COMMENT

ACCESS, ACCURACY AND FAIRNESS: THE FEDERAL PRESENTENCE INVESTIGATION REPORT UNDER *JULIAN* AND THE SENTENCING GUIDELINES*

Presentence investigation reports (PSIs) play a vital role in the federal criminal justice system, affecting not only sentencing but also correctional decisions. New amendments to Rule 32 of the Federal Rules of Criminal Procedure will increase defendants' access to their PSIs before sentencing. In addition, in *United States Department of Justice v. Julian*, the United States Supreme Court ruled that a federal prison inmate can obtain a copy of his or her PSI under the Freedom of Information Act. Still, significant exceptions to PSI disclosure remain; and even with increased access, inmates continue to find it nearly impossible to have inaccuracies in PSIs changed after sentencing.

This Comment examines the nature and purpose of the PSI under both indeterminate sentencing and the new federal sentencing guidelines. The Comment argues that the remaining exceptions to PSI disclosure under Rule 32 pose fundamental due process problems and should be eliminated. The Comment also suggests procedures to ensure the aceuracy of PSI information at sentencing hearings. Finally, the Comment proposes changing Rule 32 to give sentencing court jurisdiction to consider post-conviction motions to correct inaccurate PSIs. Such changes would ensure fairness to defendants and would safeguard the integrity of the federal criminal justice system.

I. INTRODUCTION

Robert Thompson is a federal prisoner serving two to ten years under the Washington, D.C. Criminal Code for possessing an unregistered weapon.[1] The presentence investigation report (PSI) prepared for Thompson's sentencing hearing stated that the D.C. police found marijuana in Thompson's car following his arrest on the weapons charge. Once Thompson entered the federal prison system, prison authorities used this allegation to give him a high security classification. When Thompson provided the classification committee with arrest reports refuting the allegation, he was told that only the sentencing court could

* The authors' interest in presentence investigation report (PSI) practices grew out of their experienees in the Legal Assistance to Institutionalized Persons Program (LAIP) of the University of Wisconsin Law School, which provides assistance to many federal inmates with PSI problems. The authors would like to thank the staff at LAIP for their support and encouragement. They especially wish to thank Frank J. Remington, Walter J. Dickey, David Cook, and Kenneth Lund of the University of Wisconsin Law School for their thoughtful contributions to this Comment.

1. Robert Thompson and Mark Powers are pseudonyms of inmates at the Federal Correctional Institution at Oxford, Wisconsin, to whom the authors of this Comment have provided legal assistance.

correct his PSI. Until then, prison authorities would treat the allegation as true.

Mark Powers is a former Hell's Angel and amphetamine addict sentenced to thirteen years on federal drug charges. The United States Parole Commission refused to parole Powers earlier than his mandatory release date, primarily because his PSI alleged that he had boasted to other Hell's Angels members of killing a man. To refute that allegation, Powers submitted affidavits to the Parole Commission from law enforcement officials who had conducted a thorough investigation into the murder. Those affidavits confirmed that there was no evidence linking Powers to the murder, that Powers was never a suspect and had never been charged with the murder, and that another man was properly convicted of that offense. Nonetheless, the Parole Commission treated the PSI allegation as true and denied parole accordingly.

Wayne Levesque[2] was sentenced to three years on federal fraud charges. At his sentencing hearing, Levesque challenged a statement in his PSI alleging that the fraud had resulted in victim loss of over $500,000. Levesque maintained that the total victim loss was only $14,000. The sentencing court declined to strike the $500,000 figure from the PSI, but stated on the record that it would disregard the figure and would treat the figure as stricken. The court further stated that the Parole Commission should do the same. Subsequently, the court found for restitution purposes that the total victim loss was $14,000 and ordered restitution in that amount. The Parole Commission, however, refused to be bound by the sentencing court's statement, and on the basis of no new evidence treated the victim loss as if it were over $500,000. Accordingly, the Commission denied parole.[3]

The experiences of Thompson, Powers, and Levesque illustrate the critical importance of an accurate PSI in the federal criminal justice system, as well as the devastating effects of an inaccurate PSI.[4] Because nearly ninety percent of all federal felony convictions result from a guilty plea,[5] the PSI is often the only source of information for the sentencing court and for the correctional system into which the defendant is placed.

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2. Wayne Levesque was an inmate at the Federal Prison Camp at Oxford, Wisconsin, to whom the authors, through LAIP, provided legal assistance.

3. The Parole Commission's authority to deny parole on this basis was sustained by the United States Court of Appeals for the Seventh Circuit. Levesque v. Brennan, 864 F.2d 515 (7th Cir. 1988).

4. Each of these examples cites the experiences of inmates under indeterminate sentences prior to the effective date of the new federal sentencing guideline system, under which parole is abolished. Under the new guidelines, the consequences of erroneous PSIs will be, if anything, even more serious. *See infra* text accompanying notes 21-38.

5. Fennell & Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 HARV. L. REV. 1613, 1627 n.58 (1980).

Despite the critical importance of accurate PSIs, inaccuracies are a persistent problem. In response to this problem, numerous commentators have advocated full disclosure of PSIs to defendants at sentencing, believing that disclosure would result in challenges to and correction of inaccurate allegations in PSIs.[6]

The efforts of these reformers have been largely successful. Rule 32(c) of the Federal Rules of Criminal Procedure, which governs PSIs, now mandates broad disclosure at sentencing. A series of amendments to Rule 32(c) recently promulgated by the Supreme Court and a recent United States Supreme Court case, *United States Department of Justice v. Julian*,[7] mandate even greater disclosure of the PSI.

Nevertheless, Rule 32 provides for limited, yet important, exceptions to disclosure, which pose fundamental due process problems. Moreover, even though a defendant may now see the PSI, he or she faces significant procedural and substantive barriers in attempting to correct inaccuracies in the PSI.

This Comment examines the problem of inaccuracy in PSIs in light of these legal changes. Part II of the Comment presents background information on the nature and purpose of the PSI under both indeterminate sentencing and the new federal sentencing guidelines, and reviews the history of PSI disclosure. Part III describes amendments to Rule 32 of the Federal Rules of Criminal Procedure proposed by the Advisory Committee and recently adopted by the Supreme Court concerning PSI disclosure and dispute resolution. Part IV argues that despite increased PSI disclosure, problems with inaccuracy remain, and proposes further changes to Rule 32 to address these problems. The Comment argues that the remaining exceptions to disclosure under Rule 32 pose fundamental due process problems and should be eliminated.

Part IV also considers issues raised when defendants attempt to correct inaccurate PSIs. First, the Comment argues that the government should be required to establish disputed facts in the PSI by "clear and convincing" evidence. Second, the Comment asserts that whenever sentencing courts are faced with factual disputes over PSI information, they should be required to make a factual resolution or expunge the

6. *See* Dickey, *The Lawyer and the Accuracy of the Presentence Report*, 43 FED. PROBATION June 1979, at 28; Dubois, *Disclosure of Presentence Reports in the United States District Courts*, 45 FED. PROBATION 3 (March 1981); Fennell & Hall, *supra* note 5; Schmolesky & Thorson, *The Importance of the Presentence Investigation Report After Sentencing*, 18 CRIM. L. BULL. 406 (1982); Shockley, *The Federal Presentence Investigation Report: Postsentence Disclosure Under the Freedom of Information Act*, 40 ADMIN. L. REV. 79 (1988); Comment, *Insuring the Accuracy of the Presentence Investigation Report in the Wisconsin Correctional System*, 1986 WIS. L. REV. 613; Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810 (1975); Note, *A Proposal to Ensure Accuracy in Presentence Investigation Reports*, 91 YALE L.J. 1225 (1982).

7. 486 U.S. 1 (1988).

information from the PSI. Third, the Comment suggests that Rule 32 should give the sentencing court jurisdiction to consider post-conviction motions to correct the PSI.

II. BACKGROUND

The PSI is a report prepared by a probation officer for the use of a sentencing court, following a defendant's trial and conviction or guilty plea.[8] The PSI has traditionally been viewed as a confidential court document.[9] Yet the PSI is in fact a "hybrid" document, prepared not only to assure appropriate sentencing, but also for use by the Bureau of Prisons and the United States Parole Commission in making important custody, programming, and release decisions.[10]

A. Use of the PSI Under Indeterminate Sentencing

Federal defendants who committed crimes prior to November 1, 1987 were sentenced under an indeterminate system.[11] Under this system, which affects the majority of current federal inmates, the sentencing court decides on a maximum sentence. The Parole Commission determines the actual length of time served within this maximum.[12] The court's sentencing determination is highly individualized, depending on the defendant's background, the nature of the offense, and the likelihood of rehabilitation.[13]

The purpose of the PSI in an indeterminate sentencing system is to provide the court with a complete portrait of the individual defen-

8. FED. R. CRIM. P. 32(c). On the PSI generally, see ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, THE PRESENTENCE INVESTIGATION REPORT (1978, rev. 1984) [hereinafter PSI REPORT]; R. CARTER, PRESENTENCE REPORT HANDBOOK (1978).

9. *See infra* note 39.

10. Schmolesky & Thorson, *supra* note 6, at 407-413; Shockley, *supra* note 6, at 81.

11. The indeterminate sentencing system was replaced by a guideline-based determinate system under the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984). *See infra* notes 21-38 and accompanying text.

12. 18 U.S.C. § 4205 (1986); United States Parole Commission Rules and Procedures, 28 C.F.R. §§ 2.1-2.64 (1988); Schmolesky & Thorson, *supra* note 6, at 412. The view that the U.S. Parole Commission is essentially a re-sentencing tribunal is suggested in Note, *supra* note 6, at 1238. A number of federal courts have expressed the same view. *See, e.g.*, Rodriguez v. United States Parole Comm'n, 594 F.2d 170, 175 (7th Cir. 1979); Moore v. Nelson, 611 F.2d 434, 439 (2d Cir. 1979); Hayward v. United States Parole Comm'n, 502 F. Supp. 1007, 1010 (D. Minn. 1980); Buckhannon v. Hambrick, 487 F. Supp. 41, 43 (S.D.N.Y. 1980).

13. Fennell & Hall, *supra* note 5, at 1615, 1622; 18 U.S.C. § 3577 (1982) ("No limitation shall be placed on the information concerning the background, character and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."). *See also* Williams v. New York, 337 U.S. 241 (1949) (holding that the evidentiary restrictions of a trial are inappropriate to a court's task to impose an individualized, rehabilitative sentence). *See infra* notes 78-83 and accompanying text.

dant.[14] The PSI includes the prosecutor's and defendant's versions of the crime for which the defendant was convicted. The PSI may also include descriptions of other offenses for which the defendant may not have been charged or convicted, the defendant's prior record, and accounts of the harm suffered by victims. Finally, the PSI may include personal information about the defendant's family, psychological profile, health, marital status, work history, and education.[15] The court uses this information to determine an appropriate sentence.

The PSI remains a basis for decisions after the defendant enters the federal correctional system. The Bureau of Prisons determines each inmate's security classification based on the prosecutor's version of the inmate's present and prior offenses, not simply on the offense of conviction.[16] The Bureau also uses the PSI to determine the inmate's custody classification and programming within the institution, as well as visitation, mail privileges, sentence credit, work study, and transfers.[17]

Under indeterminate sentencing, the PSI is also vital to parole decisions. The Parole Commission bases its decisions largely on the PSI.[18] The Commission's statutory directives require it to consider such factors as the severity of the offense, prior record, age, and any history of drug dependency in determining parole.[19] These factors in turn are derived from information in the PSI.[20]

B. Use of the PSI Under the New Sentencing Guidelines

The Sentencing Reform Act of 1984, part of the Comprehensive Crime Control Act of 1984,[21] dramatically changed the federal sentenc-

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14. PSI REPORT, *supra* note 8, at 1.

15. PSI REPORT, *supra* note 8, at 7-17; R. CARTER, *supra* note 8, at 10-14.

16. Schmolesky & Thorson, *supra* note 6, at 408. The use of PSIs by Wisconsin state correctional officials is described in Comment, *supra* note 6, at 616-19.

17. Schmolesky & Thorson, *supra* note 6, at 410-11.

18. The Parole Commission's reliance on the PSI is described in Project, *supra* note 6, at 878-81. *See also* 18 U.S.C. § 4207 (1982) (in making parole decisions "the Commission shall consider . . . (3) presentence investigation reports . . ."); U.S. Parole Commission Rules and Procedures, 28 C.F.R. § 2.19(a)(3) (1988).

19. The Parole Commission determines an inmate's presumptive parole date based on guidelines that set up a matrix combining the inmate's "Offense Severity" and "Salient Factor Score." The Offense Severity rating is based on the Commission's assessment of the total offense behavior, not just the elements of the crime for which the inmate was convicted. In drug cases, the offense severity may depend substantially on the description in the PSI of the amount and purity of drugs involved. *See* 28 C.F.R. § 2.20 (1988). The Salient Factor score attempts to estimate an inmate's dangerousness by examining such factors as his or her age, history of drug dependency, and prior convictions. *Id.* Again, these factors are based largely on the PSI. An excellent description of the parole guidelines is provided in Curtis, *Federal Judicial Power, Parole Guidelines, and Sentence Reform*, in 2 PRISONERS' RIGHTS SOURCEBOOK 91, 101-04 (I. Robbins ed. 1980).

20. Schmolesky & Thorson, *supra* note 6, at 410-12.

21. *See supra* note 11.

ing system.[22] Most notably, the law changed federal sentencing from an indeterminate to a determinate sentencing system. Under the indeterminate system, the maximum term of incarceration was set by the sentencing court, and the actual, release date was set by the United States Parole Commission (and still is for inmates still serving indeterminate sentences). Under the determinate system, parole is abolished, and the court imposes definite sentences under rigid sentencing guidelines promulgated by the United States Sentencing Commission.[23] Under the new law, which went into effect on November 1, 1987,[24] the term imposed by the judge is the term actually served by the prisoner, minus a maximum of 54 days per year for good time.[25] Sentences under the new system are based on complicated guidelines that eliminate much of the sentencing discretion previously vested in the sentencing judge.[26]

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22. The sentencing reforms in the Comprehensive Crime Control Act have been termed by commentators a "revolution" in federal sentencing. *See* Rezneck, *The New Federal Criminal Sentencing Provisions*, 22 AM. CRIM. L. REV. 785 (1985). The Act's objectives in the sentencing field are broadly summarized as follows: "The bill's sweeping provisions are designed to structure judicial sentencing discretion, eliminate indeterminate sentencing, phase out parole release, and make criminal sentencing fairer and more certain." SENATE COMM. ON THE JUDICIARY, REPORT ON THE SENTENCING REFORM ACT, S. REP. NO. 223, 98th Cong., 1st Sess. 62 (1983). *See generally*, Project, *Fifteenth Annual Review of Criminal Procedure: United States Supreme Court and Court of Appeals 1984-1985, Part IV, Sentencing, Probation, and Parole*, 74 GEO. L.J. 499, 841-919 (1986) (describing generally various provisions of the Sentencing Reform Act) [hereinafter Georgetown Project]; Comment, *Structuring Determinate Sentencing Guidelines: Difficult Choices for the New Federal Sentencing Commission*, 35 CATH. U.L. REV. 181 (1985) (same).

