

## NOTE

# ARMS OF THE COURT: AUTHORIZING THE DELEGATION OF SENTENCING DISCRETION TO PROBATION OFFICERS

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*Part authority figure and part social worker, probation officers have long been recognized for their unique role in the criminal justice system. District courts rely on probation officers to author the social history of defendants through presentence reports, provide sentencing recommendations, and to oversee defendants throughout their terms of supervised release. Courts also delegate limited sentencing discretion to probation officers to further the efficient administration of justice. For example, courts have entrusted probation officers to manage administrative tasks associated with supervised release, delegating the scheduling of mental health treatment sessions to probation officers. The majority of courts, however, have stopped short of delegating to probation officers the determination of whether a defendant should undergo mental health treatment at all. This Note endorses the minority position of the Eighth Circuit that allows probation officers, as arms of the court, the discretion to make this determination, provided that the court retains ultimate control over the sentence. This Note further argues that this delegation of limited sentencing authority to probation officers is both statutorily and constitutionally permissible. Finally, this Note argues that delegating this decision to probation officers not only produces a better outcome for defendants, but also for the judicial system as a whole.*

INTRODUCTION .....	432
I. THE HISTORY OF PROBATION OFFICERS IN THE UNITED STATES .....	434
A. <i>The Birth of Probation Officers</i> .....	434
B. <i>The Early Role of Probation Officers</i> .....	435
C. <i>The Changing Role of Probation Officers</i> .....	436

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*D. The Special Relationship Between Probation Officers, the Court, and Defendants* ..... 438

II. DELEGATING SENTENCING DISCRETION TO PROBATION OFFICERS: THE CIRCUIT SPLIT ..... 442

*A. Constitutional Basis for Delegation Challenges* ..... 442

*B. Statutory Basis for Delegation Challenges* ..... 443

*C. The Circuit Split* ..... 445

III. SUPPORTING DELEGATION OF AUTHORITY TO IMPOSE MENTAL HEALTH TREATMENT TO PROBATION OFFICERS .. 449

*A. Sentencing Delegations are Constitutionally and Statutorily Permissible*..... 449

*B. Probation Officers and Judges Already Agree on Sentencing Matters* ..... 451

*C. Probation Officers Already Play a Quasi-Judicial Role* ..... 452

*D. Delegation to Probation Officers Promotes Judicial Economy* ..... 453

*E. Delegation to Probation Officers Will Benefit Defendants*..... 455

CONCLUSION..... 455

INTRODUCTION

The role of probation officers in the United States has come full circle since the start of the movement in the mid-nineteenth century. As a by-product of the rehabilitative penal philosophy, early probation officers were seen as specialized social workers of the court.<sup>1</sup> However, over time, the rehabilitative model was replaced with the crime control model, and probation officers, who were once sought out to paint a portrait of the individual defendant, now had a new role: to deliver a concise, detailed account of the case, with barely any reference to the individual characteristics of the defendant.<sup>2</sup> Fortunately, with the fall of the United States Sentencing Guidelines (USSG),<sup>3</sup> probation officers have returned back to their original role, as painters of the defendant’s life portrait.<sup>4</sup>

As specialized social workers of the court, probation officers fulfill a unique role in the judicial system. Often referred to as arms of the

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<sup>1</sup> Sharon M. Bunzel, Note, *The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows*, 104 YALE L.J. 933, 944–46 (1995).

<sup>2</sup> See *id.* at 946–49.

<sup>3</sup> See *United States v. Booker*, 543 U.S. 220, 245 (2005) (holding the mandatory nature of the USSG unconstitutional).

<sup>4</sup> See OFFICE OF PROBATION AND PRETRIAL SERVS., ADMIN. OFFICE OF THE U.S. COURTS, PUB. NO. 107, *THE PRESENTENCE INVESTIGATION REPORT* (2006) [hereinafter 2006 Monograph].

court,<sup>5</sup> probation officers have gained the trust of the district courts, which rely on them to protect the public and assist in the fair administration of justice through individualized sentencing recommendations.<sup>6</sup> Due to this reliance, district courts have expanded the role of probation officers and delegated limited sentencing discretion to them. Courts have gone back and forth over the permissibility of delegating decisions regarding mental health counseling, random drug testing, and restitution payments to probation officers.<sup>7</sup> Currently, there is a circuit split involving mental health counseling as a condition of supervised release. It is widely accepted that administrative tasks, such as the scheduling of mental health counseling sessions and the location of these sessions, can be delegated to probation officers. However, only the Eighth Circuit has extended this discretion to allow probation officers the sentencing authority to determine whether or not a defendant must engage in mental health counseling at all.<sup>8</sup> In contrast, the First, Second, Third, Fourth, Seventh, Ninth, Tenth, and Eleventh Circuit Courts of Appeal reject these scheduling delegations as amounting to the unconstitutional delegation of a core judicial function.<sup>9</sup>

This Note will examine this controversial delegation and ultimately endorse the approach of the Eighth Circuit because it produces the most effective treatment for defendants and promotes judicial economy. Since the probation officer is the person in the judicial system that is most familiar with the defendant's circumstances, the probation officer is better suited to determine whether a defendant is in need of mental health treatment and to simultaneously formulate a treatment schedule from which the defendant is most likely to benefit. Additionally, the probation officer meets with offenders much more frequently than the judge, and experienced probation officers may have more effective and efficient ways overall to handle problematic defendants. Furthermore, delegating this sentencing authority to probation officers will likely produce quicker treatment decisions because the probation officer possesses firsthand knowledge of the case and more insight into the daily lives of defendants than a district court judge, and because it will allow judges more time to

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<sup>5</sup> See *United States v. Ruiz*, 580 F.2d 177, 178 (5th Cir. 1978).

<sup>6</sup> See 2006 Monograph, *supra* note 4, at I-1.

<sup>7</sup> See generally *United States v. Stephens*, 424 F.3d 876, 880 n.2 (9th Cir. 2005) (citing cases where courts have delegated decisions regarding drug testing, mental health counseling, and restitution payments to probation officers).

<sup>8</sup> See, e.g., *United States v. Mickelson*, 433 F.3d 1050, 1057–58 (8th Cir. 2006).

<sup>9</sup> See *United States v. Mike*, 632 F.3d 686, 695–96 (10th Cir. 2011); see also *United States v. Esparza*, 552 F.3d 1088, 1091 (9th Cir. 2009); *United States v. Miller*, 341 Fed. Appx. 931, 933–34 (4th Cir. 2009); *United States v. Heath*, 419 F.3d 1312, 1315 (11th Cir. 2005); *United States v. Pruden*, 398 F.3d 241, 251 (3d Cir. 2005); *United States v. Sines*, 303 F.3d 793, 799 (7th Cir. 2002); *United States v. Allen*, 312 F.3d 512, 516 (1st Cir. 2002); *United States v. Peterson*, 248 F.3d 79, 85 (2d Cir. 2001).

tend to their heavy dockets. Therefore, the court will save time and money in delegating to probation officers.

Part I of this Note details the history of the probation officer movement in the United States, from its inception to its current state. Part I focuses on the unique role probation officers play in the legal system, which, in turn, leads district court judges to entrust them with a certain amount of authority. Part II of this Note sets forth the key constitutional and statutory provisions involved in delegation challenges. Part II sketches out the circuit split that has resulted from the various interpretations of these provisions regarding the delegation of the decision of whether a defendant must complete mental health treatment as a condition of supervised release to probation officers. The majority of circuit courts do not allow any delegation of this decision to probation officers, but give probation officers discretion over administrative tasks associated with the offender's mental health treatment. On the other hand, the Eighth Circuit follows a more flexible approach that allows delegation of this decision to probation officers as long as the court retains ultimate control over the defendant's supervised release. Part III of this Note argues that the Eighth Circuit's flexible approach is both constitutional and more advantageous from a policy perspective. The conclusion of the Note calls for the Supreme Court to resolve the circuit split in favor of the more flexible approach that the Eighth Circuit endorses.

