Establishing Appropriate Special Terms and Conditions for Sex Offenders

A Report Submitted to Colorado's 20th Judicial District Probation Department

By

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About the Author

Dr. Tanner earned his Ph.D. from the University of Illinois in 1981. His Doctoral Certifications were in sociological approaches to Cognitive Social Psychology, Sociology of Law, Criminology/Delinquency and Evaluation Research. He served on faculty at three universities, teaching undergraduate and graduate classes in Criminal Justice, Corrections, Social Psych, and Statistics.

He has worked with convicted sex offenders since 1970 in almost every capacity within the Justice System; having served as a Probation Officer, Supervising Probation Officer, Director of Residential Halfway Houses, Manager of Community Corrections for Boulder County Colorado, and Vice President of a Community Corrections company in Colorado. Since 1998, he has provided consultation and training on Sex Offenders for more than 100 International, U.S. Federal, State, and public agencies.

Additionally, Dr. Tanner is a Cyber Crime Analyst, having led the design and development of live-box computer forensic software distributed free to government agencies and in use world-wide. He has personally examined more than 1,700 sex offenders' computers.

Dr. Tanner serves as an Invited Member of the Europol Cybercrime Center's Platform for Experts, Child Exploitation Division. In 1993, the American Association of Criminal Justice Planners awarded him the Weller Award for excellence in criminal justice planning. In 2017, the American Probation and Parole Association awarded him the University of Cincinnati Award for lifetime contributions to Corrections in the U.S. and Canada.

Dr. Tanner is a Colorado District Courts Qualified Expert Witness in the areas of Computer Forensics, Sex Offender's Cognitive Sets and Grooming Strategies, and Community Corrections.

Contents

Executive Summary

The State of Colorado recently implemented new standard Additional Conditions of Supervision for Adult Sex Offenders. These conditions included Special Additional Conditions (SAC) which could be optionally ordered by the Court. Community Supervision Teams/Multidisciplinary Teams (CST/MDT) evaluating, supervising, and treating convicted sex offenders were required to provide the Court with specific information regarding the basis of fact for recommending these SAC. The 20th Judicial District Probation Department requested KBSolutions Inc. to provide a resource document which assisted the CST/MDT in implementing the new SAC. This document is the product of that request.

To assist the CST/MDT, we first reviewed the statutory requirements for sentencing and probation as found in the Colorado Statutes Revised. Definitions for terms relevant to the SAC were then clarified. A brief review of the tenants of the "Risk-Need-Responsivity" model of corrections was provided to identify the dynamic need variables shown through research to be the best evidence-based targets for intervention with convicted sex offenders.

As the SAC focused primarily on Sexually Explicit Material (SEM) and its relation to Internet access and social networking, we conducted a review of recent and relevant research on the effect SEM has on sex offenders. It was found that use of SEM was significantly associated with negative impacts on numerous dynamic need factors relating to sex offender recidivism. Further, it was found that recent neurological research indicates the use of SEM can lead to neurological changes in the brain similar to addiction to alcohol or drugs, especially for individuals who have predisposing factors (such as sex offenders).

The conclusion is drawn that SEM should be prohibited without the approval of the probation officer through SAC in situations where the facts of the case indicate they were present and/or utilized by the offender. Additionally, it was concluded SEM should also be prohibited without the permission of the probation officer in situations where its use emerges during post-sentencing supervision. Representative factual basis regarding four of the SAC were identified and language suggested to demonstrate the nexus between the Condition and the specific case before the Court.

Additionally, CST/MDT were advised to engage in periodic reviews of the case to ensure Conditions aligned with changes in the risk/need of each offender over time.

The specific recommendations made to CST/MDT were:

1. Clearly define the terms "sexually explicit", "sexually oriented", and "sexually stimulating" to reduce or eliminate any confusion among the CST/MDT and the offender as to what is restricted or prohibited.
2. Construct clear and concise language for CST/MDT members to utilize when building the nexus between offender specific case elements and SAC requested in the PSI or reports to the Court.
3. In accordance with RNR principles, create a decision tree to help guide CST/MDT in recommending appropriate SAC. This decision tree should be based on elements; present in the offender's case, discovered through evaluation, identified during the PSI process, or emerge during post-sentencing behavior.

4. Prohibit SEM for Sex Offenders when SEM is an element; present in the offender's case, discovered through evaluation, identified during the PSI process, or emerge during post-sentencing behavior.
5. Prohibit SEM for Sex Offenders when exhibitionism, masturbation in public, or voyeurism is an element; present in the offender's case, discovered through evaluation, identified during the PSI process, or emerge during post-sentencing behavior.
6. Establish clear guidelines for the CST/MDT to conduct periodic review of the SAC in accordance with elements; present in the offender's case, discovered through evaluation, identified during the PSI process, or emerge during post-sentencing behavior.
7. Establish clear guidelines for the CST/MDT which, after case specific review of offender progress in supervision/treatment, allow controlled but reasonable access to SSM with approved Safety Plans in place.
8. Should provide clear physical descriptions of victims to treatment agencies to assist the treatment agency in reviewing offender behavior regarding contact with victims or individuals who resemble victims.
9. Provide training for the CST/MDT on relevant research and its relation to the SAC.

Probation's Role and Colorado's Shifting Focus

The statutory purpose of sentencing in Colorado are:

(a) To punish a convicted offender by assuring the imposition of a sentence (s)he deserves in relation to the seriousness of the offense;

(b) To assure the fair and consistent treatment of all convicted offenders by eliminating unjustified disparity in sentences, providing fair warning of the nature of the sentence to be imposed, and establishing fair procedures for the imposition of sentences;

(c) To prevent crime and promote respect for the law by providing an effective deterrent to others likely to commit similar offenses;

(d) To promote rehabilitation by encouraging correctional programs that elicit the voluntary cooperation and participation of convicted offenders;

(e) To select a sentence, a sentence length, and a level of supervision that addresses the offender's individual characteristics and reduces the potential that the offender will engage in criminal conduct after completing his or her sentence; and

(f) To promote acceptance of responsibility and accountability by offenders and to provide restoration and healing for victims and the community while attempting to reduce recidivism and the costs to society by the use of restorative justice practices (CRS 18-1-102.5).

The goals of probation are essentially two-fold; 1) to ensure that the defendant will lead a law-abiding life and 2) to assist the defendant in doing so (CRS 18-1.3-204). Conditions of supervision must meet two primary criteria to be held constitutionally valid; 1) they must be reasonably related to the offense and 2) they must impose no greater deprivation of liberty than is sensibly necessary to advance the statutory purposes of supervision.

First, probation conditions must be "reasonably related" to the relevant sentencing factors. Factors are (1) the nature and circumstances of the offense, (2) the history and characteristics of the defendant, (3) deterrence, (4) protection of the public, or (5) providing needed correctional treatment to the defendant, (6) reflect the seriousness of the offense, (7), promote respect for the law, and (8) provide just punishment for the offense. It is not necessary for a special condition to be reasonably related to every sentencing factor. Rather, each factor is an independent consideration to be weighed (Vance, 2015).

Second, the condition must minimize the deprivation of liberty. For probation cases, they must "involve only such deprivations of liberty or property as are reasonably necessary" for the purposes of deterrence, protection of the public, providing needed correctional treatment to the defendant, promoting respect for the law, and providing just punishment for the offense. Further, they must be consistent with any policy set by the [State] (Vance, 2015).

Appellate courts often require individualized explanations for why special conditions are necessary to achieve the statutory goals of sentencing and how they are sufficiently narrowly tailored to this case, and this offender at this time. Further, special conditions should be ordered only if the probation officer

determines that the mandatory and standard conditions do not adequately address the defendant's risks and needs. Good supervision, and reasonable special conditions should be tailored to the risks, needs, and strengths presented by the individual offender as determined by careful assessment of each case. The appellate courts routinely caution sentencing courts not to apply set packages of special conditions to entire classes or categories of defendants (e.g., all "sex offenders"). Appellate Courts have rejected and remanded special conditions relating to computer and Internet use for failure to conduct the required individualized inquiry and for failure to articulate findings. When sentencing courts do not set forth factual findings to justify special conditions, some appellate courts have nevertheless affirmed the condition if they can ascertain a viable basis for the condition in the record based on the presentence investigation report and other documents. However, a condition with no basis in the record or with only the most tenuous basis is less likely to be upheld (Vance, 2015).

In 2013-2014, the Colorado Sex Offender Management Board (SOMB) requested and received an external evaluation of the Guidelines and Standards for Sex Offender Management (Guidelines). Among other things, the Guidelines make recommendations regarding the actions of the Community Supervision Team/Multi Disciplinary Team (CST/MDT). The final report was positive overall, but made several recommendations concerning a noted divergence in practices from the evidence-based Risk-Need-Responsivity model ("RNR") (Bonta and Andrews 2016). The RNR model is strongly supported by more than a decade of extensive research. In brief, the SOMB evaluation suggested that Colorado focus more on the dynamic risk factors associated with risk and need as suggested in Mann et.al. 2010. (D'Orazio, Thornton, & Beech, 2014).

As a result of the recommendations, the SOMB made several significant changes to the Guidelines. The changes relevant to this document are found in Appendix D of these Guidelines (Colorado Department of Public Safety, Division of Criminal Justice, Office of Domestic Violence & Sex Offender Management, Sex Offender Management Board, 2018, pp. 193–198). These new Guidelines recommend that "Sexually oriented or explicit materials shall be prohibited, and that although the research on the impact of these materials is mixed, they may have a potentially negative impact on the propensity to sexually reoffend" (Supra, p 194). Further, the Guidelines recommend "Sexually stimulating materials should be prohibited during the early phases of treatment and supervision for all adults and juveniles who have sexually offended…[and the CST/MDT may later]…make the decision on how to regulate and monitor stimulating sexual materials" (Supra, p 196). Clearly, the Guidelines reflect best practices regarding the RNR model with on-going evaluation of risk/need and the appropriate adjustment of supervision requirements (e.g. conditions prohibiting access to and use of sexual content) as the offender progresses in supervision/treatment.

Emerging case law, combined with the SOMB adjustment in the Guidelines, resulted in Colorado Judicial engaging in an extensive process to formulate new Additional Conditions of Supervision for Adult Sex Offenders and new Special Additional Condition(s) (CO Form: JDF 446 Revised 11/18). The new Conditions separate elements of access and use of sexual content and access to the Internet. These new Special Additional Condition(s) (SAC) will require a more comprehensive statement of factual basis when Probation Officers recommend them to the Court. This paper is designed to be a resource to members of the CST/MDT when considering the implementation of the various SAC which balance the changing risk/needs of the offender, the reasonable least restrictive approach to supervision, and public safety while assisting the offender to successfully complete supervision and maintain a law-abiding life.

Definitions

As this document deals with conditions of probation which may, for delimited periods of time, prohibit possession, creation, use of, or viewing certain content, the definition of said content becomes important. The SOMB has referenced several terms in the Guidelines:

1) "**pornographic**". This term is undefined by the SOMB.
2) "**X-rated**". This term is undefined by the SOMB. The Classification and Rating Administration (CARA), established by the Motion Picture Association of America has a series of ratings from "G" (General Audiences) to "NC-17" (No One 17 and Under Admitted) (CARA, 2010, pp. 6–8). The classification "X-rated" is not part of the CARA system. However, it has become commonly accepted by the general public to refer to movies considered "pornographic" (not defined).
3) "**inappropriate sexually arousing material**". This term is undefined by the SOMB.
4) "**sexually oriented or explicit material**". This term is defined by the SOMB as:
   a) Pornographic [materials] that require the viewer to be age 18 to purchase.
   b) Such materials are developed and viewed explicitly for sexual gratification purposes.
   c) …[materials containing] depiction emphasizing sexual/human devaluation (Supra, 194).
5) "**sexually stimulating materials**". This term is defined by the SOMB as non-pornographic materials that:
   a) may lead to sexual interest or arousal,
   b) but were not developed exclusively with that goal in mind.

   The SOMB goes on to say examples of materials that may be sexually stimulating depending upon the adult or juvenile who have sexually offended include incidental nudity within the context of a non-pornographic movie, sexually suggestive images, and non-sexual images such as underwear advertisements and pictures of children (Supra, 194).

The SOMB further states "Nudity is neither sexually stimulating material in and of itself, nor does the fact that the representation or person viewed being clothed necessarily render it not sexually stimulating. The concern is a pornographic depiction emphasizing sexual/human devaluation. It is the context of the nudity and the thoughts generated in the mind of the adult or juvenile who has sexually offended that should be the concern of the CST/MDT when applying the concepts contained in this appendix" (Supra, 194).

Colorado Judicial's SAC uses two terms of interest:

1) "**sexually oriented material"**. This term is undefined in the SAC.
2) "**sexually stimulating material"**. This term is undefined in the SAC.

Judicial, however, has adopted the definitions in the Guidelines and equates "sexually oriented" and "sexually explicit" to be synonymous (Personal correspondence with 20th Judicial District Probation Supervisor of the Sex Offense Team, 2018).

Unfortunately, research conducted over the past several decades by a wide variety of international authors did not utilize the terms found within the documentation of the SOMB or the SAC of Judicial. Researchers generally utilized one of two primary terms when referring to the subject of sexual content in their research on its effect on viewers:

1) "**pornographic"**. This term tends to appear in research from the 1960's until the early 2000's. It was differentially defined by each researcher, but generally conformed to a "reasonable person" standard of explicit sexual activity in a product created primarily for sexual stimulation.
2) "**Sexually Explicit Material" (SEM)**. This term tends to appear in research after 2000. It also is differentially defined by each researcher, but generally refers to content in any format (e.g. literature, photos, film, video, drawings, anime/hentai/manga, avatars, audio recordings/broadcasts/podcasts etc.), legal or illegal, which displays, depicts, portrays or represents;
    a. sexual acts of any kind, or
    b. nudity in a sexual setting, especially involving, but not limited to, exposed genitalia, or
    c. paraphilic content.

Both of these concepts were often broken down into sub-categories, each defined differentially by respective researchers. In general, these categories could be classified as:

1) "**erotica"**. Materials which portray sexuality in an artful manner and focusing on feelings and emotions. (frequently excluded in "pornography" or "SEM" definitions by some researchers).
2) "**softcore"**. Materials which portray nudity in a sexual situation with a more limited focus on sexual penetration and contain no paraphilic behavior.
3) "**hardcore"**. Materials which explicitly portray sexual penetration, fellatio, cunnilingus, fetishism, or paraphilic content.
4) "**extreme**". Materials which explicitly portray sexual actions involving significant physical violence, non-consent, significant humiliation, or "fringe/extreme paraphilias" (undefined).

For the purposes of this document I will use the term SEM to refer to content in any format (e.g. literature, photos, film, video, drawings, anime/hentai/manga, avatars, audio recordings/broadcasts/podcasts etc.), legal or illegal, which displays, depicts, portrays or represents;

    a. sexual acts of any kind, or
    b. nudity in a sexual setting, especially involving, but not limited to, exposed genitalia, or
    c. paraphilic content.

This allows me to align my discussion with the concepts studied by recent research. I understand this term, as defined here, is broad and covers materials protected by the First Amendment. However, as will be discussed and explained later in this document, it allows me to clearly identify material with a nexus to risk/need which may be prohibited for delimited periods of time in a way that any individual can easily determine if content falls within the definition.

I will use the term "Sexually Stimulating Material" (SSM) to refer to content with any nudity or SEM, that a CST/MDT has determined through review of an offender's progress in supervision/treatment is appropriate for the offender to possess or view.

I will avoid the term “pornography” herein for two reasons: A) it has a generally negative connotation and debatably includes material protected by the First Amendment and is value/cultural dependent. What one person calls pornographic another may see as erotic. B) it has been loosely defined in most of the research cited in professional literature. In fact, an examination of the past decade of research on “pornography” found that 84% of the studies either did not define pornography for participants or did not report whether a definition was provided (Short, Black, Smith, Wetterneck, & E Wells, 2012).

Clarity is required for the purpose of establishing special conditions of supervision of sex offenders that both the offender and the CST/MDT understands. I feel the term pornography does not provide this clarity.

Risk-Need-Responsivity

Andrews and Bonta introduced the RNR model in their book first published in 2010. Now in its sixth edition (Bonta & Andrews, 2016), their RNR model has been extensively researched and is considered one of the best evidence-based approaches to correctional supervision and treatment. At the core of their model is a focus on aligning intervention in accordance with three essential principles:

1. Assign individuals to risk categories based on actuarial and validated risk assessments which take into account both static and dynamic elements.
2. Align intervention to target criminogenic needs with dosage adjusted to the level of risk.
3. Focus interventions on dynamic (e.g. changeable) criminogenic needs.

Research on criminogenic risk factors has consistently identified offense-supportive attitudes and beliefs with recidivism of sex offenders (M. Seto, 2013, p. 61; Helmus et al. 2013).

In the last decade, programs working with sex offenders have adopted and refined the RNR model. Research now gives us a clearer understanding of both offender risk and promising needs to target. Attitudes and beliefs, atypical sexual fantasy, and antisocial traits are quintessential targets for intervention. SEM has repeatedly been shown to have direct effect on all three of these needs.

Dynamic risk research with sex offenders in the community suggests that even when controlling for static risk factors, the following factors distinguished recidivistic offenders from non-recidivists: A) ability to regulate sexual thoughts, fantasies, and urges, B) attitudes tolerant of sexual abuse, C) compliance with supervision, D) antisocial peers (Hanson & Harris, 2000; Hanson, Harris, Scott, & Helmus, 2007; M. C. Seto, 2018, p. 183).

Examples of dynamic risk factors for sex offenders includes, but is not limited to:

A) Frequent sexual thoughts
B) Sexual thoughts or fantasies experienced as intrusive or distracting
C) Frequent and/or intensive sexual urges
D) Frequent masturbation
E) Disconnected with adult world
F) Lack of intimate relationships with adults
G) Socially isolated
H) Belief children can consent to sex
I) High association with antisocial peers
J) Strong sense of compulsion
K) Difficulty regulating emotions
L) Impulsive behavior
M) Substance abuse

(M. C. Seto, 2018, p. 232).

Decades of quantitative sex offender recidivism research have established two major risk dimensions; A) atypical sexual interests, and B) antisociality. Atypical sexual interests reflects paraphilias such as pedophilia, excessive sexual preoccupation, paraphilic SEM use, frequent or intensive sexual thoughts, fantasies or urges, and finally, excessive sexual behavior including masturbation and mainstream SEM use or excessive sexual activities with others. Antisociality reflects general antisocial behavior including traits such as impulsivity or callousness, antisocial attitudes or beliefs, and procriminal identification. Sex offenders high on the atypical sexual interest dimension are more likely to commit a sexually motivated

offense, while those high on antisociality are more likely to commit another criminal offense. Those high on both dimensions are very likely to sexually reoffend again. (Seto, 2018, p. 171-172).

Compared to offenders who did not commit sexual crimes, sex offenders against children are more likely to have atypical sexual interests, high sex drives, sexualized coping, offense-supportive cognitions, social skill deficits, loneliness, anxiety and difficulty with intimate relationships (M. C. Seto, 2018, p. 87).

Seto indicates, pathways to sexual offending involving physical contact include, but are not limited to:

A) Intimacy Deficits
    a. loneliness
    b. poor social skills
    c. low self esteem
B) Distorted Sexual Scripts
    a. offense supportive attitudes and beliefs
    b. misreading sexual cues
    c. sensitivity to rejection
    d. low self esteem
C) Emotional Dysregulation
    a. sex as a coping strategy
    b. linking sex with emotional well-being
    c. problems controlling anger
    d. difficulty identifying emotions
    e. impulsivity
    f. personal distress
D) Antisocial Cognitions
    a. antisocial attitudes and belief
    b. feelings of superiority over children
    c. impulsivity
    d. poor delay of gratification
E) Multiple Dysfunctions
    a. early sexualization
    b. impaired attachment styles
    c. antisocial cognitions

(M. Seto, 2013, p. 119).

Whitaker et al. found large differences between child abusers and non-sex offenders regarding sexual problems and attitudinal cognitions (Whitaker et al., 2008).

The next section of this paper reviews research regarding the effect SEM has on the dynamic criminogenic need variables indicated above.

Research Findings

Cognitive and Behavioral Effects of Sexually Explicit Material (SEM)

There is still some debate about the effect of SEM on attitudes and beliefs in nonexperimental settings ("real life"). However, the weight of evidence is trending toward frequent SEM use: A) having a detrimental effect on attitudes and beliefs regarding sexual behavior, especially when the viewer has preexisting behavioral scripts, B) causing increased craving for SEM, C) incrementally increasing need for more paraphilic content, and D) leading to increased difficulties in social interaction and decision making (Allen, Kannis-Dymand, & Katsikitis, 2017; Antons & Brand, 2018; Banca et al., 2016; Charles & Meyrick, 2018; Daneback, Ševčíková, & Ježek, 2018; Kingston, Fedoroff, Firestone, Curry, & Bradford, 2008; Laier & Brand, 2017; Malamuth, Hald, & Koss, 2012).

While there is limited research on the development of online sexual offending, it is clear that the various models explaining online sexual offending share common features: A) mood and online sexual behavior can influence each other, B) online sexual offending can be reinforced by sexual arousal, masturbation and fantasy, C) attitudes and beliefs can be influenced by online interactions and vice versa, D) habituation can lead to increased and more intense use of SEM or other online sexual outlets, E) for some individuals boredom with fantasy or active encouragement of others can promote contact sexual offending (M. Seto, 2013, p. 130).

On-line behavior reflects offenders' motivation and interests, especially when examined through computer forensics of the offender's drives (Seto, 2013, p. 157)

Fantasizing or imagining doing something activates many of the same brain circuits as actually doing it. (Buchsbaum, Lemire-Rodger, Fang, & Abdi, 2012). Viewing others engaged in a behavior causes "mirror circuits" in our brain to resonate with the motivational state of the individuals appearing in the visual depictions (Barry, 2009; Mouras et al., 2008). This can lead to the adoption of anti-social beliefs and attitudes surrounding sexual behavior (Doidge, 2007).

Mainstream SEM portrays decisively distorted views of female's participation in sexual acts. In a content analysis of 50 best-selling pornographic videos, nearly half of the scenes analyzed contained verbal aggression and more than 88 percent showed physical aggression. Of those aggressive acts, 70 percent were done by men, and 87 percent of the aggressive acts were perpetrated against women. The overwhelming majority of the time these aggressions were responded to with pleasure or neutrality by the victims. Fewer than 5 percent of aggressive acts resulted in a negative response from the victim. Furthermore, it was typical for scenes to show positive behaviors, such as compliments, kissing, or laughter (Bridges, Wosnitzer, Scharrer, Sun, & Liberman, 2010)

While research does not support the hypothesis that sex offenders use SEM more often or earlier than non-offenders, across seven studies that asked questions about sexual behavior after SEM use, sex offenders reported they were more likely to fantasize, masturbate, or engage in sexual intercourse after viewing SEM (M. Seto, 2013, p. 173).

Ciardha and Gannon postulate that the most important thoughts are not the surface products such as excuses, minimizations and justifications that may emerge post-offence but rather the cognitive structures (deeply or implicitly held beliefs, scripts and theories) or processes that play an

etiological role in offending behavior. These implicit theories or schema are hypothesized to contribute to offending behavior and also the interpretation of the behavior post-offence (Ciardha & Gannon, 2011). The use of SEM can be a significant contributor to the initialization and maintenance of these schema.

Research suggests that adolescents who use SEM, especially that found on the Internet, have lower degrees of social integration, increases in conduct problems, higher levels of delinquent behavior, higher incidence of depressive symptoms, and decreased emotional bonding with caregivers (Owens, Behun, Manning, & Reid, 2012).

The accumulated data leave little doubt that, on the average, individuals who consume SEM more frequently are more likely to hold attitudes conducive to sexual aggression and engage in actual acts of sexual aggression than individuals who do not consume SEM or who consume SEM less frequently (Wright, Tokunaga, & Kraus, 2016; Paolucci et.al., 1977).

SEM has been demonstrated to have adverse effects on several of the key dynamic criminogenic needs of sex offenders. Limiting access to SEM is clearly indicated during supervision and treatment. The CST/MDT may, after on-going review of offender progress in supervision/treatment, allow clearly defined, specific SSM in accordance with approved Safety Plans.

