POINT IV of petitioner's November 6, 2005 "Conforming Brief on the Merits" (pp. 47-50): the propriety, legality, and constitutionality of Judge Holeman's probation conditions and superseding six-month jail sentence

ISSUE IV

JUDGE HOLEMAN'S TERMS OF PROBATION FOR SUSPENDING EXECUTION OF THE ORIGINAL 92-DAY JAIL SENTENCE HE IMPOSED ON SASSOWER WERE IMPROPER AND UNCONSTITUTIONAL – AND THE SUPERSEDING SIX-MONTH JAIL SENTENCE HE SUBSTITUTED WHEN SHE EXERCISED HER RIGHT TO DECLINE THOSE TERMS PURSUANT TO D.C. CODE §16-760 WAS ILLEGAL AND UNCONSTITUTIONAL

This Court has recognized that:

> "'judicial discretion in formulating terms and conditions of probation is...limited by the requirement that the conditions be reasonably related to the rehabilitation of the convicted person and the protection of the public.'", *Gotay v. United States*, 805 A.2d 944, 946 (2002), quoting *Moore v. United States*, 387 A.2d 714, 715 (1978).

It has also held that:

> "A trial judge may not penalize a defendant for not admitting guilt and expressing remorse since the jury has found him guilty. Such an admission might jeopardize his right of appeal or a motion for a new trial..." *Miler v. United States*, 255 A.2d 497, 498 (1969).

As the "disruption of Congress" charge was not based on any harassing, stalking, violent, threatening or intimidating conduct – and the record was devoid of any such conduct on Sassower's part – there was no basis for Judge Holeman to require that she:

(a) have "no verbal, written, telephonic, electronic, physical or other contact" with the nine Senators and Senate staffers whose trial testimony she had sought by subpoena, as well as the four police officers who had testified against her – with some relaxation of the prohibition as to Home-State Senators Schumer and Clinton (but none as to the other senators who, as members of the Senate Judiciary Committee and its leadership she would have reason to contact in connection with her work as CJA coordinator) [A-1726-27];

(b) stay away not only from the Senate Judiciary Committee and the three-block radius that was the prescribed condition for her release on her own recognizance at the May 23, 2003 arraignment, but from the entire Capitol complex of all Capitol buildings and grounds indicated on "maps provided herewith" and encompassing the Library of Congress, Supreme Court, Capitol Power Plant, etc. [A-1724-26];

(c) stay away from Judge Wesley [A-1726];

[p. 48]

(d) pay $250 to the Victims of Violent Crimes Compensation Fund [A-1722] – the statutory maximum.

As the record showed that Sassower had a secure job as CJA coordinator – which she had co-founded – and had answered Judge Holeman's inquiry at sentencing as to how many hours she worked by stating "24/7", citing the prodigious, quality workproduct that was before him [A-1718] – there was no basis for him to order her to work

40 hours a week minimum, that she get other work if she did not keep that job, and submit to him "daily time records containing a description of the task performed and the time expended", with each entry recorded "to the nearest tenth of an hour", with a warning that "block entries are not acceptable" [A-1723].

As the record showed that Sassower's "24/7" work as CJA's coordinator constituted full-time "community service" – and she so-stated in her June 28, 2004 affidavit [A-1662] and at sentencing [A-1717] – there was no basis for Judge Holeman to order that she perform a substantial 300 hours of community service – 200 in New York and 100 in Washington, D.C., with an express exclusion of Sassower's work at CJA beyond the 40 hour minimum as satisfying the "community service" requirement [A-1723-24]. That Judge Holeman identified no provision to cover her traveling, food, and lodging expenses for the 100 hours of community service in D.C. – and required that only 25 of the 100 hours could be discharged during each six-month period -- made this condition all the more onerous.

Although there was nothing in the record that would constitute a basis for requiring Sassower to submit to medical, mental health, and drug screening and comply with testing and screening, this was ordered by Judge Holeman [A-1722-23, 1724], as likewise that she notify the probation officer if she left the jurisdiction for more than two weeks [A-1724].

As for Judge Holeman's final *sua sponte* condition of probation – that Sassower write letters of apology to the Senators and Judge Wesley [A-1727] – the Senators had never requested **[p. 49]** an apology, let alone attested to any injury for which an apology was warranted, and the record furnished no basis for an apology. Indeed, excepting for Senator Chambliss' name appearing on the underlying prosecution documents [A-88, 89], the Senators had absented themselves from the criminal

case. They had not testified on behalf of the prosecution, they had quashed Sassower's subpoenas for their testimony, they had ignored Sassower's memoranda calling upon them to deny or dispute the facts corroborative of her innocence from her "paper trail" of correspondence with them, and they had failed to even respond to her invitation as to what jail sentence they deemed appropriate [A-1696, 1703].

Point I of Sassower's October 26, 2004 motion [A-1748-52] challenged the constitutionality of the apology letters on First and Fifth Amendment grounds. It argued that the requirement that Sassower express remorse would require her to espouse political and ideological beliefs with which she did not agree, *to wit*, "that Judge Wesley was appropriately qualified to be appointed to the federal bench and that citizens should not be permitted to contribute to discourse regarding the confirmation process." [A-1749]. Indeed, reinforcing this was the condition barring Sassower from all contact with the Senate Judiciary Committee – thereby precluding her from contributing information with respect to other federal judicial nominees – as well as the condition that she record, to 1/10 hour increments, her work as CJA coordinator, thereby inferring that its content was somehow illegitimate and required surveillance.

These three conditions – the apology, the stay-away order, and the intrusion into the content of appellant's work as CJA's coordinator – infringe on Sassower's First and Fifth Amendment rights.

The statutory provision governing suspension of execution of sentence is D.C. Code §16-760. This Court's decision in *Schwasta v. United States*, 392 A.2d 1071, 1073 (1978), provides **[p. 50]** its obvious interpretation, *to wit*, that it "permits the trial court to grant probation only after it has imposed a sentence and suspended its execution." Plainly implicit in the announcement of sentence is the recognition that a defendant cannot give

informed consent to probation unless he is advised of the consequence in withholding it. Nor would the right to withhold consent be meaningful if a judge could punish such exercise by thereafter scrapping the announced sentence and imposing a maximum in its stead. Such would constitute an "unfree choice", *North Carolina v. Pearce*, 395 U.S. 711, 724, 89 S.Ct. 2072, 2080 (1969), and "coercion as a matter of law", *Byrd v. United States*, 377 A.2d 400, 405 (1977).

The terms of probation are the conditions for suspending execution of the announced sentence. Thus, when Sassower exercised her right under D.C. Code §16-760 to decline to consent to the probation terms, she forfeited the suspension of execution of sentence, not the sentence. By doubling to the six month maximum his already-announced 92-day jail sentence, Judge Holeman punished Sassower for exercising her lawful right to withhold consent to probation terms. That he did so without affording her notice or opportunity to be heard – where the rejected terms were palpably abusive and unconstitutional and where, additionally, he denied her request for a stay pending appeal -- made his actions all the more unlawful[17], constitutionally violative, and, vindictive.

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[17] Sassower incorporates by reference the further good and sufficient arguments as to illegality of Judge Holeman's superseding six-month sentence made at Points II-V of her October 26, 2004 motion [A-1752-55].