## I. THE HISTORY OF PROBATION OFFICERS IN THE UNITED STATES

### A. *The Birth of Probation Officers*

Probation officers emerged out of the penal philosophy of rehabilitation.<sup>10</sup> Under this model of punishment, "the primary purpose of penal treatment is to effect changes in the characters, attitudes, and behavior of convicted offenders, so as to strengthen the social defense against unwanted behavior, but also to contribute to the welfare . . . of offenders."<sup>11</sup> Rehabilitation and the desire to individualize sentences to the particular offender were both at the core of the probation movement.<sup>12</sup>

John Augustus, "The Father of Probation," became the first known probation officer in the United States in 1841, when he bailed out a man in Boston whom he believed was "not yet past all hope of reformation," and successfully persuaded the court to reduce his sentence.<sup>13</sup> After this success, Augustus sought out similar individuals for what he called "probation," in which he would petition the court to suspend the defendant's

<sup>10</sup> See Bunzel, *supra* note 1, at 938–41.

<sup>11</sup> *Id.* at 936 (quoting FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* 2 (1981)).

<sup>12</sup> See *id.* at 938.

<sup>13</sup> See *id.*

sentence and grant release under Augustus' supervision.<sup>14</sup> In addition to supervising the activities of these offenders, Augustus also aided them in finding food, shelter, clothing, and employment.<sup>15</sup> Augustus was well trusted within the Boston courts, and between 1841 and 1859, judges released over 2,000 offenders into his custody and supervision instead of imprisoning them.<sup>16</sup>

Due to Augustus' great success in the Boston courts, the Massachusetts legislature approved the nation's first statewide hiring of probation officers in 1880.<sup>17</sup> The law required probation officers to "carefully inquire into the character and offense of every person arrested for crime . . . with a view to ascertaining whether the accused may reasonably be expected to reform without punishment."<sup>18</sup> The Massachusetts model worked so well that by 1925, every state had probation officers for juveniles.<sup>19</sup> That same year, Congress passed the Federal Probation Act, which provided for probation officers in federal courts.<sup>20</sup> By 1967, all state courts also had adult probation laws.<sup>21</sup> Thus, since the beginning, courts and legislatures have given probation officers the unique role of implementing the rehabilitation model within the criminal justice system.

### *B. The Early Role of Probation Officers*

Under the rehabilitation model, early probation officers were deemed specialized social workers of the court because they were in charge of authoring the social history of the offender through presentence reports (PSR).<sup>22</sup> The probation officer's role as a social worker was explicitly acknowledged at a 1928 meeting of the National Probation Association, where probation officers were told, "[i]f there is any probation officer here . . . who does not consider himself or herself to be a social worker, . . . you are either going to change your mind and develop a social work consciousness, or you are a member of a passing race."<sup>23</sup> Furthermore, much of the coursework for probation officers, even today, has a social work focus, which includes courses on social problems and pathology, psychology, and family casework or fieldwork.<sup>24</sup>

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<sup>14</sup> *See id.*

<sup>15</sup> *See id.*

<sup>16</sup> *See id.*

<sup>17</sup> *See id.* at 939.

<sup>18</sup> *Id.* (quoting Act of Mar. 22, 1880, ch. 129, 1880 Mass. Acts 87 § 3).

<sup>19</sup> *Id.*

<sup>20</sup> *See id.*

<sup>21</sup> *Id.*

<sup>22</sup> *See id.* at 944. Presentence reports include detailed information about the offender's personality and social situation so that the judge can keep in mind these characteristics when determining the appropriate sentence for an offender. *See id.* at 940–41.

<sup>23</sup> *Id.* at 944.

<sup>24</sup> *Id.*

Additionally, while in the social worker role, the probation officer had many unique opportunities to get to know the offender and become a person whom the offender could trust. During the compilation of a PSR, the probation officer met with and interviewed the offender on many occasions.<sup>25</sup> Most of the time, defense attorneys did not attend these interviews, leading the offender to trust the probation officer as the one person who could truly persuade the judge to consider a more lenient sentence.<sup>26</sup> The offender, however, may have had a skewed view of the probation officer. While it was true that the probation officer was working with the offender to gain insight into her personality and social background, including asking about any history of abuse or psychological damage, the probation officer was simultaneously working with the prosecutor to uncover any other possible criminal activity in which the offender may have been engaged.<sup>27</sup>

In all, the probation officer was a trustworthy player in the system. With allegiances to no one but the court, the officer's only "agenda" was to provide as much information about the defendant to the sentencing judge as possible. The officer's association with rehabilitation kept her from being perceived as a threat to the case of either the prosecution or the defense.<sup>28</sup>

Thus, as the "eyes and ears" of the court, probation officers acted as indispensable entities in the rehabilitation model of punishment because they provided the crucial information needed to individualize sentences.<sup>29</sup>

### C. *The Changing Role of Probation Officers*

The national standards for the appropriate format and contents of PSRs have changed dramatically since the first monograph of the Probation Division of the Administrative Office of the United States Courts in 1943. The first monograph referred to the PSR as "the social investigation" or the "social diagnosis," indicating that the intended purpose of the PSR was to be a diagnostic tool used to individualize sentences to the defendant, not to the crime.<sup>30</sup> The goal of the PSR, according to the 1943 monograph, was for the probation officer to bring the defendant to

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<sup>25</sup> See *id.* at 945.

<sup>26</sup> See *id.* at 945, 963.

<sup>27</sup> See Bunzel, *supra* note 1, at 942, 945.

<sup>28</sup> *Id.* at 945 (arguing that the rise of the probation officer is a direct result of the dominance of the penal philosophy of rehabilitation).

<sup>29</sup> See *id.* at 945.

<sup>30</sup> *Id.* at 942.

life, focusing on the character and personality of the defendant.<sup>31</sup> The second monograph, published in 1965, made the individual offender's personality and motivation a concern.<sup>32</sup>

In contrast, later monographs shifted the focus from depicting a social history of the defendant to recounting the facts of the case, with little room for the personal characteristics of the individual.<sup>33</sup> For example, the third monograph, published in 1978 during the crime control punitive-model era,<sup>34</sup> was labeled the "core concept" approach because it instructed the probation officer to focus on a "core of essential information," which was generally just the defendant's version of the case.<sup>35</sup> Probation officers treated any character or personality information collected as "additional information, to be included in the PSR only to the extent that it was pertinent to the sentence decision."<sup>36</sup> The goal of the probation officer was transformed from making the defendant live on paper, to producing factual and precise reports.<sup>37</sup> This trend continued until 2005, when the Supreme Court ruled in *United States v. Booker* that the mandatory nature of the USSG was unconstitutional and sought to make sentences more tailored to the individual, rather than to the offense.<sup>38</sup>

The current monograph, published in 2006, appears less harsh to defendants than the 1978 version and its progeny. Although the current aim of the PSR is for probation officers to "provide a timely, accurate, objective, and comprehensive report to the court," another goal is to provide "enough information to assist the court in making a fair sentencing decision and to assist corrections and community corrections officials in managing offenders under their supervision."<sup>39</sup> The 2006 monograph advises probation officers, in conducting their presentence interviews, to "be open to receiving information from all parties, but [to] be cautious about adopting any party's interpretation outright."<sup>40</sup> In addition the monograph encourages probation officers to explore the personal history and background of the defendant.<sup>41</sup> Finally, the monograph recognizes the uniqueness and individuality of each defendant, stating that "[t]he

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<sup>31</sup> See *id.*

<sup>32</sup> See Bunzel, *supra* note 1, at 942. "Instead of giving an accumulation of cold facts the report should rather present a true, vivid, living picture of the defendant." *Id.* at 943.

<sup>33</sup> See *id.* at 947–48.

<sup>34</sup> The crime control punitive model sets deterrence and incapacitation as the goals of punishment, rather than rehabilitating the offender. See *id.* at 952–53.

<sup>35</sup> See *id.* at 947.

<sup>36</sup> *Id.*

<sup>37</sup> See *id.*

<sup>38</sup> 543 U.S. 220, 226–27 (2005).