23. Even before the sentencing guidelines became effective, they came under extensive constitutional attack. *See* Liman, *The Constitutional Infirmities of the United States Sentencing Commission*, 96 YALE L.J. 1363, 1388 (1987). Constitutional challenges were mounted on claims that the provisions establishing the Sentencing Commission violated principles of separation of powers and the nondelegation doctrine, and that guideline sentencing violates due process of law by eliminating the exercise of individualized discretion and the opportunity to challenge the weight attributed to specific factors in a given case. Before the Supreme Court resolved the matter, about 150 district court judges invalidated the guidelines, and another 115 judges upheld them. Greenhouse, *Justices Uphold Disputed System of U.S. Sentencing*, N.Y. Times, Jan. 18, 1989, at A1, col. 4. Finally, the Supreme Court ruled in United States v. Mistretta, 109 S. Ct. 647 (1989), that the guidelines do not violate principles of separation of powers or the nondelegation doctrine.

24. The Act makes clear that the new sentencing provisions apply only to offenses committed after its effective date, November 1, 1987. Pub. L. No. 98-473, § 235(a)(1), 98 Stat. 2031, set out as a note under 18 U.S.C. § 3551 as amended by the Sentencing Act of 1987, Pub. L. No. 100-182, § 2, 101 Stat. 1266. *Cf.* Miller v. Florida, 482 U.S. 483 (1987) (retroactive application of revised state sentencing guidelines violates ex post facto clause).

25. *See* 18 U.S.C. § 3624(b) (1987 & West Supp. 1989).

26. Like the parole guidelines that preceded them, *see supra* note 19, the sentencing guidelines are expressed as a range of months to be served. This range is established by applying a two-axis grid or matrix in a sentencing table. One axis is comprised of 43 offense levels designed to measure offense severity (much like the simpler eight categories utilized by the Parole Commission to measure offense severity). The other axis is comprised of a Criminal History Category (much like the Parole Commission's Salient Factor Score). The combination of these two measurements, after adjustment for a number of variables, determines the guideline range in months. U.S. SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL (West 1988) [hereinafter SENTENCING GUIDELINES].

The new law also creates a right to seek appellate review of sentences imposed under the system.[27]

The new sentencing system has necessitated altering the form and content of the PSI, as well as its uses and significance. The new PSI is tailored to provide the information and analysis necessary to compute the sentencing guidelines. Thus, it eliminates or minimizes much of the social history and other information contained in the traditional PSI. This information was necessary in a discretionary sentencing system to give the judge a complete picture of the defendant's rehabilitative needs, but it is superfluous in guideline sentencing, which is based primarily on the severity of the offense and the defendant's criminal history.[28] Almost all of the information in the new presentence report is needed simply to help the judge make the factual determinations necessary for computing a guideline sentence. Especially in guilty plea cases, in which there has usually been no development of facts at trial, the PSI is the court's primary tool for making a sentence determination under the guidelines.

The importance of accurate factual development under the guidelines cannot be overstated. Factfinding at sentencing is critical in part

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The guidelines range is mandatory; the court must apply a sentence within the range, "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described." 18 U.S.C. § 3553(b) (1987 & West Supp. 1989). Any departure from the guidelines is subject to appellate review under a "reasonableness" standard. 18 U.S.C.A. §§ 3742(e) & (f) (West Supp. 1989). *See infra* note 27.

27. Under prior law, sentences were, for the most part, unreviewable on appeal. *See infra* note 36 and accompanying text. Under the new appellate provision, 18 U.S.C. § 3742, both the defendant and the government may appeal if, among other things, the district court incorrectly applied the sentencing guidelines, the sentence imposed departed from the term specified in the applicable guidelines or from the term specified in a plea agreement, or the sentence was imposed "in violation of law."

28. The traditional PSI was designed to "describe [ ] the defendant's character and personality, evaluate [ ] his or her problems, help [ ] the reader understand the world in which the defendant lives, reveal [ ] the nature of his or her relationships with people, and disclose [ ] those factors that underlie the defendant's specific offense and conduct in general [ ] and to [ ] provide [ ] the sentencing options and a general plan to meet the defendant's problems." PSI REPORT, *supra* note 8, at 1. By contrast, the "primary purpose" of the new PSI is to provide information that will "aid the court in determining the appropriate sentence." Secondary purposes of the new PSI are to aid the probation officer in supervisory efforts during probation and supervised release and to assist the Federal Bureau of Prisons in classification, institutional programs and release planning. *Id.* Specifically, the new PSI is to contain: (a) a single narrative description of the offense conduct (as opposed to separate prosecution and defense versions) that reveals the pertinent facts necessary for determining offense severity under the guidelines; (b) a recounting of the defendant's criminal history as required to determine the defendant's Criminal History Category; (c) an assessment of the sentencing options under the guidelines, including a determination of the guideline range based on (a) and (b) above; (d) a concise statement of offender characteristics similar to those that were described in the old PSIs; (e) application of the guideline provisions for determining fines and restitution; (f) an analysis of factors that may warrant departure from the guidelines; (g) the impact of any plea agreements; and (h) a sentencing recommendation. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, THE PRESENTENCE INVESTIGATION REPORT (1987).

because the guidelines are not based solely on the offense of conviction; they reflect consideration of many facts that do not comprise elements of the offense charged or proved beyond a reasonable doubt at trial.[29] For instance, the sentence ranges vary greatly depending on a number of additional factors, such as the defendant's role in the offense, the presence of a gun, the amount of money taken, or even other uncharged or untried offenses.[30] Given these variables, the guidelines can only be as reliable as the facts fed into them; the guidelines can produce equitable sentences and reduce unwarranted disparity among defendants only if the factfinding at sentencing is reliable.[31]

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29. Although based initially on assessment of the offense of conviction, and thus not a pure "real offense" sentencing system, the new law has significant real offense elements. *See* SENTENCING GUIDELINES, *supra* note 26, § 4(a), at 5. A pure "real offense" sentencing system bases sentences upon the actual conduct in whieh the defendant engaged, regardless of the charges for whieh he or she was indieted or convicted. Pure "charge offense" sentencing bases the sentence only upon that conduct that constitutes the elements of the offense with which the defendant was charged and convicted. The Sentencing Commission, in its initial draft guidelines, attempted to develop a real offense system, but quickly found that system practically unworkable, given the vast number of harms that could arise in various eircumstanees that would have to be contemplated in the guidelines. *Id. See also U.S. Sentencing Commission Guidelines Preliminary Draft,* 40 Crim. L. Rep. (BNA) 3001 (Oct. 1, 1986). After attempting a "modified real offense system," the commission finally decided to pursue the prescnt system which it describes as "closer to a 'charge offense' system" with a number of real elements. SENTENCING GUIDELINES, *supra* note 26, § 4(a), at 5.

30. SENTENCING GUIDELINES, *supra* note 26. More specifically, section 1B1.3(a) of the SENTENCING GUIDELINES provides that conduct which is relevant to determining the applicable guideline range includes, among other things:

> (1) all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise aecountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;
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> (2) . . . all sueh acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction;
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> (3) all harm or risk of harm that resulted from the acts or omissions specified in subsections (a)(1) and (a)(2) above, if the harm or risk was caused intentionally, recklessly or by criminal negligence, and all harm or risk that was the object of such acts or omissions;. . .

See, e.g., United States v. Guerrero, 863 F.2d 245 (2d Cir. 1988) (guideline sentence properly based on total drug quantity including amounts in counts dismissed pursuant to a plea agreement). The Fifth Cireuit has even held that it was permissible for the sentencing court to impose a sentence that exceeded the guidelines, based on the conclusion that the defendant possessed a firearm, even though the defendant was acquitted of carrying a firearm. United States v. Juarez-Ortega, 866 F.2d 747 (5th Cir. 1989).

31. *See* Conyers, *Unresolved Issues in the Federal Sentencing Reform Act*, 32 FED. NEWS & J. 68 (1985) ("A guidelines sentencing system, in order effectively to reduce unwarranted sentencing disparity, must provide the sentencing judge with objective and accurate information about the defendant.").

The critical importance of accurate factfinding under a sentencing guidelines system is highlighted by the characterization of guidelines sentencing as "computerized sentencing." As one commentator has noted, there is an acronym among computer programmers that is apropos to guidelines sentencing: GIGO. "It stands for 'Garbage In, Garbage Out,' which means that it makes no difference how good a computer program is if you feed bad data into it." Pope, *How*

Rule 32 gives the PSI a central role in the initial computation of guideline sentences.[32] Likewise, the sentencing guidelines state that the PSI is the initial tool for resolving factual disputes critical to guideline application prior to sentencing and for identifying the issues that will require resolution at sentencing.[33] Thus, as important as the PSI was to sentencing under the old system, it is even more critical under the guidelines.[34]

Because parole is abolished under the new determinate sentencing system, the new PSI is not used by parole authorities in the post-sentencing context.[35] But the Bureau of Prisons continues to rely on the PSI for making security classification and programming decisions. The PSI also takes on new significance in criminal appeals under the sentence appeal provisions of the 1984 Act. Traditionally, there has been only very limited review of sentences,[36] and in most cases the PSI has

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Unreliable Factfinding Can Undermine Sentencing Guidelines, 95 YALE L.J. 1258, 1264 n.33 (1986). *See also* Coffee, *Repressed Issues of Sentencing; Accountability, Predictability, and Equality in the Era of the Sentencing Commission*, 66 GEO. L.J. 975, 986-87 (1978); Coffee, *The Future of Sentencing Reform: Emerging Legal Issues in the Individualization of Justice*, 73 MICH. L. REV. 1361, 1374 (1975) [hereinafter Coffee, *Sentencing Reform*].

32. FED. R. CRIM. P. 32(c)(2)(B) requires that the PSI include classification of the offense and defendant under the sentencing guideline categories. *See also* Grunin & Watkins, *The Investigative Role of the United States Probation Officer under Sentencing Guidelines*, 51 FED. PROBATION 43, 46 (Dec. 1987) (noting that information reporting in the PSI "under 'old law' presentence procedures did not require the [probation] officer to make independent judgments in the body of the report regarding which sets of facts . . . the court should rely on . . .", whereas "guidelines sentencing requires the probation officer to gather similar information, weigh the evidence in support of divergent accounts, if they exist, and arrive at a single version of the offense").

33. SENTENCING GUIDELINES, *supra* note 26, § 6A1.2.

34. For this reason, Congress amended Rule 32 to eliminate the provisions that previously allowed the defendant to waive the PSI. The commentary to section 6A1.1 of the SENTENCING GUIDELINES, *supra* note 26, explains that:

> A thorough presentence investigation is essential in determining the facts relevant to sentencing. In order to ensure that the sentencing judge will have information sufficient to determine the appropriate sentence, Congress deleted provisions of Rule 32(c), Fed. R. Crim. P., which previously permitted the defendant to waive the presentence report. Rule 32(c)(1) permits the judge to dispense with a presentence report, but only after explaining, on the record, why sufficient information is already available.

35. To determine a release date, the Parole Commission will continue to rely upon the old PSIs for inmates sentenced under the old system. Under sections 235(b)(1) and (3) of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2031, set out as a note under 18 U.S.C. § 3551, the U.S. Parole Commission will continue to funetion during a five-year transition period following the effective date of the Act, November 1, 1987. By the end of this transition period, on November 1, 1992, the Commission must have set release dates for all inmates still under its jurisdiction.

36. *See, e.g.*, Dorszynski v. United States, 418 U.S. 424, 431 (1974) (court review generally ends after determination that sentence is within statutory limits); Gore v. United States, 357 U.S. 386, 393 (1958) (no appellate power to revise sentences); United States v. Oxford, 735 F.2d 276, 278 (7th Cir. 1984) (appellate courts review sentences only for a "gross abuse of the sentencing judge's discretion"); United States v. Girder, 754 F.2d 877, 880 (10th Cir. 1985) (absent constitutional infirmity, sentence within statutory limits in noncapital context not open to review); United States v. Rosenberg, 195 F.2d 583, 604-06 (2d Cir. 1952) (though the courts of appeals arguably

not been included in the appellate record.[37] The new law, however, mandates that the PSI be included in the appellate record to facilitate appeals of guideline sentences.[38]

Even though parole authorities do not rely on the new PSI, the PSI continues to play a critical role in the sentencing decision, in post-sentencing corrections decisions, and in appellate review of guidelines sentences. Therefore, accuracy of the PSI may be even more important under the guidelines than under the previous indeterminate system.

C. The History of PSI Disclosure

For years, courts viewed the PSI as a confidential court document, to be kept from the defendant even at sentencing.[39] Until 1975, there was no mandatory disclosure of the PSI and very little discretionary disclosure.[40] Numerous commentators argued that disclosure of PSIs would allow defendants to contest inaccuracies, thus enhancing the

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had power to revise sentences, the exercise of that power was precluded by extensive judicial precedent). *See also* Liman, *supra* note 23 at 1364 n.14, 1368 nn.42, 43, 45; Georgetown Project, *supra* note 22, at 863-64 & nn.146-48.

37. *See, e.g.*, U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT, NOTICE TO COUNSEL IN CRIMINAL APPEALS RAISING ISSUES RELATED TO THE LEGALITY OF A CRIMINAL SENTENCE (Dec. 3, 1987) (noting that under the old law PSIs were not included in the record on appeal); U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, NOTICE TO COUNSEL FOR APPELLANTS IN CRIMINAL CASES (Mar. 1, 1988) (same).

38. 18 U.S.C.A. § 3742(d)(2) (West Supp. 1989).

