.”<sup>93</sup> The authority to recommend restitution modification to the court is effectively no authority at all.<sup>94</sup> Essentially, the court retained all of the post-sentencing decision-making authority for itself.<sup>95</sup>

b. Anti-Delegation: Treatment Regime Case Law

In *United States v. Peterson*,<sup>96</sup> the Second Circuit reviewed the defendant’s challenge to a condition on his probation that stated “[t]he defendant is to enroll, attend and participate in mental health intervention specifically designed for the treatment of sexual predators *as directed by the U.S. Probation Office*.”<sup>97</sup> The court opined that if the sentence

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2008) (overruling *Mohammed* on grounds other than those for which *Mohammed* is cited in this Comment); *United States v. Albro*, 32 F.3d 173, 174 n.1 (5th Cir. 1994) (holding that “[w]hile the district court may alter the payment schedule under 18 U.S.C. § 3663(g) and is free to receive and consider recommendations from the probation officer in this regard, the district court must designate the timing and amount of payments”).

90 *United States v. Miller*, 77 F.3d 71 (4th Cir. 1999).

91 *See id.* at 78 (citing *United States v. Johnson* 48 F.3d 806, 808-09 (4th Cir. 1995)). In *Johnson*, the court was faced with the question of whether a sentence may, in accordance with 18 U.S.C. § 3603(10), delegate authority to the probation officer to determine, within the range given by the court, the total amount of restitution to be paid and the individual installment amount above the court-ordered minimum payment of \$100. *Johnson*, 48 F.3d at 808. The court held that while the statute does give the court the discretion to assign probation officers such duties as the court directs, see 18 U.S.C. § 3603(10) (1996), the type of duty that the court may delegate is limited by Article III’s, U.S. CONST. art. III, § 2, implied prohibition on delegating cases or controversies to nonjudicial officers. *Johnson*, 48 F.3d at 808. Put succinctly, the court held that courts may use probation officers to support judicial functions, as long as the court retains and exercises ultimate responsibility. *Id.* at 809 (citing *Ex Parte United States*, 242 U.S. 27, 41 (1916); *Whitehead v. United States*, 155 F.2d 460, 462 (6th Cir. 1946)).

92 *See Miller*, 77 F.3d at 78 (citing *Johnson*, 48 F.3d at 808-09).

93 *See id.*

94 *See United States v. Weinberger*, 268 F.3d 346, 363 (6th Cir. 2001) (Cohn, J., concurring).

95 *See Miller*, 77 F.3d at 78.

96 *United States v. Peterson*, 248 F.3d 79 (2d Cir. 2001).

97 *See id.* at 84-85.

language meant that the defendant was required to participate in mental health treatment when directed to do so by the probation officer, then this delegation of judicial power was impermissible.<sup>98</sup> On the other hand, the court stated that if the sentence language was intended to give the probation officer the authority to determine only the particular treatment program and its schedule, the delegation was permissible.<sup>99</sup>

Other circuits take a similar view. In *United States v. Pruden*,<sup>100</sup> the Third Circuit held that “[i]f [the defendant] is required to participate in a mental health intervention only if directed to do so by his probation officer, then this special condition constitutes an impermissible delegation of judicial authority to the probation officer.”<sup>101</sup> However, if the district court meant to delegate nothing more than the authority to decide matters of detail, the delegation was permissible.<sup>102</sup>

The *Pruden* court believed that this test struck the proper balance between the need for flexibility in sentencing and the constitutional requirement that judges, and not non-judicial officers, are to set the defendant’s sentence.<sup>103</sup> The court’s decision, however, was nuanced. It stated that “probation officers must be allowed some discretion in dealing with their charges; courts cannot be expected to map out every detail of a defendant’s supervised release.”<sup>104</sup>

By allowing the probation officer to have some discretion in effectuating their “charges,” the *Pruden* court hedged their earlier statement limiting the officer’s authority,<sup>105</sup> and it illustrates the difficulty the court had with drawing a bright line dividing proper delegations of authority from improper ones.<sup>106</sup> Courts cannot delegate their full sentencing power to probation officers, nor should courts have to map out every single post-sentence administrative or procedural direction to effectuate their sentences.<sup>107</sup> Finding a middle ground where

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98 See *id.* at 85 (citing U.S.S.G. § 5B1.3(b) (“The court may impose other conditions of probation. . . .”) (emphasis added)).