<sup>39</sup> 2006 Monograph, *supra* note 4, at I-1.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at I-2.

report is designed to provide the court with a complete and concise picture of the defendant.”<sup>42</sup> The “full picture” language is very similar to the language used in the early monographs, which sought to make the defendant live on paper.<sup>43</sup> Furthermore, the 2006 monograph includes an entire section devoted to “offender characteristics,” which includes: personal and family data; physical conditions; mental and emotional health; substance abuse; education; vocational and special skills; employment; and financial condition (ability to pay restitution).<sup>44</sup> This section is in stark contrast to the 1978 monograph, which treated any personal information as “additional” to the factual report.<sup>45</sup>

*D. The Special Relationship between Probation Officers, the Court, and Defendants*

Although the role of the probation officer changed as the theory of punishment changed from rehabilitation to crime control, the fall of mandatory sentencing guidelines has returned the probation officer back to her original role as a trusted and invaluable investigator for the court.<sup>46</sup> Therefore, the important relationship between the district court, the probation officer, and the defendant must be explored in order to understand what prompts district courts to delegate certain authority to probation officers. *United States v. Davis* sets forth three principles of the relationship that should guide delegation inquiries.<sup>47</sup> First, the district court and the defendant must have an ongoing relationship in order for the court to impose a sentence that includes a term of supervised release.<sup>48</sup> Second, the probation officer must maintain contact with the defendant to ensure compliance with the terms of the supervised release.<sup>49</sup> Lastly, and most importantly, the probation officer serves as “an investigative and supervisory ‘arm of the court.’”<sup>50</sup> In this role, the probation officer must perform enumerated statutory requirements, includ-

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<sup>42</sup> *Id.*

<sup>43</sup> Compare 2006 Monograph, *supra* note 4, at I-2, with Bunzel, *supra* note 1, at 947.

<sup>44</sup> See 2006 Monograph, *supra* note 4, at III-24–31.

<sup>45</sup> See Bunzel, *supra* note 1, at 947.

<sup>46</sup> See 2006 Monograph, *supra* note 4, at I-1.

<sup>47</sup> 151 F.3d 1304 (10th Cir. 1998).

<sup>48</sup> *Id.* at 1306.

<sup>49</sup> *Id.*; Duties of Probation Officers, 18 U.S.C. § 3603(7) (1996):

A probation officer shall keep informed concerning the conduct, condition, and compliance with any condition of probation, including the payment of a fine or restitution of each probationer under his supervision and report thereon to the court placing such person on probation and report to the court any failure of a probationer under his supervision to pay a fine in default within thirty days after notification that it is in default so that the court may determine whether probation should be revoked . . . .

*Id.*

<sup>50</sup> *Davis*, 151 F.3d at 1306; see also *United States v. Johnson*, 935 F.2d 47, 49 (4th Cir. 1991).



ing supervising defendants serving terms of supervised release.<sup>51</sup> The probation officer is also statutorily required to perform whatever tasks the district court designates.<sup>52</sup> This statutory requirement creates a close working relationship between the probation officer and the district court because the probation officer must frequently report back to the district court regarding the defendant's actions.<sup>53</sup> "As a practical matter, then, the probation officer serves as a liaison between the sentencing court, which has supervisory power over the defendant's term of supervised release, and the defendant, who must comply with the conditions of his supervised release or run the risk of revocation."<sup>54</sup> Therefore, given her close relationship with both the court and the defendant, it is a logical consequence for the court to delegate certain authority to the probation officer. The probation officer's unique relationship with both the court and defendants strengthens the argument for the delegation of limited sentencing authority to probation officers.

Moreover, the strength of the unique relationship between the courts and probation officers was recognized as early as 1973.<sup>55</sup> Professor Eugene Czajkoski argued that probation officers played a quasi-judicial role

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<sup>51</sup> See 18 U.S.C. § 3603 (1996). Probation officers are required to:

- (1) instruct a person on supervised release, who is under his supervision, as to the conditions specified by the sentencing court, and provide him with a written statement clearly setting forth all such conditions;
- (2) keep informed, to the degree required by the conditions specified by the sentencing court, as to the conduct and condition of a probationer or a person on supervised release, who is under his supervision, and report his conduct and condition to the sentencing court;
- (3) use all suitable methods, not inconsistent with the conditions specified by the court, to aid a probationer or a person on supervised release who is under his supervision, and to bring about improvements in his conduct and condition;
- (4) be responsible for the supervision of any probationer or a person on supervised release who is known to be within the judicial district; . . .

*Id.*

<sup>52</sup> Duties of Probation Officers, 18 U.S.C. § 3603(10) (1996) ("A probation officer shall perform any other duty that the court may designate."); see also *Davis*, 151 F.3d at 1306; *United States v. Bernardine*, 237 F.3d 1279, 1283 (11th Cir. 2001). Regarding the seemingly broad language of § 3603(10), the Fourth Circuit stated:

While the statute does authorize the district court to order the probation officer to perform such duties as the court directs, the type of duty that the court may so delegate is limited by Art. III. Cases or controversies committed to Art. III courts cannot be delegated to nonjudicial officers for resolution. That general principle does not, however, prohibit courts from using nonjudicial officers to *support* judicial functions, as long as a judicial officer retains and exercises ultimate responsibility . . . . In every delegation, the court must retain the right to review findings and to exercise ultimate authority for resolving the case or controversy.

*United States v. Johnson*, 48 F.3d 806, 808–09 (4th Cir. 1995).

<sup>53</sup> *Davis*, 151 F.3d at 1306.

<sup>54</sup> *Id.* at 1306–07.

<sup>55</sup> See Eugene H. Czajkoski, D.P.A., *Exposing the Quasi-Judicial Role of the Probation Officer*, 37 FED. PROBATION 9 (1973).

in the courts.<sup>56</sup> Although Professor Czajkoski acknowledged the practical limitations on the authority probation officers can retain, he argued that such limitations “often become[ ] blurred in the actual operation of the court.”<sup>57</sup> Professor Czajkoski focused on five developments in the courts, which have resulted in the expanded role of probation officers.<sup>58</sup> These developments include: (1) the greater importance of plea bargaining and the judges’ abdication of their sentencing responsibilities in favor of sentences that the defendant and the prosecutor agreed to; (2) the increased frequency of probation officers participating in intake procedures; (3) the probation officer’s increased responsibility in setting the conditions of probation; (4) the probation officer’s role in initiating probation violation procedures against the offender; and (5) the probation officer’s ability to determine punishment.<sup>59</sup>

The development most relevant to this Note is the probation officer’s increased responsibility in setting the conditions of probation. Although Professor Czajkoski conceded that the courts, not the probation officers, set conditions of probation for offenders, he argued that courts still grant probation officers great discretion in setting the conditions of probation.<sup>60</sup> For example, courts frequently impose “blanket” conditions of probation, such as “heed the advice of your probation officer,” which effectively grants the probation officer the power to set conditions of probation.<sup>61</sup> Furthermore, although probation conditions must be clearly and effectively communicated to the offender, probation conditions are often ambiguous and require the probation officer to evaluate and interpret the court’s directive.<sup>62</sup> One such example of a typical probation condition is for the offender to “avoid undesirable associates.”<sup>63</sup> It is difficult for the offender to determine who exactly is an undesirable associate—undesirable by whose standards?<sup>64</sup> Generally, there is no established standard defining who falls into this category, so the enforcement of this condition is often “left to the personal, and frequently capricious, judgment of the probation officer.”<sup>65</sup> Thus, because the court already trusts and relies upon probation officers to set certain conditions of pro-

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<sup>56</sup> *See id.*

<sup>57</sup> *Id.* at 9.

<sup>58</sup> *See id.* at 9–13.

<sup>59</sup> *See id.*

<sup>60</sup> *Id.* at 11–12.

<sup>61</sup> *Id.* at 11.

<sup>62</sup> *Id.*

<sup>63</sup> *See Czajkoski, supra* note 55, at 11. Other examples of ambiguous conditions of probation include the directives to “stay away from disreputable places” and to refrain from “keep[ing] late hours.” *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

bation, the delegation of limited sentencing authority is a logical and efficient development.