39. Fennell & Hall, *supra* note 5, at 1617-18; Dubois, *supra* note 6, at 3. The judicial reluctance to disclose PSIs is evident in the case law. *See, e.g.*, United States v. Charmer Industries, 711 F.2d 1164, 1170 (2d Cir. 1983) (the PSI is a "court document" disclosed only with the permission of the court); Ward v. United States, 609 F. Supp. 169, 170 (D. Ohio 1985) ("Neither is there any sound reason in law why the defendant should have a copy of the presentence report so that he can have ample time to gather or fabricate evidence to question it."). Indicative of the automatic reluctance to disclose PSIs is one court's response to a 1988 LAIP post-conviction motion to obtain a copy of an inmate's PSI: "This Court determines that the decision to provide the defendant access to his presentence report is purely discretionary and accordingly, it is ordered that the motion be denied." Order, United States v. Slader, Cr. 85-30027-01 (D.S.D. May 16, 1988). The court did not give reasons for its discretionary denial.

So strong has been the bias against disclosure that even when a court was willing to release a PSI, the court's probation officer at times has insisted on retaining control over the document. For example, in 1988 LAIP made a post-conviction motion to a client's sentencing court to obtain a copy of the client's PSI. The court ordered the U.S. Probation Office to "release a copy of the March 14, 1979 presentence report of Robert Waupoose to his present counsel, Keith A. Findley and Law Student Joseph P. O'Leary" of LAIP. Order, United States v. Waupoose, No. 78-CR-167 (E.D. Wis. July 27, 1988). But, when the PSI was mailed to LAIP, the U.S. Probation Officer enclosed a letter asserting that Mr. Waupoose's counsel must return the PSI to her after reading it and could make no copies of it. Letter from Probation Officer Renee Younk to Keith A. Findley (July 29, 1988). After LAIP drew the officer's attention to the language of the court order, the officer conceded that Mr. Waupoose was entitled to retain a copy of his PSI. She continued, however, to insist that "your agency [LAIP] is prohibited from retaining a copy in your files." Letter from Renee Younk to Joseph P. O'Leary (Aug. 10, 1988).

40. FED. R. CRIM. P. 32(c) advisory committee's notes to 1974 amendments.

fairness and usefulness of the PSIs.[41] Opponents of disclosure, however, argued that PSI disclosure at sentencing would inhibit sources of information from speaking freely to the probation officer, delay sentencing because of defense challenges to statements in the PSI, and impair rehabilitation by harming the defendant's relationship with the probation officer who prepared the report.[42] A series of amendments to Rule 32(c) of the Federal Rules of Criminal Procedure, and the United States Supreme Court's recent decision in *United States Department of Justice v. Julian*,[43] have dramatically increased PSI disclosure to defendants before and after sentencing.

Responding in part to the concerns of commentators, the advisory committee suggested amendments to Rule 32(c) which increased disclosure of PSIs at sentencing. These amendments were enacted in 1966, 1974, 1983 and 1986 and increased disclosure of PSIs at sentencing.[44] In its present form, Rule 32(c) mandates disclosure of the PSI to the defendant and defense counsel.[45] Only certain confidential portions of the PSI are exempt from disclosure.[46] At sentencing, the court must determine that the defendant and his or her attorney have had an op-

41. *See supra* note 6.

42. Dubois, *supra* note 6, at 3; Schmolesky & Thorson, *supra* note 6, at 414.

43. 108 S. Ct. 1606 (1988).

44. The 1966 amendments to Rule 32(c) left PSI disclosure to the discretion of the sentencing court. The advisory committee notes to the 1966 amendments stated that the committee had decided to encourage courts to disclose PSIs to defendants. This policy of disclosure was carried further by the 1974 amendments to Rule 32(c), which mandated disclosure of the PSI to a defendant or defense counsel upon request. The 1974 amendments, however, did not require the court to inform the defendant of his or her right to see the PSI. Nor did the amendments require the court to provide the defendant with a reasonable time to review the PSI if he or she requested to see it. Still, the amendments did indicate the committee's continued policy preference for disclosure, despite strong opposition from federal courts and probation officers. The 1974 committee notes observed that "most members of the federal judiciary have, in the past, opposed compulsory disclosure." FED. R. CRIM. P. 32(c) advisory committee's notes to 1974 amendments. Nevertheless, the committee continued, "[t]he best way of insuring accuracy is disclosure with an opportunity for the defendant and counsel to point out to the court information thought by the defense to be inaccurate, incomplete or otherwise misleading." *Id.* The 1983 amendments made disclosure to the defendant and his or her attorney mandatory without request, at a "reasonable time" before sentencing. The amendments also allow the defense the opportunity to comment on the PSI. If the defense challenges information in the PSI, the sentencing court is required either to make a written factual finding resolving the dispute or to state in writing that no resolution is necessary because the court will not rely on the disputed information in sentencing. The written findings or statement must be appended to the PSI. The 1983 amendments also state that any copies of the PSI furnished to the defense must be returned to the sentencing court unless the court, in its discretion, directs otherwise. The 1986 amendments to Rule 32(a) require the sentencing court to determine that the defendant and his or her attorney have had an opportunity to read and discuss the PSI. Moreover, a 1986 amendment to 18 U.S.C. section 3552(d) mandates PSI disclosure to the defendant and counsel at least ten days prior to sentencing.

45. FED. R. CRIM. P. 32(c).

46. FED. R. CRIM. P. 32(c)(3)(A). The due process problems involved in keeping portions of the PSI confidential are discussed *infra* at text accompanying notes 74-149.

portunity to read and discuss the PSI,[47] and must allow the defense to comment on it.[48] If the defense challenges any information in the PSI, the court must either make a written finding resolving the dispute or state in writing that no resolution is necessary because the court will not rely on the disputed information in sentencing. The written finding or determination must be attached to the PSI.[49] The defendant may not keep a copy of the PSI unless the sentencing court directs otherwise.[50]

The broad mandatory PSI disclosure that Rule 32(c)(3) requires at sentencing is complemented by federal post-conviction disclosure requirements. The Parole Commission is required by statute to provide an inmate with "reasonable access" to the PSI at least thirty days before a parole hearing.[51] Until recently, such disclosure was limited to allowing inmates to review, but not copy, the PSIs in their prison files in the thirty to sixty days before their parole hearings. Beyond that, neither the Bureau of Prisons nor the Parole Commission allowed disclosure.[52] In July, 1988, however, the Bureau dramatically reversed its policy due to the Supreme Court's decision in *United States Department of Justice v. Julian*.[53] In *Julian*, the Court held that a federal PSI in the possession of the United States Parole Commission is an agency record not generally exempt from disclosure to the individual who is the subject of the PSI under the Freedom of Information Act (FOIA).[54] After *Julian*, any inmate could obtain a copy of his or her PSI from the Bureau of Prisons through a formal request under FOIA. As a result, the Bureau reversed its longstanding policy against disclosure of PSIs to inmates.[55] The Bureau will now place any PSI dated since December, 1975, in the nonexempt portion of an inmate's file and allow the inmate

47. FED. R. CRIM. P. 32(a)(1)(A) (effective Nov. 1, 1987). This rule appears to codify the Seventh Circuit's directions to sentencing courts in United States v. Rone, 743 F.2d 1169, 1174 (7th Cir. 1984).

48. FED. R. CRIM. P. 32(c)(3)(A).

49. FED. R. CRIM. P. 32(c)(3)(D).

50. FED. R. CRIM. P. 32(c)(3)(E). Under recently promulgated amendments to Rule 32, which will take effect on December 1, 1989, unless Congress rejects or amends them, the defendant will be allowed to keep a copy of the PSI provided at sentencing. *See infra* notes 57-60 and accompanying text.

51. 18 U.S.C. § 4208(b) (1982).

52. U.S. Parole Commission Rules and Procedures, 28 C.F.R. § 2.55 (1988).

53. 108 S. Ct. 1606 (1988).

54. *Id.* The history of FOIA litigation on PSIs is cogently summarized in Shockley, *supra* note 6. It should be noted that the Supreme Court's decision in *Julian* continues to allow exemption from disclosure for those portions of the PSI which are kept confidential under Rule 32(c)(3)(A) and the parallel provision under the Parole Commission and Reorganization Act, 18 U.S.C. § 4208(c) (1982) [hereinafter Parole Act]. *See infra* text accompanying notes 76-149.

55. BUREAU OF PRISONS, OPERATIONS MEMORANDUM 70-88 (1380) (July 11, 1988).

to obtain and retain a copy at the institution, without a formal FOIA request.[56]

Thus, in its present state, Rule 32 mandates disclosure of the PSI at sentencing to the defendant and his or her attorney. In addition, since *Julian*, a defendant may obtain a copy of the PSI in prison.

III. THE RECENT RULE 32 AMENDMENTS

Because of the Supreme Court's decision in *Julian* and the changes in the federal sentencing system under the Comprehensive Crime Control Act of 1984, the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts drafted amendments to Rule 32,[57] which were issued by the Supreme Court on April 25, 1989,[58] and will become effective December 1, 1989, unless Congress intervenes.[59] Significantly, the amendments require the sentencing court to provide the defendant and the defendant's counsel with a copy of the report, rather than merely permit the defendant and counsel to read the report. The amendments also eliminate the requirement that all parties return the PSI to the probation officer immediately following the imposition of sentence.[60] The amendments also require PSI disclosure to the defendant at least ten days before sentencing, rather than merely at a "reasonable time" before sentencing, unless the defendant

56. *Id.* The Operations Memorandum does not explain the reasons behind the December 1975 cut-off date. It appears to be based in part on the sentencing court's entirely discretionary disclosure of PSIs before 1975. FED. R. CRIM. P. 32(c) advisory committee's notes to 1974 amendment. In addition, the Parole Commission and Reorganization Act, 18 U.S.C. § 4205(e) (1982), required probation officers to furnish information on inmates to the Parole Commission upon request. Because the Supreme Court relied on mandatory disclosure of the PSI under Rule 32 and the Parole Act to permit FOIA disclosure in *Julian*, the Bureau of Prisons appears to have concluded that disclosure of pre-1976 documents is unnecessary.

57. Proposed Amendments to the Rules of Criminal Procedure for the United States District Courts (Sept. 1988) (on file at the Wisconsin Law Review) [hereinafter Proposed Rule 32 Amendments].

58. Amendments to the Federal Rules of Criminal Procedure, 109 S. Ct. CXCVII (Apr. 25, 1989) [hereinafter Rule 32 Amendments].

59. *Supreme Court Amends Federal Procedural Rules*, 57 U.S.L.W. 1167 (May 2, 1989).

60. FED. R. CRIM. P. 32(c)(3)(E), which the amendments strike, reads:

> (E) Any copies of the presentence investigation report made available to the defendant and the defendant's counsel and the attorney for the government shall be returned to the probation officer immediately following the imposition of sentence or the granting of probation, unless the court, in its discretion otherwise directs.

waives this minimum period.[61] Thus, under the amendments, the defendant may obtain and retain a copy of the PSI.[62]

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61. Although the rule appears to mandate that both the defendant and the defense counsel be provided with a copy of the PSI, the committee notes make this less clear. The notes state:

> The amended rule does not direct whether the defendant or the defendant's lawyer should retain the presentence report. In exceptional cases where retention of a report in a local detention facility might pose a danger to persons housed there, the district judge may direct that the defendant not personally retain a copy of the report until the defendant has been transferred to the facility where the sentence will be served.

Rule 32 Amendments, *supra* note 58, at ccxxv.

Requiring that a copy of the PSI be provided to the defendant, as well as to defense counsel, is important. Prior to the 1983 amendments to Rule 32, the rule only required disclosure of the PSI to the defendant or his or her counsel, but not to both. Fennell and Hall, in their empirical study of PSI practices, observed that in many jurisdictions the PSI was shown only to counsel, and that "[w]hen the report is shown only to the attorney, however, meaningful disclosure is jeopardized. Discovering factual errors usually requires a careful reading of the report by the defendant, who has unique knowledge of the subject matter." Fennell & Hall, *supra* note 5, at 1647. By requiring provision of the PSI to both the defendant and counsel, the amendments ensure that the defendant will have an opportunity to inspect the report for errors prior to sentencing and will retain a copy that can be referred to even when counsel is no longer available.

It is our experience at LAIP in representing incarcerated individuals that all too often counsel consider their job done and refuse to provide further assistance once the individual is sentenced and sent to prison. Even when formal representation continues, counsel find it easy to ignore and neglect their incarcerated clients. The following letter, received by an LAIP client from his appointed attorney, reflects this attitude:

> Dear . . .:
>
> I am in receipt of your letter of July 28, 1988.
>
> I am pursuing your appeal in accordance with the Criminal Justice Act. That act is contained in Title 18 of the United States Code. If you would like to know what I am doing specifically, you can review the act and it will tell you all of the things I am doing.
>
> I ordered the transcript of the trial. I will use these to prepare a brief to the Court. I will not send you a copy of the transcripts because I don't believe you have any use for them. I'm not even sure that you could read them. I question whether the letter you sent me was actually written in your own handwriting, or if someone in fact wrote it for you. In any event, I don't believe you would have any use for the transcripts and sending them to you would be just a waste of time.
>
> There is no need for you to call me collect, or by any other means. When I need to confer with you, I will send you a letter. When your brief is prepared and filed with the Court, I will send you a copy. Sincerely, . . .

In light of such attitudes, it is important that both the defendant and counsel are provided with a copy of the PSI.

62. The Advisory Committee's note to the amendment explains why the amendment is proposed:

> Because a defendant or the government may seek to appeal a sentence, an option that is permitted under some circumstances, there will be cases in which the defendant has a need for the presentence report during the preparation of or the response to an appeal. This is one reason why the Committee decided that the defendant should not be required to return the nonconfidential portions of the presentence report that have been disclosed. Another reason is that district courts may find it desirable to adopt portions of the presentence report when making findings of fact under the guidelines. They would be inhibited unnecessarily from relying on careful, accurate presentence reports if such reports could not be retained by defendants. A third reason why defendant [sic] should be able to retain the reports disclosed to them is that the Supreme Court's decision in United States Department of Justice v. Julian, 486 U.S. 1 (1988), suggests that defendants will routinely be able to secure their reports through Freedom of Information Act suits. No

These amendments are positive steps toward ensuring greater accuracy in PSIs and, thus, greater reliability in the guideline sentencing system and post-sentencing corrections decisions. Because defendants have had a right for some time to read the PSI prior to sentencing and parole hearings, there is no good reason to preclude them from keeping a copy. As Justice Scalia conceded in his dissent in *Julian*, "I am frank to admit that I cannot readily conceive why allowing a defendant or an inmate to keep a copy of the report is significantly more threatening than allowing him to read and make notes about it."[63] In any event, the amendments properly recognize that it makes no sense to require the defendant to return the PSI provided at sentencing, when under *Julian* the defendant can obtain the PSI under the Freedom of Information Act once in prison.[64]

Moreover, *Julian* and the Rule 32 amendments are appropriate responses to problems posed by more limited disclosure. Simply allowing a defendant to review, but not retain, the PSI at sentencing is an inadequate safeguard against prejudice stemming from erroneous information in the PSI. Allowing review only at the probation office or court may lead to a hurried or careless reading of the report, with inadequate time to evaluate and discuss the report fully and to verify its accuracy.[65] Likewise, allowing an inmate to review the report during the thirty to sixty days prior to a parole hearing, for inmates sentenced under the indeterminate sentencing system, is often inadequate; frequently, more time is needed to investigate the veracity of the PSI or to produce the necessary documentation for the Parole Commission to correct any errors.[66] Moreover, the Bureau of Prisons may have relied upon the PSI

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public interest is served by continuing to require the return of reports, and unnecessary FOIA litigation should be avoided as a result of the amendment to Rule 32.