Addiction to SEM

As the research referenced below indicates, use of SEM can be quickly addictive. Recent brain research has provided us a much clearer understanding of the effects of SEM. We should be treating SEM in the same manner we would treat a substance when working with a substance abuser. To do otherwise would be failing to discharge our duty to assist the offender in attaining and maintaining a law abiding lifestyle.

Researchers have found viewing SEM causes significant changes in brain chemistry leading to increased utilization of SEM (Hilton, 2013; Doidge, 2007; Kühn & Gallinat, 2014; Layden, 2010; Wilson, 2014.; Volkow et al., 2010).

Others indicate changes in brain chemistry when viewing SEM can lead to addiction to SEM (Nestler, Barrot, & Self, 2001; Pitchers et al., 2010; Riemersma & Sytsma, 2013; Rosack, 2004; Volkow et al., 2010; Wilson, 2014).

A study in Holland indicated that SEM has the greatest addictive potential of any on-line activity, with online gaming coming in at number two (Meerkerk, Eijnden, & Garretsen, 2006).

Research also indicates that viewing SEM causes the viewer to gravitate toward more extreme material (Doidge, 2007; Goto, Otani, & Grace, 2007; Zillmann, 2000; Zillmann & Bryant, 1984). One study even postulates that the effect of SEM on individuals as studied in experimental settings possibly underestimate the effect of SEM on individuals (Flood, 2010).

Cybersex addiction has been found to be a distinct behavioral pattern separate from other forms of "Internet addiction" (Baggio et al., 2018).

SEM delivered by high speed Internet connections satisfies every one of the prerequisites for neuroplastic change. Moreover, SEM is a dynamic phenomenon with "hard core" increasingly fusing sex with hatred and humiliation (Doidge, 2007, p. 102).

Reviews of recent neuroscientific studies led researchers to the conclusion that excessive SEM consumption can be connected to already known neurobiological mechanisms underlying the development of substance-related addictions (Ristow et al., 2018; Hilton, 2013; Love, Laier, Brand, Hatch, & Hajela, 2015; Pitchers et al., 2010; Stark & Klucken, 2017; Voon et al., 2014; Pliszka, 2003).

Online sexual behavior can influence the viewer's mood as well as attitudes and beliefs. This can lead to habituation and increased use of SEM (Seto, 2013, pp. 129–130).

Brand et.al. Found the role of the ventral striatum in processing reward anticipation and gratification was linked to subjectively preferred SEM content. Their research findings held that mechanisms for reward anticipation in ventral striatum may contribute to a neural explanation of why individuals with certain preferences and sexual fantasies are at-risk for losing their control over SEM consumption. Ventral striatum activity when watching preferred SEM pictures is correlated with symptoms of Internet SEM addiction (Brand, Snagowski, Laier, & Maderwald, 2016).

Is SEM Getting More Severe? Does it Need to be Restricted More?

Contrary to the popular belief that the content of SEM on the Internet is getting more "severe", content available on the Internet has shifted little over the past decade. Literotica.com is one of the major repositories of user written SEM literature. I have been tracking the number of stories in each category within the literotica library since 2004. Below is a table which indicates the number of stories in the top twelve categories as ranked by the number of stories in the category. The ranking of content areas has shifted very little since 2004. Incest stories have always ranked number 2 in popularity. BDSM (Bondage, Discipline and Sadomasochism) was number 5 in 2004, but grew to be number 3 by 2006. Stories on non-consent (e.g. rape) were number 8 in 2004 but climbed to number 6 by mid 2008. Gay Male content replaced Celebrity content as number 8 in early 2010. Beyond these shifts, the rankings of the top 12 content areas have remained stable.

Literotica Top Twelve Categories on 10/28/18 by Number of Stories

Category / Month-Year	10/18	12/17	12/16	12/15	12/14	12/13	12/12
1. "Erotic Couplings – Wild consensual 1 on 1 sex"	54289	51209	48207	46168	43009	40086	37506
2. "Incest – Keeping it in the family"	43642	40432	37154	35120	32217	29709	27593
3. "BDSM – Bondage, D/s, and other power games"	33366	31223	29627	28200	25972	23892	21714
4. "Loving Wives – Adventurous married women & mates"	30358	28661	27039	26962	24210	22322	20672
5. "Group Sex – Orgies, swingers, and others"	22755	21681	20400	19438	18123	17006	15951
6. "Non-Consent/Reluctance – Fantasies of control"	23055	21376	19647	18602	16775	15049	13347
7. "Exhibitionist & Voyeur – Watching and being watched"	19417	18008	16564	15673	14441	13307	12285
8. "Gay Male – Men loving men"	18675	17024	15644	14524	12975	11580	10267
9. "Romance – Candlelight, wine and a soft kiss"	16490	15729	14903	14287	13469	12802	12103
10. "Lesbian Sex – Women who love other women"	15365	14493	13332	12813	12036	11218	10418
11. "Fetish – Feet, panties, transsexual love and other kinky things"	14834	13449	12305	11463	10352	9309	8355
12. "Mature – May/December lust and love affairs"	11940	11191	10375	9934	9288	8601	7977

In a study published in 2018 which examined the content of popular SEM videos available to the general public on a major SEM hosting site, Shor and Seida found no evidence for the claim that pornography has become more violent over the last decade. They also found no evidence for often-heard claims that viewers increasingly prefer aggressive content (Shor & Seida, 2018a, 2018b).

The sheer volume of material, however, has increased significantly in the past 10 years. Pornhub, one of the largest SEM hosting sites on the Internet, has a research department that provides detailed information on SEM usage. Since 2013 they have provided annual usage statistics for their site. An examination of those statistics indicates increased SEM consumption by the public at large and a significant movement to using SEM on mobile phones.

Statistics on SEM usage drawn from www.pornhub.com/insights

Year	Unique Visits	Top 3 Search Terms for U.S. (in order)	Data Transferred	Percent Viewed on Phone (U.S.)
2017	28.5 Billion	lesbian, MILF, step sister	3,732 Petabytes	72%
2016	23.0 Billion	stem mom, lesbian, step sister	3,110 Petabytes	70%
2015	21.2 Billion	step mom, cartoon, lesbian	1,892 Petabytes	63%
2014	18.3 Billion	lesbian, step mom, teen	1,577 Petabytes	56%
2013	14.7 Billion	teen, creampie, MILF	n/a	52%

It is of some note that Ogas and Gaddam in their somewhat controversial book published in 2011 indicated that “teen” was the number one search term during 2010 in Dogpile - an aggregate search engine (Ogas & Gaddam, 2011). They go on to indicate that sexual content search terms accounted for approximately 13% of all the searches in their database.

Pornhub’s data reflecting the term “teen” disappearing from the top three terms after 2014 may indicate a shift away from teen material by the public at large. However, pornhub’s research clearly indicates intrafamilial content remains extremely popular.

Differences in Findings on Behavioral Effects of SEM

There are two factors which, when not clearly delineated, can produce seemingly equivocal research regarding SEM's effect on behavior. These factors are:

A) Experimental studies (respondents are studied in the controlled setting of a laboratory), versus
B) Non-experimental studies (research focused on aggregate data with only societal measures of SEM exposure and/or status as a convicted sex offender).

The interplay of these two factors produces data which can be widely divergent. Only recently have researchers attempted to parse these factors into results.

Even more importantly, some early research was not controlled for individual differences in traits, predispositions, and beliefs held by the respondents prior to the research.

More recent studies have found that while the effect of SEM is detrimental, it appears to be mediated by traits and preexisting beliefs with SEM having a more pronounced effect on individuals holding SEM aligned beliefs and greater propensity to interpersonal violence (Antons & Brand, 2018; Hald & Malamuth, 2015; Malamuth et al., 2012).

Malamuth et.al. found an overall positive association between SEM consumption and sexually aggressive attitudes. Further examination showed that it was moderated by individual differences. More specifically, the association was found to be largely due to men at relatively high risk for sexually aggression who were relatively frequent SEM consumers. The findings help resolve inconsistencies in the literature and are in line not only with experimental research on attitudes but also with both experimental and non-experimental studies assessing the relationship between pornography consumption and sexually aggressive behavior. (Malamuth et al., 2012).

The Perception Problem

The greatest obstacle to establishing "reasonable relationship" and "reasonable necessity" of supervision conditions for sex offenders is the general inability for most researchers, the lay public, attorneys, and jurists to grasp the internal world of a sex offender. A majority of the research published on sex offenders (including the work cited in this paper) assumes sex offenders assign the same or similar meaning to external stimuli as do non-offenders. It is an assumption that is difficult to test and is, therefore, rarely examined. This issue is at the core of what constitutes SEM and/or SSM. To overcome this handicap, I have attempted to triangulate through a meta-analysis of the existing work (limited as it is) and my direct supervisory and computer forensic experience with thousands of sex offenders since 1970.

Interestingly, the courts have identified this barrier and often overcome it through the admission of expert testimony as a vehicle for helping courts and juries understand complicated behavior that may look innocent on the surface but is not as innocent as it appears (U.S. v. Romero 1999). Courts have also allowed expert testimony to help interpret whether material appeals to the prurient interest of "bizarre deviant groups" where the trier of fact would be plainly inadequate to make such a determination (U.S. v. Cross 1991).

Cognition, Perception, and Sexual Behavior

Cognition, internal mental representation and interpretation, have an important role in guiding general sexual behavior (Seto, 2013, 2018; Ryan, 2004; Taylor and Quayle 2003; Ward 2003; Ward 2000;). Sexual assault, being a specific sexual behavior, does not appear spontaneously, in a vacuum, or without some cognitive predecessors – it is learned behavior (Doidge, 2007; Ryan, 2004). More importantly, sexual assault is a specific sexual behavior which cognition can play a role in fostering (Seto, 2018; Taylor and Quayle 2003).

Cognition is essentially a four step process (Tanner 1999). Take an individual viewing a dog, for example. There will be four steps that rapidly occur as the person "sees" the dog:

1) **Reception**. The viewer receives stimuli. This can be in almost any format; auditory, visual, olfactory, tactile, "internal" (e.g., thoughts), etc. In our example, our eyes would detect edges, lines, and general shape and transmit that to the brain.

2) **Object**. The incoming information is parsed and the individual recognizes an Object. An Object is simply the internal representation of the stimuli. At this point of cognition, the Object has no meaning, it is simply recognized as familiar or known. In our example, the brain would translate the visual information sent by the eyes and recognize the Object as a "dog."

3) **Concept**. Upon Object recognition, a generalized meaning is immediately associated with the Object. At this level of cognition, the meaning is broad and conforms to socially established content. In our example, the dog would be recognized as an animal and potentially as a breed (e.g., Poodle). Additionally, we would understand the culturally shared meaning of "dog" (e.g. tail wagging, barking, canine described as a person's 'best friend', used for hunting,

herding, pulling loads, protection, assisting law enforcement and military, companionship, aiding handicapped individuals, and in therapeutic roles etc.).

4) **Context**. Immediately after conceptualization, our personal past life experiences with the Object class are associated with the Object in front of us - we see the Object in the context of our life experiences. In our example, a person who loved dogs might see a warm and friendly animal. A person who was attacked by a dog might see a vicious threat. The actual dog is neutral at this point, the meaning is assigned by the viewer. Subsequent behavior by the dog could begin to change the perception of it, obviously. This new behavior would be seen through the contextualization based on our past life experiences and change as the new behavior is added to our past life experiences with the Object.

It is in this last stage of cognition, the assignation of our past life experiences to the Object before us, that our day to day meaning is found. As each of us has unique past life experiences, we all interpret Objects differentially.

This is where the complication begins when trying to establish 'reasonable relatedness" of an image or story to a sex offender's offense. A sex offender often imputes sexual content where others do not see it or adds deviant overtones to Objects that others may see as only erotic. In short, we can't know definitively what stimulates a sex offender, but it is a reasonable conclusion that SEM does based on the research reviewed previously in this document.

While research is somewhat limited, it appears that sex offenders have different responses to sexual images and sexual fantasy than do nonoffenders (Barbaree, Baxter, and Marshall 1986; Earls 1988; Abel et al. 1977). Neuroscience studies tend to support this idea (Brand et al., 2016; Love et al., 2015; Ristow et al., 2018; Stark & Klucken, 2017) In general, offenders perceive more deviant undertones and are more aroused to deviant undertones in SEM than do non-offender populations. When compared to non-offenders, offenders have more frequent fantasy, are more strongly affected by fantasy, and their fantasies tend to foster sex assaults (Vega and Malamuth 2007; Taylor and Quayle 2003).

To make matters even more complicated, sex offenders can attribute sexual constructs to stimuli that the average person would not view as sexual. Anyone doing treatment with sex offenders has encountered "porn" the offender has created out of catalogues, magazines, and "innocent pictures". During more than 1,700 computer examinations of convicted sex offenders, I've found a wide variety of "innocent" websites and images which were subsequently discovered to be associated with deviant sexual fantasies (Tanner 2007). During my career I have had sex offenders inform me objects that I would never consider to be sexually stimulating were, in fact, stimulating to them and used as fodder for paraphilic masturbatory fantasy and behavior. Such articles include, but are certainly not limited to, a shirt (the one he wore when assaulting children), a J.C. Penny's catalogue, a Barbie doll, a 1959 Chevy Bel Air, a pair of wader boots, duct tape, the family dog, and a paint roller. The magnitude of defining what might potentially be SEM for each offender becomes quickly overwhelming. The CST/MDT should take care to fully understand what constitutes SEM for a particular offender when allowing access to SSM in a given case.

Research also indicates when fantasies of sex offenders are compared to non-offenders, a significant difference is that sex offenders tend to lack non-deviant fantasy (Daleiden et al. 1998). Deviant fantasies are frequently established early in adolescence, and play an important role in sexual scripts (Seto, 2018, 2013; Fisher and Barak 2001; Taylor and Quayle 2003;). It should be noted recent research from Holland

indicates the Central Eight Risk Factors of the RNR model have disparate significance across offenders in different age groups (Wilpert, van Horn, & Boonmann, 2018).

In their review of literature on sexual fantasy, Leitenberg & Henning define sexual fantasy as "... almost any mental imagery that is sexually arousing or erotic to the individual". They indicate having fantasies is not problematic unless "...(a) there is extreme guilt about having sexual fantasies, (b) individuals are so preoccupied with their sexual fantasies that the fantasies interfere with daily functioning, [or] (c) fantasies are acted out in a way that is harmful to the individual or to others, as is the case with many paraphilias and sexual offenses". More importantly, they conclude "...one needs to be concerned about [deviant fantasies] primarily in those individuals in whom the barrier between thought and action has been broken. Once this has occurred, sexual fantasies often become part of the chain of events leading to recurrent sexual crimes, and then they indeed have to be considered as serious danger signals". (Leitenberg and Henning 1995)

A second major misstep concerning "legal" SEM and sex offenders is to assume the presenting problem is the problem in its entirety. To fully discharge the statutory mandate of protecting the public, a supervising officer must know what (s)he is trying to monitor. Generally, the sexual behaviors elicited by the Pre-Sentence Investigation and initial psychosexual assessment are only the tip of the iceberg.

While many sex offenders appear compliant during supervision, a study conducted by Tanner of 128 convicted sex offenders in the community and in treatment for at least six months revealed that 82% were routinely engaging in "high risk behaviors", 45% of them were viewing sexually explicit materials, 32% were masturbating to deviant sexual fantasies, and 54% of them were using alcohol and drugs (Tanner 1998). This same study revealed that it took, on average, 735 days before the supervision team fully understood all of the offender's sexual interests and behaviors. The study was replicated by Brake with similar findings (unpublished report). This time frame has likely been reduced since the issuance of these reports, but it is unlikely that our understanding of an offender's total set of sexually inappropriate behaviors can be revealed by the time of sentencing.

Given it takes significant time to fully uncover all of an offender's deviant interests, and that 4 out of 5 offenders in treatment continue to engage in some high risk behaviors, prohibiting access to any SEM is reasonably necessary to meet the statutory goals of probation during early phases of supervision and treatment. Over time the CST/MDT can, and should, adjust initial conditions as progress in supervision and treatment provide more complete information and changes in the offender's risk.

Conditions of supervision prohibiting possession or use of sexually explicit materials have been upheld upon appeal and satisfy the "least intrusive" or "minimal deprivation of liberty" tests (United States v. Ullman 2015; United States v. Grennan 2007; United States v. Vinson 2005; United States v. Ristine 2003; United States v. Simmons 2003; United States v. Angle 2010; United States v. Durham 2010; United States v. Ellis 2013; Unites States v. Phillips 2010; United States v. Rath 2015; United States v. Smith 2014). But, we have to be clear about what is prohibited and care should be taken to craft language that clearly informs the offender what is prohibited (United States v. Antelope 2005; United States v. Cabot 2003; U.S. v. Guagliardo 2002; United States v. Loy 2001).

[Author's note: The reader is referred to Appendix B of this document for a review of the relevant court cases.]

The Importance of Review and Adjustment

The findings presented thus far make a compelling argument for prohibiting access to SEM at sentencing. Psychosexual evaluations and Presentence Investigations/Reports can provide us with a reasonable picture of an offender's risk at the time of sentencing. However good the assessment tools are and regardless of the depth of the PSI interview and records review, we have only a cursory understanding of the breadth and scope of the offender's criminogenic needs at sentencing. A fuller understanding of the offender's needs is only acquired through engagement of the Community Supervision Team/Multidisciplinary Team (CST/MDT) with the offender over time. A fact based yet more restrictive approach to SEM during the early stages of supervision seems the only responsible approach. It is, indeed, what the SOMB advocates in the Guidelines. I agree with their position.

> "Sexually stimulating materials should be prohibited during the early phases of treatment and supervision for all adults and juveniles who have sexually offended" (Supra, 196).

In recommending such prohibitions, the Probation Officer should clearly identify the nexus between offender behavior, current research, and the Special Additional Conditions (SAC) requested. This not only provides the necessary legal authority for any prohibitions, but also clarifies for the CST/MDT and the offender what elements need to change. The PSI writer can be assisted in this task by law enforcement forensic laboratories examining the evidence, evaluators providing psychosexual reports, and collateral contacts contributing to the PSI report.

People do change, however. Neuroscience studies inform us that even the addicted and severely altered brain can, over time, recover (Doidge, 2007). Offenders, through treatment and learning, can change cognitions, attitudes, beliefs, and behavior. Indeed, a central purpose of probation is to assist the offender to make such changes. It is, therefore, incumbent upon the CST/MDT to periodically review the offender's progress in supervision/treatment and adjust the Special Additional Conditions (SAC) as indicated.

For the reasons stated earlier in this document, it is unlikely that unregulated access to SEM should ever be allowed for a sex offender; but over time CST/MDT approved sexually stimulating material (as defined by the Guidelines) could be allowed to further the offender's progress in treatment and improve quality of life.

What We Know and What it Means

In Summary, we know the following:

1. Sex offenders have committed an act involving sexual behavior which is prohibited by law.
2. The RNR model recommends interventions be focused on specific dynamic criminogenic needs of each offender. Further, the RNR model recommends the dosage of intervention be adjusted in accordance with the risk/need level of the specific offender across time.
3. Significant dynamic criminogenic needs of sex offenders have been identified as:
    a. Offense supportive attitudes and beliefs
    b. Atypical sexual interests
    c. Antisociality
    d. Frequent sexual thoughts and/or inability to regulate them
    e. Frequent masturbation
    f. Impulsivity
    g. Poor delay of gratification
    h. Misreading sexual cues
    i. Problems controlling anger
    j. Intimacy deficits
    k. Personal distress
4. The use of SEM has been demonstrated to:
    a. Directly affect the user by contributing to the dynamic criminogenic needs listed in #3 above. This effect is exacerbated for individuals who are already pre-disposed to have these factors (e.g. those who have already committed a sex crime).
    b. Have the same addiction-based neurological effect on the brain as does addiction to drugs or alcohol.
    c. Have a fast onset of addiction.
    d. Frequently lead to experimentation with increasingly atypical sexual behavior.
5. While validated risk tools, psychosexual evaluation, and existing practices in PSI information gathering gives us the best possible evidence of risk/need <u>at the time of sentencing</u>, our understanding of the offender risk/needs is limited until the CST/MDT engages the offender in on-going supervision/treatment.
6. People can change. This is the cornerstone of the dynamic risk/need approach to supervision and treatment.
7. To assist a probationer in achieving and maintaining a law-abiding lifestyle, the CST/MDT must engage in actions which follow two fundamental objectives:
    a. Do no harm. Avoid engaging in behaviors which are antithetical to reducing risk/need.
    b. Objectively evaluate, recognize, and reward progress toward the goal of offender law-abiding behavior through informed adjustment of supervision/treatment approaches.
8. There is an overarching legal need for specific SAC to be individualized and the reasons for imposing them articulated in sentencing orders.

Taken collectively, this knowledge leads to evidence-based best practices of establishing SAC which:

1. Base SAC upon elements present in the individual's case, the PSI process, or emerge post-sentencing through the supervision/treatment process.
2. Articulate the nexus between the SAC and elements present in the individual's case.
3. Prohibit access to and use of SEM where it has been part of the elements of the case, the PSI process, or emerge in post-sentencing supervision/treatment.
4. Prohibit access to and use of SSM, where SEM has been part of the elements of the case, the PSI process, or emerge in post-sentencing supervision/treatment. Such prohibition of SSM may be adjusted after the CST/MDT can establish SSM is beneficial to the offender and there is an approved Safety Plan regarding SSM.
5. Periodically review offender progress in supervision/treatment. Such reviews should occur more frequently during early stages of supervision/treatment.
6. Adjust SAC as needed to accommodate and reward offender progress in supervision/treatment.

Factual Basis for Requesting SAC

While each case will present diverse factual basis for recommending SAC, there is some commonality on what might be considered as basis when writing the PSI. The following is an attempt to provide some guidelines to the CST/MDT. It should be noted that Standard Condition #19 establishes the probationer will not **use** digital vectors in a manner that violates the supervision conditions or the Computer Use Agreement for Sex Offenders. Additionally, #19 establishes that digital devices used by the probationer can be searched to ensure compliance with the condition.

Special Condition #23 (Prohibition of Internet subscription or use unless authorized by CST/MDT).

Factual basis that apply:

1. Possession of any SEM in any digital form.
2. Creation of any SEM in any digital form.
3. Use of SNS milieu to contact, entice, or exchange SEM or groom victims or potential victims.

Suggested language:

"<defendant> utilized digital equipment and Internet access to <create/acquire/possess/store> sexually explicit material. Sexually explicit material has been consistently demonstrated through research to adversely affect dynamic risk/need factors of sex offenders, thus reducing <defendant's> chances of successful completion of supervision. Special Condition 23 will allow the CST/MDT to work with the offender in controlling access to sexually explicit material while allowing appropriate Internet use and making adjustments to access to the Internet in accordance with ongoing reevaluation of the risk/needs of the offender without clogging the Court's docket with review hearings."

And/or

"<defendant> utilized digital equipment and Internet access to <contact/entice/groom/exchange sexually explicit materials> with victims and/or potential victims. Special Condition 23 will allow the CST/MDT to work with the offender in controlling access to Social Networking Sites while allowing appropriate Internet use and making adjustments to Internet access in accordance with ongoing reevaluation of the risk/needs of the offender without clogging the Court's docket with review hearings."

Special Condition #26 (Prohibition of sexually explicit or sexually stimulating material)

Factual basis that apply:

1. Possession of any SEM in any digital form.
2. Creation of any SEM in any digital form.
3. Charge involves exhibitionism or masturbation in public.
4. Charge involves voyeurism.

Suggested language:

"<defendant> <created/acquired/possessed/used/stored> sexually explicit material. Sexually explicit material has been consistently demonstrated through research to adversely affect dynamic risk/need factors of sex offenders, thus reducing <defendant's> chances of successful completion of supervision. Special Condition 26 will allow the CST/MDT to work with the offender in controlling access to sexually explicit material while potentially allowing later use of sexually stimulating material after ongoing reevaluation of the risk/needs of the offender. Condition 26 allows adjustments without clogging the Court's docket with review hearings."