Similarly, the probation officer's ability to determine punishment is also a relevant consideration because it showcases the vast discretion that courts afford probation officers. Professor Czajkoski argued that the probation officer's great latitude in restricting the offender's liberty amounts to the ability to punish.<sup>66</sup> This power stems from the blanket conditions courts so frequently set. For example, the probation officer can require that the probationer not live in or visit certain areas, not retain particular jobs, or to refrain from associating with certain people.<sup>67</sup> Such conditions are often imposed under the sole discretion of the probation officer and are clear restrictions on the offender's liberty.<sup>68</sup> Once again, this observation supports the delegation of sentencing authority to probation officers because, in a sense, they already have sentencing authority in their power to punish offenders by restricting their liberty.

Additionally, probation officers have more direct ways to punish defendants.<sup>69</sup> Notably, in some jurisdictions, offenders may not attain driving or occupational licenses without the express approval of their probation officers, and the withholding of the license approval can be regarded as a punishment.<sup>70</sup> Moreover, "[i]f one chooses not to regard the probation officer's withholding of license approval as punishment and therefore not in the nature of a judicial action, it is at least still possible to conceive of the probation officer's approval role in licensing as being quasi-judicial."<sup>71</sup>

Further, the probation officer has the power to initiate probation violation procedures against the offender.<sup>72</sup> While the ultimate decision to revoke probation lies with the judge, the probation officer monitors for a violation and informs the judge of the offender's actions.<sup>73</sup> In fact, in the majority of revocation proceedings, the judge closely follows the proba-

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<sup>66</sup> See *id.* at 13 ("With his awesome authority over the probationer, the probation officer may in various ways restrict his liberty. It is easily argued that restriction of liberty amounts to punishment").

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> See Czajkoski, *supra* note 55, at 13.

<sup>70</sup> See *id.*

<sup>71</sup> *Id.*

<sup>72</sup> See *id.* at 12; see also *United States v. Davis*, 151 F.3d 1304, 1307 (10th Cir. 1998) (holding that the probation office's practice of filing petitions seeking revocation of supervised release is proper and within the officer's statutory authority to "report the conduct and condition [of a person on supervised release] to the sentencing court" (quoting 18 U.S.C. § 3603(2))).

<sup>73</sup> See Czajkoski, *supra* note 55, at 12; see also *Davis*, 151 F.3d at 1307 ("[T]he sentencing court at most delegates to probation officers the power to recommend revocation proceedings, and in light of probation officers' duty to report . . . [and] the probation officers' supervisory and investigative functions, . . . no improper delegation of judicial power occurs");

tion officer's recommendations.<sup>74</sup> Professor Czajkoski argued that the probation officer's great power in these proceedings "plainly casts the probation officer in a quasi-judicial role."<sup>75</sup> Moreover, police and prosecutors often rely on probation officers to invoke a technical violation against an offender when they suspect the offender has violated a condition of probation, but cannot easily prove the violation at trial.<sup>76</sup> Thus, the probation officers' invocation of a technical violation cements their quasi-judicial role, allowing the court to revoke probation without proceeding to trial and having to prove that the offender committed another criminal act.<sup>77</sup>

## II. DELEGATING SENTENCING DISCRETION TO PROBATION OFFICERS: THE CIRCUIT SPLIT

### A. *Constitutional Basis for Delegation Challenges*

Article III of the Constitution provides the constitutional basis for delegation inquiries, vesting responsibility for resolving all cases and controversies in the judicial branch.<sup>78</sup> Justice Anthony Kennedy, while sitting on the Ninth Circuit, observed that this responsibility is an essential role of the judiciary and requires "both the appearance and the reality of control by Article III judges over the interpretation, declaration, and application of federal law."<sup>79</sup> However, because the improper delegation of judicial powers can erode the judiciary's essential role of resolving cases and controversies, the doctrine of separation of powers forbids the courts from delegating their Article III responsibilities.<sup>80</sup> Although Article III has been read to prohibit the delegation of judicial authority, it has not been interpreted to prevent courts from using nonjudicial officers to

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*see also* United States v. Burnette, 980 F.Supp. 1429, 1435 (M.D. Ala. 1997) (noting that probation officers are the "eyes and ears" of the courts).

<sup>74</sup> *See* Czajkoski, *supra* note 55, at 12; *see also* John Rosecrance, *The Probation Officers' Search for Credibility: Ball Park Recommendations*, 150 PLI/CRIM. 159, 159-60 (1989) ("Studies of sentencing practices reports a consistently high rate of agreement between probation officer recommendations and judicial disposition").

<sup>75</sup> *See* Czajkoski, *supra* note 55, at 12.

<sup>76</sup> *See id.* Technical violations are violations "which are somehow covered by the conditions of probation but which are not specified in criminal statutes." *Id.* For example, an offender's failure to report to the probation officer or failure to avoid "undesirable persons" can be considered a type of technical violation. *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>79</sup> Pacemaker Diagnostic Clinic of America, Inc. v. Instrumedix, Inc., 725 F.2d 537, 544 (9th Cir. 1984).

<sup>80</sup> *See* United States v. Melendez-Santana, 353 F.3d 93, 101 (1st Cir. 2003).

support judicial functions, so long as the courts retain ultimate responsibility.<sup>81</sup>

### *B. Statutory Basis for Delegation Challenges*

In imposing a sentence of imprisonment, 18 U.S.C. § 3553 directs district court judges to sufficiently satisfy the following purposes:

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.<sup>82</sup>

In addition to fulfilling the purpose of sentencing, the court must also consider specific factors when determining what sentence to impose.<sup>83</sup> The court must consider the nature and circumstances of the offense committed, the defendant's history and personal characteristics, the kinds of sentences available, and the established sentencing ranges for the category of offense that the defendant committed.<sup>84</sup> In addition, the court must "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," while keeping the need to provide restitution to the victims of the offense in mind.<sup>85</sup> Furthermore, the court must consider any pertinent policy statements regarding sentencing.<sup>86</sup>

The above factors governing the imposition of a prison term also guide the court in imposing a term of supervised release on a defendant.<sup>87</sup> Similarly, district court judges also use § 3583 to guide the length and conditions of supervised release to be imposed.<sup>88</sup> The statute repeatedly refers to "the court" as having authority to make sentencing

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<sup>81</sup> *United States v. Allen*, 312 F.3d 512, 515–16 (1st Cir. 2002) (quoting *United States v. Johnson*, 48 F.3d 806, 809 (4th Cir. 1995)). This Note argues that the Eighth Circuit's approach does not offend this reading of Article III.

<sup>82</sup> *Imposition of a Sentence*, 18 U.S.C. § 3533(a)(2) (2006).

<sup>83</sup> *See id.* § 3553(a).

<sup>84</sup> *Id.*

<sup>85</sup> *See id.* § 3553(a)(6)–(7).

<sup>86</sup> *See id.* § 3553(a)(5).

<sup>87</sup> *Inclusion of a Term of Supervised Release After Imprisonment*, 18 U.S.C. § 3583(c) (2006). *But see* *United States v. Sicher*, 239 F.3d 289, 291 (3d Cir. 2000) (stating that in order to impose a term of supervised release, it is not necessary that all of the factors identified in § 3553(a) be present).