Rule 32 Amendments, *supra* note 58, at ccxxv.

63. *Julian*, 108 S. Ct. at 1615 (Scalia, J., dissenting).

64. *See supra* note 62.

65. *See* Fennell & Hall, *supra* note 5, at 1645-46; Schmolesky & Thorson, *supra* note 6, at 434 (Rule 32 should be amended to allow the defendant and counsel to retain a copy of the PSI "to provide the opportunity for careful examination of the report . . . in a setting that is conducive to private study and discussion.").

66. Schmolesky & Thorsen, *supra* note 6, at 436. If the defendant represented by an attorney or parole advocate in parole proceedings, the representative is often not the same attorney who represented the defendant in the criminal proceedings. Thus, the parole representative in many cases has never seen the PSI and is not fully acquainted with the facts as they were developed in court. In our experience at LAIP, disclosure of the PSI 30 days prior to parole hearings has often allowed insufficient time to investigate and verify the accuracy of PSIs. Such investigation often entails tracking down court records of prior adjudications in other jurisdictions or searching for and obtaining affidavits from distant witnesses. Moreover, reviewing the PSI at the prison is inadequate because often the portions of the PSI that become critical to the parole proceeding are not readily apparent at the first reading of the report, necessitating delays and additional trips to the institution to review the report again. *Cf.* Note, *supra* note 6, at 1236 (PSI misinformation is unlikely to be corrected in the parole process).

before the first parole hearing to make post-sentencing decisions.[67] In many instances, the PSI is also needed for other purposes prior to parole hearings, such as enabling new post-conviction counsel who have not seen the report to evaluate and prepare post-conviction pleadings on an informed basis.[68]

Furthermore, since the new sentencing system includes provisions for appellate review of sentences under the guidelines, it is essential that the defendant and his or her counsel have a copy of the PSI to use on appeal.[69] The appeals of guideline sentences will in many cases be based largely on application of the sentencing guidelines to the facts set forth in the PSI. Meaningful appellate review will require full access to the PSI by all parties during the appeal. Therefore, the new statute now requires that the report be included in the appellate record whenever a criminal appeal includes a challenge to the guideline sentence.[70]

Surprisingly, however, prior to the effective date of the Rule 32 amendments, no rule or statute exists that guarantees the parties access to the PSI on appeal of a sentence under the guidelines. Consequently, the federal courts of appeals have been left to fashion their own rules governing the parties' access to PSIs during sentence appeals under the guidelines. Yet only five of the twelve circuits with jurisdiction to review guideline sentences have adopted rules governing disclosure of PSIs during appeal.[71] None of these rules allows the defendant easy or cer-

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67. *See supra* text accompanying notes 16-17. *See also* Schmolesky & Thorson, *supra* note 6, at 436.

68. Schmolesky & Thorson, *supra* note 6, at 425. Many LAIP clients have needed to view their PSIs during times when the PSIs were unavailable from the Parole Commission. In one case, the client wished to file a Rule 35(b) motion for reduction of sentence, which must be filed with the sentencing court within 120 days of sentencing. The client, however, was unsure what the government had alleged he had done in the PSI. The sentencing court denied the client's motion to obtain a copy of his PSI in order to prepare the Rule 35(b) motion. Instead, the court agreed with the contention of the U.S. Attorney that a ruling on the Rule 35(b) motion could be delayed until the client's FOIA request for the PSI could be processed by the Parole Commission. Because the client's parole hearing was due, a LAIP student was able to sign on as his parole representative and view his PSI pursuant to 18 U.S.C. § 4208(b). It was fortunate that she was able to view the PSI because it contained an unsubstantiated charge that the client, a forty-five year old man, had had intercourse with a minor while the minor was passed out from drug use. The student was able to marshall evidence to refute this charge before both the sentencing court in the Rule 35(b) motion and the Parole Commission.

Another LAIP client was a non-citizen who was threatened with deportation due to his felony conviction; although the PSI would have been of great help in preparing his immigration case, LAIP was unable to view his PSI at the institution because he did not have an upcoming parole hearing. In that case, the sentencing court granted the inmate's motion for release of a copy of his PSI for LAIP in preparing for the deportation proceeding.

69. See *supra* note 62 for Advisory Committee's comment to the Rule 32 amendments recognizing the need for access to the PSI on sentence appeal.

70. 18 U.S.C.A. § 3742(d)(2) (West Supp. 1989).

71. Circuits that have not adopted any rule on access to PSIs on appeal include: the First Circuit, Letter from Francis P. Scigliano, Clerk, to LAIP Paralegal Jesse J. Ford, III (Aug. 29, 1988); the Second Circuit, Letter from Elain B. Goldsmith, Clerk, to LAIP Paralegal Jesse J. Ford,

tain access to the PSI, and three of the five circuit rules prohibit access during an appeal, absent a court order.[72]

The amendments to Rule 32 should remedy these appellate and post-conviction problems by requiring the court to provide the defendant and his or her counsel with copies of the PSI prior to sentencing. The amendments are necessary to supplement the disclosure of the PSI by corrections authorities under the Freedom of Information Aet that is mandated by *Julian*. Not only is the Freedom of Information Act procedure unnecessarily cumbersome,[73] but it provides no remedy to defendants who need the PSI on appeal, but whose sentences are stayed pending appeal. In that situation, corrections authorities will not yet have a copy of the PSI, and therefore cannot make the required disclo-

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III (Aug. 26, 1988); the Third Circuit, Letter from Sally Mrvos, Clerk, to LAIP Paralegal Jesse J. Ford, III (Aug. 26, 1988); the Seventh Circuit, Letter from Thomas F. Strubbe, Clerk, to LAIP Paralegal Jesse J. Ford, III (Aug. 29, 1988); the Eighth Circuit, Letter from Robert St. Vrain, Clerk, to LAIP paralegal Jesse J. Ford, III (Sept. 15, 1988); the Eleventh Circuit, Letter from Miguel J. Cortez, Clerk, to LAIP Paralegal Jesse J. Ford, III (Aug. 26, 1988); and the D.C. Circuit, Telephone interview with Robert Bonner, Deputy Clerk (Apr. 12, 1989).

Circuits that have adopted a rule of some sort include: the Fourth Circuit, Letter from John M. Greacen, Clerk, to LAIP Paralegal Jesse J. Ford, III (Sept. 9, 1988) (enclosing Notice to Counsel in Criminal Appeals Concerning the Procedures for Raising Issues Related to the Legality of a Criminal Sentence (Dec. 3, 1987)); the Fifth Circuit, Circuit Rule 47.10-Rule Governing Appeals Raising Sentencing Guidelines Issues-18 U.S.C. § 3742; the Sixth Circuit, Letter from Leonard Green, Clerk, to LAIP Paralegal Jesse J. Ford, III (Aug. 30, 1988); the Ninth Circuit, Letter from Cathy A. Catterson, Clerk, to LAIP Paralegal Jesse J. Ford, III (Aug. 31, 1988) (stating that the Ninth Circuit has not yet adopted any rules with respect to sentencing guidelines, but enclosing the Circuit's Notice to Counsel for Appellants in Criminal Cases, with provisions governing PSI disclosure on appeal); and the Tenth Circuit, General Order, In Re: Procedures for Criminal Appeals Filed After December 31, 1987 (Dec. 22, 1987).

72. The Fourth and Fifth Circuits' rules provide that the PSI shall be transmitted as a non-confidential part of the record but grant the district court authority to order that the PSI be transmitted to the court of appeals under seal. If the PSI is sealed by the district court, appellate counsel has no right to review the report during appeal, and the court of appeals will review the report in camera. The rule is silent as to whether or how counsel will be able to review the PSI if it is not sealed. *See supra* note 71.

The other three circuits that have adopted a rule, the Sixth, Ninth and Tenth Circuits, require that the report be transmitted to the court of appeals under seal in all cases. These circuits provide that if counsel wishes to have access to the report, he or she must move the court to unseal the document. *See supra* note 71.

73. A formal FOIA request to the Bureau of Prisons under 28 C.F.R. §§ 16.1-16.208 and Bureau of Prisons Policy Statement No. 1353.1 (May 29, 1975), and to the Parole Commission under 28 C.F.R. § 2.56, requires a formal written request, a search for the file by the agency, and a formal response. The experience at LAIP has been that such formal requests take approximately two months with the Bureau of Prisons and even longer with the Parole Commission. The Bureau of Prisons, however, now no longer requires formal FOIA requests to obtain PSIs, but rather makes them available to inmates at the institution. *See supra* notes 55-56 and accompanying text. Even that procedure, however, is cumbersome when compared to a rule that allows the defendant to keep the PSI provided at sentencing. Obtaining a PSI at prison requires at least one request to staff at the institution, followed by a staff check to determine that no portions of the PSI are confidential, and copying at the institution of the requested PSI. *See* Bureau of Prisons Operations Memorandum No. 70-88 (1380) (July 31, 1988).

sure under *Julian*. Thus, despite *Julian*, the amendments are needed to remedy the remaining problems posed by the prior rule.

IV. Further Changes Needed to Address Remaining Problems

The changes in PSI disclosure mandated by *Julian* and the amendments to Rule 32 represent significant improvements. But even if Congress allows the amendments to go into effect as scheduled on December 1, 1989, substantial problems regarding access to, and accuracy of, PSIs will remain. First, the amendments fail to address the due process problems posed by allowing a sentencing court to deem certain portions of the PSI confidential. Second, the enormous amount of PSI litigation since the 1983 amendments has demonstrated that disclosure by itself is no cure-all; defendants still face serious obstacles in trying to have their PSIs corrected at the sentencing hearing and after sentencing.[74] At sentencing, Rule 32(c) provides little guidance on what procedures should be used to resolve disputes about the accuracy of the PSI. Among the unanswered questions is the fundamental issue of what standard of proof should apply in the resolution of PSI disputes. Third, Rule 32(c) is inadequate in addressing the problem of information in the PSI that is not relevant to sentencing, but that may prove important at the institution. Finally, there remains no adequate mechanism for correcting PSI errors after sentencing, even though those errors may continue to affect the defendant adversely.

A. Due Process Problems With the Remaining Exceptions to Disclosure Under Rule 32

Although the Advisory Committee decided not to propose elimination of all exemptions to Rule 32's disclosure provisions, it did note that "[s]ubstantial due process problems" may arise if portions of the PSI with information relevant to sentencing are withheld and provided to the defendant in summarized form only. Under those circumstances, the defendant would have to litigate any objections to the information in the dark, without knowledge of the sources or details of the disputed information. The Committee, however, dodged the difficult due process problem inherent in allowing nondisclosure: "In deciding not to require disclosure of everything in a presentence report, the Committee made

74. The authors have counted nearly 100 appellate cases since 1983 in which defendants argued that their PSIs were inaccurate or that the sentencing court in some way violated Rule 32(c). A Westlaw command in October, 1988, to search for appellate cases since 1983 in which Rule 32(c)(3)(D) was cited turned up more than 3,000 cases.

no judgment that findings could validly be made based upon nondisclosed information."[75]

Because of the specific impact that relevant facts under the guidelines will have on the sentence imposed, the issue of nondisclosure is one that the Advisory Committee should confront—at least as a policy decision under the guidelines, if not as a matter of due process. Nondisclosure of any sentencing information is inappropriate under a guideline sentencing system. To allow consideration of any information not disclosed to the defendant creates too great a risk of error and unfairness. The Advisory Committee was cognizant of these risks when it proposed the Rule 32 amendments but elected not to prohibit nondisclosure of confidential or diagnostic material[76] or the probation officer's sentence recommendation.[77]

The Supreme Court has never squarely addressed the issue of whether due process requires disclosure of the PSI in noncapital cases. Lower courts, commentators and even the Advisory Committee notes to the 1966 amendments to Rule 32(c)(2) have cited *Williams v. New York*[78] for the proposition that nondisclosure of all or part of the PSI does not violate the Constitution.[79] Yet the Supreme Court, other

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75. Rule 32 Amendments, *supra* note 58, at CCXXVI.

76. The Advisory Committee stated in its notes to the proposed amendments that:

> Although the Committee was concerned about the potential unfairness of having confidential or diagnostic material included in presentence reports but not disclosed to a defendant who might be adversely affected by such material, it decided not to recommend at this time a change in the rule which would require complete disclosure. Some diagnostic material might be particularly useful when a court imposes probation, and might well be harmful to the defendant if disclosed. Moreover, some of this material might assist correctional officials in prescribing treatment programs for an incarcerated defendant. Information provided by confidential sources and information posing a possible threat of harm to third parties was particularly troubling to the Committee, since this information is often extremely negative and thus potentially harmful to a defendant. The Committee concluded, however, that it was preferable to permit the probation officer to include this information in a report so that the sentencing court may determine whether is [sic] ought to be disclosed to the defendant.

Id.

77. The amendments to Rule 32, as originally proposed, eliminated the exemption allowing nondisclosure of the probation officer's sentence recommendation. Rule 32 Amendments, *supra* note 58, at 21, 23. The committee, however, voted five to four to restore the exemption when the committee met on January 19-20, 1989. Letter from Professor Charles Alan Wright, member of the Standing Committee on Rules of Practice and Procedure, to Professor Frank J. Remington (Jan. 24, 1989). *See infra* notes 129-137 and accompanying text.

78. 337 U.S. 241 (1949).