Or

"<defendant's> crime involved elements of <exhibitionism/masturbation in public>. Sexually explicit material engenders exhibitionist tendencies through explicit exhibitionist content and/or the publication and distribution of sexual acts for the express purpose of these acts being viewed by others. Sexually explicit material has been consistently demonstrated through research to adversely affect dynamic risk/need factors of sex offenders, thus reducing <defendant's> chances of successful completion of supervision. Special Condition 26 will allow the CST/MDT to work with the offender in controlling access to sexually explicit material while potentially allowing later use of sexually stimulating material after ongoing reevaluation of the risk/needs of the offender. Condition 26 allows adjustments without clogging the Court's docket with review hearings."

Or

"<defendant's> crime involved elements of <voyeurism>. Sexually explicit material engenders voyeuristic tendencies through the publication and distribution of sexual acts for the express purpose of these acts being viewed by others. Sexually explicit material has been consistently demonstrated through research to adversely affect dynamic risk/need factors of sex offenders, thus reducing <defendant's> chances of successful completion of supervision. Special Condition 26 will allow the CST/MDT to work with the offender in controlling access to sexually explicit material while potentially allowing later use of sexually stimulating material after ongoing reevaluation of the risk/needs of the offender. Condition 26 allows adjustments without clogging the Court's docket with review hearings."

Special Condition #27 (Prohibition of patronizing places sexually explicit material is available).

Factual basis that apply:

1. Possession of any SEM in any digital form.
2. Creation of any SEM in any digital form.
3. Charge involves exhibitionism or masturbation in public.
4. Charge involves voyeurism.

Suggested language:

"<defendant> <created/acquired/possessed/used/stored> sexually explicit material. Sexually explicit material has been consistently demonstrated through research to adversely affect dynamic risk/need factors of sex offenders, thus reducing <defendant's> chances of successful completion of supervision. Special Condition 27 will allow the CST/MDT to work with the offender in controlling access to sexually explicit material while potentially allowing later use of sexually stimulating material after ongoing reevaluation of the risk/needs of the offender. Condition 27 allows adjustments without clogging the Court's docket with review hearings."

Or

"<defendant's> crime involved elements of <exhibitionism/masturbation in public>. Sexually explicit material engenders exhibitionist tendencies through explicit exhibitionist content and/or the publication and distribution of sexual acts for the express purpose of these acts being viewed by others. Sexually explicit material has been consistently demonstrated through research to adversely affect dynamic risk/need factors of sex offenders, thus reducing <defendant's> chances of successful completion of supervision. Special Condition 27 will allow the CST/MDT to work with the offender in controlling access to sexually explicit material while potentially allowing later use of sexually stimulating material after ongoing reevaluation of the risk/needs of the offender. Condition 27 allows adjustments without clogging the Court's docket with review hearings."

Or

"<defendant's> crime involved elements of <voyeurism>. Sexually explicit material engenders voyeuristic tendencies through the publication, distribution, or live performance of sexual acts for the express purpose of these acts being viewed by others. Sexually explicit material has been consistently demonstrated through research to adversely affect dynamic risk/need factors of sex offenders, thus reducing <defendant's> chances of successful completion of supervision. Special Condition 27 will allow the CST/MDT to work with the offender in controlling access to sexually explicit material while potentially allowing later use of sexually stimulating material after ongoing reevaluation of the risk/needs of the offender. Condition 27 allows adjustments without clogging the Court's docket with review hearings."

Special Condition #28 (Prohibition of possession of vision enhancing or cameras/video recording devices).

Factual basis that apply:

1. Creation of any SEM in any form.
2. Charge involves voyeurism.

Suggested language:

"<defendant> utilized equipment to create < possess/use/store> sexually explicit material. Sexually explicit material has been consistently demonstrated through research to adversely affect dynamic risk/need factors of sex offenders, thus reducing <defendant's> chances of successful completion of supervision. Special Condition 28 will allow the CST/MDT to work with the offender in controlling the use of equipment to create sexually explicit material while potentially allowing later use of said equipment after ongoing reevaluation of the risk/needs of the offender. Condition 28 allows adjustments without clogging the Court's docket with review hearings."

Or

"<defendant's> crime involved <the use of hidden cameras/vision enhancing devices/or video recording devices to produce> elements of voyeurism. Sexually explicit material engenders voyeuristic tendencies, attitudes and beliefs through the publication and distribution of sexual behavior for the express purpose of these acts being viewed by others. Moreover, specifically voyeuristic themed sexually explicit materials generally involve hidden cameras, telescopes and other means of viewing and/or recording victims without their knowledge. Sexually explicit material has been consistently demonstrated through research to adversely affect dynamic risk/need factors of sex offenders, thus reducing <defendant's> chances of successful completion of supervision. Special Condition 28 will allow the CST/MDT to work with the offender in controlling access to devices associated with voyeuristic behavior while potentially allowing later use of these devices after ongoing reevaluation of the risk/needs of the offender. Condition 28 allows adjustments without clogging the Court's docket with review hearings."

Special Condition #29 (Prohibition of social networking)

Factual basis that apply:

1. Use of SNS milieu to contact, entice, or exchange SEM or groom victims or potential victims.

Suggested language:

"<defendant> utilized Social Networking Sites to <contact/entice/groom/exchange sexually explicit materials> with victims and/or potential victims. Special Condition 29 will allow the CST/MDT to work with the offender in controlling access to Social Networking Sites while potentially allowing later use of SNS after ongoing reevaluation of the risk/needs of the offender. Condition 29 allows adjustments without clogging the Court's docket with review hearings."

Recommendations

Based on the materials presented in this document, I recommend the Probation Department:

1. Clearly define the terms “sexually explicit”, “sexually oriented”, and “sexually stimulating” to reduce or eliminate any confusion among the CST/MDT and the offender as to what is restricted or prohibited.
2. Construct clear and concise language for CST/MDT members to utilize when building the nexus between offender specific case elements and SAC requested in the PSI or reports to the Court.
3. In accordance with RNR principles, create a decision tree to help guide CST/MDT in recommending appropriate SAC. This decision tree should be based on elements; present in the offender’s case, discovered through evaluation, identified during the PSI process, or emerge during post-sentencing behavior.
4. Prohibit SEM for Sex Offenders when SEM is an element; present in the offender’s case, discovered through evaluation, identified during the PSI process, or emerge during post-sentencing behavior.
5. Prohibit SEM for Sex Offenders when exhibitionism, masturbation in public, or voyeurism is an element; present in the offender’s case, discovered through evaluation, identified during the PSI process, or emerge during post-sentencing behavior.
6. Establish clear guidelines for the CST/MDT to conduct periodic review of the SAC in accordance with elements; present in the offender’s case, discovered through evaluation, identified during the PSI process, or emerge during post-sentencing behavior.
7. Establish clear guidelines for the CST/MDT which, after case specific review of offender progress in supervision/treatment, allow controlled but reasonable access to SSM with approved Safety Plans in place.
8. Should provide clear physical descriptions of victims to treatment agencies to assist the treatment agency in reviewing offender behavior regarding contact with victims or individuals who resemble victims.
9. Provide training for the CST/MDT on relevant research and its relation to the SAC.

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Appendix A: Special Additional Conditions Decision Matrix

Initial Special Additional Conditions Decision Matrix
Supervision of Sex Offenders

For each element of the case, check the appropriate available conditions. At the bottom of the chart, check any column which contains a checkmark.

Case Element / Condition Recommended	23	26	27	28	29
Possession: Probationer was in possession of any sexually explicit or oriented/stimulating materials in any form including, but not limited to, images, videos, literature or anime.					
Creation: Probationer created any sexually explicit or oriented/stimulating materials in any form including, but not limited to, images, videos, literature or anime.					
Charge involved exhibitionism or masturbation in public.					
Charge involved voyeurism.					
Use of SNS: Probationer used any social networking milieu (e.g. Facebook, Kik, Instagram, Twitter, etc.) to contact, groom, entice or exchange sexually oriented/stimulating materials with victims or potential victims.					
Conditions which should be recommended (Check any box with a checkmark anywhere in the column).					
Prohibitions without supervising officer's approval.	Access to Web	Sexually Stimulating Material	Patronize Sexually Stimulating Establishments	Distance Enhancing or Camera Equipment	Social Networking
	23	26	27	28	29

Appendix B

Supervising Cybercrime Offenders Through Computer-Related Conditions: A Guide for Judges

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Contents

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I. Introduction

Over the past fifteen years, federal district judges have increasingly imposed special conditions of supervised release and probation restricting computer and Internet use in an effort to protect the public from cybercrime, including child pornography offenses. As computers and the Internet have become more ingrained in society, however, justifying conditions that unnecessarily limit their use has become more difficult. Today, computers and the Internet are used for countless educational, professional, expressive, financial, and other purposes. Recognizing this, some courts have turned to narrower conditions to balance the need for reasonable restrictions with the need for reasonable access. These measures include permitting computer and Internet use based on probation officer approval and authorizing the use of hardware or software to filter, monitor, or record computer and Internet data.

This guide provides an overview of the rapidly evolving law on this topic.[1] Section II summarizes the relevant statutory provisions and Sentencing Guidelines policy statements that courts consider when evaluating computer and Internet special conditions. It also reviews Judicial Conference policy concerning the recommendation and execution of special conditions by federal probation officers. Section III summarizes the types of bans and restrictions on computer and Internet access during postconviction supervision that have been upheld or rejected by courts and discusses the most important factors that courts consider in assessing the restrictions. Section IV describes the factors courts consider when evaluating conditions requiring computer filtering or monitoring and discusses other procedural issues related to the imposition and execution of such restrictions.

1. For an introduction to cybercrime from the perspective of probation officer supervision, including technical and legal issues and specific case examples, *see* Mark Sherman, *Special Needs Offenders Bulletin* (Federal Judicial Center 2000).

II. General Legal Framework

A. Statutory Principles

Sentencing courts have broad discretion to impose special conditions of postconviction supervision, provided that several requirements are met. First, the condition must be "reasonably related" to the relevant sentencing factors. For supervised release cases, these factors are (1) the nature and circumstances of the offense, (2) the history and characteristics of the defendant, (3) deterrence, (4) protection of the public, or (5) providing needed correctional treatment to the defendant.[2] For probation cases, these factors are the same as in supervised release cases and also include reflecting the seriousness of the offense, promoting respect for the law, and providing just punishment for the offense.[3] It is not necessary for a special condition to be reasonably related to every sentencing factor. Rather, each factor is an independent consideration to be weighed.[4]

Second, the condition must minimize the deprivation of liberty. For supervised release cases, they must involve "no greater deprivation of liberty than is reasonably necessary" for the purposes of deterrence, protection of the public, and providing needed correctional treatment to the defendant.[5] For probation cases, they must "involve only such deprivations of liberty or property as are reasonably necessary" for the purposes of deterrence, protection of the public, providing needed correctional treatment to the defendant, promoting respect for the law, and providing just punishment for the offense.[6] Third, the condition must be "consistent with any pertinent policy statements issued by the Sentencing Commission."[7]

Appellate courts often require individualized explanations for why special conditions are necessary to achieve the statutory goals of sentencing and how they are sufficiently narrowly tailored.[8] The courts also caution sentencing courts not to apply set packages of special conditions to entire classes or categories of defendants (e.g., all "sex offenders").[9] Courts have rejected and remanded special conditions relating to computer and Internet use for failure to conduct the required individualized inquiry and for failure to articulate findings.[10] When sentencing courts do not set forth factual findings to justify special conditions, some appellate courts have neverthe-

2. 18 U.S.C. §§ 3583(d)(1), 3553(a)(1), 3553(a)(2)(B)–(D).

3. *Id*. §§ 3563(b) & 3553(a)(1)–(2).

4. United States v. Tang, 781 F.3d 476, 482 (5th Cir. 2013); United States v. Weatherton, 567 F.3d 149, 153 (5th Cir. 2009); United States v. Weber, 451 F.3d 552, 557–58 (9th Cir. 2006); United States v. Zinn, 321 F.3d 1084, 1089 (11th Cir. 2003); United States v. Brown, 235 F.3d 2, 6 (1st Cir. 2000).

5. 18 U.S.C. §§ 3583(d)(2) & 3553(a)(2)(B)–(D).

6. *Id*. §§ 3563(b) & 3553(a)(2).

7. *Id*. § 3583(d)(3).

8. United States v. Murray, 692 F.3d 273 (3d Cir. 2012); United States v. Forde, 664 F.3d 1219, 1222 (8th Cir. 2012); United States v. Miller, 594 F.3d 172, 184 (3d Cir. 2010); United States v. Keller, 366 F. App'x 362, 363 (3d Cir. 2010) (unpublished); United States v. Warren, 186 F.3d 358, 366 (3d Cir. 1999).

9. United States v. Siegel, 753 F.3d 705, 717 (7th Cir. 2014); United States v. Deatherage, 682 F.3d 755, 765 (8th Cir. 2012); United States v. Bender, 566 F.3d 748 (8th Cir. 2009); United States v. Davis, 452 F.3d 991, 995 (8th Cir. 2006).

10. *See, e.g*., United States v. Dunn, 777 F.3d 1171 (10th Cir. 2015); United States v. Rodríguez-Santana, 554 F. App'x 23 (1st Cir. 2014) (unpublished); United States v. Dotson, 715 F.3d 576 (6th Cir. 2013); United States v. Goodwin, 717 F.3d 511 (7th Cir. 2013); United States v. Malenya, 736 F.3d 554 (D.C. Cir. 2013); United States v. Inman, 666 F.3d 1001 (6th Cir. 2012); United States v. Wiedower, 634 F.3d 490 (8th Cir. 2011); United States v. Mayo, 642 F.3d 628 (8th Cir. 2011); United States v. Lamere, 337 F. App'x 669, 673 (9th Cir. 2009) (unpublished); United States v. Mark, 425 F.3d 505 (8th Cir. 2005).

less affirmed the condition if they can ascertain a viable basis for the condition in the record based on the presentence investigation report and other documents.[11] However, a condition with no basis in the record or with only the most tenuous basis is less likely to be upheld.[12]

B. United States Sentencing Guidelines

If the instant offense of conviction is a sex offense, the Sentencing Guidelines include a special condition of probation and supervised release "limiting the use of a computer or an interactive computer service in cases in which the defendant used such items."[13] Regardless of the offense of conviction, the court may impose a condition of probation or supervised release prohibiting the defendant from engaging in a specified occupation or limiting the terms on which the defendant may do so only if it determines that (1) there was a reasonably direct relationship between the defendant's occupation and the conduct relevant to the offense of conviction, and (2) imposition of such a restriction is reasonably necessary to protect the public because there is reason to believe that, absent such restriction, the defendant will continue to engage in unlawful conduct similar to that for which the defendant was convicted.[14] As discussed in Section III(B)(1), *infra*, some courts have found that restrictions or bans on computer and Internet use violate the Sentencing Guidelines policy statement on occupational restrictions.

C. Judicial Conference Policy

Under Judicial Conference policy, the specific blend of supervision interventions selected by federal probation officers should be the least restrictive necessary to meet the objectives of supervision in the individual case.[15] Probation officers should consider recommending a special condition to the court only if the officer determines that the mandatory and standard conditions do not adequately address the defendant's risks and needs.[16] Officers are to monitor and facilitate compliance with the conditions using a blend of strategies that are sufficient, but not greater than necessary, to meet sentencing purposes and the objectives in each individual case.[17]

When considering special conditions, officers "should avoid presumptions or the use of set packages of conditions for groups of offenders and keep in mind that the purposes vary depending on the type of supervision."[18] Officers "should ask first whether the circumstances in *this* case require such a deprivation of liberty or property to accomplish the relevant sentencing purposes at *this* time."[19] Good supervision is "tailored to the risks, needs, and strengths presented by the individual offender as determined by careful assessment of each case."[20]

For defendants facing lengthy terms of imprisonment, the officer should consider whether the risks and needs present at the time of sentencing will be present when the defendant returns

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11. United States v. Heckman, 592 F.3d 400, 405 (3d Cir. 2010); United States v. Voelker, 489 F.3d 139, 144 (3d Cir. 2007).

12. *Heckman*, 592 F.3d at 405; United States v. Burroughs, 613 F.3d 233, 244 (D.C. Cir. 2010).

13. U.S.S.G. §§ 5B1.3(d)(7)(b), p.s. & 5D1.3(d)(7)(b), p.s. The term "sex offense" is defined in Application Note 1 of the Commentary to U.S.S.G. § 5D1.2.

14. U.S.S.G. § 5F1.5, p.s.

15. *Guide to Judiciary Policy* ("*Guide*"), vol. 8E, § 620.60(b).

16. *Id.*, vol. 8D, § 530.20.30(a).

17. *Id.*, vol. 8E, § 210(e)(3).

18. *Id.*, vol. 8D, §§ 240(d) & 530.20.30(b).

19. *Id.* §§ 240(d), 530.20.30(b) (emphasis in original).

20. *Id.*, vol. 8E, § 170(a).

to the community.[21] In some cases, it may be appropriate to avoid recommending special conditions until the defendant is preparing to reenter the community from prison.[22] Throughout the ongoing supervision assessment and implementation process, officers recommend the addition, modification, deletion, amelioration, or suspension of conditions.[23] Officers are to re-evaluate the adequacy and applicability of special conditions throughout the term of supervision.[24] It is particularly important to reassess conditions of supervised release when the defendant is released from prison, because personal, family, and community circumstances may have changed considerably since the defendant was sentenced.[25]

21. *Id.*, vol. 8D, § 530.20.30(b).
22. *Id.*
23. *Id.*, vol. 8E, § 210(e)(3).
24. *Id.*, vol. 8D, § 240(c).
25. *Id.*

III. Computer and Internet Restrictions

Defendants have challenged a wide variety of conditions restricting computer and Internet use, ranging from absolute bans to more narrow restrictions that allow for limited use. This is "an area of law that requires a fact-specific analysis,"[26] and there are numerous combinations of factors that may determine whether a restriction is affirmed. Moreover, even when courts are faced with the same set of facts, there is, as one court recently observed, "some tension among various courts of appeals' opinions regarding the reasonableness of restrictions on computer use and Internet access. Dichotomies can be discerned."[27]

A discussion of the most important factors considered provides a helpful framework for analyzing the permissibility of conditions. Courts generally examine (1) the scope of the restriction, including whether computer and Internet use is permitted with probation officer approval or for specific purposes such as employment and education; (2) the nature of the defendant's offense history; and (3) the length of the term of supervision.

A. Scope of Restrictions

1. Absolute Bans

One consideration is whether computer and Internet use is prohibited entirely or whether exceptions are permitted based upon approval of the probation office or for legitimate purposes such as employment and education. As discussed in Section III(A)(2), *infra*, courts are significantly more likely to uphold computer and Internet bans when they allow for limited access. Because absolute bans have been upheld in a relatively small number of cases, a description and discussion of those cases is instructive. The Fifth Circuit held in *United States v. Paul*[28] that it was not an abuse of discretion for the district court to impose a three-year ban on possessing or accessing computers or the Internet. The court reasoned that the defendant "used the Internet to initiate and facilitate a pattern of criminal conduct and victimization."[29] Specifically, the defendant used online resources and bulletin boards to inform others about websites featuring child pornography, he solicited individuals for trips to visit children in Mexico, and he told others "how to 'scout' single, dysfunctional parents and gain access to their children."[30] The Fifth Circuit has subsequently emphasized that the broad scope of the absolute ban in *Paul* was upheld in part because of the short duration of the supervised release term.[31]

In *United States v. McDermott*,[32] the Fifth Circuit held that it was not plain error for the district court to impose a condition prohibiting a defendant convicted of possession of child pornography from possessing or having computer and Internet access. The court reasoned that, alt-

26. United States v. Heckman, 592 F.3d 400, 405 (3d Cir. 2010); *see also* United States v. Lantz, 443 F. App'x 135, 142 (6th Cir. 2011) (unpublished) ("Because of the fact-specific nature of other cases imposing restrictions on computer and internet access, and the infinite variations on such restrictions, it is difficult to find cases directly on point.").

27. United States v. Miller, 665 F.3d 114, 127 (5th Cir. 2011).

28. 274 F.3d 155 (5th Cir. 2001).

29. *Id.* at 169.

30. *Id.* at 168.

31. *Miller*, 665 F.3d at 131.

32. 133 F. App'x 952 (5th Cir. 2005) (unpublished).

hough the defendant was not convicted for using his computer and the Internet to facilitate contact with a minor, they were the means that he used to exploit children. The court also rejected the defendant's argument that computer and Internet access would be essential to his ability to earn a living as speculative, given that he was 62 years old.

In *United States v. Johnson*,[33] the Second Circuit upheld a condition barring the defendant from "us[ing] or possess[ing] any computer … with online capabilities at any location until … cleared to do so" by the district court.[34] The offense conduct included using the Internet to conduct sexually explicit conversations with minors and to lure several of them to meetings. Johnson admitted to having sex with two minors and was arrested while on his way to have sex with a third.[35] In upholding the absolute ban, the Second Circuit noted that Internet restrictions "may serve several sentencing objectives, chiefly therapy and rehabilitation, as well as the welfare of the community (by keeping an offender away from an instrumentality of his offenses)."[36] The ban in this case "served these sentencing objectives, confronts Johnson with the need to take his treatment seriously, and serves as an external control to predatory Internet behavior, standing in for Johnson's deficient internal controls."[37]

With regard to whether a lesser restriction could have been imposed instead of a complete ban, the court noted that it had on several occasions vacated absolute bans because narrower restrictions were equally suited to achieving sentencing goals. In those cases, which involved downloading and disseminating child pornography, an outright ban was "held to be more restrictive than needed to serve the sentencing goals of rehabilitation and incapacitation because a combination of monitoring and unannounced inspections would exert the control of an Internet ban while allowing an offender access to the Internet for legitimate purposes."[38]

The court distinguished Johnson's case from cases where computer and Internet bans were vacated based on a combination of his personal characteristics and the nature of his past offenses.[39] Johnson was in denial about his risk of reoffending, had not come to terms with what caused him to commit his crimes, had been "less than truthful with his mental health care providers and with probation," and had "acted in a secretive manner concerning his sexual activity."[40] There was also testimony from the treatment provider that Johnson was at a high risk for reoffending.[41] In addition, he was a sophisticated computer user, and the district court found that a person with his skills likely could circumvent the software needed for monitoring.[42]

As to Johnson's offense history, the court reasoned that, in its prior cases rejecting absolute bans, the defendants were convicted of possession and distribution of child pornography, and the likeliest consequence if a less restrictive measure should fail would be that the defendant would download and distribute child pornography.[43] While these are serious offenses, "the direct harm to children was inflicted previously, when the pornographic images were made, and the

33. 446 F.3d 272 (2d Cir. 2006).
34. *Id.* at 281.
35. *Id.* at 275.
36. *Id.* at 281.
37. *Id.* at 282.
38. *Id.* (citing United States v. Sofsky, 287 F.3d 122, 126–27 (2d Cir. 2002)). For a discussion of this line of cases, see Section IV, *infra*.
39. *Johnson*, 446 F.3d at 282.
40. *Id.*
41. *Id.*
42. *Id*.
43. *Id.* at 283.

lesser harm caused by trafficking can be largely remedied afterward, by destroying copies of the material and returning the offender to prison."[44] In Johnson's case, however, the likeliest consequence if a less restrictive measure should fail would be that Johnson could use the Internet to locate children and lure them to sexual abuse. The "perfectly obvious ground for distinguishing [Johnson's case] is that here the failure of lesser measures risks direct harm to children that may be devastating and irremediable."[45] While the court affirmed the computer ban in *Johnson*, it stressed that it was "not hold[ing] that an outright ban on Internet use is categorically appropriate for any sex offender whose offense involves use of the Internet."[46] In light of the fact that Internet access has become "virtually indispensable in the modern world of communications and information gathering,"[47] a "careful and sensitive individualized assessment is always required before such a ban is imposed."[48]

The Fifth Circuit in *United States v. Brigham*[49] affirmed a revocation of supervised release for violation of a condition that the defendant "not possess or utilize a computer or internet connection device during the [three-year] term of supervised release."[50] The court explained that, given the defendant's use of a computer and the Internet to post, receive, and store child pornography images, "a limited period of time—while on supervised release and participating in sex offender treatment—of complete prohibition from such a powerful tool, and access to an enormous amount of persons of all ages, is not unreasonable."[51] Moreover, such a condition both "assists with rehabilitation" and "provides an effective test for [the defendant's] progress, dedication, remorse, willingness, and ability to make the changes in his conduct necessary for his successful unsupervised return to society."[52] The Fifth Circuit concluded that "though [the defendant] is correct that computers and the internet have become significant and ordinary components of modern life as we know it, they nevertheless still are not absolutely essential to a functional life outside of prison."[53]

Finally, in *United States v. Tome*,[54] the Eleventh Circuit upheld a one-year Internet ban as a condition of the defendant's second term of supervised release after he violated conditions allowing for limited Internet use during the first supervised release term. Tome's underlying conviction was for possession of child pornography. The conditions during the first supervision term allowed him to use the Internet for authorized employment purposes, but he had to maintain for his probation officer a daily log of all other Internet use, including use for personal reasons.[55]

Tome was arrested for violating numerous conditions of his supervised release, including Internet restrictions. The district court sentenced Tome to 24 months of imprisonment, followed by one year of supervised release, during which year Tome would be prohibited from accessing the Internet. The district court stated that its decision to restrict access entirely during the second supervised release term was based on his admissions of inappropriate use of the Internet while

44. *Id*.
45. *Id.*
46. *Id.* at 282, n.2.
47. *Id.*
48. *Id.*
49. 569 F.3d 220 (5th Cir. 2009).
50. *Id.* at 231.
51. *Id.* at 234.
52. *Id.*
53. *Id.*
54. 611 F.3d 1371 (11th Cir. 2010).
55. *Id.*

already on supervised release, specifically, his using the Internet to communicate with sex-offender inmates, to meet women, and for personal reasons.[56]

The Eleventh Circuit held that the year-long Internet ban was reasonably related to multiple factors listed in 18 U.S.C. § 3553(a).[57] The court rejected Tome's contention that his Internet ban was a greater deprivation of liberty than reasonably necessary based on "his unwillingness to conform his behavior to more lenient restrictions" during the first term of supervised release and the lack of showing that his vocational goals or expressive activities would be negatively affected.[58]

2. Qualified Bans

Several courts examining absolute computer and Internet bans have rejected them as overly broad restrictions of liberty even in cases of extremely serious offense conduct such as using the Internet to attempt to have sexual contact with minors.[59] One court has characterized the Fifth Circuit's opinion in *United States v. Paul*, which upheld an absolute ban, as an "outlier."[60] It further noted that "the computer and internet have permeated everyday life in ways that make a restriction on their use far more burdensome than when *Paul* was decided [in 2001]."[61]

Many courts closely scrutinize computer and Internet bans, not only because of their effect on the defendant's liberty but because they may conflict with the goal of rehabilitation by hampering employment and other opportunities.[62] As one court put it, given "the ubiquitous presence of the internet and the all-encompassing nature of the information it contains," and "the extent to which computers have become part of daily life and commerce," it is "hard to imagine how [defendants] could function in modern society" without computer and Internet access.[63]

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56. *Id.* at 1375.