<sup>88</sup> *See* 18 U.S.C. § 3583(b) (the authorized length of terms of supervised release by class of felony); *see also* § 3583(d) (discussing conditions of supervised release).

determinations and set conditions of supervised release.<sup>89</sup> In addition to setting forth certain enumerated conditions of supervised release related to the defendant's crime,

[t]he court may order, as a further condition of supervised release, to the extent that such condition—(1) is reasonably related to the [above stated] factors set forth in §§ 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D); (2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth [and] . . . (3) is consistent with any pertinent policy statements issued by the Sentencing Commission . . . any other condition set forth as a discretionary condition of probation . . . and any other condition it considers to be appropriate.<sup>90</sup>

Although the § 3553(a) factors are broad, they still impose a real restriction on the district court's ability to impose conditions of supervised release.<sup>91</sup> For example, even though a condition might have clear rehabilitative effect, a court cannot impose the condition "without evidence that the condition imposed is 'reasonably related,' that is, related in a 'tangible way,' to the crime or to something in the defendant's history."<sup>92</sup> The court in *United States v. Pruden* concedes that this is not a very high standard, but nonetheless argues it is "a standard with teeth."<sup>93</sup> The court argues that a condition with no basis, or only a tenuous basis in the record, will inevitably be in violation of § 3583(d)(2), since conditions of supervised release cannot involve a "greater deprivation of liberty than is reasonably necessary."<sup>94</sup>

Furthermore, the court may also modify or revoke the imposed conditions of supervised release.<sup>95</sup> Modifications may: (1) terminate a term of supervised release and thus discharge a defendant of supervision; (2) extend a term of supervised release and thereby impose additional restrictions on the defendant; or (3) reduce the conditions of supervised release.<sup>96</sup> Moreover, revocation of supervised release is yet another option for the district court.<sup>97</sup> Such revocation would require the defendant

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<sup>89</sup> See *id.* § 3583.

<sup>90</sup> See *id.* § 3583(d).

<sup>91</sup> See *United States v. Pruden*, 398 F.3d 241, 248 (3d Cir. 2005).

<sup>92</sup> *Id.* at 248–49 (quoting *United States v. Evans*, 155 F.3d 245, 249 (3d Cir. 1998)).

<sup>93</sup> See *id.* at 249.

<sup>94</sup> *Id.* (quoting § 3583(d)(2)). For example, in *Pruden*, the Third Circuit found that the imposition of a condition of supervised release requiring the defendant to undergo mental health counseling was plain error because the district court "did not point to any evidence that any of the § 3553(a) factors were present." *Id.*

<sup>95</sup> See *id.* § 3583(e).

<sup>96</sup> See *id.* § 3583(e)(1)–(2).

<sup>97</sup> See *id.* § 3583(e)(3).

“to serve in prison all or part of the term of supervised release . . . for the offense . . . without credit for time previously served on post release supervision, if the court . . . finds . . . that the defendant violated a condition of supervised release.”<sup>98</sup>

In sum, these important statutory provisions governing the imposition of a sentence<sup>99</sup> and the inclusion of a term of supervised release after imprisonment<sup>100</sup> give the courts authority to make sentencing and supervised release decisions. As previously noted, § 3553(a), which sets forth factors that courts must consider when imposing a sentence, begins, “[t]he court shall impose a sentence sufficient, but not greater than necessary . . . .”<sup>101</sup> Likewise, § 3583 details the terms and conditions to guide the court when imposing a term of supervised release.<sup>102</sup>

Since the district courts must follow the aforementioned statutory guidelines for sentencing, defendants on supervised release may challenge their sentences and the amount of authority the judge has delegated to the probation officer.<sup>103</sup> These challenges usually target the district court’s delegation of authority to the probation officer and consist of appealing to the circuit court or filing a motion to revise the sentence with the district court judge.<sup>104</sup>

### C. *The Circuit Split*

All circuits that have ruled on the issue<sup>105</sup> agree that it is permissible to delegate some discretion to probation officers regarding mental health treatment<sup>106</sup> as a condition of a defendant’s supervised release.

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<sup>98</sup> *Id.*

<sup>99</sup> *See generally* § 3553.

<sup>100</sup> *See generally* § 3583.

<sup>101</sup> § 3553(a).

<sup>102</sup> § 3583.

<sup>103</sup> *See, e.g.*, *United States v. Kent*, 209 F.3d 1073 (8th Cir. 2000) (holding that the Court’s delegation of authority to determine whether the defendant should undergo mental health counseling to the probation officer was improper).

<sup>104</sup> *See* Ronald S. Chapman, *Is Your Probation Officer Exceeding His or Her Authority?*, WEST PALM BEACH CRIMINAL LAWYER BLOG, July 27, 2008, <http://www.justiceflorida.com/2008/07/articles/florida-law-regarding-probatio/is-your-probation-officer-exceeding-his-or-her-authority/>. For example, when an offender is placed on probation in Florida, the sentencing judge orders the offender to comply with certain conditions of the probation. “As long as the probation officer is simply supervising a specific, judge-ordered condition of probation, all is well. However, problems arise whenever a judge delegates authority to a probation officer to impose what amounts to additional conditions of probation.” *Id.*

<sup>105</sup> The Fifth and Sixth Circuits have not yet ruled on this issue. Although the Fifth Circuit has not specifically spoken on the issue of delegation, it appears the court might follow the *Peterson* circuits, holding that delegation of administrative tasks to probation officers is not a plain error. *United States v. Turpin*, 2011 U.S. App. LEXIS 4017, at \*3–4 (5th Cir. Mar. 1, 2011).

<sup>106</sup> Courts include psychological or psychiatric counseling programs and sex offender counseling in the term mental health treatment. *See, e.g.*, *United States v. Kent*, 209 F.3d

However, circuits differ over the degree of discretion that courts should afford to probation officers. The majority of circuits hold that the court, not the probation officer, must make the decision of whether a defendant is to engage in mental health treatment.<sup>107</sup> In contrast, the Eighth Circuit holds that it is permissible for a probation officer to make this determination, so long as the court does not explicitly abdicate its authority in the ongoing supervision of the defendant's supervised release.<sup>108</sup>

The majority circuits generally follow the rule set forth in *United States v. Peterson*, which states:

If [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 . . . . On the other hand, if the [d]istrict [c]ourt was intending nothing more than to delegate to the probation officer details with respect to the selection and schedule of the program, such delegation was proper.<sup>109</sup>

*Peterson* relies primarily on the USSG to support the distinction.<sup>110</sup> While the USSG places authority in *the court* to impose conditions of probation,<sup>111</sup> it also states that the court may impose “a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office.”<sup>112</sup> *Peterson* cites the former language to support its stance that only the court, and not the probation officer, can determine whether a defendant must undergo mental health treatment as a condition of supervised release.<sup>113</sup> *Peterson* argues that the latter language allows courts to delegate the scheduling of treatment sessions to probation officers.<sup>114</sup>

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1073, 1074 (8th Cir. 2000) (discussing psychological or psychiatric counseling); *United States v. Peterson*, 248 F.3d 79, 84 (2d Cir. 2001) (discussing sex offender counseling).

107 *See, e.g.*, *United States v. Mike*, 632 F.3d 686, 695–96 (10th Cir. 2011); *see also* *United States v. Esparza*, 552 F.3d 1088, 1091 (9th Cir. 2009); *United States v. Miller*, 341 Fed. Appx. 931, 933–34 (4th Cir. 2009); *United States v. Heath*, 419 F.3d 1312, 1315 (11th Cir. 2005); *United States v. Pruden*, 398 F.3d 241, 251 (3d Cir. 2005); *United States v. Sines*, 303 F.3d 793, 799 (7th Cir. 2002); *United States v. Allen*, 312 F.3d 512, 516 (1st Cir. 2002); *Peterson*, 248 F.3d at 85.

108 *See* *United States v. Thompson*, 653 F.3d 688, 693 (8th Cir. 2011); *see also* *United States v. Mickelson*, 433 F.3d 1050, 1057–58 (8th Cir. 2006).

109 *Id.* at 85.

110 *See id.*

111 *See id.* (quoting U.S.S.G. § 5B1.3(b)).

112 *Id.* (quoting U.S.S.G. § 5B1.3(d)(5)).