99 See *id.* (citing U.S.S.G. §5B1.3(d)(5)).

100 *United States v. Pruden*, 398 F.3d 241 (3d Cir. 2005).

101 See *Pruden*, 398 F.3d at 251 (quoting *Peterson*, 248 F.3d at 85 (citations omitted)). This *Peterson* test is cited verbatim as the standard in these types of mental health treatment delegation cases by several other circuits as well. See *United States v. Bishop*, 603 F.3d 279, 281 n.6 (5th Cir. 2010); *United States v. Allen*, 312 F.3d 512, 516 (1st Cir. 2002).

102 See *Pruden*, 398 F.3d at 251 (quoting *Peterson*, 248 F.3d at 85 (citations omitted)).

103 See *id.*

104 *Id.*

105 See *id.*

106 See *id.*

107 See *United States v. Weinberger*, 268 F.3d 346, 362 (6th Cir. 2001) (Cohn, J., concurring).

courts retain their constitutional role as final adjudicator, while also allowing for the greatest chance of efficacious implementation of their sentences after the offender leaves the courtroom, is difficult.<sup>108</sup>

Similarly, in *United States v. Tejada*,<sup>109</sup> the defendants were sentenced to a special condition of supervised release that required them to attend a testing program and outpatient treatment for drug and alcohol abuse “as approved by the supervising probation officer.”<sup>110</sup> The Seventh Circuit panel accepted the defendants’ argument based on the holding in *United States v. Bonanno*<sup>111</sup> that district courts are required to set the maximum number of drug tests incidental to a mandatory drug treatment condition of supervised release.<sup>112</sup> This holding begs the question and implies that if the district court were to set the maximum number of drug tests, and delegate discretion to the probation officer up to that number it would be permissible.<sup>113</sup>

### III. ANALYSIS

As detailed in Part II of this Comment, the circuit courts of appeals that have addressed the issue of whether delegation of judicial authority to the probation officer is appropriate have coalesced into two starkly different viewpoints.<sup>114</sup> The majority holds that delegation is never proper,<sup>115</sup> while the minority maintains that delegation is permissible as long as the sentencing court sets a range in which the probation officer has discretion.<sup>116</sup>

Accordingly, this section focuses on the importance of sentencing functionality and argues that probation officers are best equipped to tailor a court’s sentence to effectuate a defendant’s rehabilitation, offender treatment, and supervision.<sup>117</sup> Specifically, this section presupposes the likelihood of significant change in offenders’ post-sentence life and argues for the application of a functional and practical delegation to the probation officer.<sup>118</sup> Second, because probation officers have

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108 *See id.* Put succinctly, Judge Cohn believes that forcing the district judge to set the restitution payment schedule at the time of sentencing “puts form over substance[.]” *Id.* at 362.

109 *United States v. Tejada*, 476 F.3d 471 (7th Cir. 2007).

110 *See id.* at 472.

111 *United States v. Bonanno*, 146 F.3d 502 (7th Cir. 1998).

112 *See Tejada*, 476 F.3d at 472 (citing 18 U.S.C. § 3583(d) and providing statutory basis for mandatory drug treatment conditions of supervised release).

113 *See id.*

114 *See supra* Part II.C.

115 *See cases cited supra* note 49 and accompanying text.

116 *See cases cited supra* note 51 and accompanying text.

117 *See infra* Part III.A.