57. *Id.* at 1377.

58. *Id*.

59. United States v. Mayo, 642 F.3d 628 (8th Cir. 2011); United States v. Russell, 600 F.3d 631, 637 (D.C. Cir. 2010); United States v. Voelker, 489 F.3d 139, 144 (3d Cir. 2007); United States v. Carlson, 47 F. App'x 598 (2d Cir. 2002) (unpublished).

60. United States v. Russell, 600 F.3d 631, 638 (D.C. Cir. 2010). *See also Voelker*, 489 F.3d at 148 ("Only the Court of Appeals for the Fifth Circuit [in *United States v. Paul*] has approved a complete ban on the use of computers in a precedential opinion, and that was limited to three years."); United States v. Feigenbaum, 99 F. App'x 782, 785 (9th Cir. 2004) (unpublished) ("Most other circuit courts that have addressed the issue have either rejected total Internet bans as conditions of supervised release … or have allowed Internet bans only where the ban can be lifted at the discretion of a probation officer.").

61. *Russell*, 600 F.3d at 638. While the Fifth Circuit has not found the Internet to be so integral to modern life that a district court may not restrict its use, *Paul*, 274 F.3d 155, 169 (5th Cir. 2001), it has more recently observed that "computers and the internet have become significant and ordinary components of modern life as we know it," *Brigham*, 569 F.3d at 234, and that "access to computers and the Internet is essential to functioning in today's society." United States v. Sealed Juvenile, 781 F.3d 747, 756 (5th Cir. 2015). *See also* Art Bowker, The Cybercrime Handbook for Community Corrections: Managing Offender Risk in the 21st Century 9 (2012) ("[A] total ban on all computer and Internet use … will be harder and harder to support. This is particularly the case when life in modern society is increasingly dependent upon computer and Internet access.").

62. United States v. Wright, 529 F. App'x 553, 558 (6th Cir. 2013) (unpublished); *Russell*, 600 F.3d 631; *Voelker*, 489 F.3d at 148–49.

63. *Voelker,* 489 F.3d at 148. *See also* United States v. Ullmann, 2015 WL 3559221 (10th Cir. 2015) ("[T]he Internet has become more crucial to participation in employment, communication, and civic life. Internet use is necessary for many jobs, is essential to access information ranging from the local news to critical government documents, and is the encouraged medium for filing tax returns, registering to vote, and obtaining various permits and licenses. Accordingly, we … hold that conditions imposing complete prohibitions on Internet use or use of Internet-capable

Courts are significantly more likely to uphold computer and Internet bans when they allow for limited use based on probation officer approval or for specified legitimate purposes. These types of restrictions, which are commonly imposed in cases where defendants are convicted of child pornography offenses,[64] are often referred to as "qualified," "conditional," or "modifiable" bans. In many cases where qualified bans have been affirmed, the defendant's offense history includes egregious conduct such as completed sex acts with a child or taking substantial steps toward completion of the acts. (For an extensive list of cases upholding these types of bans, *see* Appendix A.)

Rather than prohibiting all use, courts upholding qualified bans reason that defendants may need access to the computer or Internet for purposes such as employment, education, research, communication, and commerce. Furthermore, these courts argue, qualified bans allow for future adjustments to technology developments and provide a reasonable balance between rehabilitative and deterrence goals.[65] When upholding restrictions allowing for use subject to probation officer approval, courts expect that officers will exercise this authority in a reasonable, responsible, and nonarbitrary manner.[66] This is particularly true given the importance of computers and the Internet for reintegration into society.[67] At least one court has clarified that, while bans subject to probation officer approval are appropriate, it is unreasonably restrictive to require prior probation office permission every single time a defendant needs to use a computer or access the Internet, particularly when there is already a separate condition that restricts access to sexually explicit materials.[68]

B. Nature of Defendant's Offense History

Another factor examined by courts considering computer and Internet restrictions is the nature of the defendant's offense history. In particular, courts assess (1) whether defendants have a history of Internet use for illegal purposes and (2) the severity of their instant offense conduct and prior offense history.

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devices will typically constitute greater deprivations of liberty than reasonably necessary, in violation of § 3583(d)(2).").

64. *Wright*, 529 F. App'x at 557 ("[T]his is a common special condition with respect to individuals convicted of child pornography crimes.").

65. United States v. Love, 593 F.3d 1, 12 (D.C. Cir. 2010); United States v. Walser, 275 F.3d 981, 988 (10th Cir. 2001).

66. *See also* Arthur L. Bowker, *Computer Crime in the 21st Century and Its Effect on the Probation Officer*, 65 Fed. Probation 18, 19 (2001) ("Absent appropriate training and/or court guidance, some probation officers may be inclined to simply deny any access without regard to the particular circumstances of a case. Such blanket denials may not always pass court scrutiny.").

67. United States v. Morais, 670 F.3d 889, 896 (8th Cir. 2012) ("Given the importance of the Internet as a resource, we expect that the probation office will not arbitrarily refuse such approval when it is reasonably requested and when appropriate safeguards are available."); United States v. Love, 593 F.3d 1, 12 (D.C. Cir. 2010) ("We assume the Probation Office will reasonably exercise its discretion by permitting [the defendant] to use the Internet when, and to the extent, the prohibition no longer serves the purposes of his supervised release.").

68. United States v. Sealed Juvenile, 781 F.3d 747, 756 (5th Cir. 2015) ("We must recognize that access to computers and the Internet is essential to functioning in today's society. The Internet is the means by which information is gleaned, and a critical aid to one's education and social development.… We intend this [condition] to allow for oversight of the … computer and Internet usage, but not with the heavy burden of requiring prior written approval every time [the defendant] must use a computer or access the Internet for school, health, work, recreational, or other salutary purposes.").

1. Nexus Between Offense History and the Internet

Courts are more likely to uphold restrictions when there is a connection between the defendant's offense history and the Internet. For instance, courts have affirmed conditions for a defendant convicted of bank fraud who had a history of fraudulent Internet transactions and a defendant convicted of mail fraud where the fraudulent activity emanated from an Internet business. On the other hand, Internet restrictions have been rejected for defendants convicted of bank larceny, possession of device-making equipment for "skimming," using a computer to make counterfeit $20 bills, contact sex offenses where the defendant had no history of illegal Internet use, and failure to register under the Sex Offender Registration and Notification Act. (For a list of cases upholding or rejecting restrictions based on whether the defendant's offense history involved illegal use of the Internet, *see* Appendix B.)

Courts have also rejected restrictions in cases where no history of computer and Internet abuse is present as being inconsistent with Section 5D1.3(d)(7) of the Sentencing Guidelines, which recommends "[a] condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items" in committing a sex offense.[69] Finally, because limiting computer and Internet use can affect employment opportunities, some courts have found that restrictions are inconsistent with Section 5F1.5 of the Sentencing Guidelines, which permits a district court to limit the defendant's ability to engage in a specified occupation or business if there is a reasonably direct relationship between the defendant's occupation and the conduct relevant to the offense of conviction.[70]

2. Severity of Offense History

Another factor courts consider when evaluating computer and Internet restrictions is the severity of the defendant's offense history, particularly for sex-related offenses. Courts are more likely to reject restrictions when computers and the Internet are used exclusively for possession of child pornography. (For a list of cases rejecting Internet restrictions due in part to the lack of use of the Internet for conduct beyond the possession of child pornography, *see* Appendix C.)

On the other hand, courts are more likely to uphold conditions when the defendant uses a computer or the Internet for "child pornography plus" cases "involving not merely possession but additional conduct that threatens the welfare of children."[71] For example, courts have approved restrictions when the defendant: (1) facilitated the real-time molestation of a child when he encouraged another person through an online "chat" to have sexual contact with a young girl; (2) used the Internet as a means to develop an illegal sexual relationship with a young girl; (3) solicited sex with a fictitious minor online; (4) used the Internet to meet and develop a relationship with a young girl, which culminated in a sexual relationship; (5) expressed an interest in

69. United States v. Smathers, 351 F. App'x 801 (4th Cir. 2009) (unpublished).

70. United States v. Peterson, 248 F.3d 79, 84 (2d Cir. 2001).

71. Cheryl A. Krause & Luke A.E. Pazicky, *An Un-Standard Condition: Restricting Internet Use as a Condition of Supervised Release,* 20 Fed. Sent'g Rep. 201, 202 (2008). *See also* Art Bowker, *An Introduction to the Supervision of the Cybersex Offender*, 68 Fed. Probation 3, 5 (2004) ("Obviously, more restrictive conditions should be considered for offenders who have personally victimized a minor or demonstrated a willingness to do so. For instance, a traveler (offender who travels across state lines to have sex with a minor) poses a different risk than an individual convicted of simple possession of child pornography."); U.S. Sentencing Commission, Federal Offenders Sentenced to Supervised Release 21 (2010) ("[B]ans on Internet access are sometimes upheld … if the defendant made some use of the Internet to victimize children.").

young boys in an Internet message, triggering a concern he was willing to use the Internet to facilitate victimization; (6) printed out pictures of child pornography that could be used for distribution; (7) posted pictures of child pornography on a file-sharing program accessible to the public; and (8) joined a child pornography website and initiated contact with an undercover law enforcement officer to order a child pornography video. (A list of cases where courts have upheld restrictions based on conduct where the defendant used the Internet for more than possession of child pornography is available at Appendix D.)

While there appears to be some recognition that computer and Internet restrictions may be greater deprivations of liberty than necessary for defendants who possess or receive child pornography, other courts have refused to adopt this approach and have upheld restrictions when the offense conduct involved no more than possession or receipt of child pornography.[72] In one case, the Eighth Circuit declined to construe its prior cases discouraging Internet restrictions in possession and receipt cases as establishing a *per se* rule against such conditions because "[s]uch a *per se* rule would be in tension with [its] cases holding that a district court should fashion conditions of supervised release on an individualized basis in light of the statutory factors … and not by treating defendants as part of a class that is defined solely by the offense of conviction."[73] The Eighth Circuit upheld a qualified Internet ban in that case because the defendant's possession of child pornography involved conduct more egregious than in its prior possession cases.[74] At the other end of the spectrum, one court has cautioned against computer and Internet restrictions even when a defendant used the Internet for arranging for sexual contact with a person he believed to be a child.[75]

C. Length of the Term of Supervision

Another factor examined by courts when evaluating technology restrictions is the length of the supervision term. Courts have rejected absolute bans for life[76] or for very lengthy periods.[77] One

72. United States v. Wright, 529 F. App'x 553 (6th Cir. 2013) (unpublished); United States v. Morais, 670 F.3d 889 (8th Cir. 2012); United States v. Miller, 665 F.3d 114, 131 (5th Cir. 2011); United States v. Lantz, 443 F. App'x 135, 144 (6th Cir. 2011) (unpublished); United States v. Zinn, 321 F.3d 1084 (11th Cir. 2003).

73. United States v. Morais, 670 F.3d 889, 896 (8th Cir. 2012).

74. *Id.* at 879.

75. In *United States v. Malenya*, 736 F.3d 554, 560 (D.C. Cir. 2013), the defendant was convicted of arranging for a sexual contact with a real or fictitious child. The district court imposed a condition prohibiting access to any computer or online service without the prior approval of the probation officer and requiring installation of a computer and Internet monitoring program. The appellate court stated "[i]t is unclear if *any* computer or internet restriction could be justified in Malenya's case, but the condition in its current form is surely a greater deprivation of liberty than is reasonably necessary to achieve the goals referenced in § 3583(d)." *Id.* at 561. Because the district court failed to weigh the burden of the condition on the defendant's liberty against its likely effectiveness, the appellate court vacated the condition and remanded it to the district court to impose the condition in compliance with 18 U.S.C. § 3583(d).

76. United States v. Duke, 2015 WL 3540562, *6 (5th Cir. 2015) ("No circuit court of appeals has ever upheld an absolute, lifetime Internet ban.… While we have approved absolute Internet bans for limited durations of time … and lifetime Internet restrictions that conditioned Internet usage on probation officer or court approval…, we have not addressed whether absolute bans, imposed for the rest of a defendant's life, are permissible conditions. We conclude that they are not.… [I]t is hard to imagine that such a sweeping, lifetime ban could ever satisfy §3583(d)'s requirement that a condition be narrowly tailored to avoid imposing a greater deprivation than reasonably necessary."); United States v. Heckman, 592 F.3d 400, 405 (3d Cir. 2010); United States v. Voelker, 489 F.3d 139, 146 (3d Cir. 2007).

reason for this is that extensive terms of supervision may become a "poorer fit over time" as technology changes.[78] When lifetime bans are upheld, they are for qualified bans where exceptions are made based on probation officer approval or for employment purposes.[79] In other cases, even qualified bans for life are rejected.[80] Far shorter technology bans (e.g., for five years) have been either upheld or rejected depending on whether the length of supervision falls within the range of time periods previously examined in cases with similar circumstances.[81] In short, while there is "no precise formula for determining what constitutes a reasonable length of time,"[82] courts examine the duration of technology restrictions as one factor.

D. Other Factors Considered by Courts

In addition to the considerations above, courts examine a variety of factors, including the defendant's computer sophistication and potential ability to evade monitoring software, whether the defendant's occupation requires computers, the temporal remoteness of prior sex offenses, and whether there are other restrictive conditions that make computer or Internet limits unnecessary. As discussed in section III(A)(1), in *United States v. Johnson*[83] the Second Circuit upheld an absolute ban on Internet use in part because the defendant's sophisticated computer skills likely would enable him to circumvent monitoring software, allowing him to continue the offense of having sexually explicit conversations with minors and luring minors into having sex with him.[84]

In *United States v. Granger*,[85] the Fourth Circuit upheld a condition that "[t]he defendant shall not possess or use any computer which is connected or has the capacity to be connected to any network," reasoning that the great majority of the defendant's work history involved manual labor, and therefore the computer restriction would not prevent him from earning a living. Similarly, in *United States v. Knight*,[86] the Fifth Circuit held that the trial court did not abuse its discretion in ordering that the defendant, who was convicted of receiving child pornography, could not own or use a computer at home or at work with Internet or e-mail access without permission from his probation officer. The defendant's livelihood was not dependent on his having access to a computer because he had worked for less than a year in a finance-related position, and as a janitor, test scorer, stock clerk, waiter, and bartender.[87] Finally, in *United States v. Angle*,[88] the Seventh Circuit upheld a special condition of supervised release prohibiting the defendant from hav-

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77. United States v. Russell, 600 F.3d 631, 638 (D.C. Cir. 2010) (overturning a categorical ban on computer use in part due to the lengthy (30 years) period of the ban).

78. *Id*.

79. United States v. Ellis, 720 F.3d 220, 225 (5th Cir. 2013); United States v. Stults, 575 F.3d 834, 837, 855–56 (8th Cir. 2009); United States v. West, 333 F. App'x 494, 495 (11th Cir. 2009) (unpublished); United States v. Dove, 343 F. App'x 428, 431–32 (11th Cir. 2009) (unpublished); United States v. Boston, 494 F.3d 660, 663, 664 (8th Cir. 2007); United States v. Alvarez, 478 F.3d 864, 865 (8th Cir. 2007).

80. United States v. Miller, 594 F.3d 172 (3d Cir. 2010).

81. United States v. Maurer, 639 F.3d 72, 83 (3d Cir. 2011); United States v. McKinney, 324 F. App'x 180 (3d Cir. 2009) (unpublished); United States v. Freeman, 316 F.3d 386, 392 (3d Cir. 2003).

82. *Maurer*, 639 F.3d at 83.

83. 446 F.3d 272 (2d Cir. 2006).

84. *See* U.S. Sentencing Commission, Federal Offenders Sentenced to Supervised Release 21 (2010) ("[B]ans on Internet access are sometimes upheld … if less restrictive prohibitions would not be effective.").

85. 117 F. App'x 247 (4th Cir. 2004) (unpublished).

86. 86 F. App'x 2 (5th Cir. 2003) (unpublished).

87. *Id.* at 4.

88. 598 F.3d 352 (7th Cir. 2010).

ing "personal access to computer Internet services" because "his use of the Internet was not integrally connected to his profession as he was previously employed as a salesman and mechanic."[89]

In *United States v. T.M.,*[90] the Ninth Circuit rejected a condition that the defendant not possess or use a computer with access to any "on-line computer service" at any location (including place of employment) without the prior written approval of the probation officer based on a charge forty years earlier, later dismissed, of a sexual relationship with a minor, and a kidnaping conviction approximately twenty years earlier involving the undressing and nude picture-taking of an eight-year-old girl. The court explained that conditions predicated solely upon twenty-year-old incidents do not promote the goals of public protection and deterrence.[91] Finally, in *United States v. Russell*,[92] the D.C. Circuit rejected an absolute thirty-year ban on computer use, reasoning in part that "[t]he sentence already achieves considerable severity by its thirty-year term and several other conditions," including the requirements that the defendant register as a sex offender in any jurisdiction where he resides and not be in the presence of anyone under the age of eighteen in a private setting without another adult present.[93]

89. *Id.* at 361.

90. 330 F.3d 1235 (9th Cir. 2003).

91. *Id*. at 1240. *See also* United States v. Scott, 270 F.3d 632, 636 (8th Cir. 2001) (finding it unreasonable to impose sex offender conditions on the basis of a past conviction for sexual abuse fifteen years earlier); United States v. Kent, 209 F.3d 1073, 1077 (8th Cir. 2000) (finding that an incident of abuse committed thirteen years earlier does not justify supervised release conditions).

92. 600 F.3d 631 (D.C. Cir. 2010).

93. *Id.* at 637.

IV. Computer and Internet Filtering, Monitoring, and Physical Inspections

While some courts have expressed concern regarding computer and Internet bans, they have also stressed that persons on postconviction supervision are not entitled to unlimited access, particularly if more narrowly tailored restrictions can balance the protection of the public with defendant rehabilitation. Appellate courts have frequently vacated absolute and qualified bans and directed lower courts to devise narrower conditions consisting of some combination of remote filtering, remote monitoring, and in-person searches of computers.[94] When sentencing courts have imposed restrictions other than absolute or qualified bans, such as filtering or monitoring, appellate courts have often upheld them as a middle-ground approach to restrict illicit computer and Internet use while allowing access for legitimate purposes.[95]

There is not a significant body of case law to guide courts as they evaluate the reasonableness of conditions authorizing the filtering, monitoring, or inspection of an defendant's computer. This is due to the nascent nature of the technology and to the fact that these conditions frequently go unchallenged by defendants seeking to avoid bans.[96] The existing cases, however, include some helpful guidance concerning (1) the scope and efficacy of the conditions, (2) the most appropriate defendants for these conditions, and (3) the timing and methods for recommending and implementing the conditions.

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94. United States v. Duke, 2015 WL 3540562 (5th Cir. 2015); United States v. Phillips, 785 F.3d 282 (5th Cir. 2015); United States v. Dotson, 715 F.3d 576 (6th Cir. 2013); United States v. Miller, 594 F.3d 172 (3d Cir. 2010); United States v. Love, 593 F.3d 1, 11 (D.C. Cir. 2010); United States v. Perazza-Mercado, 553 F.3d 65, 73 (1st Cir. 2009); United States v. Mark, 425 F.3d 505 (8th Cir. 2005); United States v. Freeman, 316 F.3d 386, 392 (3d Cir. 2003); United States v. Holm, 326 F.3d 872, 877–78 (7th Cir. 2003); United States v. Scott, 316 F.3d 733, 735 (7th Cir. 2003); United States v. Sofsky, 287 F.3d 122, 127 (2d Cir. 2002); United States v. Crume, 422 F.3d 728, 733 (8th Cir. 2005); United States v. White, 244 F.3d 1199, 1206–07 (10th Cir. 2001).

95. United States v. Deatherage, 682 F.3d 755, 764 (8th Cir. 2012); United States v. Grigsby, 469 F. App'x 589 (9th Cir. 2012) (unpublished); United States v. Dorner, 409 F. App'x 26 (7th Cir. 2011) (unpublished); United States v. Quinzon, 643 F.3d 1266, 1272 (9th Cir. 2011); *see also* Art Bowker, *An Introduction to the Supervision of the Cybersex Offender*, 68 Fed. Probation 3, 5 (2004) ("Monitoring software/hardware, coupled with computer search/seizure, serves as the least intrusive and restrictive method for controlling the risk that may be posed by most cybersex offenders. Offenders are permitted to use a computer and access the Internet, with the clear understanding that their computer activities are being monitored."); Frank E. Correll, Jr., "*You Fall into Scylla in Seeking to Avoid Charybdis": The Second Circuit's Pragmatic Approach to Supervised Release for Sex Offenders,* 49 Wm. & Mary L. Rev. 681, 684 (2007) (referring to computer monitoring as the "pragmatic middle ground" because it allows sentencing courts and probation officers to use technology to avoid the opposing extremes of banning computer and Internet use altogether or not placing any restrictions).

96. United States v. Ullmann, 2015 WL 3559221, *2 (10th Cir. 2015); United States v. Legg, 713 F.3d 1129 (D.C. Cir. 2013) (holding it was not plain error to impose condition allowing random searches of, and installation of monitoring programs on, computer, noting that counsel for defendant conceded that the conditions were "pretty standard in cases like this"); United States v. Heckman, 592 F.3d 400, 408 (3d Cir. 2009) ("[T]here are alternative, less restrictive, means of controlling [the defendant's] post-release behavior, including the computer monitoring condition already imposed by the District Court in this case (and that [the defendant] has not challenged)."); United States v. Mark, 425 F.3d 505, 509 (8th Cir. 2005) ("According to Mark, the district court could have addressed its concerns by ordering him to install filtering software that would block access to sexually-oriented websites and to permit the probation office unannounced access to verify that the software was functioning properly.").