113 *See id.*

114 *See id.*



Similarly, the majority circuits also interpret Article III of the Constitution narrowly, holding that delegating the authority to determine whether the defendant must undergo mental health treatment to a probation officer is improper. These circuits hold that requiring the defendant to participate in treatment and counseling programs as a condition of supervised release amounts to the imposition of a sentence, which is a core judicial function that judges may not delegate to nonjudicial probation officers.<sup>115</sup> Although probation officers are authorized to manage aspects of sentences and to supervise those on supervised release, “[n]o statutory provision, however, assigns a probation officer any judicial function.”<sup>116</sup> Furthermore, while probation officers are authorized to “perform any [ ] duty that the court may designate,”<sup>117</sup> the majority circuits read Article III’s Cases and Controversies Clause as limiting this seemingly broad authorization, and hold that these authorizations are in fact delegations of judicial functions in violation of Article III.<sup>118</sup> “Requiring a defendant to participate in a mental health program as a condition of his supervised release is unquestionably a judicial function” because it imposes a sentence on the defendant.<sup>119</sup>

In contrast to the *Peterson* rule, the minority Eighth Circuit allows probation officers to determine whether the defendant will undergo mental health treatment if there is no indication that the court will not retain ultimate control over the condition of supervised release.<sup>120</sup> Both the majority and minority circuits rely on the same constitutional and statutory provisions, but differ in interpreting the point at which the district court’s ultimate authority over the sentence is lost.<sup>121</sup> For the majority, the trigger is as soon as the probation officer is permitted to determine whether the defendant must undergo mental health treat-

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<sup>115</sup> See, e.g., *United States v. Heath*, 419 F.3d 1312, 1315 (11th Cir. 2005); see also *United States v. Johnson*, 48 F.3d 806, 808 (4th Cir. 1995).

<sup>116</sup> *Johnson*, 48 F.3d at 808.

<sup>117</sup> 18 U.S.C. § 3603(10) (2010).

<sup>118</sup> See U.S. CONST. art. III, § 2, cl. 1; see also *Heath*, 419 F.3d at 1315; *Johnson*, 48 F.3d at 808–09.

<sup>119</sup> *Heath*, 419 F.3d at 1315.

<sup>120</sup> See *United States v. Wynn*, 553 F.3d 1114, 1120 (8th Cir. 2009). The court notes that even if a district court does not explicitly claim that it will retain ultimate control over the decision of whether a defendant should complete mental health counseling as a condition of supervised release, the probation officer will most likely consult with the court about the matter. See *id.* The court also stated that a district court could hear a defendant’s motion for reconsideration of the probation officer’s decision. See *id.*

<sup>121</sup> Compare *United States v. Peterson*, 248 F.3d 79, 85 (2d Cir. 2001) (explaining the district court loses authority upon allowing the probation officer to determine whether the defendant needs treatment) with *United States v. Mickelson*, 433 F.3d 1050, 1057–58 (8th Cir. 2006) (explaining that the district court loses authority when it indicates it will not retain final authority over the conditions of supervised release and instead suggests that final authority vests in the probation officer).

ment.<sup>122</sup> In contrast, the Eighth Circuit finds that the district court's authority is lost only when the district court specifically indicates that it is abdicating its authority over the defendant to the probation officer.<sup>123</sup> Therefore, the Eighth Circuit does not have an entirely different interpretation of the constitutional or statutory provisions than the majority circuits. Instead, the Eighth Circuit sees the probation officer as an arm of the court, granting the probation officer discretion to determine whether the defendant should undergo mental health treatment without disclaiming the district court's responsibility for the defendant.<sup>124</sup>

For example, in *United States v. Mickelson*, the Eighth Circuit upheld three conditions of supervised release despite the defendant's argument that the conditions constituted an improper delegation of the court's authority to the probation officer.<sup>125</sup> The special conditions required the defendant to participate in alcohol testing, to be placed on a Global Positioning Satellite (GPS) system for tracking, and to receive mental health counseling, all at the discretion of the probation officer.<sup>126</sup> The court expressed a preference for flexible conditions of supervised release because such flexibility "can serve a defendant's interests since they can be tailored to meet his specific correctional needs."<sup>127</sup> The court ruled that the delegations were proper, and under the language of the delegations, the court retained and exercised ultimate responsibility for the defendant's sentence.<sup>128</sup> The court also distinguished the case from *United States v. Kent*, in which the court rejected delegation of the decision whether a defendant's supervised release should include mental health treatment to a probation officer.<sup>129</sup> The *Mickelson* court determined that the district court "gave no indication that it would not retain ultimate authority over all of the conditions of Mickelson's supervised release," whereas the sentencing district court in *Kent* "could have been interpreted to vest final authority in the probation office."<sup>130</sup>

In contrast, the Eighth Circuit in *Kent* noted that the district court clearly sought to abdicate its role in determining whether the defendant should undergo psychiatric treatment, stating, "the court explicitly stated

<sup>122</sup> See, e.g., *Heath*, 419 F.3d at 1315.

<sup>123</sup> See, e.g., *United States v. Smart*, 472 F.3d 556, 560 (8th Cir. 2006).

<sup>124</sup> See *Wynn*, 553 F.3d at 1120.

<sup>125</sup> Compare *Mickelson*, 433 F.3d at 1056–57 (holding that judges can delegate limited authority to probation officers to determine probation conditions as long as the judge retains ultimate responsibility), with *Kent*, 209 F.3d 1073, 1074 (8th Cir. 2000) (holding that judges cannot delegate the authority to determine whether a defendant should undergo mental health counseling to probation officers, but limited the holding to the facts of the case).

<sup>126</sup> See *Mickelson*, 433 F.3d at 1051.

<sup>127</sup> *Id.* at 1057 (citing *United States v. Cooper*, 171 F.3d 582, 587 (8th Cir.1998)).

<sup>128</sup> See *id.* at 1056–57.

<sup>129</sup> See *id.*

<sup>130</sup> *Id.* at 1057.

it hoped it would not be ‘riding herd’ in the probation officer’s decision to require Kent to undergo psychiatric treatment.”<sup>131</sup> Although the *Kent* court struck down the delegation, it limited its decision to the facts of the case, recognizing that “federal district courts cannot be expected to police every defendant to the extent that a probation officer is capable of doing.”<sup>132</sup> Therefore, so long as the court retains and exercises the ultimate responsibility for the conditions of supervised release, limited delegations to probation officers of the determination of the necessity of mental health treatment sessions are permissible in the Eighth Circuit because probation officers are on the ground with defendants and better suited to identify the needs of defendants as they arise.<sup>133</sup>

### III. SUPPORTING DELEGATION OF AUTHORITY TO IMPOSE MENTAL HEALTH TREATMENT TO PROBATION OFFICERS

This Note endorses the Eighth Circuit’s side of the split, which extends the greatest amount of sentencing discretion to probation officers, because it allows for more flexibility in sentencing and is the best approach for both the judicial system and defendants. The Eighth Circuit’s view permits limited delegation of sentencing authority, such as the ability to determine whether a defendant should engage in mental health therapy, with the district court ultimately retaining responsibility for the sentence through general regulation of the defendant’s supervised release.<sup>134</sup> This Note will argue that authorizing the district court judge to delegate a wider amount of discretion in sentencing to the probation officer is the better policy alternative because it will promote the defendant’s rehabilitation and overall judicial economy.

#### A. *Sentencing Delegations are Constitutionally and Statutorily Permissible*

In contrast to the majority’s position, the Eighth Circuit’s stance does not circumvent the constitution or statutory provisions governing supervised release because the court retains ultimate authority over the sentence through the court’s oversight of the conditions of supervised release and the defendant’s ability to appeal to the court.<sup>135</sup> The USSG vests the power to impose a sentence in the courts.<sup>136</sup> However, the USSG also vests power in the probation office regarding substance

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<sup>131</sup> *Kent*, 209 F.3d at 1079.

<sup>132</sup> *Id.*

<sup>133</sup> See *United States v. Mickelson*, 433 F.3d 1050, 1057 (8th Cir. 2006) (citing *United States v. Cooper*, 171 F.3d 582, 587 (8th Cir. 1998)).

<sup>134</sup> See *id.* at 1056–57; see also *United States v. Thompson*, 653 F.3d 688, 693 (8th Cir. 2011); *United States v. Conelly*, 451 F.3d 942, 945 (8th Cir. 2006).

<sup>135</sup> See 18 U.S.C. § 3583(e); see *Mickelson*, 433 F.3d at 1056–57.