118 *See United States v. Weinberger*, 268 F.3d 346, 362 (6th Cir. 2001) (Cohn, J., concurring).

successfully adapted to changes in their duties in response to the promulgation of the United States Sentencing Guidelines,<sup>119</sup> this section argues that permissible delegations of post-sentencing authority to the probation officer would be met with very little implementation headwind.<sup>120</sup>

This section then examines the possibility that sentencing courts could tailor sentences in light of its knowledge of the particular skills of the probation officer that will be supervising the offender, making successful rehabilitation more likely.<sup>121</sup> Next, this section discusses courts' reliance on probation officers in sentencing by means of the PSR as a basis for allowing the probation officer to continue this quasi-sentencing authority after sentencing.<sup>122</sup> Lastly, this section discusses the functionality problems associated with requiring courts to assign rigid sentences that may extend over many years based on defendants' current family, financial, mental, and physical situations.<sup>123</sup>

A. *Delegation of Post-Sentencing Authority Will Help Effectuate Sentences*

Courts should be able to delegate the authority to probation officers to determine, within a range, restitution and treatment regime specifics because it makes practical and functional sense.<sup>124</sup> In *Weinberger*, the Sixth Circuit rightly held that as long as the district court sets the total amount of restitution to be paid by the defendant, it does not "abrogate its judicial authority when it delegates the setting of a restitution-payment schedule" to the probation officer.<sup>125</sup> In this case, the Sixth Circuit did not give the probation officer the authority to change the final amount paid by the defendant, but instead gave him the authority to set the monthly installment payment based on the offender's ability to pay.<sup>126</sup> In other words, it is misguided to claim that the probation officer who has the authority to change the restitution payment schedule has been given sentencing authority because courts do not sentence defendants to payment schedules; they sentence defendants to restitution payable on certain terms.<sup>127</sup>

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119 See Glass, *supra* note 1.

120 See *infra* Part III.B.

121 See *infra* Part III.C.

122 See *infra* Part III.D.

123 See *infra* Part III.F.

124 See *Weinberger v. United States*, 268 F.3d 346, 362 (Cohn, J., concurring); see also cases cited *supra* note 51.

125 See *id.* at 359-60 (citing *United States v. Gray*, 121 F.3d 710, at \*4 (6th Cir. 1997) (per curiam) (unpublished)).

126 See *id.* (citing *Gray*, 121 F.3d 710, at \*4).

127 See *id.*



Another issue with the impermissibility of delegations of judicial authority is that it is nearly impossible for courts to anticipate the future needs of the probationer, the probation officer, or the community at the time of sentencing.<sup>128</sup> The offender may be incarcerated for years before entering probation and supervised release.<sup>129</sup> The financial, physical, and mental states of the probationer may have changed dramatically in the years between sentencing and the probationary period.<sup>130</sup> In *Weinberger*, Judge Cohn alluded to the fact that the defendant's circumstances might change so much between sentencing and the time for restitution payment that setting a rigid restitution amount at that time would be too speculative.<sup>131</sup> For example, a white-collar criminal may lose his or her wealth and be unable to afford to pay restitution or the monthly installments assigned by the court, or an offender who had a drug problem at the time of sentencing may verifiably have stopped using drugs before probation. Conversely, the position of the offender may change in a way that favors a speedier completion of his sentenced responsibilities.<sup>132</sup> The probation officer needs the discretion to respond to the changing needs and circumstances of the offender whether they have changed in ways that require more or less stringent application of the sentence.<sup>133</sup>

One way to respond to these changes is to allow the offender's supervising probation officer the discretion to work within the confines of the outer limits of the sentence to effectuate the sentencing goals fully, without requiring the officer and probationer to participate in a long probation condition modification process in the short term.<sup>134</sup> Therefore, courts should set the parameters of the probation sentence, but should not delegate authority to the officer requiring the offender to adhere to new requirements of supervised release of which he was not apprised of by the court at sentencing.<sup>135</sup>

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128 *See id.* at 362 (Cohn, J., concurring).

129 *See id.* at 363.