79. *See, e.g.*, United States v. Jones, 473 F.2d 293, 296 (5th Cir.), *cert. denied*, 411 U.S. 984 (1973); United States v. Dockery, 447 F.2d 1178, 1182 (D.C. Cir.), *cert. denied*, 404 U.S. 950 (1971); United States v. McKinney, 450 F.2d 943, 943 (4th Cir. 1971); United States v. Knupp, 448 F.2d 412 (4th Cir. 1971); United States v. Fischer, 381 F.2d 509, 511 (2d Cir. 1967), *cert. denied*, 390 U.S. 973 (1968); Powers v. United States, 325 F.2d 666, 667 (1st Cir. 1963); Chandler, *Latter-Day Procedures in the Sentencing and Treatment of Offenders in the Federal Courts*, 37 VA. L. REV. 825, 833 (1951).

courts and commentators have recognized that *Williams* contains no such holding.[80] *Williams* involved a claim that the defendant's death sentence was imposed in violation of the due process clause because it was based on information supplied by witnesses with whom the accused had not been confronted and whom he had had no opportunity to cross-examine.[81] There was no claim of inaccuracy in the information relied upon, and no issue concerning disclosure of the PSI. Rather, *Williams* held that the rules of evidence applicable at trial are not controlling at sentencing, and that the sentencing judge is free to obtain sentencing information from the widest possible sources without regard to the restrictions of formal rules of evidence. Thus, under *Williams*, information in a PSI may be considered by the court even though it is hearsay and its sources are not subject to cross-examination.

Williams reflects one side of a conflict between two competing interests at stake in the debate over PSI disclosure.[82] On the one hand, *Williams* recognizes an important interest in allowing the sentencing court to obtain, without procedural hindrances, the fullest information possible about the defendant and his or her background in order to exercise appropriate individualized sentencing discretion. On the other hand, the defendant has a competing liberty interest in scrutinizing and testing the information relied on by the sentencing judge to ensure its accuracy. In *Williams*, the interest in complete information prevailed. The Court concluded that the sentencing judge should "not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial."[83]

A separate line of Supreme Court cases, however, suggests that the defendant's interest in assuring PSI accuracy should prevail, and that there might be a due process right to disclosure. In *Townsend v. Burke*,[84] which was decided before *Williams*, the Court held that it vio-

80. *See, e.g.*, Gardner v. Florida, 430 U.S. 349, 355-56 (1977) (plurality opinion); United States v. Fatico, 603 F.2d 1053, 1054-55 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980); United States v. Weston, 448 F.2d 626, 631 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972); United States v. Dockery, 447 F.2d 1178, 1189 n.12 (D.C. Cir.) (Wright, J., dissenting), *cert. denied*, 404 U.S. 950 (1971); Note, *Disclosure of Presentence Reports in Federal Court: Due Process and Judicial Discretion*, 26 HASTINGS L.J. 1527, 1534 (1975) [hereinafter *Disclosure of Presentence Reports*]; Pugh & Carver, *Due Process and Sentencing: From* Mapp *to* Mempa *to* McGautha, 49 TEX. L. REV. 25, 29 (1970); Katkin, *Presentence Reports: An Analysis of Uses, Limitations and Civil Liberties Issues*, 55 MINN. L. REV. 15, 25 (1970); Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821, 827 (1968) [hereinafter *Due Process at Sentencing*]; Guzman, *Defendant's Access to Presentence Reports in Federal Criminal Courts*, 52 IOWA L. REV. 161, 171-72 (1966).

81. *Williams*, 337 U.S. at 243.

82. *See* Fennell & Hall, *supra* note 5, at 1630.

83. *Williams*, 337 U.S. at 247.

84. 334 U.S. 736 (1948).

lates due process for an uncounseled defendant to be sentenced on the basis of "materially untrue" information about his prior record.[85] Subsequently, in *Mempa v. Rhay*,[86] the Court held that sentencing is a critical stage in a criminal proceeding, and that, accordingly, a defendant has a sixth amendment right to counsel at sentencing. Drawing on *Townsend*, the Court noted that counsel is important to help prevent a court's reliance on misinformation in imposing sentence.[87] In *United States v. Tucker*,[88] the Court extended *Townsend* and held that it violates due process for a sentencing court to rely on prior convictions that were constitutionally defective due to the lack of counsel in those prior proceedings. Thus, *Tucker* recognizes a due process right not to be sentenced on the basis of "misinformation of constitutional magnitude."[89]

Capping the Supreme Court's recognition of the importance of accuracy in sentencing information, the Court in *Gardner v. Florida*[90] recognized a constitutional right to disclosure of all presentence information in capital cases. In imposing the death sentence, the trial judge in *Gardner* stated that he was relying in part on information in a PSI, portions of which were not disclosed to counsel or the defendant.[91] Although Justice Stevens' plurality opinion relied partially on the fact that the death penalty was involved, the opinion's reasoning can readily be extended to create a due process right to access to the PSI in noncapital cases as well.[92] The plurality opinion explicitly made clear that *Williams* was not controlling because that case only decided whether hearsay statements in a PSI may be considered in sentencing, not whether that information can be withheld from the defendant.[93] Furthermore, the plurality opinion relied on non-death penalty cases such as *Mempa v. Rhay* and *Specht v. Patterson*[94] and was not tied to the eighth amendment. Indeed, the Court recognized generally that "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause."[95]

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85. *Id.* at 740-41.

86. 389 U.S. 128 (1967).

87. *Id.* at 133. Some commentators have argued that the right to counsel at sentencing implies the right to disclosure of sentencing information, since counsel can only operate effectively if provided with the information at issue. *See* Katkin, *supra* note 80, at 26; Guzman, *supra* note 80, at 174.

88. 404 U.S. 443 (1972).

89. *Id.* at 447.

90. 430 U.S. 349 (1977).

91. *Id.* at 351.

92. *See* Fennell & Hall, *supra* note 5, at 1637 & n.123. *But see Gardner*, 430 U.S. at 364 (White, J., concurring) (the holding should not be extended beyond death penalty cases).

93. *Gardner*, 430 U.S. at 356 (plurality opinion).

94. 386 U.S. 605 (1967).

95. *Gardner*, 430 U.S. at 358.

Prior to *Gardner* most lower courts had held that there was no due process right to disclosure of the PSI.[96] In light of *Townsend* and *Tucker*, however, the courts have required that sentencing judges assure themselves that the information they rely on in sentencing is reliable and accurate,[97] and that defendants be given an opportunity to rebut allegedly false information.[98] A right to disclosure is a logical extension of these holdings. A meaningful opportunity to rebut possibly false information requires access to that information. But, as Rule 32 has been amended, first to allow, and then to require, greater disclosure of the PSI, the due process issue has received less scrutiny by the lower courts.

The due process argument becomes more compelling as the federal sentencing system changes from a discretion-based indeterminate system to a guideline-based determinate system. *Williams* was decided when the prevailing penological philosophy was, as the Court observed, that "punishment should fit the offender and not merely the crime."[99] Sentencing courts were charged with fashioning individualized[100] sentences designed to meet the "treatment"[101] needs of specific defen-

96. *See supra* note 79. *See also* United States v. Ainesworth, 716 F.2d 769, 772 (10th Cir. 1983). *But see* United States v. Janiec, 464 F.2d 126, 127 (3d Cir. 1972) (due process requires disclosure of PSI's listing of defendant's prior convictions, although not entire PSI, unless court does not rely in any way upon the prior convictions); *id.* at 132 (Teitelbaum, J., concurring) (court should require disclosure of all portions of the PSI relied on by the sentencing judge); United States v. Headspeth, 852 F.2d 753, 755 (4th Cir. 1988) (due process not violated by nondisclosure of sentencing recommendation portion of PSI, but only because it is nothing but a subjective judgment of the probation officer rather than a factual statement). At least one state court has held that the defendant has a due process right to see his or her PSI. State v. Skaff, No. 88-2423-CR (Wis. Ct. App. Aug. 16, 1989).

97. *See* United States v. Lee, 818 F.2d 1052, 1055 (2d Cir. 1987) (court must assure itself that sentencing information is reliable and accurate), *cert. denied*, 108 S. Ct. 350 (1988); United States v. Pugliese, 805 F.2d 1117, 1124 (2d Cir. 1986) (when defendant challenges veracity of hearsay statements in PSI, government must introduce corroborating proof to ensure reliability).

98. United States *ex rel.* Welch v. Lane, 738 F.2d 863 (7th Cir. 1984); United States v. Harris, 558 F.2d 366, 374 (7th Cir. 1977); Collins v. Buchkoe, 493 F.2d 343, 346 (6th Cir. 1974). An evidentiary hearing is not required in every case, however. United States v. Romano, 825 F.2d 725, 730 (2d Cir. 1987); United States v. Stephens, 699 F.2d 534, 537 (11th Cir. 1983).

99. *Williams*, 337 U.S. at 247.

100. Individualized sentencing was not the norm until the nineteenth-century. Before then, sentencing was largely the ceremonial imposition of a punishment fixed by common law or statute. The view then was that there was one appropriate or "fitting" penalty fixed by the law for each offense, so that no individualized discretion was necessary or appropriate. *Due Process at Sentencing*, *supra* note 80, at 821-23. *See also* Pugh & Carver, *supra* note 80, at 26-27.

101. One commentator has noted that this "treatment" model, which came into vogue in the late nineteenth-century, coincided with the development of the social and psychological sciences. With this model came the need for reliance on "expert" social scientists. This in turn shaped the form of the sentencing hearing:

> The expertise relevant to sentencing was not that of the judge but that of the "expert" social scientist, who could function more conveniently in an administrative than a judicial forum. To obtain maximum benefit from the contribution social experts could make, a court acting as a sentencing tribunal should therefore adapt its procedures to the needs of the experts, giving sentencing the character of an administrative rather than a judicial

dants. Rehabilitation, rather than retribution, was the predominant goal.[102] Relaxed due process requirements governing the consideration of sentencing information were deemed critical by the *Williams* Court to implement this philosophy of sentencing.

Under the new guideline sentencing system, rehabilitation is no longer the predominant goal of sentencing,[103] and individualized sentencing discretion is virtually eliminated.[104] As Representative John Conyers, who chaired the Subcommittee on Criminal Justice of the House Committee on the Judiciary, has observed:

> The Court's reasoning in *Williams* relied heavily on the increasing pervasiveness of indeterminate sentencing and of reliance on rehabilitation as the justification for punishment. Extensive judicial discretion and reliance on the subjective observations of the sentencing court played a critical role in such a sentencing scheme. The premises of the Sentencing Reform Act are diametric to this philosophy.[105]

Given the direct impact that factfinding has on sentencing under a guideline system, and the absence of the need for broad "treatment" information, the interest in accuracy should now predominate over the interest in full information that prevailed in *Williams*.

The due process argument for full PSI disclosure under a guideline sentencing system draws additional force from the Supreme Court's decisions in *Kent v. United States*[106] and *Specht v. Patterson*.[107] In *Kent*, the Court held that in proceedings to determine whether to try a juvenile for alleged offenses in adult court, the juvenile was entitled to a hearing, including access to the social records and probation reports on which the court would rely in making the determination.[108] Although

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> proceeding. If the new sentencing process were to operate efficiently, the presentation of information to the sentencing tribunal should not be impeded by legal concepts of admissible evidence. Nor was the legal method of adversary procedure thought suitable to the scientific investigation to be conducted.

Due Process at Sentencing, *supra* note 80, at 824.

102. *See Williams*, 337 U.S. at 248; *Due Process at Sentencing*, *supra* note 80, at 823-24; Katkin, *supra* note 80, at 15; *Disclosure of Presentence Reports*, *supra* note 80, at 1528; Note, *supra* note 6, at 1225.

103. Rehabilitation is explicitly rejected by the Comprehensive Crime Control Act as an objective to be served by a sentence to prison. 28 U.S.C. § 994(k) (1982 & Supp. 1987) directs that: "The [Sentencing] Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment."

104. *See supra* notes 21-26 and accompanying text.

105. Conyers, *supra* note 31, at 69.

106. 383 U.S. 541 (1966).

107. 386 U.S. 605 (1967).

108. *Kent*, 383 U.S. at 557.

the decision rested upon an interpretation of the juvenile waiver statute, the Court concluded that "[w]e believe that this result is required by the statute read in the context of constitutional principles relating to due process and the assistance of counsel."[109] If due process requires full disclosure in this context, it is difficult to understand why it requires any less in the adult guideline sentencing context, where the consequences of misinformation are more direct and potentially far graver.

Specht involved a state sex offender act that permitted a sentencing judge to sentence the defendant to an indeterminate term of from one day to life if the judge found that the defendant constituted a threat of bodily harm to members of the public or was a habitual offender and mentally ill.[110] The statute required a psychiatric examination and report but did not allow the defendant access to the report or a hearing. The Court observed that this procedure required the judge to make a post-conviction finding of fact for sentencing purposes on a matter that was not an ingredient of the offense charged.[111] The Court concluded that with respect to this separate finding, due process required that the defendant be accorded the full range of due process rights, including that he "be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own."[112]

Like the statute in *Specht*, the sentencing guidelines require findings of facts on matters that are not ingredients of the offense charged.[113] Thus, under the guidelines, defendants should have the full panoply of due process rights required in *Specht*. A prerequisite to such confrontation and cross-examination rights is an opportunity to review all information in a PSI.

Under traditional due process analysis, determining what process is due requires a balancing of several factors, including (1) the nature of the individual interest; (2) the risk of an erroneous deprivation of that interest through the procedure used; (3) the value of additional safeguards; and (4) the government's interest.[114] Applied here, these factors support the due process right to full disclosure.

The first factor, the nature of the individual's interest, weighs heavily in favor of disclosure. The defendant's "interest in his sentence could

109. *Id.*

110. *Specht*, 386 U.S. at 607 (citing COLO. REV. STAT. §§ 39-19-1 to 10 (1963)).

111. *Id.* at 608.

112. *Id.* at 610. *See also* Oyler v. Boles, 368 U.S. 448, 449-52 (1962) (state statute providing for a mandatory life sentence upon finding that defendant had been convieted of two prior felonies required factfinding on issues independent of underlying guilt determination, and thus due process required notiee and an opportunity to be heard on the enhancement issue).

113. *See supra* notes 29-30 and accompanying text.

114. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

not be greater because his sentence determines in large measure his future liberty."[115]

Likewise, the second factor, the risk of an erroneous deprivation, tilts the equation in favor of disclosure. Without an opportunity for the defendant to review the confidential portions of a PSI, errors and bias will likely go undetected, possibly resulting in substantial consequences on the sentence imposed. Rule 32's requirements for summarizing nondisclosed information simply cannot adequately alert the defendant to the possible errors or bias. Indeed, the Advisory Committee on the federal rules has recognized that "[t]he best way of insuring accuracy is disclosure."[116] Fennell and Hall's 1980 empirical study of PSI uses and practices led them to conclude that forty-three percent of judges fail to summarize adequately undisclosed information relied on in sentencing.[117] The appellate courts have struggled to impose meaningful standards by which to judge the adequacy of trial court summaries of nondisclosed material under Rule 32.[118] The reality is that for most information, a summary cannot provide enough information to enable meaningful scrutiny. Diagnostic opinions and clinical evaluations, in particular, which comprise one remaining Rule 32 exemption, "are generally unverifiable without knowledge of the expert's credentials and the basis for his assessment of the defendant."[119]

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115. United States v. Lee, 818 F.2d 1052, 1055 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 350 (1988).