A. Scope and Efficacy: Minimal Intrusiveness and Maximal Effectiveness

In *United States v. Lifshitz*,[97] the court provided perhaps the most thorough legal analysis of computer monitoring conditions. In *Lifshitz*, the defendant pleaded guilty to receiving child pornography over the Internet. The district court imposed a condition of probation that allowed the probation office to "monitor or filter computer use on a regular or random basis" without any individualized suspicion and to make, "upon reasonable suspicion … unannounced examinations of any computer equipment owned or controlled by the defendant."[98]

In addressing whether the condition resulted in a deprivation of liberty greater than reasonably necessary, the court held that the condition must "seek a minimum of intrusiveness coupled with maximal effectiveness."[99] The precise type of monitoring technology is the critical factor when evaluating whether a condition satisfies this standard. According to the court, there was very little information in the record about the kind of monitoring authorized by the condition.[100] The court conducted a brief survey of monitoring technology and stated that there are two principal axes along which monitoring methods can be distinguished. First, some monitoring uses software installed on an individual's personal computer, whereas other monitoring relies on records from the Internet Service Provider (ISP), through whom an account user's requests for information or e-mails are routed.[101] The former type of monitoring might be more conducive to investigating all of a probationer's computer-based activities, including those performed locally without connection to the Internet or any network, whereas the latter would be limited to transmissions mediated by the ISP.[102] Second, some software focuses attention upon specific types of unauthorized materials, whereas other kinds monitor all activities engaged in by the computer user.[103]

Constant inspection of the documents that Lifshitz created on his computer might, as the court put it, "be more like searching his diary or inspecting his closets than it is like the highly targeted diagnosis accomplished by drug testing."[104] By contrast, software that alerted a probation officer only when Lifshitz was engaging in impermissible communications over e-mail or the Internet would "bear much greater resemblance to screening a probationer's urine for particular drugs—as opposed to investigating a sample to ascertain all medical conditions from which the individual suffered or to figure out his or her favorite foods."[105] These types of distinctions, according to the court, may be relevant to determining whether the scope of the monitoring condition's infringement on privacy is commensurate with the special needs of rehabilitation and deterrence.[106]

In addition to the uncertain scope of the condition, it was not clear whether the monitoring would be effective. The court noted that experienced computer users were quite resourceful in circumventing the software employed.[107] It was not obvious from the record that computer

97. 369 F.3d 173 (2d Cir. 2004)
98. *Id.* at 177.
99. *Id.* at 186.
100. *Id.* at 190.
101. *Id*.
102. *Id*.
103. *Id*.
104. *Id*. at 192.
105. *Id*.
106. *Id*.
107. *Id*.

monitoring would be immune from such evasion.[108] The court therefore vacated the condition and remanded the case to the district court to evaluate whether the proposed monitoring techniques were sufficiently narrowly tailored and maximally effective compared to less restrictive alternatives such as filtering the electronic data accessed by the defendant.[109]

The appellate court suggested that the district court might wish—through a hearing or other appropriate procedures—to evaluate the scope and efficacy of the methods of computer monitoring or filtering that the probation office intended to employ. If it appeared that filtering was no less effective than monitoring, the court might decide to permit filtering rather than monitoring. If, on the other hand, there were demonstrable advantages to monitoring, the court might instead prefer to ensure that a narrower but still effective condition be imposed, if one was reasonably available.[110] Finally, if at some point in the future the defendant presented clear evidence that less intrusive but still effective methods of controlling his computer use had become technologically available, the court stressed that nothing in its decision would preclude the district court from modifying its order.

According to one legal commentator, this approach places a substantial fact-finding burden on courts and probation officers:

> In the *Lifshitz* ruling, the Second Circuit left it to the district court to determine just what methods of computer monitoring are permissible. This places a heavy burden on the lower courts to review search technologies and find facts regarding their effectiveness in targeting specific types of computer use. *Lifshitz* exacerbates this burden by providing that a probationer could return to the court and request a modification of the supervision conditions upon introduction of a new privacy-enhancing search capability. In addition, each approach to computer monitoring can be circumvented depending on the technical skills of the probationer. As a result, courts must continually revise search approaches depending on the available technology and the characteristics of the probationer.[111]

B. Applicability of Conditions

When considering whether conditions requiring computer and Internet filtering or monitoring are appropriate, courts examine factors similar to those considered for computer and Internet bans (*see* Section III, *supra*). Courts have found, for instance, that filtering and monitoring are more appropriate than bans in cases where defendants did not use the Internet to contact young children.[112] As one court put it, using the Internet for solicitation of children is "more difficult to

108. *Id*.

109. *Id.*

110. For example, two ways in which the condition might be more narrowly tailored would be by limiting it to Internet-related activity and e-mail and by implementing monitoring software that searches for particular suspect words and phrases rather than recording all varieties of computer-related activity. This was not to suggest, according to the Second Circuit, that the condition must necessarily be restricted to the monitoring of online conduct. *Id.*

111. Shawna Curphey, *United States v. Lifshitz: Warrantless Computer Monitoring and the Fourth Amendment*, 38 Loy. L.A. L. Rev. 2249, 2262 (2005).

112. United States v. Freeman, 316 F.3d 386, 392 (3d Cir. 2003); United States v. Sofsky, 287 F.3d 122, 126–27 (2d Cir. 2002).

trace [through computer monitoring] than simply using the internet to view pornographic web sites."[113]

Courts are also more likely to affirm these measures in cases where there is a connection between the Internet and the defendant's offense history.[114] Not all courts, however, agree that an Internet nexus is required. Courts have held that a history of Internet abuse is not necessary to impose a monitoring condition when the defendant had a documented history or propensity for sexually deviant or other inappropriate behavior toward minors.[115] Another court has upheld a computer monitoring condition where the defendant had no history of using a computer to commit an offense but used a cell phone to send threatening text messages.[116] Courts also assess the characteristics of the defendant, including whether the nature of the defendant's profession gives him access to children,[117] and the defendant' mental illness and young age.[118]

C. Timing and Methods for Imposing and Executing Conditions

Courts have also discussed procedural and logistical issues concerning the imposition of conditions that remotely monitor or filter computer and Internet use. Some courts have suggested that, where technological considerations prevent specifying at the time of sentencing how a condition is to be implemented following years of imprisonment, a modification of conditions after sentencing or a postponement in imposing conditions should be considered to ensure that they re-

113. *Freeman*, 316 F.3d at 392.

114. United States v. Stergios, 659 F.3d 127, 134 (1st Cir. 2011); United States v. Burroughs, 613 F.3d 233, 244 (D.C. Cir. 2010); United States v. Smathers, 351 F. App'x 801, 802 (4th Cir. 2009) (unpublished); United States v. Peterson, 248 F.3d 79, 83 (2d Cir. 2001).

115. United States v. McGee, 559 F. App'x 323, 330 (5th Cir. 2014) (unpublished) (for defendant convicted of failure to register as a sex offender, upholding a condition requiring the installation of filtering software regarding sexually arousing material, reasoning that the condition was reasonably related to public protection from defendant's "very troubling, sexually deviant criminal history," and noting that, while there was no nexus between defendant's offense history and Internet use, the sentencing court found defendant was a "predator" due to his criminal history, including multiple charges for aggravated rape of minors, and the sentencing court justified the condition as "a precaution, purely protective" because of its concern "about the stimulation factor motivating [defendant] for additional types of conduct consistent with child molestation"); United States v. Perazza-Mercado, 553 F.3d 65, 73 (1st Cir. 2009) ("Although the internet did not play a role in the sexual misconduct which was the basis for his conviction, we must also consider Perazza–Mercado's documented propensity for inappropriate behavior towards young girls. The personal characteristics of the defendant, even though they do not reflect any history of computer misuse, could justify a targeted limitation on internet use involving certain kinds of chat rooms or any sites involving children. . . Because of this concern, and the nature of his prior conduct, other conditions of Perazza–Mercado's supervised release forbid him from working with children in a professional capacity and residing or loitering near areas which are frequented by groups of children.… We can imagine, and modern technology permits, an internet prohibition which would essentially replicate these real-world limitations.").

116. United States v. Hayes, 283 F. App'x 589 (9th Cir. 2008) (unpublished) (upholding condition requiring monitoring of defendant's computer and "other electronic devices or media," reasoning that cell phones qualify as "other electronic devices" and that, in light of the defendant's history of threatening and volatile behavior, the district court could have reasonably concluded that allowing the probation officer to inspect and monitor Hayes's personal computer—which, in turn, may deter Hayes from utilizing another viable means of sending threats to his family—was reasonably necessary to achieve deterrence or public protection).

117. United States v. Mangan, 306 F. App'x 758, 760 (3d Cir. 2009) (unpublished) ("We conclude, in light of the record before us, that the basis for each of these conditions of supervised release [including computer monitoring] is patent given … his status as an educator.").

118. United States v. Sealed Juvenile, 781 F.3d 747, 757 (2015) ("Appellant is a mentally ill juvenile. Given the potential influence of the Internet on his sexual development,… it is in the interests of deterrence and rehabilitation to monitor his access to technology.").

main both narrowly tailored and effective as technology and other circumstances change.[119] Other courts have taken or suggested an incremental approach where less restrictive measures permitting some degree of Internet access are imposed initially and, if violated, replaced by more restrictive conditions.[120]

Some courts suggest that a ban that delimits computer and Internet use based on probation officer approval may be a more effective way to implement remote filtering and monitoring software because it provides the officer with the flexibility to adjust to rapidly changing technology, while a stand-alone monitoring condition may become outdated, ineffective, or overly burdensome after lengthy periods of incarceration and supervision.[121] Courts delegating to officers the authority to determine how best to implement monitoring and filtering conditions emphasize the officer's continuing duty to make adjustments with changing technology to ensure maximal effectiveness and minimal intrusiveness.[122] Other courts, however, caution that district courts should adopt precise rules rather than open-ended delegations to avoid arbitrary execution of the condition.[123]

Many courts that impose computer-monitoring conditions intend that the monitoring be done on a regular or random basis without individual showings of reasonable suspicion. If the court intends that regular or random computer monitoring be done without an individual demonstration of reasonable suspicion, it may be prudent to make that intention clear in the special condition of supervision.[124] One court has upheld on plain error review a condition requiring that

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119. United States v. Siegel, 753 F.3d 705, 717 (7th Cir. 2014) (recommending as a "best practice" for sentencing judges imposing conditions of supervised release that they "[r]equire that on the even of his release from prison, the defendant attend a brief hearing before the sentencing judge (or his successor) … to consider whether to modify one or more of the conditions in light of changed circumstances"); United States v. Kent, 554 F. App'x 611 (9th Cir. 2014) (unpublished) (noting that if technology has changed by the time the defendant is released from prison, and he believes that the probation office has not met its continuing obligation to ensure not only the efficacy of the computer monitoring methods, but also that they remain reasonably tailored so as not to be unnecessarily intrusive, he may seek relief from the district court at that time); United States v. Quinzon, 643 F.3d 1266, 1273 (9th Cir. 2011) ("[A]s new technologies emerge or circumstances otherwise change, either party is free to request that the court modify the condition of supervised release … In situations like this one, where technological considerations prevent specifying in detail years in advance how a condition is to be effectuated, district courts should be flexible in revisiting conditions imposed to ensure they remain tailored and effective."); United States v. Balon, 384 F.3d 38, 47 (2d Cir. 2004) (stating that changing technology "is an appropriate factor to authorize a modification of supervised release conditions under Section 3583(e)."); United States v. Lifshitz, 369 F.3d 173, 193, n.11 (2d Cir. 2004) ("Because Lifshitz is being sentenced to probation, it seems necessary to determine, at this time, the conditions of that probation and to base that determination, in the first instance, on the state of technology and other practical constraints as they currently exist. Were this, however, a case involving supervised release, or if there were any reasons why the commencement of the defendant's term of probation would be substantially delayed, it might well be prudent for the district court to postpone the determination of the supervised release or probation conditions until an appropriate later time, when the district court's decision could be based on then-existing technological and other considerations.").

120. United States v. Freeman, 316 F.3d 386, 392 (3d Cir. 2003) ("[I]f Freeman does not abide by more limited conditions of release permitting benign internet use, it might be appropriate to ban all use.").

121. United States v. Kent, 554 F. App'x 611 (9th Cir. 2014) (unpublished); United States v. Miller, 665 F.3d 114, 124 (5th Cir. 2011); United States v. Quinzon, 643 F.3d 1266, 1273 (9th Cir. 2011); United States v. Love, 593 F.3d 1, 11 (D.C. Cir. 2010).

122. United States v. Quinzon, 643 F.3d 1266, 1273 (9th Cir. 2011).

123. United States v. Scott, 316 F.3d 733, 735 (7th Cir. 2003).

124. David N. Adair, Jr., *Looking at the Law*, 65 Fed. Probation 66, 67 (2001) ("Given the lack of certainty in the requirement of reasonable suspicion, and the fact that the use of [computer monitoring] software is less intrusive than a full-blown computer search, it is understandable that some courts will want monitoring to be done without a necessity for reasonable suspicion.… [S]uch monitoring should be conducted pursuant to specific court authoriza-

the defendant install filtering software on his personal computers to monitor and block websites containing illegal child pornography and allowing the probation office "unannounced access" to his personal computers "to verify that the filtering software is functional."[125] The court held that the condition was reasonably related to the defendant's offense history involving computer use and did not violate the defendant's Fourth Amendment rights.[126] It noted that the sentencing judge "reasonably found that the monitoring program will 'ensure compliance' with the other conditions, most notably the condition prohibiting [the defendant] from receiving, transmitting, or viewing illegal pornography."[127] Furthermore, it reasoned that "[t] he deterrent effect of filtering software—and unannounced checks to determine the software remains functional—is apparent."[128]

Another court has upheld on plain error review a condition requiring that the defendant "consent to … periodic unannounced examinations of his computer, hardware, and software which may include retrieval and copying of all data from his computer [and] removal of such equipment, if necessary, for the purpose of conducting a more thorough inspection."[129] It reasoned in part that these conditions are "reasonably necessary, as an additional safeguard to supplement the [computer-monitoring software], to ensure that the [defendant] does not access prohibited materials and to check whether he does access them."[130]

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tion in the form of a special condition that permits the use of the particular software. And, if it is the intent of the court that the results will be monitored by a probation officer on a regular or random basis, the condition should specifically so state.").

125. United States v. Kappes, 782 F.3d 828, 857 (7th Cir. 2015).

126. *Id*.

127. *Id*.

128. *Id*.

129. United States v. Sealed Juvenile, 781 F.3d 747, 757 (5th Cir. 2015).

130 *Id*.

V. Conclusion

In recent years, sentencing courts have increasingly imposed special conditions of supervised release and probation restricting computer and Internet use. Appellate courts appear to examine similar factors when considering these conditions, though there are differences among circuits depending on the specific facts and circumstances in each case. At the same time, the case law is still evolving to address rapidly changing technology. A significant challenge has been to apply legal standards to complex and evolving forms of technology used to commit cyber crime, to monitor computer and Internet use, or to evade monitoring of computer and Internet use.

Appendix A: Cases Upholding Qualified Bans

United States v. Rath, 2015 WL 3559160 (5th Cir. 2015) (for defendant convicted of abusive sexual contact with a minor, upholding conditions prohibiting access to any computer capable of Internet access, reasoning in part that defendant may use a computer for school and work as long as the computer is not capable of Internet access)

United States v. Sealed Juvenile, 781 F.3d 747, 756 (5th Cir. 2015) (upholding condition that the defendant not possess or use a computer with access to any "on-line computer service" without the prior written approval of the probation office, but construing the condition to not require the defendant to seek written permission "every single time he must use a computer or access the Internet")

United States v. Ullman, 2015 WL 3559221 (10th Cir. 2015) (upholding condition restricting Internet access without probation office approval, noting that all Internet access is not prohibited and that devices without Internet access, such as gaming systems, are not restricted)

United States v. Smith, 564 F. App'x 200, 208 (6th Cir. 2014) (unpublished) (upholding condition limiting computer and Internet access except with probation officer approval, reasoning in part that the court "reasonably lessened the impact of the restrictions by stressing that Smith's probation officer would have the flexibility to approve Smith's use of cell phones and computers")

United States v. Sullivan, 588 F. App'x 631 (9th Cir. 2014) (unpublished) (for defendant convicted of making a threatening communication in violation of 18 U.S.C. § 875(c) through use of electronic communications, including the Internet, upholding computer restriction in part because the restriction was not absolute and permitted access when approved by the probation office)

United States v. Valdoquin, 586 F. App'x 513 (11th Cir. 2014) (unpublished) (upholding condition limiting computer use in part because defendant retained the right to use a computer with access to the Internet based on the district court's approval)

United States v. Ellis, 720 F.3d 220, 224 (5th Cir. 2013) (upholding a condition requiring the defendant to receive prior approval from the court before "possess[ing], hav[ing] access to, or utiliz[ing] a computer or internet connection device including, but not limited to Xbox, PlayStation, Nintendo, or similar device")

United States v. Wright, 529 F. App'x 553 (6th Cir. 2013) (unpublished) (for defendant who possessed and distributed child pornography, upholding a ban on Internet use except with probation officer approval because the ban was not absolute and was therefore reasonable and consistent with the sentencing objectives of 18 U.S.C. § 3553 and 18 U.S.C. § 3583(d))

United States v. Atias, 518 F. App'x 843, 846-47 (11th Cir. 2013) (unpublished) (upholding computer and Internet restrictions as a condition of supervised release where defendant, who was

convicted of receipt of child pornography, could still "petition the court for approval to use either a computer or the internet")

United States v. Legg, 713 F.3d 1129 (D.C. Cir. 2013) (where defendant was convicted of persuading a person to travel in interstate commerce to engage in criminal sexual activity, holding it was not plain error to impose conditions forbidding the defendant from possessing or using a computer or any online service without prior approval of the probation office, and requiring him to identify all computer systems and Internet-capable devices to which he would have access, and to allow random searches of, and installation of monitoring programs on, those devices, noting that counsel for defendant conceded that the conditions were "pretty standard in cases like this")

United States v. Hilliker, 469 F. App'x 386, 387 (5th Cir. 2012) (unpublished) (holding it was not plain error to "den[y] all access to computers, the internet, cameras, photographic equipment, and other electronic equipment without the permission of his probation officer" for a defendant with a fugitive background who was a "predator" and who had repeatedly engaged in direct physical contact with minor children and who admitted that Internet pornography was a factor in clouding his judgment regarding the propriety of touching or fondling young girls in public places)

United States v. Borders, 489 F. App'x 858, 863 (6th Cir. 2012) (unpublished) (upholding condition for defendant convicted of possession of child pornography that he "shall not utilize a computer unless for legal, outside employment or for an express class assignment in an accredited educational institution and with the approval of the probation officer")

United States v. Lewis, 565 F. App'x 490 (6th Cir. 2012) (unpublished) (finding no abuse of discretion for ban on use of a computer with access to any "on-line service" or other forms of wireless communication without the prior approval of the probation officer)

United States v. Black, 670 F.3d 877, 883 (8th Cir. 2012) (district court did not plainly err by prohibiting defendant from accessing Internet without prior officer approval because defendant was "not just a passive possessor of child pornography" but rather had accessed the child pornography through a Limewire file-sharing program, and because defendant may still access the Internet with the permission of the probation office)

United States v. Morais, 670 F.3d 889, 897 (8th Cir. 2012) ("The special condition at issue here is not a complete ban on use of the Internet. With prior approval of the probation office, Morais may access the Internet for legitimate purposes of research, communication, and commerce.")

United States v. Muhlenbruch, 682 F.3d 1096 (8th Cir. 2012) (holding it was not an abuse of discretion to prohibit defendant, who was convicted of possession and receipt of child pornography, from possessing a computer or accessing the Internet without prior approval of the probation officer)

United States v. Munjak, 669 F.3d 906 (8th Cir. 2012) (upholding a ban on Internet access without probation officer approval for defendant convicted of possession of child pornography who

possessed images of child pornography on a computer and who distributed them by using a peer-to-peer file-sharing program, reasoning that the ban was reasonably necessary to further the purposes of sentencing, including deterrence and protection of the public)

United States v. Accardi, 669 F.3d 340, 347 (D.C. Cir. 2012) (upholding on plain error review a ban on "possess[ion] or use [of] a computer that has access to any online computer service at any location, including [the defendant's] employment, without the prior approval of the probation office")

United States v. Maurer, 639 F.3d 72, 83 (3d Cir. 2011) (upholding qualified Internet ban, reasoning that the scope of the restriction was sufficiently narrow because, rather than restrict all computer use, the court limited only the defendant's access to the Internet, with exceptions to be provided by the probation office)

United States v. Demers, 634 F.3d 982, 983 (8th Cir. 2011) (upholding condition banning the defendant from having access to an Internet-connected computer or accessing the Internet from any location without first demonstrating a "justified reason" for that access and obtaining the approval of the probation officer, where the defendant had a prior history of sexual abuse and possession of child pornography)

United States v. Fletcher, 435 F. App'x 578 (8th Cir. 2011) (unpublished) (upholding on plain error review the special condition of supervised release prohibiting defendant from having Internet access at his residence, and from having—without prior approval by the probation office and a justified reason—access to an Internet-connected computer or other device with Internet capabilities or access to the Internet from any location)

United States v. Mayo, 642 F.3d 628 (8th Cir. 2011) (upholding condition restricting access to the Internet unless it is necessary for employment purposes and the probation officer approves it)

United States v. Phillips, 370 F. App'x 610, 620 (6th Cir. 2010) (unpublished) (upholding special condition prohibiting defendant "from owning, using or possessing a computer or any other internet-capable electronic device without the written permission of his probation officer," reasoning that the restrictions were not overly restrictive because they did not ban all computer and Internet use and they were reasonably related to protection of the public and rehabilitation)

United States v. Angle, 598 F.3d 352 (7th Cir. 2010) (for defendant convicted of possession of child pornography, attempted receipt of child pornography, and attempt to entice a minor, via Internet and telephone, to engage in sexually prohibited activity, upholding a condition prohibiting defendant from having "personal access to computer Internet services," reasoning in part that the ban was not a complete ban because it disallowed only "personal" access)

United States v. Durham, 618 F.3d 921, 944 (8th Cir. 2010) (district court did not abuse its discretion in imposing a restriction on Internet access when the restriction did not amount to a total ban, reasoning in part that the condition "must be treated as merely a partial deprivation of Durham's interest in having unfettered access to the Internet")

United States v. Koch, 625 F.3d 470, 482 (8th Cir. 2010) (upholding qualified ban where defendant was permitted to use a computer and the Internet with prior approval from a probation officer "who will have the guidance of our case law, which recognizes the importance of computers and internet access for education, employment, and communication, when considering [defendant's] requests")

United States v. Thielemann, 575 F.3d 265, 278 (3d Cir 2009) (emphasizing the relatively limited coverage of the ban, noting that the defendant could seek permission from the probation officer to use the Internet and that he could "own or use a *personal* computer as long as it is not connected to the Internet; thus he is allowed to use word processing programs and other benign software")

United States v. Loflin, 318 F. App'x 212 (4th Cir. 2009) (unpublished) (for defendant convicted of traveling in interstate commerce to engage in a sexual act with a juvenile and transportation of a minor in interstate commerce with intent to engage in criminal sexual activity, holding it was not an abuse of discretion to impose a special condition limiting use of a computer without probation officer approval)

United States v. Bender, 566 F.3d 748 (8th Cir. 2009) (holding it was not an abuse of discretion to prohibit possession or use of a computer or any device with access to any online computer service without probation officer approval)

United States v. Moran, 573 F.3d 1132, 1141 (11th Cir. 2009) (for a defendant convicted of felon in possession of a firearm, holding that the court did not abuse its discretion by imposing special condition restricting defendant's access to the Internet without probation officer approval, reasoning that, although the Internet provides valuable resources for information and communication, it also serves as a dangerous forum in which a defendant can access child pornography and communicate with potential victims, and the defendant may still use the Internet for valid purposes by obtaining permission)

United States v. Beeman, 280 F. App'x 616, 619 (2008) (upholding conditions restricting Internet access without probation office approval and allowing the probation office to monitor defendant's computer-based activities in part because they did not involve an unreasonable deprivation of liberty because defendant may use computers and access the Internet with the permission of the probation office)