130 *See Weinberger*, 268 F.3d at 363 (Cohn, J., concurring).

131 *See id.*

132 *See id.*

133 In fact, the statute which gives the court the power to set a payment schedule for restitution or fine payments, 18 U.S.C. § 3572(d) (1996), has a legislative history stating that it was enacted to "eliminate the . . . requirement that the specific terms of an installment schedule [] be fixed by the court. The court is thus able to delegate the responsibility for setting specific terms to a probation officer." H.R. REP. NO. 100-390, at 7 (1987), reprinted in 1987 U.S.C.C.A.N. 2137, 2143.

134 *See supra* note 61 and accompanying text.

135 *See cases cited supra* note 49.

*B. Probation Officers Can Adapt to the Authority to Tailor Sentences*

Probation officers, in response to changes in the authority given to them by statute and the common law, have adapted.<sup>136</sup> If courts give authority to the officer to determine what the offender's post-sentence ability to pay is, or what the offender's drug or mental health treatment needs are, they would adapt again.<sup>137</sup> Probation officers' ability to adapt to the new post-sentencing responsibilities should assuage courts' concern that probation officers are ill equipped or unable to handle sentencing authority.<sup>138</sup>

PSRs are an exercise in quasi-judicial decision-making by the probation officer pursuant to the United States Sentencing Guidelines.<sup>139</sup> In many districts, the probation office designates specialists who do not supervise offenders post-sentence, but only conduct presentence investigations and write PSRs.<sup>140</sup> Officer specialization could be effective post-sentence as well.<sup>141</sup> If courts delegate authority to determine certain specifications of the offender's sentence, the probation office could designate particular officers as specialists in post-sentence maintenance of courts' decisions and the offender's restitutionary requirements or treatment needs.<sup>142</sup>

Designating particular officers as post-sentence specialists would eliminate some of the judiciary's fear about probation officers dabbling in sentencing without the expertise to do so, because as specialists they would have extensive experience in this area.<sup>143</sup> Many officers already are quasi-experts at applying the law to the facts of the offender's case.<sup>144</sup>

*C. Court Familiarity with the Strengths of Particular Probation Officers Lends Itself to Flexible Sentencing*

Along similar lines, judges' knowledge and familiarity with the experience and reputation of particular probation officers who routinely

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136 See Glass, *supra* note 1.

137 See *id.*

138 See generally cases cited *supra* note 51 and accompanying text.

139 See U.S. Sentencing Guidelines Manual (2010); Fed. R. Crim. P. 32(c); see also Glass, *supra* note 1.

140 See Heaney, *supra* note 3, at 200.

141 See generally *United States v. Weinberger*, 268 F.3d 346, 362-63 (6th Cir. 2001) (Cohn, J., concurring).

142 See Heaney, *supra* note 3, at 200 (illustrating the probation office's ability to adapt to changes in their probationary responsibilities).

143 See *id.* The fact that probation officers have adapted to the pre-sentence responsibility to apply the law to the facts of the defendant's case supports an argument that they could apply the post-sentence circumstances of the defendant to the court's sentence of restitution. See *id.*

144 See Glass, *supra* note 1.

appear in that court give the judge the ability to tailor the sentence, delegating authority in light of the probation officer's skills.<sup>145</sup> For instance, consider the case in which a judge knows that the probation officer assigned to the offender has particularly compelling experience in working with offenders to find gainful and remunerative employment based on the offender's skills after incarceration. In light of these skills, a court that permits delegation of judicial authority could grant the authority to the probation officer to determine the timing and amount of restitution installment payments based on the probation officer's expectations and analysis of the offender's prospective ability to pay.<sup>146</sup> Similarly, a judge who knows that the assigned probation officer has specialized knowledge of drug treatment could fix the amount of restitution to be paid, but delegate the authority to the probation officer to determine the number of drug tests to which the offender must submit.<sup>147</sup> This exercise in judicial flexibility would give courts the ability to tailor sentences to the defendant's post-sentence circumstances, making rehabilitation, effective treatment, and payment of restitution more likely.<sup>148</sup>