116. FED. R. CRIM. P. 32(c) advisory committee notes to 1974 amendment.

117. Of the responses to their survey of district court practices when dealing with nondisclosed portions of the PSI, 30.8% of the judges followed a practice of not disclosing a summary for at least one category of information, 21% followed a standard practice of nondisclosure, and 12.5% followed a practice of merely indicating receipt of confidential information but not the nature of that information. Fennell & Hall, *supra* note 5, at 1663.

118. *See, e.g.*, United States v. Woody, 567 F.2d 1353 (5th Cir.), *cert. denied*, 436 U.S. 908 (1978); United States v. Scalzo, 716 F.2d 463 (7th Cir. 1983); United States v. Muniz, 569 F.2d 858 (5th Cir. 1978).

119. Fennell & Hall, *supra* note 5, at 1630. *See also* Campbell, *Sentencing: The Use of Psychiatric Information and Presentence Reports*, 60 KY. L.J. 285, 311 (1972). In one LAIP case, for example, the sentencing judge recommended against parole on the basis of an undisclosed psychological evaluation that the judge summarized as containing the conclusion that the defendant had a propensity for violence. On the basis of the judge's summary, the Parole Commission denied parole, even though the inmate had no record of violent behavior prior to his present offense. Without access to the psychological evaluation there was no way to ascertain whether the report actually concluded that the inmate had such a propensity, or to challenge the bases for that conclusion.

The manual instructing probation officers on how to prepare PSIs does little to allay concerns about the inadequacy of the summaries of nondisclosed information. The manual provides an example of how a summary of withheld information should be drafted. Unfortunately, the summary set forth as a model for probation officers provides so little information that it would be useless to a defendant in verifying the withheld information. The manual presents a five-paragraph segment of nondisclosed material that includes information provided by the defendant's wife and psychologist indicating that the defendant suffered from sexual difficulties, tension, insomnia and unusual behavior. The report further describes the breakup of the defendant's marriage and an

The third element in the due process balancing, the value of additional safeguards, also weighs heavily in favor of disclosure. It is a basic notion in the adversary system that the adequacy of factfinding mechanisms depends on the ability of both sides to scrutinize and challenge the evidence which the opponent relies upon. As the Supreme Court has observed in the civil context, where the consequences of an erroneous determination are less severe than the deprivation of liberty at risk in an erroneous sentencing decision:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.[120]

The final factor, the government's interest, is not strong enough to override the defendant's interest in full disclosure. Indeed, in many ways the government shares in the interest in full disclosure.

Although the opponents of disclosure have posited numerous arguments to support confidentiality of the report,[121] most of those arguments have already been rejected through the gradual expansion of the disclosure requirements under Rule 32. For example, fears that disclosure of the PSI would lead to unnecessary delays in the sentencing process and the drying up of sources of information—two frequently cited objections to disclosure—have failed to materialize with the nearly full disclosure under Rule 32.[122] In any event, the guideline system already necessarily envisions an expanded sentencing proceeding to resolve the factual issues required for application of the guidelines.[123]

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incident in the county jail when the defendant was a victim of a homosexual assault. The report concludes with the psychologist's assessment that the defendant is not overtly homosexual, but that his sexual orientation is ambiguous, and that he suffers from complete sexual dysfunction. The entire model summary of this information reads as follows: "The court has received information about experiences of the defendant while previously incarcerated which caused him to have serious emotional problems. Subsequent psychological examination confirmed this existence." PSI REPORT, *supra* note 8, at 61.

120. Greene v. McElroy, 360 U.S. 474, 496 (1959). *Greene* involved the withholding of information relied upon in proceedings for revocation of an engineer's security clearance.

121. *See supra* note 42 and accompanying text.

122. *See* Fennell & Hall, *supra* note 5, at 1686, 1689 (amount of information available to court has not changed significantly due to mandatory disclosure, and fears that disclosure would lengthen the sentencing process appear to have been groundless).

123. The commentary to section 6A1.3 of the SENTENCING GUIDELINES, *supra* note 26, observes that under the guidelines:

> [t]he court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair. Although lengthy sentencing hearings should seldom be necessary, disputes about sentencing factors must be resolved with

Moreover, the necessity of maintaining confidentiality exceptions is doubtful in light of the way probation officers and courts have used the exemptions. As Fennell and Hall have observed, the remaining confidentiality exceptions serve two main purposes: (1) to assure the continued availability of information obtained upon a promise of confidentiality by assuring individual sources that they will not be subject to retaliation; and (2) to prevent release of diagnostic information that could be harmful to the defendant or disrupt rehabilitation if disclosed.[124] Thus, Fennell and Hall conclude that to be true to these purposes, most nondisclosed information should concern either (1) the defendant's relations with his or her family or other private individuals, where reprisal for providing information is a possibility; or (2) professional mental health opinions.[125] They found, however, that in fact law enforcement investigative information—which should not satisfy the criteria for nondisclosure—is the most frequent type of information held confidential.[126] Moreover, they found that forty percent of the probation officers surveyed did not report submitting any confidential information, while only twenty-eight percent of the probation officers accounted for eighty-four percent of the reports with confidential information.[127] This data suggests that a large number of probation officers believe that the confidentiality exceptions are not necessary or important. More recently, informal reports from various probation offices confirm that in fact most of the confidentiality provisions are rarely used.[128]

Under current practice it appears that the information most frequently withheld from the defendant is the probation officer's sentence recommendation.[129] The primary rationale for withholding this information is the fear that disclosure of the sentence recommendation will interfere with the relationship between the officer and the defendant

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care. When a reasonable dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. . . . An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues.

124. Fennell & Hall, *supra* note 5, at 1655.

125. *Id.*

126. *Id.* at 1656. Nondisclosure of law enforcement investigative material is particularly troubling given that law enforcement information often contains unsubstantiated labels of defendants (for example, "major drug supplier" or "organized crime member"), often is not independently verified by probation officers, and often is not impartial. *Id.* at 1656-58.

127. *Id.* at 1653.

128. Telephone interviews with Frank Schwartz, Deputy Chief Probation Officer, Southern District of Florida (Feb. 9, 1989); Esther Davis, Duty Officer, United States Probation Office, Northern District of California (Feb. 9, 1989); Thomas Downey, Supervising Probation Officer, Southern District of New York (Feb. 7, 1989); Trudy Schmidt, Chief Probation Officer, Eastern District of Wisconsin (Oct. 7, 1988); Jack Verhagen, Chief Probation Officer, Western District of Wisconsin (Oct. 7, 1988) [hereinafter Probation Officer Interviews].

129. *See supra* note 128.

during probation or parole supervision.[130] The validity of this concern, however, is suspect. The probation officer's relationship with the defendant is inherently somewhat adversarial, regardless of whether the defendant has seen the sentence recommendation. The probation officer is responsible for policing the individual's behavior on parole or probation and for initiating revocation proceedings for violations of the terms of supervision.[131] Thus, many defendants inevitably view the relationship with caution. Moreover, if the sentence recommendation is harsh, it is likely that the body of the PSI will contain substantial negative information. Concealing the final recommendation is therefore unlikely to protect the probation officer from the defendant's dissatisfaction.

The experience in jurisdictions that routinely disclose the sentence recommendation confirms that the fear that disclosure will interfere with parole or probation supervision is unfounded.[132] Indeed, where disclosure is the practice, probation officers and administrators often

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130. *Id.* The Advisory Committee has previously cited this as the sole reason to justify nondisclosure of the sentence recommendation, stating that disclosure "may impair the effectiveness of the probation officer if the defendant is under supervision on probation or parole." FED. R. CRIM. P. 32 advisory committee notes to 1974 amendments.

Courts have sustained nondisclosure of the sentence recommendation against due process challenges by reasoning that the recommendation contains only the probation officer's subjective judgment, not facts. *See, e.g.*, United States v. Headspeth, 852 F.2d 753, 755 (4th Cir. 1988). But the sentence recommendation often carries great weight with the sentencing court. *See* Note, *supra* note 6, at 1228 ("judges frequently adopt the probation officer's own synthesis of this information—the sentence recommendation"); *Sentencing Reform, supra* note 31, at 1369 (judges generally follow the PSI sentence recommendation). Discovering the recommendation, and probing and challenging its bases, may be essential to a meaningful opportunity to be heard at sentencing, especially in those cases when bias or factual misunderstandings underlie the recommendation. *See* AMERICAN BAR ASSOCIATION, 3 STANDARDS FOR CRIMINAL JUSTICE § 18-5.1, at 344-45 (2d ed. 1980) (some probation officers have a prosecutorial bias); *Sentencing Reform, supra* note 31, at 1395-96 (probation officers feel "pressure to extrapolate adverse conclusions about the offender from relatively tenuous informational resources" and have a "preoccupation with adverse information").

131. *See* 18 U.S.C. § 3603(6) (Supp. 1987); 18 U.S.C. § 4203(b)(4) (1982); 28 C.F.R. § 2.38(a) (1988); 28 C.F.R. § 2.44 (1988).

132. For example, in Wisconsin all information in the PSI must be disclosed to the defense except, under certain circumstances, the identity of persons who provided information in the PSI. *See* WIS. STAT. § 972.15 (1987-1988); WIS. ADMIN. CODE §§ HSS 328.27(3)(c), 328.28, 328.29 (April 1986). The general consensus among corrections administrators and probation officials is that disclosure of the sentence recommendation does not impair the supervisory relationship. To the contrary, it is viewed as a positive factor in that relationship. Telephone interview with Walter Dickey, former Administrator of the Wisconsin Division of Corrections (Apr. 14, 1989); telephone interview with Bill Grosshans, Social Service Supervisor (probation officer supervisor), Bureau of Community Corrections, Wis. Division of Corrections (Apr. 14, 1989); telephone interview with Dan Nevers, former probation officer and current Assistant Regional Chief, Southern Region Bureau of Community Corrections, Wis. Division of Corrections (Apr. 14, 1989). Similarly, Fennell and Hall have observed that:

> In general, we found that disclosure [of the PSI] has been achieved without the serious repercussions predicted by opponents of the mandatory diselosure rule . . . . To the contrary, mandatory disclosure has had a positive impact on many aspects of the

believe that full disclosure enhances, rather than impedes, development of a positive supervisory relationship. Full disclosure of the probation officer's recommendation fosters honesty and openness, important ingredients in successful parole or probation supervision.[133] Disclosure also helps ensure that the defendant understands why a particular sentence or condition of probation is imposed.[134] Concealing the sentence recommendation, however, may actually damage the supervisory relationship by generating suspicion and distrust.[135]

Nondisclosure of the sentence recommendation is especially indefensible under the guideline sentencing system. Under a guideline system, the entire PSI is in a sense a sentence recommendation, since it represents the probation officer's judgment about how the guidelines should be applied to the case.[136] Given this structure and function of the PSI, it is difficult to understand how the ultimate sentence recommendation can be withheld without withholding important factual conclusions, or how withholding the recommendation will enhance the relationship between the officer and parolee or probationer.[137]

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presentence investigation and report, and, most important, it has brought greater objectivity to the entire sentencing process.

Fennell & Hall, *supra* note 5, at 1689.

133. Dickey interview, *supra* note 132; Grosshans interview, *supra* note 132; Nevers interview, *supra* note 132.

134. Grosshans interview, *supra* note 132.

135. Dickey interivew, *supra* note 132.

136. *See* FED. R. CRIM. P. 32(c)(2)(B)(1988). *See also supra* note 32.

137. Indeed, the Advisory Committee on the federal rules recognized this when it initially proposed deleting the disclosure exemption for the sentence recommendation under the guidelines. The original committee notes to the 1989 amendments explained:

> Because guideline sentencing requires the sentencing court to make findings as to the various faetors that affect sentencing, the Committee concluded that no good argument could be made to withhold from the defendant or the government the probation officer's recommendation, if any, as to sentenee. . . . [T]he parties should have an opportunity to address the recommendation and to challenge it if they so desire.

Rule 32 Amendments, *supra* note 58, Advisory Committee notes at 23. The Criminal Rules Committee, however, was deluged with letters from federal judges and probation officials urging that the disclosure exemption for the sentence recommendation be retained. Wright Letter, *supra* note 77. Under this pressure, the exemption was restored by the Standing Committee on Rules of Practice and Procedure in January 1989 by a five to four vote. Aecording to Professor Wright, the committee approved restoration of the sentence recommendation exemption "essentially without any discussion." *Id.* The Criminal Rules Committee report restoring the exemption came before the Standing Committee at the end of two days of dealing with other matters, when the committee was "short of time and tired and almost the only people left were federal judges who were sympathetic to the nondisclosure view." *Id.*

Nonetheless, some district courts are considering changes in local rules or practices to provide the recommendation to the parties under the guidelines. *E.g.*, United States v. Rogers, No. 88-CR-111-C-1 (W.D. Wis. Feb. 6, 1989) (Chief Judge Barbara Crabb's comments at sentencing that although the routine practice in her court had been to keep the sentence recommendation confidential, her policy would probably change under the guidelines to require disclosure of the recommendation). *See also* Judicial Conference of the United States, Committee on the Administration of the Probation System, *Recommended Procedures for Guideline Sentencing and Commentary*, in

According to federal probation officers, a second category of information that is most frequently withheld from disclosure is information that could harm the defendant if it became known in the prison, such as information about the defendant's cooperation in the prosecution of others.[138] Although concern about the defendant's well-being is important, it does not justify keeping that information from the defendant. In many instances that information may be sent to the prison even if labeled confidential; labeling portions of a PSI "confidential" simply means that the Bureau of Prisons will maintain the information in the privacy portion of the inmate's prison file, precluding its release to the inmate at the institution.[139] Therefore, making the information confidential will not necessarily protect the defendant from dangers in prison. Even if it is not sent to the prison, there should be no reason why it cannot be shared with the defendant at the time of sentencing. Protecting a defendant from harm from others in prison is an odd basis upon which to deny a defendant the right to see information about himself or herself at sentencing.