United States v. Brimm, 302 F. App'x 588 (9th Cir. 2008) (unpublished) (holding the district court did not abuse its discretion when it imposed a special condition of supervised release that prohibited the defendant from using a computer with access to any online services, except for use with his employment and after the approval of the probation officer, and rejecting the contention that the condition constituted an unwarranted occupational restriction because it did not interfere with the defendant's employment)

United States v. Goddard, 537 F.3d 1087, 1090 (9th Cir. 2008) (finding that condition requiring that defendant "use only those computers and computer-related devices, screen user names, passwords, email accounts, and internet service providers (ISPs) as approved by the Probation

Officer" where "computers and computer-related devices include, but are not limited to, personal computers, personal data assistants (PDAs), internet appliances, electronic games, and cellular telephones, as well as their peripheral equipment, that can access, or can be modified to access, the internet, electronic bulletin boards, other computers, or similar media" was not an abuse of discretion)

United States v. Nisely, 172 F. App'x 713 (9th Cir. 2006) (unpublished) (for defendant convicted of use of a facility of interstate commerce to attempt to induce a minor to engage in criminal sexual activity, holding that prohibition against Internet access without probation officer permission did not involve greater deprivation of liberty than reasonably necessary)

United States v. Sullivan, 451 F.3d 884, 887 (D.C. Cir. 2006) (upholding on plain error review the condition that the defendant "shall not possess or use a computer that has access to any 'on-line computer service' at any location, including his place of employment, without the prior written approval of the Probation Office," where "on-line computer service" included, but was not limited to, "any Internet service provider, bulletin board system, or any other public or private computer network")

United States v. Antelope, 395 F.3d 1128, 1142 (9th Cir. 2005) (affirming the imposition of a condition prohibiting defendant from "possess[ing] or us[ing] a computer with access to any 'on-line computer service' at any location (including employment) without the prior written approval of the probation department")

United States v. Vinson, 147 F. App'x 763, 775 (10th Cir. 2005) (unpublished) (for defendant convicted of subscribing to a false tax return, wire fraud, and mail fraud, upholding a condition prohibiting the defendant from using any Internet service without first receiving written permission from his probation officer, noting its assumption that, the officer "will implement this condition without a greater intrusion of [defendant's] liberty than is necessary")

United States v. Landry, 116 F. App'x 403, 407 (3d Cir. 2004) (unpublished) (upholding on plain error review a restriction where the defendant was not prohibited from using stand-alone computers without Internet access and where Internet access was permitted upon probation officer approval)

United States v. Harding, 57 F. App'x 506, 507 (3d Cir. 2003) (unpublished) (upholding a condition that the defendant shall "not possess or use a computer with access to any online computer service at any location, including employment, without prior approval of the probation officer")

United States v. Knight, 86 F. App'x 2 (5th Cir. 2003) (unpublished) (holding that the trial court did not abuse its discretion in ordering that the defendant, who was convicted of receiving child pornography, could not own or use a computer at home or at work with Internet or e-mail access without permission from his probation officer and that any computer he used must be blocked from accessing child pornography Internet sites, reasoning in part that the claim that the defendant did not victimize anyone with his computer is without merit and in contradiction to his guilty plea for receiving images of child pornography on his home computer)

United States v. Crandon, 173 F.3d 122, 125, 128 (3d Cir.1999) (upholding a condition that directed the defendant not to "possess, procure, purchase[,] or otherwise obtain access to any form of computer network, bulletin board, Internet, or exchange format involving computers unless specifically approved by the United States Probation Office," reasoning that the restrictions are permissible because the special condition is narrowly tailored and is directly related to deterrence and protecting the public)

United States v. Fields, 324 F.3d 1025, 1027 (8th Cir. 2003) (ban on use of a computer without probation officer permission did not constitute abuse of discretion where the offense of conviction involved running a child pornography website for profit)

United States v. Ristine, 335 F.3d 692 (8th Cir. 2003) (finding no plain error where the district court barred the defendant from having Internet service at his residence and where other Internet access was permissible upon probation office approval)

United States v. Rearden, 349 F.3d 608, 620 (9th Cir. 2003) ("We recognize the importance of the Internet for information and communication, but we disagree that the condition is plainly impermissible in Rearden's case as it leaves open the possibility of appropriate access…The condition does not plainly involve a greater deprivation of liberty than is reasonably necessary for the purpose because it is not absolute; rather, it allows for approval of appropriate online access by the Probation Office.")

United States v. Taylor, 338 F.3d 1280 (11th Cir. 2003) (finding that condition prohibiting defendant from using or possessing a computer with Internet access without probation officer approval was not an abuse of discretion in part because, if defendant had a legitimate need to use a computer, the district court's order authorized his probation officer to allow that use)

United States v. Zinn, 321 F.3d 1084, 1092 (11th Cir. 2003) ("We realize the Internet has become an important resource for information, communication, commerce, and other legitimate uses, all of which may be potentially limited to [defendant] as a result of our decision. Nevertheless,…the restriction in this case is not overly broad in that [defendant] may still use the Internet for valid purposes by obtaining his probation officer's prior permission.")

United States v. Suggs, 50 F. App'x 208, 211 (6th Cir. 2002) (unpublished) (upholding a condition of supervised release in a fraud case that prohibited defendant from having access to a personal computer except for employment purposes)

United States v. Walser, 275 F.3d 981, 988 (10th Cir. 2001) (upholding prohibition where defendant could use the Internet with permission of the probation office)

United States v. Crandon, 173 F.3d 122 (3d Cir. 1999) (upholding a three-year ban prohibiting the defendant from using any "computer network, bulletin board, Internet, or exchange format involving computers" without permission from the probation office)

Appendix B: Cases Upholding or Rejecting Bans Based on Nexus Between Offense History and Internet Use

United States v. Rath, 2015 WL 3559160 (5th Cir. 2015) (for defendant convicted of abusive sexual contact with a minor, upholding conditions prohibiting access to any computer capable of Internet access and requiring defendant to consent to installation of computer-monitoring software, reasoning in part that, although the facts of the instant conviction did not involve a computer, defendant used Internet access—specifically, email and instant messaging—to groom a subsequent victim over an extended period of time in developing a relationship that culminated in illegal sexual intercourse)

United States v. Fernandez, 776 F.3d 344, 348, (5th Cir. 2015) (for defendant convicted of failing to register as a sex offender under the Sex Offender Registration and Notification Act, holding that court abused its discretion in imposing a special condition requiring the installation of computer-monitoring software, when neither the defendant's failure-to-register offense nor his criminal history had any connection to computer use or the Internet, and noting that "[i]n the absence of evidence to the contrary, the court's general concerns about recidivism or that [defendant] would use a computer to perpetrate future sex-crimes are insufficient to justify the imposition of an otherwise unrelated software-installation special condition")

United States v. Ramos, 763 F.3d 45 (1st Cir. 2014) (for defendant convicted of aiding and abetting in the production of child pornography, vacating prohibition on any access to internet, without permission from probation officer, reasoning that the district court did not cite evidence that defendant used a computer or the Internet in any way in connection with the offense, nor did it identify past impermissible uses that justified generally barring him from using a computer or the Internet, and leaving in place a more narrowly tailored monitoring and filtering condition that was not challenged by defendant)

United States v. Baker, 755 F.3d 515, 525 (7th Cir. 2014) (for defendant convicted of failing to register as a sex offender under the Sex Offender Registration Act, rejecting condition requiring participation in the probation office's computer and Internet monitoring program because the conviction "in no way require[d], or [was] facilitated through, the use of a computer")

United States v. Sullivan, 588 F. App'x 631 (9th Cir. 2014) (unpublished) (for defendant convicted of making a threatening communication in violation of 18 U.S.C. § 875(c) through use of electronic communications, including the Internet, upholding computer restriction in part because the use of a computer and the Internet was essential to the commission of the crime)

United States v. Valdoquin, 586 F. App'x 513 (11th Cir. 2014) (unpublished) (upholding condition limiting computer use in part because defendant downloaded approximately 400 images of child pornography, including material that depicted sadistic or masochistic conduct, approximately 200 of which involved children between the ages of four and eleven and others that involved minors who were at least twelve years old)

United States v. Tang, 718 F.3d 476, 483 (5th Cir. 2013) (for a defendant convicted of failure to register as a sex offender, holding it was an abuse of discretion to impose a ban on Internet use

without probation officer permission because the ban was not reasonably related to the statutory sentencing factors, reasoning that the defendant had never committed an offense over the Internet and his prior conviction for assault with intent to commit sexual abuse did not involve any use of a computer or the finding of the minor victim online, and that restricting the defendant's access to a computer had the potential to stifle any educational and vocational training)

United States v. Doyle, 711 F.3d 729 (2013) (for defendant convicted of failure to register as a sex offender, vacating qualified Internet ban, reasoning that the record did not show why ban related to rehabilitating defendant or protecting the public)

United States v. Maxwell, 483 F. App'x 233 (6th Cir. 2012) (unpublished) (vacating condition banning defendant from possessing an Internet-capable device without probation officer approval, reasoning that there was no history of using a computer or the Internet to facilitate prior offenses, and remanding to sentencing court for further exposition of how condition was reasonably related to defendant's history and characteristics)

United States v. Stergios, 659 F.3d 127 (1st Cir. 2011) (upholding special condition for defendant convicted of bank fraud imposing a ban—except when approved by the supervising officer—on Internet access where the defendant relied heavily on the Internet to perpetrate his frauds by opening banking accounts and conducting money transfers and where the defendant had a history of fraudulent Internet transactions)

United States v. Springston, 650 F.3d 1153, 1156 (8th Cir. 2011) (for defendant convicted of failing to register as a sex offender, holding that district court abused its discretion by imposing special condition prohibiting Internet access without probation officer approval because the record was devoid of evidence that the defendant had ever used a computer for any purpose related to the offense)

United States v. Laureys, 653 F.3d 27 (D.C. Cir. 2011) (for defendant convicted of attempted enticement of a minor and traveling across state lines with intent to engage in illicit sexual conduct, upholding condition requiring defendant to log all Internet addresses he accessed and to disclose computer restrictions to potential employers, reasoning that defendant used the internet to facilitate criminal sexual conduct with minors)

United States v. Heckman, 592 F.3d 400 (3d Cir. 2010) (a condition banning Internet use was plain error because of the length (lifetime) and coverage (no exceptions for approved use) of the ban, and, although defendant's criminal history was extensive, he had never been convicted of criminal behavior that involved the use of the Internet)

United States v. Keller, 366 F. App'x 362 (3d Cir. 2010) (unpublished) (upholding special condition banning defendant from using the Internet to create "business websites" because it was directly related to the criminal conduct underlying Keller's mail fraud conviction, to wit: mail fraud emanating from an Internet candy business)

United States v. Perazza–Mercado, 553 F.3d 65, 74 (1st Cir. 2009) (overturning as overbroad a total ban on the defendant's residential Internet use where the defendant had "no history of im-

permissible Internet use and the Internet was not an instrumentality of the offense of conviction" and remanding to the district court so that, in light of a variety of technological options at its disposal, it might devise a more limited restriction)

United States v. Smathers, 351 F. App'x 801 (4th Cir. 2009) (unpublished) (striking down on plain error review a special condition forbidding the defendant from "possess[ing] or us[ing] a personal computer or any other means to access any 'on-line computer service' at any location (including employment) without the prior approval of the probation officer [including] any Internet service provider, bulletin board system, or any other public or private computer network," reasoning that there was no history of using the computer or the Internet to obtain or disseminate child pornography and therefore the condition was not related to the factors in 18 U.S.C. 3553(a) nor was it in line with the Sentencing Commission's policy statement in Section 5D1.3(d)(7) recommending "[a] condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items" in committing a sex offense)

United States v. Barsumyan, 517 F.3d 1154, 1160 (9th Cir. 2008) (rejecting on plain error review prohibition on "access[ing] or possess[ing] any computer or computer-related devices in any manner, or for any purpose" for a defendant convicted of possession of device-making equipment in part because, while a computer was required to download the credit card numbers that a skimming device skimmed, defendant was an intermediary who told Secret Service agents that he knew two individuals who would be able to produce cards from the numbers provided on the skimmer, and there was no indication that defendant was going to be the one to do the downloading)

United States v. Beeman, 280 F. App'x 616, 619 (2008) (unpublished) (upholding conditions restricting Internet access without probation office approval and allowing the probation office to monitor defendant's computer-based activities in part because they were reasonably related to the goals of protecting the public and deterring defendant from repeating his criminal conduct, which involved using a computer to view and download child pornography)

United States v. Sales, 476 F.3d 732, 736 (9th Cir. 2007) (rejecting condition forbidding access to computers and computer-related devices that could access or be modified to access the Internet, electronic bulletin boards, and other computers, or similar media where the defendant had been convicted of using his personal computer, scanner, and printer to make counterfeit $20 bills, and his offense in no way involved or relied upon the Internet, reasoning that "[t]he breadth of [the condition] is not reasonably related to the nature and circumstances of Sales's counterfeiting offense or Sales's history and characteristics," and that "the condition "results in a far greater deprivation of Sales's liberty than is reasonably necessary to prevent recidivism, protect the public, or promote any form of rehabilitation")

United States v. Peterson, 248 F.3d 79, 81 (2d Cir. 2001) (for defendant convicted of bank larceny with a prior state incest conviction, rejecting condition imposing restrictions on computer ownership and Internet access where there was no indication that defendant's past incest offense had any connection to computers or to the Internet)

Appendix C: Cases Rejecting Bans Based on Lack of Conduct Beyond Possession or Receipt of Child Pornography

United States v. Phillips, 785 F.3d 282 (8th Cir. 2015) (vacating condition banning defendant from accessing the Internet without written approval, which was premised in part on defendant's possession of adult pornography, reasoning that because possession of child pornography may not necessarily justify a ban, a court exceeds its discretion by imposing a ban for possession of adult pornography)

United States v. Wiedower, 634 F.3d 490 (8th Cir. 2011) (vacating a condition banning the use of *any* computer, whether connected to the Internet or not, without prior approval of the probation officer where the defendant did not use a computer to do more than possess and receive child pornography (he was convicted of possessing two images and three short videos of child pornography), and remanding to the district court to create a more narrowly tailored ban)

United States v. Miller, 594 F.3d 172, 176 (3d Cir. 2010) (striking down a lifetime supervised release condition that prevented Miller from using without prior written approval a computer with Internet access, reasoning that Miller's case involved receipt and possession of child pornography, whereas other cases upholding Internet bans involved the active solicitation of sexual contact with minors)

United States v. Heckman, 592 F.3d 400, 405 (3d Cir. 2009) (rejecting on plain error review a special condition where the defendant was "prohibited from access to any Internet service provider, bulletin board system, or any other public or private computer network" for the remainder of his life—without exception due not only to the length and scope of the condition but to the fact that the defendant had no history of using the Internet either to lure a minor into direct sexual activity or to entice another to exploit a child)

United States v. Voelker, 489 F.3d at 144, 146 (3d Cir. 2007) (rejecting as overbroad a lifetime condition prohibiting the defendant from "accessing any computer equipment or any 'on-line' computer service at any location, including employment or education. This includes, but is not limited to, any internet service provider, bulletin board system, or any other public or private computer network," and reasoning in part that the defendant "did not use his computer equipment to seek out minors nor did he attempt to set up any meetings with minors over the internet")

United States v. Crume, 422 F.3d 728, 733 (8th Cir. 2005) (striking down as not reasonably necessary a ban prohibiting defendant from using a computer or the Internet without the prior approval of the probation office, because despite the defendant's "grievous" history of sexual misconduct, there was no evidence he had ever used his computer "for anything beyond simply possessing child pornography," and concluding that the district court could "impose a more narrowly-tailored restriction on Mr. Crume's computer use through a prohibition on accessing certain categories of websites and Internet content and can sufficiently ensure his compliance with this condition through some combination of random searches and software that filters objectionable material")

United States v. Mark, 425 F.3d 505, 510 (8th Cir. 2005) (vacating the special conditions of supervised release prohibiting access to any online computer programs, and prohibiting the use or possession of a computer with Internet access, where the criminal conduct involved simple possession of child pornography, and remanding to the district court to consider less restrictive alternatives such as filtering software and unannounced computer inspections)

Appendix D: Cases Upholding Bans Based on Conduct Beyond Possession or Receipt of Child Pornography

United States v. Black, 670 F.3d 877 (8th Cir. 2012) (district court did not plainly err by prohibiting defendant from accessing the Internet without prior officer approval because defendant was "not just a passive possessor of child pornography" but rather had accessed the child pornography through a Limewire file-sharing program)

United States v. Muhlenbruch, 682 F.3d 1096, 1105 (8th Cir. 2012) (holding it was not an abuse of discretion to prohibit defendant from possessing a computer or accessing the Internet without prior approval of the probation officer, reasoning in part that the defendant used his computer for something "beyond simply possessing child pornography" by saving images of child pornography, including images of prepubescent minors engaged in sadistic or masochistic violence, to a disk—a readily transferable medium)

United States v. Maurer, 639 F.3d 72, 84 (3d Cir. 2011) (for defendant convicted of possession of child pornography, holding that the district court did not plainly err in imposing an Internet ban, reasoning in part that "[t]he scope of the restriction [was] … sufficiently narrow" because "[r]ather than restricting all computer use, the District Court limited only Maurer's access to the internet, with exceptions to be provided by the Probation Office")

United States v. Demers, 634 F.3d 982 (8th Cir. 2011) (for defendant convicted of possession of child pornography, upholding on plain error review a condition forbidding him from accessing an Internet-connected computer or from accessing the Internet from any location without prior approval by the probation office, reasoning in part that Demers was arrested at a public library after having printed images of child pornography, which could very well have been done for the purpose of distributing those images)

United States v. Angle, 598 F.3d 352 (7th Cir. 2010) (for defendant convicted of possession of child pornography, attempted receipt of child pornography, and attempt to entice a minor, via Internet and telephone, to engage in sexually prohibited activity, upholding a condition prohibiting defendant from having "personal access to computer Internet services," reasoning in part that the defendant was convicted of more than possession of child pornography)

United States v. Durham, 618 F.3d 921, 944 (8th Cir. 2010) (district court did not abuse its discretion when the restriction did not amount to a total ban, reasoning that "there is no real doubt that restricting [the defendant's] access to the Internet is reasonably related to the nature and circumstances of the offense—which, at a minimum, involved using [a file-sharing program] to acquire a large collection of child pornography")

United States v. Love, 593 F.3d 1, 511 (D.C. Cir. 2010) (upholding condition that the defendant "shall not possess or use a computer that has access to any online computer service at any location, including his place of employment, without the prior written approval of the Probation Office," reasoning that the defendant not only distributed child pornography but also solicited sex with a fictitious young girl online)

United States v. McKinney, 324 F. App'x 180 (3d Cir. 2009) (unpublished) (upholding condition that defendant could not possess or use a computer with Internet access or possess a device capable of transmitting child pornography without the approval of the probation officer, reasoning in part that defendant's conduct involved mechanisms of Internet communications rather than solely accessing child pornography websites)

United States v. Thielemann, 575 F.3d 265, 267 (3d Cir. 2009) (upholding a ten-year, conditional ban on Internet access as narrowly tailored and closely related to the goals of deterrence and public protection where the defendant was actively involved not only in distributing child pornography but also in using the Internet to facilitate, entice, and encourage the real-time molestation of a child when he encouraged another person through an online "chat" to have sexual contact with a young girl)

United States v. Bender, 566 F.3d 748 (8th Cir. 2009) (holding it was not an abuse of discretion to prohibit possession or use of a computer or any device with access to any online computer service without probation officer approval, reasoning in part that the defendant arranged online to meet a woman for sexual relations, and pursued a sexual relationship despite discovering that she was a minor)

United States v. Alvarez, 478 F.3d 864, 868 (8th Cir. 2007) (affirming on plain error review a qualified condition prohibiting residential Internet access where defendant admitted that he had a problem with self-control and that every prior attempt to curtail his access to prohibited material had been unsuccessful, where the defendant's statements and actions could be interpreted to suggest that online material provided him with actionable ideas, and where defendant's employment history (which included work as a stocker at a store) did not indicate that he had a particular day-to-day vocational need for Internet access)

United States v. Boston, 494 F.3d 660, 668 (8th Cir. 2007) (holding that the special condition prohibiting Boston from accessing or possessing a computer without written approval of his probation officer did not constitute an abuse of discretion because it was not absolute and because evidence was presented that Boston had used a computer to print out images of child pornography, which could easily have been done for the purpose of transferring them to others)

United States v. Antelope, 395 F.3d 1128, 1142 (9th Cir. 2005) (affirming the imposition of a condition prohibiting defendant from "possess[ing] or us[ing] a computer with access to any 'online computer service' at any location (including employment) without the prior written approval of the probation department," where defendant joined an Internet site advertising "Preteen Nude Sex Pics" and started corresponding with and ordered a child pornography video from an undercover law enforcement agent, and where the use of the Internet was "essential" to the crime and where the crime was "one step on a path towards more serious transgressions")

United States v. Landry, 116 F. App'x 403, 407 (3d Cir. 2004) (unpublished) (upholding on plain error review a restriction where the defendant was not prohibited from using stand-alone computers without Internet access and where Internet access was permitted upon probation officer approval, reasoning that the defendant was not acting as a "simple 'consumer'" of child pornog-

raphy, but as "someone directly involved in the exploitation of children" because "he not only traded in the pornographic material, but in fact created some of it")

United States v. Fields, 324 F.3d 1025, 1027 (8th Cir. 2003) (ban on use of computer without probation officer permission did not constitute abuse of discretion where the offense of conviction involved running a child pornography website for profit, which was more serious than a possessory offense because it exploited young girls by making materials available to child predators, and the defendant pointed to no specific negative impact on his educational or vocational training that would result from the condition)

United States v. Ristine, 335 F.3d 692, 696 (8th Cir. 2003) (finding no plain error where the district court barred the defendant from having Internet service at his residence, where the defendant "more than merely possessed images of child pornography-he exchanged the images with other Internet users, and he attempted to arrange sexual relations with underage girls")

United States v. Taylor, 338 F.3d 1280 (11th Cir. 2003) (finding that condition prohibiting defendant from using or possessing a computer with Internet access without probation officer approval was not an abuse of discretion where defendant engaged in a series of harassing and threatening activities, including posting a message on an Internet bulletin board successfully encouraging men to call a woman's twelve-year-old daughter in order to engage in sexual activities)

United States v. Paul, 274 F.3d 155, 169 (5th Cir. 2001) (affirming a total ban on defendant's Internet and computer use where he had previously used the Internet to "encourage exploitation of children by seeking out" other pedophiles and advising them on how to locate potential child victims)

United States v. Crandon, 173 F.3d 122, 145 (3d Cir. 1999) (upholding a three-year ban prohibiting the defendant from using any "computer network, bulletin board, Internet, or exchange format involving computers" without permission from the probation office as narrowly tailored and related to deterrence and public protection for a defendant's use of the Internet to contact a minor, initiate a personal encounter and subsequently engage in sexual activities, photographically record the activities, and receive the images through interstate commerce)

About the Federal Judicial Center

The Federal Judicial Center is the research and education agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and seven judges elected by the Judicial Conference.

The organization of the Center reflects its primary statutory mandates. The Education Division plans and produces education and training for judges and court staff, including in-person programs, video programs, publications, curriculum packages for in-district training, and Web-based programs and resources. The Research Division examines and evaluates current and alternative federal court practices and policies. This research assists Judicial Conference committees, who request most Center research, in developing policy recommendations. The Center's research also contributes substantially to its educational programs. The Federal Judicial History Office helps courts and others study and preserve federal judicial history. The International Judicial Relations Office provides information to judicial and legal officials from foreign countries and informs federal judicial personnel of developments in international law and other court systems that may affect their work. Two units of the Director's Office—the Information Technology Office and the Editorial & Information Services Office—support Center missions through technology, editorial and design assistance, and organization and dissemination of Center resources.

Notable Digital Content for Probation Presentence Investigation

Below you will find a list of elements which we take into consideration when developing the Presentence Investigation Report and recommending Special Terms and Conditions of supervision for sex offenders. Many of these elements are routinely noted in forensic examinations of forensic devices. Some may not be typically noted in reports. These elements are, however, important contributors to setting appropriate conditions of supervision to house offenders safely in the community. When possible, Probation appreciates notation that the elements are present in the case. Thank You.