*D. Probation Officers Are Already Relied on for Sentencing Decisions Because of Their Extensive Personal Knowledge of the Defendant*

Courts already trust and utilize the expert discretion of the probation officer in making sentencing decisions, as evidenced by their reliance on probation officer-produced PSRs.<sup>149</sup> The PSR's recommended sentence, including a suggested amount of restitution, if applicable, receives great deference from the courts.<sup>150</sup> In other words, the defendant's sentence often is determined by the probation officer as a function of his presentence authority.<sup>151</sup> Inherently, the completion of a PSR entails discretion on the part of the probation officer; discretion that the court is more than willing to accept when it comes time for sentencing.<sup>152</sup>

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145 See Heaney, *supra* note 3, at 189, 200.

146 See cases cited *supra* note 49 and accompanying text.

147 See cases cited *supra* notes 49-50 and accompanying text.

148 See *United States v. Weinberger*, 268 F.3d 346, 362-63 (6th Cir. 2001) (Cohn, J., concurring); see also *United States v. Knight*, 534 U.S. 112, 119 (2001) (stating that the two "primary goals of probation" are "rehabilitation and protecting society from future criminal violations").

149 See FED. R. CRIM. P. 32(b), (c); 18 U.S.C. § 3552 (1990).

150 See *Weinberger*, 268 F.3d at 362 (Cohn, J., concurring).

151 See Heaney, *supra* note 3, at 168-69.

152 See *id.* at 189, 200; see also Glass, *supra* note 1 ("The process of investigation, weighing evidence, and talking to the parties inevitably requires probation officers to use their discretion in determining what questions to ask, whom to talk to, and, ultimately, what to write in the report.").

Uniformly, all courts accept the findings of the PSR to one degree or another, and most courts accept them in large part.<sup>153</sup> Therefore, for the same reason that courts defer to the probation officer's PSR before sentencing—the officer's familiarity with the offender and his circumstances—courts should defer to the officer's judgment during the probation period.<sup>154</sup>

*E. Final Sentencing Authority Rests with the Court Even After Formal Sentencing and Modification by the Probation Officer*

When a sentence requires the officer to determine the restitution payment schedule and/or the number of drug tests or other treatments, the court has not delegated final authority because it retains the prerogative to correct the officer's decisions.<sup>155</sup> At any time prior to the end of the term of supervised release the court may modify or revoke a condition of the supervised release.<sup>156</sup> Therefore, the probation officer makes his determinations subject to the implicit, or if challenged, explicit approval of the authority of the court if at the time of sentencing the court grants the authority to determine some details of the terms of restitution or requirements.<sup>157</sup>

*F. Problems with the Impermissibility of Delegating Judicial Authority to Probation Officers*

1. The Economic Circumstances of the Defendant During the Post-Sentencing Period Are Nearly Impossible to Know

The primary public policy consideration behind ordering the offender to pay restitution is to compensate the victims of crimes for their pecuniary or other losses.<sup>158</sup> Because 18 U.S.C. § 3664 forbids the court from considering "the economic circumstances of the defendant" when determining the amount of restitution, a rigid restitution order risks undermining another one of the important policy considerations underlying restitution.<sup>159</sup> The court may set an amount too high for the

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153 See Heaney, *supra* note 3, at 174.