The government's interest in including psychological or psychiatric diagnostic opinions in the PSI but not disclosing them to the defendant is also weak. The Advisory Committee recognized the dangers of not disclosing such information but opted to propose no amendment to that disclosure exemption.[140] The Committee reasoned that such material "might be particularly useful when a court imposes probation, and might well be harmful to the defendant if disclosed."[141] The Committee further explained that "some of this material might assist correctional officials in prescribing treatment programs for an incarcerated defendant."[142] If, however, the Committee's concern is merely to allow consideration of this material to facilitate probation supervision and prison programming or treatment decisions, this could be accomplished without including the information in the PSI, where it could

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T. HUTCHINSON, & D. YELLEN, FEDERAL SENTENCING LAW AND PRACTICE 437 (1989) (Appendix 8) [hereinafter RECOMMENDED PROCEDURES FOR SENTENCING] (noting that under the guidelines the probation officer may be called to testify at sentencing and the nature of the sentence recommendation may become relevant on the issue of bias, necessitating its disclosure).

138. Probation Officer Interviews, *supra* note 128.

139. BUREAU OF PRISONS PROGRAM STATEMENT NO. 5800.3, at 14 (June 3, 1983).

140. Rule 32 Amendments, *supra* note 58, at ccxxvi.

141. *Id.* The committee's assumption that some mental health diagnostic opinions "might well be harmful to the defendant if disclosed," *id.*, is itself suspect. Recent mental health literature reveals disagreement over whether mental health records should ever be withheld from the subject of those records, and recent studies suggest that full disclosure of such records in forensic settings produces no significant problems. *See, e.g.*, Miller, Morrow, Kaye & Maier, *Patient Access to Medical Records in a Forensic Center: A Controlled Study*, 38 HOSP. & COMMUNITY PSYCHIATRY 1081 (1987) (reporting no adverse consequences from full diselosure and summarizing other studies with similar conclusions).

142. Rule 32 Amendments, *supra* note 58, at ccxxvi.

possibly prejudice the sentencing decision. The probation officer can simply keep such information separate from the PSI and retain it for use during probation or forward it separately to the Bureau of Prisons. Rule 32 could even be amended to provide a specific mechanism for such limited use of potentially harmful diagnostic material. The government's interest in keeping some types of this information from the defendant, if legitimate in any situation, does not support including that information in the materials considered ex parte at sentencing.

Finally, the government's interest in protecting sources of information from threats or harm from the defendant may in theory be its strongest interest in nondisclosure. But in practice very little information is made confidential on this basis.[143] The probation officers we consulted expressed the view that it is futile to attempt to keep this information confidential. Because most of this information comes from family members or friends, the summary of the nondisclosed information required by Rule 32 almost always gives the defendant enough clues to determine who the source is.[144]

In any event, the government's asserted interest in protecting confidential sources is undermined by the Supreme Court's holding in *Gardner*. The Court there explicitly rejected the state's contention that an assurance of confidentiality to potential sources of information is essential to enable investigators to obtain relevant but sensitive information. The Court stated:

> Assurances of secrecy are conducive to the transmission of confidences which may bear no closer relation to fact than the average rumor or item of gossip and may imply a pledge not to attempt independent verification of the information received. The risk that some of the information accepted in confidence may be erroneous, or may be misinterpreted by the investigator or by the sentencing judge, is manifest.[145]

The government's interest in nondisclosure is thus inadequate to override the other factors in the due process balancing test. Indeed, the government actually shares the defendant's interest in full disclosure. Because a primary objective of the guideline system is to eliminate sen-

143. Probation Officer Interviews, *supra* note 128. *See also supra* notes 125-27 and accompanying text.

144. Probation Officer Interviews, *supra* note 128.

145. Gardner v. Florida, 430 U.S. 349, 359 (1977). Likewise, the Advisory Committee notes to the 1989 Rule 32 amendments concede that "[i]nformation provided by confidential sources and information posing a possible threat of harm to third parties was particularly troubling to the Committee, since this information is often extremely negative and thus potentially harmful to a defendant." Rule 32 Amendments, *supra* note 58, at ccxxvi.

tencing disparity,[146] the government shares an interest in ensuring the accuracy of the sentencing facts and guidcline computation. Under the guidelines, inaccurate facts translate directly into inappropriate sentences,[147] thereby creating unwarranted disparities among defendants. The government also has an interest in preventing the waste of resources occasioned by appellate reversals of sentences, or by post-conviction litigation over withheld and allegedly false PSI information. Full disclosure can help ensure that sentencing disputes are resolved at the district court level.

In addition, correctional authorities have an interest in full disclosure of the PSI. The correctional system inevitably suffers when it has to deal with individuals who feel they were sentenced unfairly on the basis of withheld information.[148] Moreover, to the extent that correctional custody and programming decisions are based on the PSI,[149] the government has an interest in ensuring that these decisions are based on accurate information. Given these considerations, the government can have little real interest in withholding PSI information from a defendant.

Thus, the balancing of interests under a due process analysis strongly supports the conclusion that nondisclosure of any portion of the PSI violates due process. Moreover, the risks of nondisclosure—both to the defendant and the government—are so profound that full disclosure should be required as a matter of policy. Regardless of whether the Constitution requires full disclosure, Rule 32 should be amended to mandate disclosure of all sentencing material.

B. PSI Correction

1. A STANDARD OF PROOF FOR PSI CORRECTION

At present, there is little statutory or rule-based guidance on how courts should go about resolving factual disputes involving information in the PSI relevant to sentencing. Rule 32 provides that prior to sentencing the court shall notify the parties of the probation officer's determination of the sentencing guideline range believed applicable to the defendant.[150] The rule further provides that, at the time of sentencing, the court shall afford the defendant and counsel an opportunity to com-

146. *See* 28 U.S.C. § 991(b)(1)(B) (Supp. 1987) (one of the primary purposes of the sentencing commission is to establish sentencing guidelines that "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparity among defendants. . .").

147. *See supra* note 31 and accompanying text.

148. Dickey interview, *supra* note 132.

149. *See supra* text accompanying notes 16-17.

150. FED. R. CRIM. P. 32(a)(1) (1988).

ment on the report and, in the court's discretion, to introduce testimony or other information.[151] The sentencing guidelines provide that the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, and that the court must follow the provisions of Rule 32.[152] Neither Rule 32 nor the sentencing guidelines, however, give any further guidance about what procedures should be used, or establish a standard of proof for resolving factual disputes.[153]

At a minimum, establishing a uniform standard of proof for resolving factual disputes is essential under the sentencing guidelines. Because sentencing facts must be established with accuracy for application of the guidelines and because one of the goals of the guideline sentencing system is to reduce unwarranted sentencing disparity, a standard applicable to all factual disputes that ensures a high level of accuracy ought to be mandated.

In the absence of such a standard, the courts in pre-guidelines cases had long imposed sentences on facts found without any prescribed standard of proof.[154] Where a standard of proof was articulated, the standard varied widely. The courts appeared to be split on which party had the burden of proof.[155] The standards enunciated ranged from requiring only "some minimal indicium of reliability [in the disputed information] beyond mere allegation,"[156] to proof by a preponderance of

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151. FED. R. CRIM. P. 32(c)(3)(A) (1988).

152. SENTENCING GUIDELINES, *supra* note 26, at § 6A1.3.

153. The sentencing guidelines do not explicitly address the issue of a standard or burden of proof, beyond stating merely that "[a]ny information may be considered, so long as it has 'sufficient indicia of reliability to support its probable accuracy.' United States v. Marshall, 519 F. Supp. 751 (D. Wis. 1981), *aff'd*, 719 F.2d 887 (7th Cir. 1983); United States v. Fatico, 579 F.2d 707 (2d Cir. 1978)." SENTENCING GUIDELINES, *supra* note 26, commentary to § 6A1.3.

The Supplementary Report on the Initial Sentencing Guidelines and Policy Statements explains that the Sentencing Commission intentionally opted to leave it to the courts to establish sentencing procedures, including the standard and burden of proof to be employed:

> With respect to sentencing issues that are genuincly disputed, the Commission chose simply to emphasize the importance of accuracy and fairness. Especially in light of questions that have been raised regarding the Commission's power to prescribe enforceable rules for dispute resolution, most of the procedural details are left for resolution by the sentencing court in light of the nature and importance of the particular issue and the context in which it arises. Existing precedent will provide some guidance; more extensive precedent will develop as the issues become more sharply defined in context.

U.S. SENTENCING COMMISSION, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 46-47 (June 18, 1987). The Commission specifically left for court resolution such issues as "[w]hich party bears the burden of persuasion?" and "[w]hat is the weight of the burden of persuasion." *Id.* at 47 n.79.

154. *See* McMillan v. Pennsylvania, 477 U.S. 79, 91-92 (1986).

155. *See* United States v. Strayer, 846 F.2d 1262, 1267 n.5 (10th Cir. 1988) (citing cases).

156. United States v. Ibarra, 737 F.2d 825, 827 (9th Cir. 1984); United States v. Catch the Bear, 727 F.2d 759, 761 (8th Cir. 1984). *See also* United States v. Mealy, 851 F.2d 890, 906 (7th Cir. 1988); United States v. Restrepo, 832 F.2d 146, 147 (11th Cir. 1987) (requiring only "some reliable proof").

the evidence,[157] to no set standard but a holding that proof beyond a reasonable doubt is not required.[158] Other opinions and commentators suggested that a standard of clear and convincing evidence should be adopted as a matter of policy and would be consistent with the Supreme Court's holdings in other contexts.[159]

In *McMillan v. Pennsylvania*,[160] the Supreme Court held that in making findings for sentencing purposes, the preponderance of the evidence standard comports with due process.[161] Although *McMillan* holds that the preponderance standard meets constitutional muster, it does not decide that this is the standard that federal courts should utilize. That policy decision should be made through a further amendment to Rule 32. Otherwise, the issue will likely be resolved by case law analysis establishing only a standard that will minimally satisfy due process, without a complete analysis of what standard would be best to use under the federal guideline system.

Indeed, this is precisely what has begun to happen. The first cases addressing the burden of proof issue under the sentencing guidelines have attempted to do no more than discern what standard of proof is constitutionally mandated. In *United States v. Silverman*,[162] for example, the district court looked to *McMillan* and its progeny to conclude that the preponderance standard should be utilized under the guidelines, because due process requires no more.[163] The court's opinion highlights the need for a rule-based decision on the issue. The court stated: "In light of the lack of an express statute or provision in Fed. R. Crim. P. 32 governing the burden of proof and considering the comments of the Supreme Court in *McMillan*, it may be that no particular burden of proof need be established for sentencing proceedings."

157. United States v. Lee, 818 F.2d 1052, 1057 (2d Cir.), *cert. denied*, 108 S. Ct. 350 (1987).

158. United States v. Pugliese, 805 F.2d 1117, 1125 (2d Cir. 1986).

159. *See Lee*, 818 F.2d at 1058 (Oakes, J., concurring); Note, *supra* note 6, at 1245 & nn.115-17; United States v. Johnson, 682 F. Supp. 1033, 1035 (W.D. Mo. 1988), *aff'd on other grounds sub nom.* United States v. Mistretta, 109 S. Ct. 647 (1989) (applying a preponderance of the evidence standard but noting that under the sentencing guidelines "there are strong policy arguments" for requiring the clear and convincing evidence standard).

160. 477 U.S. 79 (1986).

161. *Id.* at 84. Lower courts have also consistently held that the preponderance standard comports with due process for making findings of aggravating factors under sentence enhancement statutes. United States v. Affleck, 861 F.2d 97, 99 (5th Cir. 1988); United States v. Darby, 744 F.2d 1508, 1537 (11th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985); United States v. Davis, 710 F.2d 104, 105-07 (3d Cir.), *cert. denied*, 464 U.S. 1001 (1983); United States v. Schell, 692 F.2d 672, 676-79 (10th Cir. 1982); United States v. Inendino, 604 F.2d 458, 463 (7th Cir. 1979), *aff'g*, 463 F. Supp. 252 (N.D. Ill. 1978), *cert. denied*, 444 U.S. 932 (1979); United States v. Williamson, 567 F.2d 610, 615 (4th Cir. 1977), *cert. denied*, 435 U.S. 906 (1978). *Contra*, United States v. Duardi, 384 F. Supp. 874, 882-85 (W.D. Mo. 1974), *aff'd on other grounds*, 529 F.2d 123 (8th Cir. 1975).

162. 692 F. Supp. 788 (S.D. Ohio 1988).

163. *Id.* at 791.

Therefore, the court reasoned, a preponderance standard was the most that it would require.[164]

An amendment to Rule 32 or the sentencing guidelines is therefore necessary to establish a standard of proof for resolving factual disputes under the sentencing guidelines. The rules should place the burden of proof on the government to prove disputed facts by clear and convincing evidence. Such a standard is appropriate and commonly required when a liberty interest is at stake to minimize the risk of erroneous deprivations.[165] As the Supreme Court has held, "[t]he individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state."[166] Under a guidelines sentencing system, in which sentencing factfinding is often the most critical stage in determining an individual's future liberty, no lesser standard should be countenanced.

2. COURT DISCLAIMER OF DISPUTED INFORMATION

Rule 32(c)(3)(D) currently gives a court two options if a defendant challenges information in his or her PSI at sentencing. The court may either make a written finding on the disputed information or provide a written statement that it will not rely on the disputed information in sentencing. The finding or statement must then be appended to the PSI.[167] The new Rule 32 amendments make no change in this proce-

164. *Id. See also* United States v. Urrego-Linares, 879 F.2d 1234 (4th Cir. 1989) (the preponderance standard satisfies due process for sentencing factfinding under the guidelines and policy considerations do not require any higher standard); *Johnson*, 682 F. Supp. at 1035 (although "there are strong policy arguments and possibly constitutional arguments" for requiring the clear and convincing evidence standard under the guidelines, the court would continue to apply the preponderance of evidence standard "[a]bsent appellate guidance to the contrary"); United States v. Dolan, 701 F. Supp. 138 (E.D. Tenn. 1989) (the preponderance standard satisfies due process for sentencing factfinding under the guidelines); United States v. Landry, 709 F. Supp. 908 (D. Minn. 1989) (same); United States v. Kikumura, 706 F. Supp. 331, 345 (D.N.J. 1989) (same); United States v. Bennett, 716 F. Supp. 1137 (N.D. Ind. 1989). *But see* United States v. Davis, 715 F. Supp. 1473 (C.D. Cal. 1989) (sentencing factfinding under the guidelines violates due process under any standard less stringent than proof beyond a reasonable doubt).