Content Structure:

- Encryption present
- Organization present

Digital Vector:

- Chat
- Email
- Messaging Services
- Peer to Peer
- Social Networking
- TOR
- Website visitation

Content:

- BDSM
- Bestiality
- Defendant masturbating
- Defendant produced sexually explicit material
- Exhibitionism
- Luring/grooming children
- Nude selfies of the defendant
- Severe/Violent content
- Up-skirts
- Voyeurism
- Other unusual paraphilia

TWENTIETH JUDICIAL DISTRICT
PROBATION DEPARTMENT
CYBER CRIME LABORATORY

Proposed Implementation Of The New Special Additional Conditions Of Supervision for Sex Offenders

December 6, 2018 Meeting

I placed a copy of the report, the additional documents, and a copy of all the slides used today in a file on my website. You can download it from my "main page".

www.kbsolutions.com

A Quick Review

Establishing Appropriate Special Terms and Conditions for Sex Offenders

A Report Submitted to Colorado's 20th Judicial District Probation Department

The State of Colorado recently implemented new standard Additional Conditions of Supervision for Adult Sex Offenders. These conditions included Special Additional Conditions (SAC) which could be optionally ordered by the Court. Community Supervision Teams/Multidisciplinary Teams (CST/MDT) evaluating, supervising, and treating convicted sex offenders were required to provide the Court with specific information regarding the basis of fact for recommending these SAC. The 20th Judicial District Probation Department requested KBSolutions Inc. to provide a resource document which assisted the CST/MDT in implementing the new SAC. This document is the product of that request.

Court's Opinion on Elements of T&Cs.

1. Conditions must be "reasonably related" to the relevant sentencing factors. These are:
    - the nature and circumstances of the offense,
    - the history and characteristics of the defendant,
    - deterrence,
    - protection of the public,
    - providing needed correctional treatment to the defendant,
    - reflect the seriousness of the offense,
    - promote respect for the law,
    - provide just punishment for the offense.

It is not necessary for a special condition to be reasonably related to every sentencing factor. Rather, each factor is an independent consideration to be weighed.

2. Conditions must minimize the deprivation of liberty. For probation cases, they must "Involve only such deprivations of liberty or property as are reasonably necessary" for the purposes of:
    - deterrence,
    - protection of the public,
    - providing needed correctional treatment to the defendant,
    - promoting respect for the law,
    - providing just punishment for the offense,
    - they must also be consistent with any policy set by the State.

Vance, 2015

Appellate courts often require individualized explanations for why special conditions are necessary to achieve the statutory goals of sentencing and how they are sufficiently narrowly tailored to **this** case, and **this** offender at **this** time. Further, special conditions should be ordered only if the probation officer determines that the mandatory and standard conditions do not adequately address the defendant's risks and needs.

Relevant Special Conditions

(emphasis added)

19. I will not use computer systems, Internet-capable devices, or similar electronic devices (to include but not be limited to satellite dishes, PDAs, electronic games, web televisions, Internet appliances, and cellular/digital telephones) in a manner that **violates my supervision conditions or the requirements of the signed "Computer Use Agreement for Sex Offenders**." Additionally, I will allow the probation officer, or other trained person, to conduct **searches of computers** or other electronic devices used by me. The person conducting the search may include a non-judicial employee and I may be required to pay for such a search.

ONE OF THE FOLLOWING (emphasis added)

23. I will not **subscribe to or use any Internet service provider**, by modem, LAN, DSL, or any other avenue (to include but not be limited to satellite dishes, PDAs, electronic games, web televisions, Internet appliances and cellular/digital telephones) and will not use another person's Internet or use the Internet through any avenue **until approved in advance by the probation officer** in consultation with the community supervision team. This includes but is not limited to the following activities: web browsing/surfing; email; Internet-related interpersonal communication (e.g. chatting, texting, instant messaging, participating in interactive games); producing web content; Internet-related telephone communication (e.g. Skype, Voice Over Internet Protocol); and file sharing through any means.

24. I will **only use or access computer systems**, Internet-capable devices, and/or similar electronic devices (to include but not be limited to satellite dishes, PDAs, electronic games, web televisions, Internet appliances, and cellular/digital telephones) **for the following purposes:**

____ ☐ Employment (including seeking employment)
____ ☐ School
____ ☐ Other: _____

Use of any computer systems, Internet-capable devices, and/or similar electronic devices for any purpose not authorized herein is strictly prohibited absent **prior approval from the probation officer**.

25. I will **not subscribe to or use any Internet service provider**, by modem, LAN, DSL, or any other avenue (to include but not be limited to satellite dishes, PDAs, electronic games, web televisions, Internet appliances and cellular/digital telephones) and will not use another person's Internet or use the Internet through any avenue **unless approved by the Court**. This includes but is not limited to the following activities: web browsing/surfing; email; Internet-related interpersonal communication (e.g. chatting, texting, instant messaging, participating in interactive games); producing web content; Internet-related telephone communication (e.g. Skype, Voice Over Internet Protocol); and file sharing through any means.

Additional Special Conditions (emphasis added)

26. I will not access, possess, utilize, or subscribe to any **sexually oriented or sexually stimulating material** to include but not be limited to mail, computer, television, or telephone, except under circumstances approved in advance and in writing by **the probation officer in consultation with the community supervision team**.

27. I will not patronize any **place where sexually oriented or sexually stimulating material or entertainment** is available, except under circumstances approved in advance and in writing by the **probation officer in consultation with the community supervision team.**

28. I will not use or possess **distance vision enhancing or tunnel focusing devices or any cameras** or video recording devices (including cell phones with camera or video recording capabilities) except under circumstances approved in advance and in writing by the **probation officer**.

29. I will not access or utilize, by any means, any commercial **social networking** site except under circumstances approved in advance and in writing by **the probation officer in consultation with the community supervision team.** For purposes of this condition, "commercial social networking site" means an Internet website or mobile application that: (i) allows users, through the creation of Internet web pages or profiles or other similar means, to provide personal information to the public or other users of the Internet website or mobile application; (ii) offers a mechanism for communication with other users of the Internet website or mobile application; and (iii) has the primary purpose of facilitating online social interactions.

The SOMB has referenced several terms in the Guidelines (See Appendix D of the Guidelines):

"**pornographic**". This term is undefined by the SOMB.

"**X-rated**". This term is undefined by the SOMB. The Classification and Rating Administration (CARA), established by the Motion Picture Association of America has a series of ratings from "G" (General Audiences) to "NC-17" (No One 17 and Under Admitted). The classification "X-rated" is not currently part of the CARA system. However, it has become commonly accepted by the general public to refer to movies considered "pornographic" (not defined).

"**inappropriate sexually arousing material**". This term is undefined by the SOMB

"**sexually oriented or explicit material**". This term is defined by the SOMB as:

A) Pornographic [materials] that require the viewer to be age 18 to purchase.
B) Such materials are developed and viewed explicitly for sexual gratification purposes.
C) …[materials containing] depiction emphasizing sexual/human devaluation.

"**sexually stimulating materials**". This term is defined by the SOMB as non-pornographic materials that:

A) may lead to sexual interest or arousal,
B) but were not developed exclusively with that goal in mind.

Colorado Judicial's SAC uses two terms of interest:

"**sexually oriented material"**. This term is undefined in the SAC.

"**sexually stimulating material"**. This term is undefined in the SAC.

Judicial, however, has adopted the definitions in the Guidelines and equates "sexually oriented" and "sexually explicit" to be synonymous.

Unfortunately, research conducted over the past several decades by a wide variety of international authors did not utilize the terms found within the documentation of the SOMB or the SAC of Judicial. Researchers generally utilized one of two primary terms when referring to the subject of sexual content in their research on its effect on viewers:

"**pornographic"**. This term tends to appear in research from the 1960's until the early 2000's. It was differentially defined by each researcher, but generally conformed to a "reasonable person" standard of explicit sexual activity in a product created primarily for sexual stimulation.

"**Sexually Explicit Material" (SEM)**. This term tends to appear in research after 2000. It also is differentially defined by each researcher, but generally refers to content in any format (e.g. literature, photos, film, video, drawings, anime/hentai/manga, avatars, audio recordings/broadcasts/podcasts etc.), legal or illegal, which displays, depicts, portrays or represents;

A) sexual acts of any kind, or
B) nudity in a sexual setting, especially involving, but not limited to, exposed genitalia, or
C) paraphilic content.

Both of these concepts were often broken down into sub-categories, each defined differentially by respective researchers. In general, these categories could be classified as:

"**erotica"**. Materials which portray sexuality in an artful manner and focusing on feelings and emotions. (frequently excluded in "pornography" or "SEM" definitions by some researchers).

"**softcore"**. Materials which portray nudity in a sexual situation with a more limited focus on sexual penetration and contain no paraphilic behavior.

"**hardcore"**. Materials which explicitly portray sexual penetration, fellatio, cunnilingus, fetishism, or paraphilic content.

"**extreme**". Materials which explicitly portray sexual actions involving significant physical violence, non-consent, significant humiliation, or "fringe/extreme paraphilias" (undefined).

For the purposes of the resource paper and suggested implementation of the SAC, we define the following:

"Sexually Explicit Material" (SEM) is defined as :

- content in any format (e.g. literature, photos, film, video, drawings, anime/hentai/manga, avatars, audio recordings/broadcasts/podcasts etc.),
- legal or illegal,
- which displays, depicts, portrays or represents;
  - sexual acts of any kind, or
  - nudity in a sexual setting, especially involving, but not limited to, exposed genitalia, or
  - paraphilic content.

"Sexually Stimulating Material" (SSM) is defined as:

content with or without any nudity or SEM, that a CST/MDT has determined through review of an offender's progress in supervision/treatment is appropriate for the offender to possess or view.

Risk-Need-Responsivity

Andrews and Bonta introduced the RNR model in their book first published in 2010. Now in its sixth edition (Bonta & Andrews, 2016), their RNR model has been extensively researched and is considered one of the best evidence-based approaches to correctional supervision and treatment. At the core of their model is a focus on aligning intervention in accordance with three essential principles:

1. Assign individuals to risk categories based on actuarial and validated risk assessments which take into account both static and dynamic elements.
2. Align intervention to target criminogenic needs with dosage adjusted to the level of risk.
3. Focus interventions on dynamic (e.g. changeable) criminogenic needs.

Research on criminogenic risk factors has consistently identified offense-supportive attitudes and beliefs with recidivism of sex offenders (M. Seto, 2013, p. 61; Helmus et al. 2013).

In the last decade, programs working with sex offenders have adopted and refined the RNR model. Research now gives us a clearer understanding of both offender risk and promising needs to target.

1. **Attitudes and beliefs,**
2. **Atypical sexual fantasy,**
3. **Antisocial traits**

Sexually Explicit Material (SEM) has repeatedly been shown to have direct effect on all three of these needs.

Attitudes and Beliefs

There is still some debate about the effect of SEM on attitudes and beliefs in nonexperimental settings ("real life"). However, the weight of evidence is trending toward frequent SEM use:

A) having a detrimental effect on attitudes and beliefs regarding sexual behavior, especially when the viewer has preexisting behavioral scripts,
B) causing increased craving for SEM,
C) incrementally increasing need for more paraphilic content, and
D) leading to increased difficulties in social interaction and decision making

(Allen, Kannis-Dymand, & Katsikitis, 2017; Antons & Brand, 2018; Banca et al., 2016; Charles & Meyrick, 2018; Daneback, Ševčíková, & Ježek, 2018; Kingston, Fedoroff, Firestone, Curry, & Bradford, 2008; Laier & Brand, 2017; Malamuth, Hald, & Koss, 2012).

Atypical sexual interests - paraphilias such as:

- pedophilia
- excessive sexual preoccupation
- paraphilic SEM use
- frequent or intensive sexual thoughts, fantasies or urges
- excessive sexual behavior including
    - masturbation and mainstream SEM use
    - excessive sexual activities with others.

Antisociality - general antisocial behavior including traits such as:

- impulsivity or callousness
- antisocial attitudes or beliefs
- procriminal identification.

Sex offenders high on the atypical sexual interest dimension are more likely to commit a sexually motivated offense.

Those high on antisociality are more likely to commit another criminal offense.

Those high on both dimensions are very likely to sexually offend again.

(Seto, 2018, p. 171-172).

Pathways to hands-on sexual offending against children.

- Intimacy Deficits
  - loneliness
  - poor social skills
  - low self esteem
- Distorted Sexual Scripts
  - offense supportive attitudes and beliefs
  - misreading sexual cues
  - sensitivity to rejection
  - low self esteem
- Emotional Dysregulation
  - sex as a coping strategy
  - linking sex with emotional well-being
  - problems controlling anger
  - difficulty identifying emotions
  - impulsivity
  - personal distress
- Antisocial Cognitions
  - antisocial attitudes and belief
  - feelings of superiority over children
  - impulsivity
  - poor delay of gratification
- Multiple Dysfunctions
  - early sexualization
  - impaired attachment styles
  - antisocial cognitions

(M. Seto, 2013, p. 119).

Examples of **dynamic risk factors for sex offenders** includes, but is not limited to:

- Frequent sexual thoughts
- Sexual thoughts or fantasies experienced as intrusive or distracting
- Frequent and/or intensive sexual urges
- Frequent masturbation
- Disconnected with adult world
- Lack of intimate relationships with adults
- Socially isolated
- Belief children can consent to sex
- High association with antisocial peers
- Strong sense of compulsion
- Difficulty regulating emotions
- Impulsive behavior
- Substance abuse

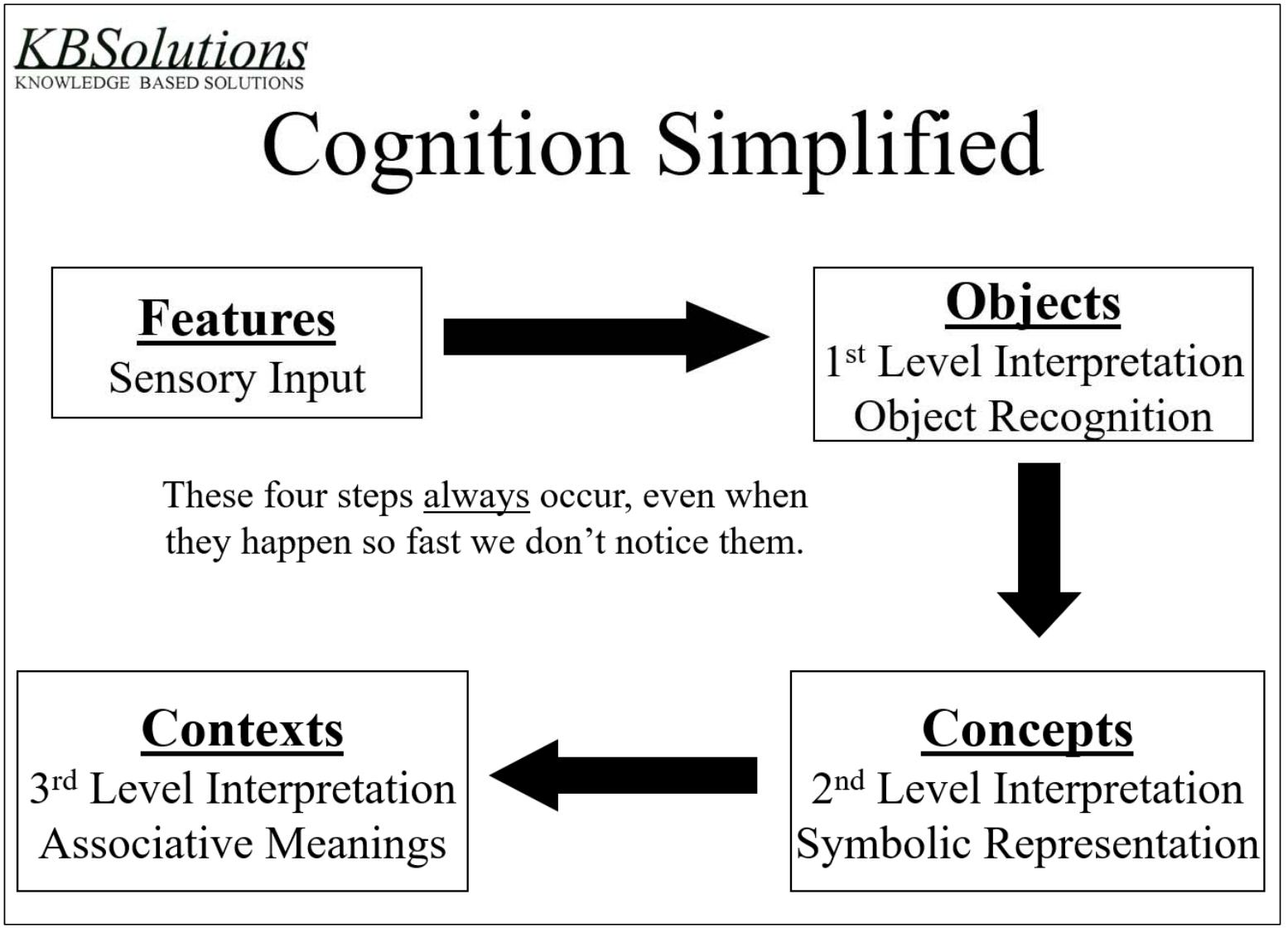
(M. C. Seto, 2018, p. 232)

SEM has been demonstrated to have adverse effects on several of the key dynamic criminogenic needs of sex offenders.

Limiting access to **SEM** is clearly indicated during supervision and treatment.

The CST/MDT may, after on-going review of offender progress in supervision/treatment, allow clearly defined, specific **SSM** in accordance with approved Safety Plans.

The Perception Problem



The SOMB advocates in their Guidelines:

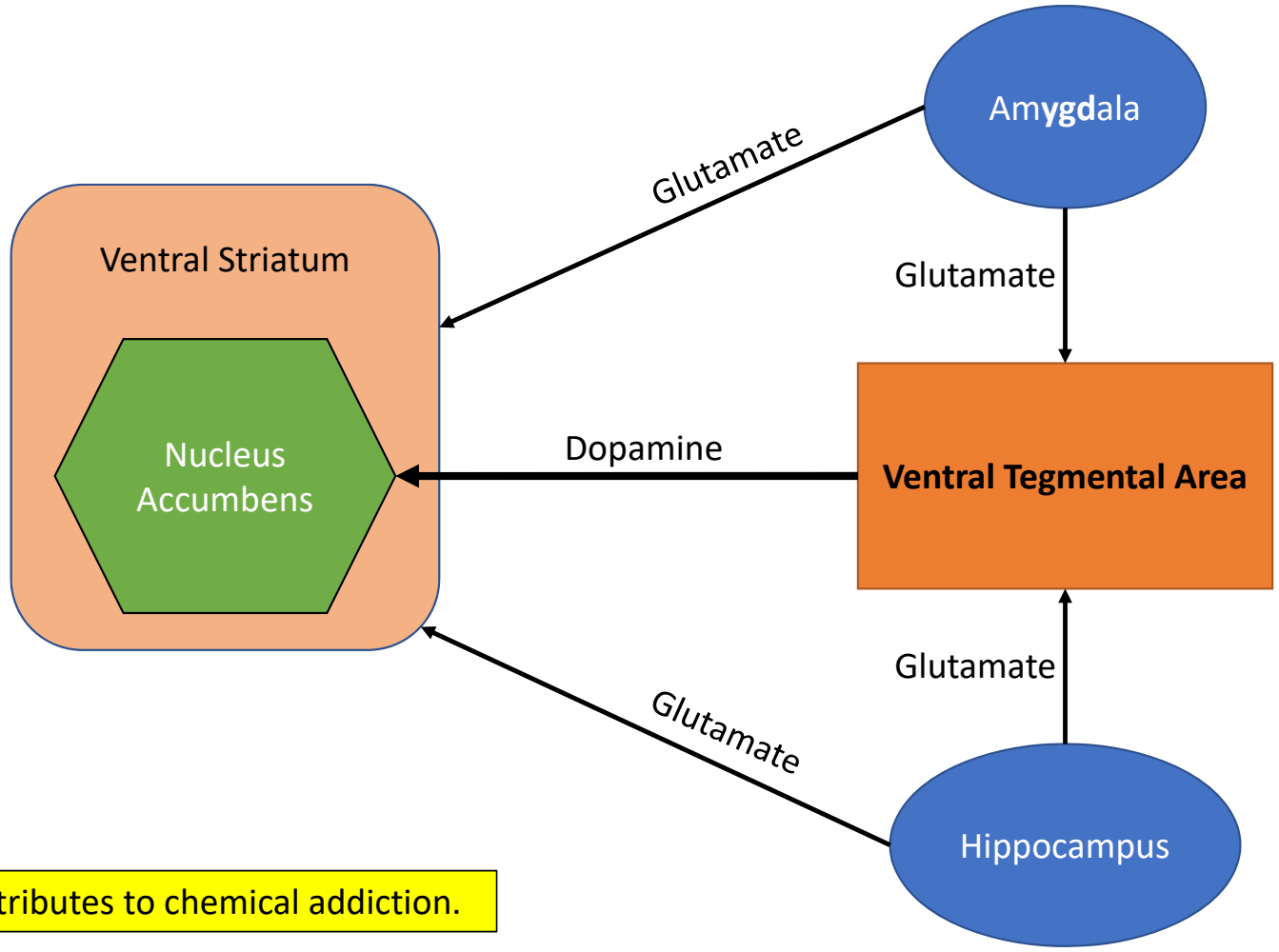
“Sexually stimulating materials should be prohibited during the early phases of treatment and supervision for all adults and juveniles who have sexually offended”

(Guidelines, page 196).

A few brief comments about neuroplasticity SEM and addiction.

The Mesolimbic Dopamine Pathway

- Nucleus Accumbens (NAc) is a key part of the “reward” system.
- Consistent dopamine flooding results in accumulation of ΔFosB.
- ΔFosB increases onset sensitivity to stimuli and increases desire, but reduces reward efficacy.
- ΔFosB peptide can last for months in the NAc.



This is the same circuitry that contributes to chemical addiction.

SEM and Addiction

1. Researchers have found viewing SEM causes significant changes in brain chemistry leading to increased utilization of SEM.
2. Research also indicates that viewing SEM causes the viewer to gravitate toward more extreme material.
3. Reviews of recent neuroscientific studies led researchers to the conclusion that excessive SEM consumption can be connected to already known neurobiological mechanisms underlying the development of substance-related addictions.

We should be treating SEM with sex offenders in the same manner we would treat a substance when working with a substance abuser. To do otherwise would be failing to discharge our duty to assist the offender in attaining and maintaining a law abiding lifestyle.

People do change, however. Neuroscience studies inform us that even the addicted and severely altered brain can, over time, recover (Doidge, 2007). Offenders, through treatment and learning, can change cognitions, attitudes, beliefs, and behavior. Indeed, a central purpose of probation is to assist the offender to make such changes.

It is, therefore, incumbent upon the CST/MDT to periodically review the offender's progress in supervision/treatment and adjust the Special Additional Conditions (SAC) as indicated.

For the reasons stated earlier, **it is unlikely that unregulated access to SEM should ever be allowed for a sex offender**; but over time CST/MDT approved sexually stimulating material (**SSM**) could be allowed to further the offender's progress in treatment and improve quality of life.

Statistics on SEM usage drawn from www.pornhub.com/insights

Year	Unique Visits	Top 3 Search Terms for U.S. (in order)	Data Transferred	Percent Viewed on Phone (U.S.)
2017	28.5 Billion	lesbian, MILF, step sister	3,732 Petabytes	72%
2016	23.0 Billion	step mom, lesbian, step sister	3,110 Petabytes	70%
2015	21.2 Billion	step mom, cartoon, lesbian	1,892 Petabytes	63%
2014	18.3 Billion	lesbian, step mom, teen	1,577 Petabytes	56%
2013	14.7 Billion	teen, creampie, MILF	n/a	52%

Differences in Findings on Behavioral Effects of SEM

There are two factors which, when not clearly delineated, can produce seemingly equivocal research regarding SEM's effect on behavior. These factors are:

- Experimental studies (respondents are studied in the controlled setting of a laboratory), versus
- Non-experimental studies (research focused on aggregate data with only societal measures of SEM exposure and/or status as a convicted sex offender).