154 See Heaney, *supra* note 3, at 174.

155 See *supra* note 61 and accompanying text.

156 See *supra* note 61 and accompanying text.

157 See *United States v. Weinberger*, 268 F.3d 346, 363 (6th Cir. 2001) (Cohn, J., concurring).

158 See *State v. Kinneman*, 119 P.3d 350, 354 (Wash. 2005).

159 See 18 U.S.C. § 3664(f)(1)(A) (2002). The court will take the economic circumstances and other factors into consideration, however, if it decides to determine the "manner in which, and the schedule according to which," the defendant will pay the restitution. See 18 U.S.C. § 3664(f)(3)(B).

defendant to reasonably pay. Unless the probation officer is given the authority and flexibility to modify the schedule, timing, and amount of installment payments after sentencing, this blindness at sentencing may “threaten[] respect for judicial orders generally.”<sup>160</sup> The court in *Mahoney* believed, and rightly so, that the effect of setting a rigid and impossible-to-satisfy restitution order would be to weaken the offender’s incentive to pay.<sup>161</sup>

Similarly, a restitution order beyond the defendant’s means to pay strongly diminishes the likelihood that he will be rehabilitated.<sup>162</sup> Moreover, a defendant who pays only part of the restitution order has no assurance that the court will consider the partial restitution as satisfaction of the order.<sup>163</sup> Therefore, an offender who knows he will never be able to fully pay the restitution and will not, therefore, satisfy the order has little incentive to attempt to pay any of it at all.<sup>164</sup> A defendant subject to an “impossible restitution order has less incentive to seek remunerative, rehabilitative, and non-criminal employment and to maximize his or her income”<sup>165</sup> than does a defendant subject to a reasonable order or an order that is subject to probation officer-directed modification.<sup>166</sup>

## 2. A Court-Order Increase in Restitution After Formal Sentencing May Run Afoul of Supreme Court’s Double Jeopardy Jurisprudence

Forcing courts to set an exact and inflexible amount of restitution or a restrictive payment schedule at sentencing may cause another avoidable problem. If the restitution amount turns out to be lower than

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160 See *United States v. Remillong*, 55 F.3d 572, 574 (11th Cir. 1995) (quoting *United States v. Bailey*, 975 F.2d 1028, 1032 (4th Cir. 1992) (internal quotation marks omitted)); see also *United States v. Mahoney*, 859 F.2d 47, 52 (7th Cir. 1988) (“[A]n impossible order of restitution . . . is nothing but a sham, for the defendant has no chance of complying with the same, thus defeating any hope of restitution and impeding the rehabilitation process.”).

161 See *Mahoney*, 859 F.2d at 52.

162 See *id.* (“[I]t is most paramount that the defendant, in the all-important rehabilitative process, have at least a hope of fulfilling and complying with each and every order of the court.”).

163 See *In re Silverman*, 616 F.3d 1001, 1009 (9th Cir. 2010).

164 See *United States v. Porter*, 41 F.3d 68, 73 (2d Cir. 1994) (Winter, J., concurring).

165 *United States v. Porter*, 41 F.3d 68, 73 (2d Cir. 1994) (Winter, J., concurring); cf. *Bearden v. Georgia*, 461 U.S. 660, 670-71 (1983) (“Revoking the probation of someone who through no fault of his own is unable to make restitution . . . may have the perverse effect of inducing the probationer to use illegal means to acquire funds to pay in order to avoid revocation.”).

166 See *In re Silverman*, 616 F.3d 1001, 1009 (9th Cir. 2010) (citing *Kelly v. Robinson*, 479 U.S. 36, 49 n.10 (1986)). The Court held in *Kelly* that restitution “forces the defendant to confront, in concrete terms, the harm his actions have caused[.]” *Id.*

what justice required in light of the damage to the victim, increasing the restitution amount later may run afoul of the Supreme Court's double jeopardy jurisprudence.<sup>167</sup> In *United States v. DiFrancesco*,<sup>168</sup> the Court altered the long-standing double jeopardy rule against increased punishment and held that a sentence may be revised upward so long as the defendant had no "expectation of finality" at the original sentencing.<sup>169</sup> In order to avoid running afoul of this doctrine, courts could set a range of restitution payable, and allow the probation officer to work within that range according to the offender's ability to pay.<sup>170</sup> If probation officers had this authority, the need to petition the court for an increase in restitution would be more rare.<sup>171</sup> Furthermore, if Courts make it a practice to delegate the authority to modify sentences to the probation officer, defendants would not unintentionally expect finality at the time of sentencing.<sup>172</sup> Therefore, the courts would avoid concerns of double jeopardy if, at a later time, the probation officer and court upwardly revised the total restitution to be paid.<sup>173</sup>