<sup>136</sup> See U.S.S.G. § 5B1.3(b) (“The court may impose other conditions of probation . . .”).

abuse<sup>137</sup> and mental health programs.<sup>138</sup> Thus, courts that merely follow the *Peterson* rule ignore the intent of these USSG provisions to give the probation office explicit discretion in these areas.<sup>139</sup> The Eighth Circuit is simply acknowledging the statutory discretion already entrusted to probation officers and endorsing the discretion to address the realities of the judicial system. Generally, the court learns about the defendant's deep-seated mental health issues only through the probation officer's investigation of the defendant's life. But sometimes such problems do not manifest until supervised release, and the probation officer, as an arm of the court, must be granted authority to place an offender in treatment to address mental health issues that arise during the course of supervised release. Moreover, judges cannot attend to every defendant's special needs during the periods of supervised release because they are overwhelmed with mountain-high piles of cases on their desks. And as much as some judges may want to get to know their defendants, they generally achieve this knowledge only through the PSRs probation officers submit, and reports from probation officers during the course of supervised release.<sup>140</sup> This reality is exactly why the courts already rely so heavily on probation officers and precisely the reason why courts should continue to do so.

Furthermore, the Eighth Circuit's approach does not offend Article III of the Constitution, which vests the responsibility to resolve all cases and controversies with the judiciary.<sup>141</sup> When the court delegates to the probation officer the discretion to determine whether treatment sessions are necessary, the court still retains responsibility for resolving the case because the *court* always retains ultimate authority over the defendant.<sup>142</sup>

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<sup>137</sup> See U.S.S.G. § 5B1.3(d)(4):

The following "special" condition[ ] of probation [is] recommended . . . if the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol—a condition requiring the defendant to participate in a program *approved by the United States Probation Office* for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol.

<sup>138</sup> See USSG § 5B1.3(d)(5) ("The following "special" condition[ ] of probation [is] recommended . . . if the court has reason to believe that the defendant is in need of psychological or psychiatric treatment—a condition requiring that the defendant participate in a mental health program *approved by the United States Probation Office*") (emphasis added).

<sup>139</sup> Compare *United States v. Heath*, 419 F.3d 1312, 1315 (11th Cir. 2005) (holding that a judge cannot delegate the decision of whether a defendant should undergo mental health treatment as a condition of supervised release to a probation officer because it is a judicial function), with USSG § 5B1.3(d)(5) (permitting a court to require a defendant to participate in a mental health program approved by the United States Probation Office).

<sup>140</sup> See *Bunzel*, *supra* note 1, at 941–44 (stressing the important role the PSR plays in educating the district court about the defendant).

<sup>141</sup> See U.S. CONST. art. III, § 2, cl. 1.

<sup>142</sup> See *United States v. Thompson*, 653 F.3d 688, 693 (8th Cir. 2011) (quoting *United States v. Wynn*, 553 F.3d 1114, 1120 (8th Cir. 2009)) (" . . . such an impermissible delegation

Implicit in these decisions is an assumption that where the district court does not disclaim ultimate responsibility for deciding the appropriateness of mental health counseling, it is likely that the probation officer will consult with the court about the matter or, at a minimum, the court will entertain a motion from the defendant for reconsideration of the probation officer's initial decision.<sup>143</sup>

Thus, it is unlikely that the probation officer will commit the defendant to mental health treatment without any involvement from the court. Additionally, if the court does not agree with the decision of the probation officer, it can override the probation officer's discretion through a modification of the supervised release conditions.<sup>144</sup> As such, in accordance with Article III, the court retains the responsibility to resolve the defendant's case. Moreover, if the defendant is unhappy with the conditions the probation officer sets, the defendant can seek relief from the district court.<sup>145</sup>

#### *B. Probation Officers and Judges Already Agree on Sentencing Matters*

More often than not, the probation officer will be able to determine conditions that both the court and the defendant will agree with. The bulk of the probation officer's work with the court occurs through the preparation of the PSR, which aids the judge in imposing the most intelligent, informed sentence possible.<sup>146</sup> Studies have shown there is a very high rate of agreement between the probation officer's recommendation and the ultimate judicial disposition.<sup>147</sup> This high level of agreement stems in part from the trusting relationship between the court and probation officers. "District courts rely upon probation officers every day for the necessary information regarding an appropriate sentence"; the courts also inherently trust the probation officers.<sup>148</sup> Thus, courts delegate to probation officers because they trust that the officers will come to a reasonable determination regarding the sentence.

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occurs only where the district court gives an 'affirmative indication' that it will not retain 'ultimate authority over all of the conditions of supervised release'").

<sup>143</sup> *Wynn*, 553 F.3d at 1120.

<sup>144</sup> *See* 18 U.S.C. § 3583(e).

<sup>145</sup> *See* *United States v. Lykken*, 2001 WL 1789405, \*3 (D. N. Dakota Oct. 22, 2001) (holding that the probation officer can recommend treatment for the defendant and if the defendant disagrees, he can seek relief in the district court by seeking modification of the condition of probation or opposing the probation officer's petition).

<sup>146</sup> *See* discussion of the PSR, *supra* Parts I.B–C.

<sup>147</sup> *See* Rosecrance, *supra* note 74, at 159.

<sup>148</sup> *United States v. Weinberger*, 268 F.3d 346, 362 (6th Cir. 2001) (Cohn, J., concurring).

There are three additional explanations for this high agreement rate. First, the probation officer devotes much more time to investigating the defendant's circumstances than judges, and can control the information that judges receive.<sup>149</sup> Therefore, judges are more apt to agree with the probation officer, because judges possess little more information than what the probation officer relays, and are likely to follow the probation officer's recommendations.<sup>150</sup> Secondly, a seasoned probation officer may be able to tailor recommendations to the individual judge based on the judge's past sentencing behavior.<sup>151</sup> Lastly, the probation officer uses the PSR to establish and maintain credibility throughout the judiciary, and is therefore likely to be meticulous when detailing sentencing recommendations.<sup>152</sup> Probation officers are evaluated on their ability to provide accurate and reasonable recommendations, and judges are very powerful figures in this evaluation.<sup>153</sup> Thus, in seeking to attain respect from judges, the probation officers are greatly improving the criminal justice system through providing detailed and accurate sentencing reports. Expanding the role of probation officers through sentencing delegation will only continue to improve the criminal justice system because defendants will benefit from mental health counseling and treatment that is appropriately tailored to their individual circumstances.

### C. Probation Officers Already Play a Quasi-Judicial Role

Likely due to the high level of agreement between probation officers and judges, probation officers already play a quasi-judicial role in the criminal justice system.<sup>154</sup> In their everyday capacity, probation officers are entrusted with a wide level of discretion. As previously discussed, probation officers recommend sentencing conditions to the court through PSRs.<sup>155</sup> Additionally, probation officers have the responsibility to ensure that defendants follow the conditions set and to initiate proceedings if these conditions are violated.<sup>156</sup> Since probation conditions are often extremely vague, such as the condition to "avoid undesirable associates," probation officers are afforded wide latitude in determining whether a defendant violated the condition and referring the matter to the

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<sup>149</sup> See Rosecrance, *supra* note 74, at 160 (quoting ALFRED BLUMSTEIN ET AL., RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 44 (National Academy Press 1983)).

<sup>150</sup> See *id.* at 159; see also *Weinberger*, 268 F.3d at 362.

<sup>151</sup> See Rosecrance, *supra* note 74, at 160.

<sup>152</sup> See *id.*

<sup>153</sup> See *id.* at 164–65 ("Judges can exert a considerable influence upon the career potential of individual probation officers. Judicial praise for the quality of an officer's work is often used as a basis for promotion").

<sup>154</sup> See discussion about the unique role of probation officers, *supra* Part I.D.

<sup>155</sup> See discussion of the PSR, *supra* Parts I.B–C.

<sup>156</sup> See Czajkoski, *supra* note 55, at 11–12.

court when they deem appropriate.<sup>157</sup> Although the probation officer can determine if a violation occurred and refer such violations to the courts, the ultimate control over the defendant still remains with the courts. Sound familiar?