The interplay of these two factors produces data which can be widely divergent. Only recently have researchers attempted to parse these factors into results.

Even more importantly, some early research was not controlled for individual differences in traits, predispositions, and beliefs held by the respondents prior to the research.

More recent studies have found that while the effect of SEM is detrimental, it appears to be mediated by traits and preexisting beliefs with SEM having a more pronounced effect on individuals holding SEM aligned beliefs and greater propensity to interpersonal violence (e.g. sex offenders).

Malamuth et.al. found the association between SEM and sexual aggression to be largely due to men at relatively high risk for sexual aggression who were relatively frequent SEM consumers. The findings help resolve inconsistencies in the literature and are in line not only with experimental research on attitudes but also with both experimental and non-experimental studies assessing the relationship between SEM consumption and sexually aggressive behavior.

What We Know

1. Sex offenders have committed an act involving sexual behavior which is prohibited by law.

2. The RNR model recommends interventions be focused on specific dynamic criminogenic needs of each offender. Further, the RNR model recommends the dosage of intervention be adjusted in accordance with the risk/need level of the specific offender across time.

3. Significant dynamic criminogenic needs of sex offenders have been identified as:
   a) Offense supportive attitudes and beliefs
   b) Atypical sexual interests
   c) Antisociality
   d) Frequent sexual thoughts and/or inability to regulate them
   e) Frequent masturbation
   f) Impulsivity
   g) Poor delay of gratification
   h) Misreading sexual cues
   i) Problems controlling anger
   j) Intimacy deficits
   k) Personal distress

4. The use of SEM has been demonstrated to:
    a) Directly affect the user by contributing to the dynamic criminogenic needs listed in #3 above. This effect is exacerbated for individuals who are already pre-disposed to have these factors (e.g. those who have already committed a sex crime).
    b) Have the same addiction-based neurological effect on the brain as does addiction to drugs or alcohol.
    c) Have a fast onset of addiction.
    d) Frequently lead to experimentation with increasingly atypical sexual behavior.

5. While validated risk tools, psychosexual evaluation, and existing practices in PSI information gathering gives us the best possible evidence of risk/need **at the time of sentencing**, our understanding of the offender risk/needs is limited until the CST/MDT engages the offender in on-going supervision/treatment.

6. People can change. This is the cornerstone of the dynamic risk/need approach to supervision and treatment.

7. To assist a probationer in achieving and maintaining a law-abiding lifestyle, the CST/MDT must engage in actions which follow two fundamental objectives:

    a) Do no harm. Avoid engaging in behaviors which are antithetical to reducing risk/need (e.g. taking a clear position on the use of SEM and SSM).

    b) Objectively evaluate, recognize, and reward progress toward the goal of offender law-abiding behavior through informed adjustment of supervision/treatment approaches.

8. There is an overarching legal need for specific SAC to be individualized and the reasons for imposing them articulated in sentencing orders.

What We Need to Do

1. Base SAC upon elements present in the individual's case, the PSI process, or emerge post-sentencing through the supervision/treatment process.

2. Articulate the nexus between the SAC and elements present in the individual's case.

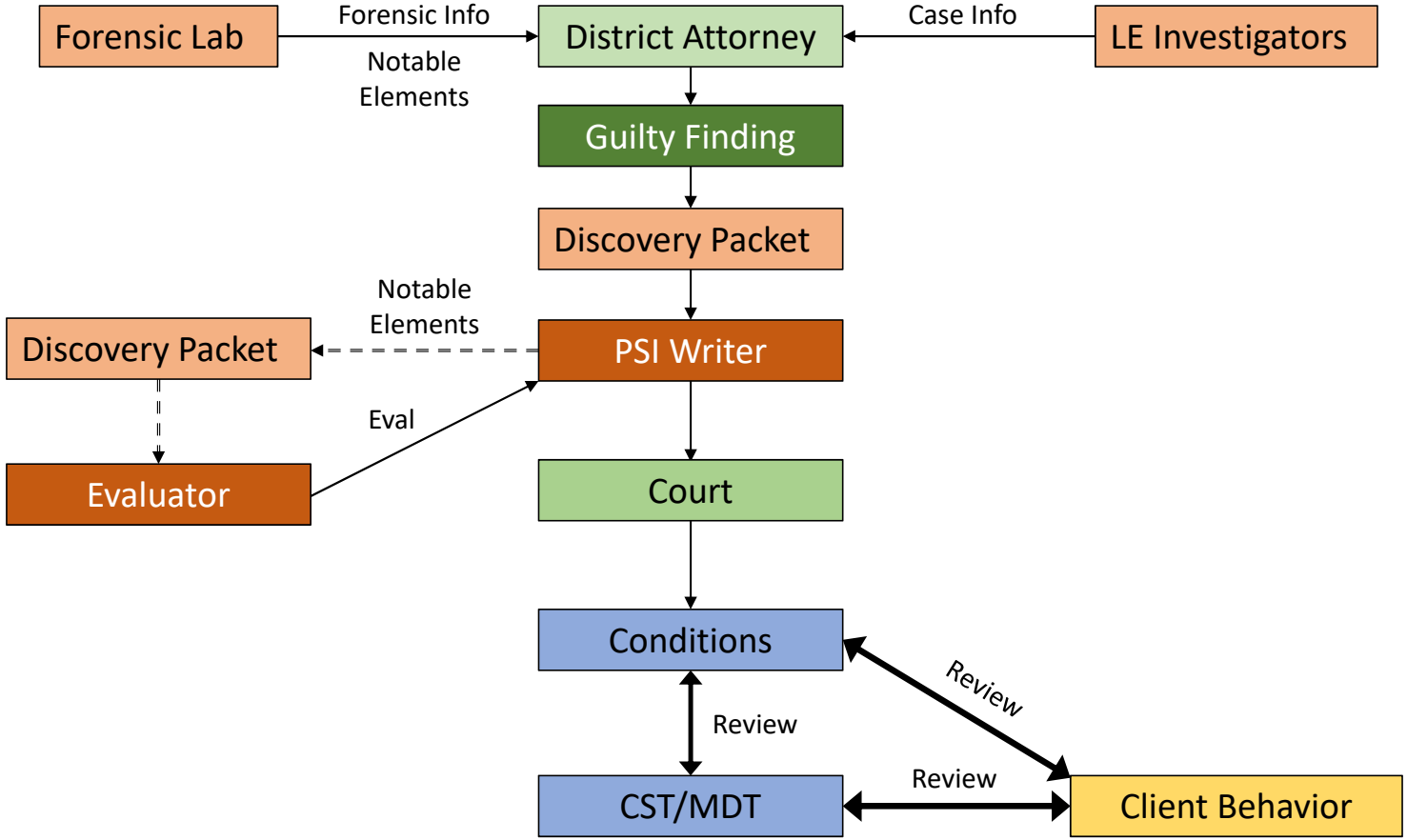
3. Prohibit access to and use of SEM where it has been part of the elements of the case, the PSI process, or emerge in post-sentencing supervision/treatment.

4. Prohibit access to and use of SSM, where SEM has been part of the elements of the case, the PSI process, or emerge in post-sentencing supervision/treatment. Such prohibition of SSM may be adjusted after the CST/MDT can establish SSM is beneficial to the offender and there is an approved Safety Plan regarding SSM.

5. Periodically review offender progress in supervision/treatment. Such reviews should occur more frequently during early stages of supervision/treatment.

6. Adjust SAC as needed to accommodate and reward offender progress in supervision/treatment.

So How Do We Get There?



Forensic Lab's Contribution

- PSI writers do not get the full forensic reports.
- PSI writers typically do get the narrative portions of the reports.
- A simple notation in the narrative section report that these elements were present enhances the accuracy of risk assessment and focuses recommendations for special terms of supervision.

NOTE: This is the only 100% reliable information we get on SEM behaviors. All other sources are products of offender self-report.

Notable Elements

Content Structure:

- Encryption present
- Organization present

Digital Vector:

- Chat
- Email
- Messaging Services
- Peer to Peer
- Social Networking
- TOR
- Website visitation

Content:

- BDSM
- Bestiality
- Defendant masturbating
- Defendant produced sexually explicit material
- Exhibitionism
- Luring/grooming children
- Nude selfies of the defendant
- Severe/Violent content
- Up-skirts
- Voyeurism
- Other unusual paraphilia

Evaluator's contributions:

- Include a section on SEM utilization.
  - Frequency & Duration.
  - Media types utilized.
    - Print.
    - Computer/Tablet.
    - Phone.
    - Social Media.
    - Messaging.
  - Manner of use and experience.
- Sexting – chat encounters.
- Live entertainment.
- Masturbation Habits.
  - Objects.
  - Location
  - Foci.
- History of voyeurism.
- History of exhibitionism.
- Attempts to hide content or behaviors.

If you include the above in your evaluations, recommendations on restrictions are always welcome, **but there is no need to directly address the Special Additional Conditions**.

SEXUAL EVALUATION	
Sexual History (Onset, Intensity, Duration, Arousal Pattern) Witnessed or Experienced Victimization (Sexual or Physical) Source of Sexual Education Information and Extent of Sexual Knowledge Sexual dysfunction (medical, psychological, etc.) Sexual attitudes Pornography Use • Age of Onset • Frequency • Duration • Media (e.g. Telephone, Cable, Video, Internet, Social Media, Anime) • Manner of use and experience History and Response to Sexual Experiences (Both Positive and Negative) Sexual Lifestyle, Environment and Culture (e.g. Sexting, Cults, Prostitution, Strip Clubs, etc.) History, Frequency and Method of Masturbation • Objects • Location	• Clinical Interview • History of Functioning • Collateral Information/Contact/Interview • Clinical Mental Status Exam • Observational Assessment • Case File/Document Review ○ Personal Sentence Completion Inventory - Miccio-Fonseca ○ Sex Offender Incomplete Sentence Blank ○ Wilson Sexual Fantasy Questionnaire ○ SONE Sexual History Background Form ○ Colorado Sex Offender Risk Scale (Actuarial scale normed on Colorado offenders from probation, parole and prison) ○ Multiphasic Sex Inventory ○ Penile Plethysmography (PPG) ○ Viewing Time (VT) ○ Wechsler Adult Intelligence Scale (WAIS) ○ Clarke Sex History Questionnaire for Males-Revised ○ Polygraph ○ Adverse Childhood Experiences Scale (ACES)
Arousal/Interest Pattern Sexual Arousal or Sexual Interest Preference Orientation Gender Identity	• Clinical Interview • Plethysmograph or Viewing Time (VT)

COLORADO
Department of Public Safety

Decision Grid

Notable Digital Content for Probation Presentence Investigation

Below you will find a list of elements which we take into consideration when developing the Presentence Investigation Report and recommending Special Terms and Conditions of supervision for sex offenders. Many of these elements are routinely noted in forensic examinations of forensic devices. Some may not be typically noted in reports. These elements are, however, important contributors to setting appropriate conditions of supervision to house offenders safely in the community. When possible, Probation appreciates notation that the elements are present in the case. Thank You.

Content Structure:

- Encryption present
- Organization present

Digital Vector:

- Chat
- Email
- Messaging Services
- Peer to Peer
- Social Networking
- TOR
- Website visitation

Content:

- BDSM
- Bestiality
- Defendant masturbating
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- Include a section on SEM utilization.
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    - Messaging.
  - Manner of use and experience.
- Sexting – chat encounters.
- Live entertainment.
- Masturbation Habits.
  - Objects.
  - Location
  - Foci.
- History of voyeurism.
- History of exhibitionism.
- Attempts to hide content or behaviors.

Discovery Packet

PSI Interview

Information utilized to make decision.

Initial Special Additional Conditions Decision Matrix
Supervision of Sex Offenders

For each element of the case, check the appropriate available conditions. At the bottom of the chart, check any column which contains a checkmark.

Case Element / Condition Recommended	23	26	27	28	29
Possession: Probationer was in possession of any sexually explicit or oriented/stimulating materials in any form including, but not limited to, images, videos, literature or anime.					
Creation: Probationer created any sexually explicit or oriented/stimulating materials in any form including, but not limited to, images, videos, literature or anime.					
Charge involved exhibitionism or masturbation in public.					
Charge involved voyeurism.					
Use of SNS: Probationer used any social networking milieu (e.g. Facebook, Kik, Instagram, Twitter, etc.) to contact, groom, entice or exchange sexually oriented/stimulating materials with victims or potential victims.					
Conditions which should be recommended (Check any box with a checkmark anywhere in the column).					
Prohibitions without supervising officer's approval.	**Access to Web**	**Sexually Stimulating Material**	**Patronize Sexually Stimulating Establishments**	**Distance Enhancing or Camera Equipment**	**Social Networking**
	23	26	27	28	29

PSI Writer

1. Lead the reader through the PSI.
2. Lay foundation for recommendations within the body of the PSI
    a) Case elements
    b) Forensic notables
    c) Psychosexual Evaluator's findings
    d) Interview findings
3. Recommendations for SAC provide nexus to case elements

Special Condition #23 (Prohibition of Internet subscription or use unless authorized by CST/MDT).

Factual basis that apply:

- Possession of any SEM in any digital form.
- Creation of any SEM in any digital form.
- Use of SNS milieu to contact, entice, or exchange SEM or groom victims or potential victims.

Suggested language:

"<defendant> utilized digital equipment and Internet access to <create/acquire/possess/store> sexually explicit material. Sexually explicit material has been consistently demonstrated through research to adversely affect dynamic risk/need factors of sex offenders, thus reducing <defendant's> chances of successful completion of supervision. Special Condition 23 will allow the CST/MDT to work with the offender in controlling access to sexually explicit material while allowing appropriate Internet use and making adjustments to access to the Internet in accordance with ongoing reevaluation of the risk/needs of the offender without clogging the Court's docket with review hearings."

And/or

"<defendant> utilized digital equipment and Internet access to <contact/entice/groom/exchange sexually explicit materials> with victims and/or potential victims. Special Condition 23 will allow the CST/MDT to work with the offender in controlling access to Social Networking Sites while allowing appropriate Internet use and making adjustments to Internet access in accordance with ongoing reevaluation of the risk/needs of the offender without clogging the Court's docket with review hearings."

Special Condition #26 (Prohibition of sexually explicit or sexually stimulating material)

Factual basis that apply:

- Possession of any SEM in any digital form.
- Creation of any SEM in any digital form.
- Charge involves exhibitionism or masturbation in public.
- Charge involves voyeurism.

Suggested language:

"<defendant> <created/acquired/possessed/used/stored> sexually explicit material. Sexually explicit material has been consistently demonstrated through research to adversely affect dynamic risk/need factors of sex offenders, thus reducing <defendant's> chances of successful completion of supervision. Special Condition 26 will allow the CST/MDT to work with the offender in controlling access to sexually explicit material while potentially allowing later use of sexually stimulating material after ongoing reevaluation of the risk/needs of the offender. Condition 26 allows adjustments without clogging the Court's docket with review hearings."

Or

"<defendant's> crime involved elements of <exhibitionism/masturbation in public>. Sexually explicit material engenders exhibitionist tendencies through explicit exhibitionist content and/or the publication and distribution of sexual acts for the express purpose of these acts being viewed by others. Sexually explicit material has been consistently demonstrated through research to adversely affect dynamic risk/need factors of sex offenders, thus reducing <defendant's> chances of successful completion of supervision. Special Condition 26 will allow the CST/MDT to work with the offender in controlling access to sexually explicit material while potentially allowing later use of sexually stimulating material after ongoing reevaluation of the risk/needs of the offender. Condition 26 allows adjustments without clogging the Court's docket with review hearings."

Or

"<defendant's> crime involved elements of <voyeurism>. Sexually explicit material engenders voyeuristic tendencies through the publication and distribution of sexual acts for the express purpose of these acts being viewed by others. Sexually explicit material has been consistently demonstrated through research to adversely affect dynamic risk/need factors of sex offenders, thus reducing <defendant's> chances of successful completion of supervision. Special Condition 26 will allow the CST/MDT to work with the offender in controlling access to sexually explicit material while potentially allowing later use of sexually stimulating material after ongoing reevaluation of the risk/needs of the offender. Condition 26 allows adjustments without clogging the Court's docket with review hearings."

Special Condition #27 (Prohibition of patronizing places sexually explicit material is available).

Factual basis that apply:

- Possession of any SEM in any digital form.
- Creation of any SEM in any digital form.
- Charge involves exhibitionism or masturbation in public.
- Charge involves voyeurism.

Suggested language:

"<defendant> <created/acquired/possessed/used/stored> sexually explicit material. Sexually explicit material has been consistently demonstrated through research to adversely affect dynamic risk/need factors of sex offenders, thus reducing <defendant's> chances of successful completion of supervision. Special Condition 27 will allow the CST/MDT to work with the offender in controlling access to sexually explicit material while potentially allowing later use of sexually stimulating material after ongoing reevaluation of the risk/needs of the offender. Condition 27 allows adjustments without clogging the Court's docket with review hearings."

Or

"<defendant's> crime involved elements of <exhibitionism/masturbation in public>. Sexually explicit material engenders exhibitionist tendencies through explicit exhibitionist content and/or the publication and distribution of sexual acts for the express purpose of these acts being viewed by others. Sexually explicit material has been consistently demonstrated through research to adversely affect dynamic risk/need factors of sex offenders, thus reducing <defendant's> chances of successful completion of supervision. Special Condition 27 will allow the CST/MDT to work with the offender in controlling access to sexually explicit material while potentially allowing later use of sexually stimulating material after ongoing reevaluation of the risk/needs of the offender. Condition 27 allows adjustments without clogging the Court's docket with review hearings."

Or

"<defendant's> crime involved elements of <voyeurism>. Sexually explicit material engenders voyeuristic tendencies through the publication, distribution, or live performance of sexual acts for the express purpose of these acts being viewed by others. Sexually explicit material has been consistently demonstrated through research to adversely affect dynamic risk/need factors of sex offenders, thus reducing <defendant's> chances of successful completion of supervision. Special Condition 27 will allow the CST/MDT to work with the offender in controlling access to sexually explicit material while potentially allowing later use of sexually stimulating material after ongoing reevaluation of the risk/needs of the offender. Condition 27 allows adjustments without clogging the Court's docket with review hearings."

Special Condition #28 (Prohibition of possession of vision enhancing or cameras/video recording devices).

Factual basis that apply:

- Creation of any SEM in any form.
- Charge involves voyeurism.

Suggested language:

"<defendant> utilized equipment to create < possess/use/store> sexually explicit material. Sexually explicit material has been consistently demonstrated through research to adversely affect dynamic risk/need factors of sex offenders, thus reducing <defendant's> chances of successful completion of supervision. Special Condition 28 will allow the CST/MDT to work with the offender in controlling the use of equipment to create sexually explicit material while potentially allowing later use of said equipment after ongoing reevaluation of the risk/needs of the offender. Condition 28 allows adjustments without clogging the Court's docket with review hearings."

Or

"<defendant's> crime involved <the use of hidden cameras/vision enhancing devices/or video recording devices to produce> elements of voyeurism. Sexually explicit material engenders voyeuristic tendencies, attitudes and beliefs through the publication and distribution of sexual behavior for the express purpose of these acts being viewed by others. Moreover, specifically voyeuristic themed sexually explicit materials generally involve hidden cameras, telescopes and other means of viewing and/or recording victims without their knowledge. Sexually explicit material has been consistently demonstrated through research to adversely affect dynamic risk/need factors of sex offenders, thus reducing <defendant's> chances of successful completion of supervision. Special Condition 28 will allow the CST/MDT to work with the offender in controlling access to devices associated with voyeuristic behavior while potentially allowing later use of these devices after ongoing reevaluation of the risk/needs of the offender. Condition 28 allows adjustments without clogging the Court's docket with review hearings."

Special Condition #29 (Prohibition of social networking)

Factual basis that apply:

- Use of SNS milieu to contact, entice, or exchange SEM or groom victims or potential victims.

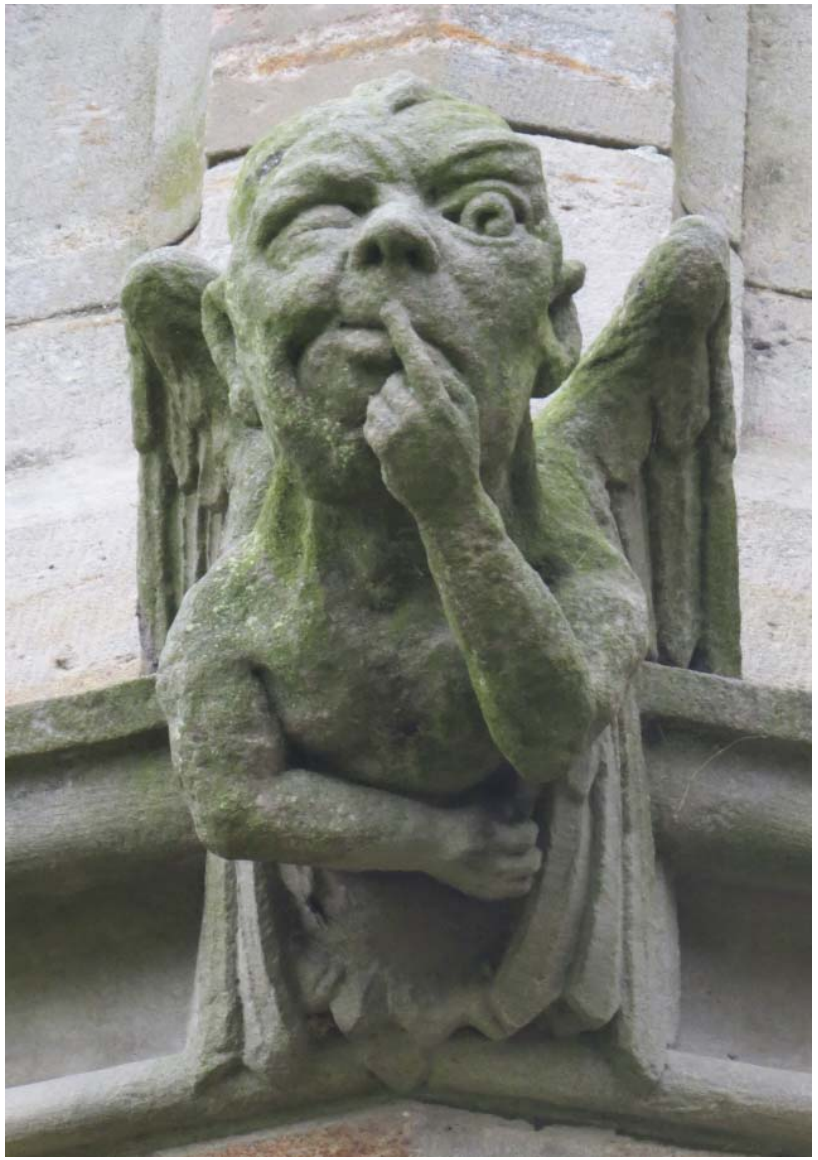
Suggested language:

"<defendant> utilized Social Networking Sites to <contact/entice/groom/exchange sexually explicit materials> with victims and/or potential victims. Special Condition 29 will allow the CST/MDT to work with the offender in controlling access to Social Networking Sites while potentially allowing later use of SNS after ongoing reevaluation of the risk/needs of the offender. Condition 29 allows adjustments without clogging the Court's docket with review hearings."

Hands-on Offense Against Child

"the defendant has committed a hands on sexual offense against a minor child. Sex offenders who offend against children are more likely to present with excessive sexual preoccupation, use of sexually explicit materials, frequent or intensive sexual thoughts/fantasies or urges. Sex offenders who offend against children also typically present with antisocial behavior(s) including impulsivity, attitudes/beliefs and or pro-criminal lifestyle. The defendant demonstrated < PSI writer can plug in here what those anti-social traits are to individualize the PSI>. Sexually explicit material has been consistently demonstrated through research to adversely affect dynamic risk/need factors such as <plug in here what defendant's dynamic risk factors are to individualize the PSI> present in the defendant, thus reducing <defendant's> chances of successful completion of supervision. Special Condition 23 will allow the CST/MDT to work with the offender in controlling access to sexually explicit material while allowing appropriate Internet use and making adjustments to access to the Internet in accordance with ongoing reevaluation of the risk/needs of the offender without clogging the Court's docket with review hearings."

Further Discussion



Thanks.

We are out of here.