#### IV. CONCLUSION

It is critical that probation officers have the authority necessary to effectively and efficiently carry out their post-sentence responsibilities to offenders and society.<sup>174</sup> Probation officers act as an important point of contact between the justice system and the offender, and are intimate with the financial, family, and other circumstances of the offender's life.<sup>175</sup>

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167 See *United States v. DiFrancesco*, 449 U.S. 117, 139 (1980). This section of the discussion is not meant to be an exhaustive discussion and analysis of the Supreme Court's double jeopardy case law or its possible application to this Comment's topic. It is meant merely to highlight a potential problem that could easily be avoided if courts sentenced a range of restitution to be paid by the defendant, in which the probation officer could determine, based on the defendant's ability to pay, the exact amount and timing regime.

168 See *id.*

169 See *DiFrancesco*, 449 U.S. at 139; accord *United States v. Porter*, 41 F.3d 68, 71 (2d Cir. 1994) (citing *DiFrancesco*, 449 U.S. at 139). However, the court may still be unable to modify a restitution sentence upward if the sentence carried with it an understanding of finality on the part of the defendant. See *United States v. Early*, 816 F.2d 1428, 1433-34 (10th Cir. 1987); see also *United States v. Jones*, 722 F.2d 632, 636-39 (11th Cir. 1983).

170 See cases cited *supra* note 49 and accompanying text.

171 See *DiFrancesco*, 449 U.S. at 139.

172 See *id.*

173 See *id.*

174 See generally 18 U.S.C. § 3603(3) (1996); see also *United States v. Knight*, 534 U.S. 112, 119 (2001) (stating that the two "primary goals of probation" are "rehabilitation and protecting society from future criminal violations").

175 See 18 U.S.C. § 3603(3) (Probation officers are to "use all suitable methods, not inconsistent with the conditions specified by the court, to aid a probationer or a person on

The circuit courts of appeals that have addressed the issue of delegation of judicial authority to probation officers agree that maximizing the officer's flexibility in his post-sentence responsibilities is a worthwhile goal.<sup>176</sup> However, the majority of circuits that have addressed this issue—the Second, Third, Fourth, Fifth, and Seventh—have missed the mark, and have put formality over substance in holding that any delegation of judicial authority is impermissible.<sup>177</sup>

Although there are compelling public policy and constitutional concerns present on both sides of the issue, offenders and society would be better served with the most efficient and functional post-sentence rehabilitative process possible.<sup>178</sup> Sentencing judges engage in mere speculation when they set a rigid restitution payment schedule to be paid years out from the time of sentencing.<sup>179</sup> Accordingly, the Sixth, Ninth, and Eleventh Circuits are correct in allowing the probation officer, with his exceptional knowledge of the probationer's background, history, family status, and post-incarceration finances, to make the final determinations as to the exact specifications of the probationer's sentence.<sup>180</sup> With practical and functional concerns in mind, district courts should be permitted to delegate to the probation officer the authority to determine, within a range, the various specifics of a defendant's sentence.<sup>181</sup>

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supervised release who is under his supervision, and to bring about improvements in his conduct and condition. . . .").

176 See generally cases cited *supra* notes 49-53 and accompanying text.

177 See cases cited *supra* note 51 and accompanying text; see also *United States v. Weinberger*, 268 F.3d 346, 363 (6th Cir. 2001) (Cohn, J., concurring).

178 See *Weinberger*, 268 F.3d at 362-63 (Cohn, J., concurring).

179 See *id.*

180 See cases cited *supra* note 49 and accompanying text.

181 See *Weinberger*, 268 F.3d at 363 (Cohn, J., concurring).