Given the quasi-judicial role probation officers already play, allowing probation officers authority over mental health treatment for defendants under the Eighth Circuit's rule is not such a stretch at all. In fact, it is no different from any other sentencing matter courts already delegate to probation officers. Allowing probation officers authority over treatment decisions, with the courts retaining the ultimate authority to either agree with the decision or modify the condition, amounts to probation officers essentially recommending a condition of probation. Therefore, since courts have relied upon probation officers to recommend sentencing conditions for over forty years,<sup>158</sup> courts should be allowed to "extend" their sentencing delegations to the determination of the necessity of mental health treatment. Arguably, probation officers already determine whether or not a defendant should engage in mental health treatment in the majority circuits, as judges often follow the probation officer's recommendations in the PSR.

#### *D. Delegation to Probation Officers Promotes Judicial Economy*

Probation officers will produce conditions of supervised release similar to those that district judges would determine on their own, but will reach these decisions at a much lower cost. Delegating these mental health treatment decisions to probation officers, while keeping the ultimate control in the hands of the court, is less costly because it frees the hands of busy federal judges with overflowing dockets. Instead of spending precious time to compose treatment conditions, the judge can instead delegate the authority over treatment decisions to the probation officer, who can develop this decision over time and observation of the defendant. Moreover, a judge's composition of treatment conditions is largely speculative because the judge has not personally observed the defendant and cannot predict the effectiveness of the treatment or the cooperation of the defendant at the outset. Requiring the judge, and only the judge, to make this determination "underappreciates the role of the probation officer and does not take into account what a burdensome proposition it would be to require the district courts to micro-manage each defendant."<sup>159</sup>

Authorizing sentencing delegation to probation officers, moreover, is a better use of public resources. Probation officers are already paid to

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<sup>157</sup> *Id.* at 11.

<sup>158</sup> See Bunzel, *supra* note 1, at 939, 942–43.

<sup>159</sup> *United States v. Weinberger*, 268 F.3d 346, 363 (6th Cir. 2001) (Cohn, J., concurring).

observe and work with defendants on a daily basis. Why not take this one step further, and allow the probation officer to make decisions about mental health treatment with the defendant, that will actually work for the defendant, and to which the defendant will be able to adhere? This would not take up much more of the probation officer's time, because it is essentially an extension of what the probation officer is already doing. But this would free up a lot more of the court's time. As previously discussed, the court still has final authority over the decision, but perhaps this delegation will lead to the defendant and probation officer coming into court just one time to report the treatment decision and the reasons for the decision to the court. This is much faster and less costly than the alternative scenario, where the probation officer and defendant repeatedly appear in court because the defendant cannot stick to the conditions of supervised release the judge laid out months, or even years prior, due to persistent mental distress that the probation officer cannot exercise discretion to remedy.

Additionally, district courts purposefully delegate matters to probation officers for a reason—because they need to. In the circuits that merely follow the *Peterson* rule, district court judges have expressed their trust in probation officers and recognized the benefits that delegations of treatment decisions will have in their courtrooms.<sup>160</sup> Yet, the circuit court judges have chastised the district court judges for simply responding in a logical and efficient manner and asking probation officers for this much-needed assistance.<sup>161</sup> These district court judges trust their probation officers to recommend sentences after the defendant is found guilty, but are being told by the appellate courts that they cannot trust their probation officers, who work with the defendants throughout the term of supervised release, to determine whether mental health treatment would benefit the defendant. The circuits following *Peterson* are sending an illogical message to the district court judges, which is damaging to the defendants and to the courts.

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<sup>160</sup> See, e.g., *United States v. Esparza*, 552 F.3d 1088, 1089 (9th Cir. 2009) (the district court delegated the decision of whether the defendant needed inpatient treatment to the probation officer); *United States v. Heath*, 419 F.3d 1312, 1315 (11th Cir. 2005) (the district court delegated the decision of whether the defendant had to participate in mental health treatment as a condition of supervised release to the probation officer).

<sup>161</sup> See, e.g., *Esparza*, 552 F.3d at 1091 (holding that allowing the probation officer discretion to determine whether the defendant needed inpatient treatment as a condition of supervised release was impermissible); *Heath*, 419 F.3d at 1315 (holding that the district court's delegation of the authority to decide whether a defendant will receive mental health treatment to the probation officer was improper).



### *E. Delegation to Probation Officers Will Benefit Defendants*

The probation officer is in the best position to determine whether treatment and counseling sessions will be beneficial to the defendant. Since the probation officer is the person most familiar with the defendant and is in charge of supervising the defendant during the term of supervised release, the probation officer is bound to know the defendant on a more personal level. Although the role of the probation officer has changed a lot over the years, the 2006 monograph seems to restore the probation officer back to its role as a social worker for the court.<sup>162</sup> The 2006 monograph directs the probation officer, in preparing the PSR, to get the full picture of the defendant through an evaluation of the defendant's childhood, family history, current financial circumstances, and living situation.<sup>163</sup> Thus, it is the probation officer, not the court, who is most familiar with the circumstances of the individual defendant.

Additionally, since the probation officer has returned to his role as a specialized social worker for the court, the defendant will likely trust the probation officer throughout the sentencing phase because the probation officer represents the defendant's only hope for leniency at the hands of the court.<sup>164</sup> Similarly, the defendant and probation officer have likely met on numerous occasions for presentence interviews, and have likely developed some sort of relationship.<sup>165</sup> Most importantly, the probation officer supervises the defendant's actions during supervised release. It is the probation officer, not the court, with whom the defendant checks in on a regular basis. It is the probation officer, not the court, who witnesses firsthand whether the defendant is making progress or violating the conditions of supervised release. Therefore, it should be the probation officer, not the court, who should determine the defendant's need for counseling and treatment sessions, because the probation officer is most familiar with the plight of the defendant prior to the imposition of the sentence, and throughout the term of supervised release.

### CONCLUSION

This Note argued that authorizing delegations of limited sentencing discretion to probation officers to make decisions about mental health treatment produces a better policy outcome for both courts and defendants because of the unique, quasi-judicial role probation officers already play in the criminal justice system. Part I of this Note examined the history and current role of probation officers. Part II of this Note dis-

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<sup>162</sup> See Bunzel, *supra* note 1, at 942–48. See generally 2006 Monograph, *supra* note 4.

<sup>163</sup> See 2006 Monograph, *supra* note 4, at III-24–31.

<sup>164</sup> See Bunzel, *supra* note 1, at 945.

<sup>165</sup> See *id.*

cussed the constitutional and statutory provisions essential to evaluating delegations of decisions regarding a defendant's mental health treatment and the varying interpretations that have culminated in a circuit split. Part III of this Note detailed the nuanced arguments of the circuit split and evaluated the merits of the arguments from a policy perspective.

Described as the arms, eyes, and ears of the court, probation officers are entrusted with many statutory duties. Probation officers recommend sentences for defendants to district court judges after a careful evaluation of the individual's circumstances. They are entrusted with supervising defendants on supervised release and writing reports detailing whether the defendant is in compliance with conditions of supervised release. The determination of necessary treatment and counseling sessions is no different from any of the aforementioned duties already entrusted to probation officers. Moreover, given that the court retains the ultimate authority over the determination, the probation officer's actions do not amount to much more than a traditional recommendation. The probation officer determines whether treatment is necessary and beneficial, based on his detailed observations of the defendant, and the court retains the ability to accept, modify or reject the treatment. Therefore, the flexible position the Eighth Circuit takes regarding delegation is not such a shocking concept at all, but rather a logical and efficient development for the judicial system.

This Note calls for the Supreme Court to resolve the circuit split over whether the court can delegate the determination of mental health treatment sessions to probation officers in the affirmative. This flexible approach will ultimately reduce judicial costs and will result in the most effective treatment for defendants on supervised release. Judges will not be burdened with the task of determining whether mental health treatment is necessary at the outset of sentencing, with little knowledge of how the defendant's circumstances will change throughout the term of supervised release. Instead, probation officers will determine the necessity of mental health treatment with the insight gained through presentence interviews, and the ongoing information collected through frequent meetings during the term of supervised release. Thus, the flexible approach will produce the best outcome for both defendants and the judiciary.