165. *See, e.g.*, Addington v. Texas, 441 U.S. 418, 427 (1979) (involuntary civil commitment); Santosky v. Kramer, 455 U.S. 745, 756 (1982) (termination of parental rights). Under the guidelines the courts have generally put the burden of proof on the government but have held that the defendant bears the burden of proving certain facts offered to mitigate the sentence. *E.g.*, *Urrego-Linares*, 879 F.2d at 1234; United States v. Lovell, 715 F. Supp. 854 (W.D. Tenn. 1989). The Federal Rules Committee has agreed with this approach, suggesting that generally the government bears the burden, but the defendant may "have the burden of proving the faets necessary to obtain a reduced offense level or a sentence below the guideline range." RECOMMENDED PROCEDURES FOR SENTENCING, *supra* note 137, at 438.

166. *Addington*, 441 U.S. at 427.

167. FED. R. CRIM. P. 32(c)(3)(D).

dure.[168] Thus, the courts will be allowed to disclaim PSI information even under the new sentencing guidelines. While it is less likely that courts will disclaim PSI information under the guidelines, given the streamlined format of guideline PSIs,[169] nothing in Rule 32 prevents them from doing so.

The Advisory Committee's note to Rule 32(c)(3)(D) explains that the purpose of this procedure is to "ensure that a record is made as to exactly what resolution occurred as to controverted matter" and to "ensure that this record comes to the attention of the Bureau [of Prisons] or [Parole] Commission when these agencies utilize the presentence investigation report."[170] Courts frequently quote the Advisory Committee's admonishment that there should be a "resolution of factual disputes" in PSIs.[171]

Rule 32(c)(3)(D), however, allows sentencing courts to avoid any resolution of disputed information in PSIs by claiming that they will not rely on the information in sentencing.[172] This aspect of Rule 32(c) can cause problems for a defendant both at sentencing and later. The disputed allegations on which the sentencing court chooses not to rely remain in the PSI, and the Bureau of Prisons and Parole Commission may treat those allegations as fact in making their own determinations.[173]

Although Rule 32(c)(3)(D) allows the sentencing court to disclaim contested material for sentencing purposes, it is rather disingenuous for a court to claim that it is not relying on the contested information. First, courts depend heavily on the sentencing recommendations of

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168. *See supra* text accompanying notes 49 & 57-61.

169. *See supra* note 28.

170. FED. R. CRIM. P. 32(c)(3)(D) advisory committee notes to 1983 amendments.

171. *See, e.g.*, United States v. Hornick, 815 F.2d 1156, 1159 (7th Cir. 1987); United States v. Lawal, 810 F.2d 491, 493 (5th Cir. 1987); United States v. Mischler, 787 F.2d 240, 246 (7th Cir. 1986); United States v. Ursillo, 786 F.2d 66, 71 (2d Cir. 1986).

172. FED. R. CRIM. P. 32(c)(3)(D)(ii). Courts are often very reluctant to make factual findings on information in PSIs. In United States v. Hill, 766 F.2d 856, 858 (4th Cir.), *cert. denied*, 474 U.S. 923 (1985), for example, the Court of Appeals for the Fourth Circuit stated that Rule 32(c)(3)(D) does not require the district court "in each case to make a finding that the controverted fact is either true or not true, but it is neeessary for the district court to say how it treats the controverted fact in sentencing." *Id.* at 858. In other words, according to the Fourth Circuit, a "finding" under Rule 32(c)(3)(D) is simply a statement of how a court treated the disputed information in sentencing! A similar reluctance to make a finding was shown by the sentencing court in Kramer v. United States, 798 F.2d 192 (7th Cir. 1986). On a remand to the sentencing court to resolve the accuracy of a disputed IRS tax estimate in the defendant's PSI, the sentencing court "found" that it was "accurate" to say that the IRS did indeed believe that there was a $320,000 tax liability; but the court failed to "find" whether the estimate itself was accurate. *Kramer*, 798 F.2d at 194.

173. *See* Levesque v. Brennan, 864 F.2d 515, 518-20 (7th Cir. 1988) (Parole Commission is free to make its own determination on facts disclaimed for sentencing purposes by sentencing court); Kramer v. Jenkins, 803 F.2d 896, 900 (7th Cir. 1986) (same); Ochoa v. United States, 819 F.2d 366, 372 (2d Cir. 1987) (same).

probation officers, and these recommendations, in turn, are based on the entire contents of the PSI.[174] Second, under indeterminate sentencing, courts often rely on an estimate of a defendant's parole guidelines.[175] Thus, the courts unconsciously consider all the information the Parole Commission will use in computing parole guidelines—information that may be based on the entire PSI.

Rule 32(c), therefore, should be further amended to require the sentencing court to make factual findings on all disputed issues relevant to both sentencing and correctional uses of the PSI. Although such a procedure may prolong the sentencing hearing, it will save litigation later.[176] Furthermore, the defendant is unlikely to make too many frivolous challenges, for fear of alienating the sentencing judge by prolonging the hearing.[177] Any disputed information that the court finds immaterial to sentencing and corrections should be excised from the report. It is important that the PSI be altered to incorporate the court's deletions and factual findings; otherwise, inaccurate information remaining in the PSI may affect a reader despite an appended correction

174. Fennell & Hall, *supra* note 5, at 1627. In other contexts, the Supreme Court has not allowed a sentencing court's disclaimer of sentencing information to be dispositive. In Santobello v. New York, 404 U.S. 257, 262 (1971), for example, the Court held that the sentencing court's claimed nonreliance on a prosecutor's sentence recommendation did not obviate the need for resentencing when the recommendation violated a plea agreement promise to make no recommendation.

175. Note, *supra* note 6, at 1236. Nevertheless, although courts factor in parole guidelines when they determine sentences, the Supreme Court held in United States v. Addonizio, 442 U.S. 178, 190 (1979), that a change in Parole Commission policies which requires a defendant to stay in prison longer than the sentencing court expected does not render the sentence illegal or subject to collateral attack. The Court stated that a sentencing judge "has no enforceable expectations with respect to the actual release of a sentenced defendant short of his statutory term . . . . [W]e hold that subsequent actions taken by the Parole Commission . . . do not retroactively affect the validity of the final judgment itself." *Id.* at 190. Accordingly, the appellate courts have ruled that a defendant has no recourse under 28 U.S.C. § 2255 (the habeas corpus analogue for federal prisoners) when the sentencing court relies on an incorrect estimate of parole guidelines prepared by the probation officer. *See, e.g.*, United States v. Coyer, 732 F.2d 196 (D.C. Cir. 1984).

176. Professor Frank J. Remington suggests that the district courts have legitimate fears of being inundated with requests to change minor details in PSIs. But he also notes that requiring courts to expunge disputed yet marginally relevant materials from PSIs at sentencing would minimize such problems after sentencing. Interview with Professor Frank J. Remington, University of Wisconsin Law School (Oct. 12, 1988). Moreover, the vast amount of litigation contesting the proper procedure for PSI corrections indicates that the creation of procedural barriers to such motions has not saved the courts much time or energy. *See supra* note 74.

177. Most defendants plead guilty, hoping that they will get a break at sentencing if they save the court the time and trouble of a trial. In this setting, the defendant would be unlikely to raise challenges to facts in the PSI beyond those of some significance that he or she could prove incorrect. *See* Guzman, *supra* note 80, at 169-70.

or disclaimer.[178] As Wayne Levesque's experience demonstrates,[179] the Parole Commission has not proved particularly receptive to court directions to amend or ignore information in a PSI. In this age of word processors, it is reasonable to require the probation officer to revise the PSI to incorporate the sentencing court's deletions and findings of fact.

3. CORRECTION OF THE PSI AFTER SENTENCING

Following sentencing, a defendant may wish to correct errors remaining in the PSI. Under either an indeterminate sentence or a guideline sentence, errors may remain in the PSI that had no effect on the sentencing decision, but that might affect subsequent correctional decisions.[180] Recent case law indicates that under the present language of Rule 32, the defendant's chances of getting the PSI corrected are minimal. It is unlikely that the defendant will find any tribunal willing to accept jurisdiction to correct the PSI.

For several reasons, disputed information may remain in a PSI after sentencing. As already discussed, the sentencing court may simply disclaim reliance on the information and decline to resolve the dispute. In addition, the defendant might not challenge all disputed apsects of the PSI at the sentencing hearing. First, the defendant may think that there is no point in correcting the PSI, particularly when there is a plea bargain and the defendant is expecting an agreed-upon sentence. Second, the defendant may feel that it is unwise to prolong the sentencing

178. Note, *supra* note 6, at 1238. Interestingly, the suggestion that findings should be made on all disputed matters in the PSI, and that the PSI should be altered to reflect those findings, was made by the majority of individuals and organizations that sent letters to the Advisory Committee on Rule 32 when the committee was considering the 1983 amendments. These proponents included the Criminal Law Committee Association of the Bar of the City of New York; the California State Bar Federal Courts Committee; the Jerome N. Frank Legal Services Organization of the Yale Law School; the Criminal Justice Seetion of the American Bar Association; Mr. Peter J. Hughes; and the San Diego Criminal Defense Lawyers Club. Letters to the Advisory Committee provided to the authors by Professor Frank J. Remington. The Advisory Committee failed to adopt the suggestion in 1983; the authors urge that it do so now. The State of Michigan has already established such a procedure for its courts. MICH. COMP. LAWS ANN. § 771.14(5) (West 1984).

The burden on the court of such a procedure need not be onerous. The courts have held that it is within the sentencing court's discretion to decide whether an evidentiary hearing is necessary when a defendant challenges information in a PSI. *See, e.g.*, United States v. Monaco, 852 F.2d 1143 (9th Cir.), *stay denied*, 109 S. Ct. 388 (1988); United States v. Peterman, 841 F.2d 1474 (10th Cir. 1988); U.S. v. Pettito, 767 F.2d 607 (9th Cir. 1985). In many cases, if the information is minor or truly irrelevant, and the sentencing court does not wish to take the time to adjudicate a dispute about it, the court can simply strike the information from the report. *See* United States v. Stout, 882 F.2d 270 (7th Cir. 1989). This procedure to establish the accuracy of PSI information may lengthen sentencing hearings; but in a criminal justice system in which the courts and correctional authorities base their decisions largely on the PSI, the time must be taken to get it right. *See supra* note 5 and accompanying text.

179. *See supra* notes 2-3 and accompanying text.

180. See the discussion of the court disclaimer, *supra* text accompanying notes 168-74, and the discussion of correctional uses of the PSI, *supra* text accompanying notes 16-20.

hearing, and possibly annoy the sentencing judge, by raising objections to information in the PSI that is not apparently relevant to sentencing. Third, since the sentencing court is not required to explain to the defendant that the PSI will be used as a basis for correctional decisions, the defendant may see no reason to object to any material not directly relevant to sentencing.

Once a sentence is imposed, however, it is nearly impossible for a defendant to have the PSI corrected.[181] The defendant may try to have the PSI corrected on direct appeal. The appellate courts will consider whether the district court complied with the requirements of Rule 32(c)(3)(D) and will remand if the district court failed to make the proper written findings or disclaimer of disputed information in the PSI.[182] Most courts, however, have allowed no PSI correction on appeal, holding that the only recourse is an administrative appeal with the Parole Commission.[183]

To get the PSI corrected in any other post-conviction forum, the defendant faces major jurisdictional obstacles. It might seem that the sentencing court is the logical tribunal to correct the PSI following conviction. Indeed, the PSI manual of the Administrative Office of the United States Courts states that if a defendant alleges that "critical decision-making data" in the PSI are in error, the defendant should write, with supporting evidence, to the probation officer who originally prepared the report.[184] Upon the direction of the sentencing court, the probation officer is required to send a letter to the federal prison system, the Parole Commission (for indeterminate sentences), and the defendant, stating the correction.[185] Thus, the manual views postsentencing PSI correction as properly venued in the sentencing court.

In a similar vein, the Parole Commission's General Counsel has stated that "[n]either the Commission's enabling statute nor its regula-

181. *See, e.g.*, United States v. Matlock, 786 F.2d 357, 361 (8th Cir. 1986); United States v. Legrano, 659 F.2d 17, 18 (4th Cir. 1981).

182. The leading cases include United States v. Lawal, 810 F.2d 491 (5th Cir. 1987); United States v. Eschweiler, 782 F.2d 1385 (7th Cir. 1986); United States v. Pettito, 767 F.2d 607 (9th Cir. 1985); United States v. Rone, 743 F.2d 1169 (7th Cir. 1984).

183. *See, e.g.*, United States v. Legrano, 659 F.2d 17, 18 (4th Cir. 1981). Yet at least one appellate court has emphasized a defendant's failure to appeal his sentence in affirming denial of the defendant's post-conviction motion to correct his PSI. United States v. Ursillo, 786 F.2d 66, 69 (2d Cir. 1986). *See also* United States v. Potamitis, 666 F. Supp. 43, 45 (S.D.N.Y. 1987). Other courts have stated that appeal is the best route to litigate sentencing matters. *See, e.g.*, United States v. Peloso, 824 F.2d 914, 915 (11th Cir. 1987); Johnson v. United States, 805 F.2d 1284, 1287 (7th Cir. 1986). It should be noted that even the limited option of an administrative appeal with the Parole Commission exists only for those defendants sentenced under indeterminate sentencing. Defendants sentenced under the guidelines receive no parole and hence have no recourse to the Parole Commission. *See supra* text accompanying notes 23-25.

184. PSI REPORT, *supra* note 8, at 18. It is not clear whether the "decision-making data" can be critical to correctional decisions or only to the sentencing decision.

185. *Id.*

tions give the inmate a right to have the Parole Commission correct alleged errors in the presentence report. The Commission believes that only the district court which utilized the presentence report has the authority to amend or correct the report."[186]

The courts, however, have refused to take jurisdiction over post-conviction challenges to the accuracy of PSIs. Defendants have tried a number of procedural avenues to have sentencing courts correct PSI information that is causing problems at the institution. Some have attempted to file a "Rule 32" motion for PSI correction. Most, courts, however, have held that Rule 32(c) provides no jurisdiction for a sentencing court to correct a PSI after sentencing.[187]

Some courts have allowed defendants to move for PSI correction under the guise of a motion for sentence correction or reduction under the old Rule 35, which was applicable to pre-guidelines sentences.[188] Rule 35, however, will not work in most cases. First, both the sentence correction provisions of Rule 35(a) and the sentence modification provisions of Rule 35(b) have been repealed and are not available under the guideline sentencing system.[189] Even in pre-guideline cases, in which these provisions are still applicable, Rule 35 usually will not work. The purpose of a Rule 35 motion is to change a sentence, not simply to correct information in the PSI. Even if a court allows a defendant to use Rule 35 to challenge the PSI, the Rule is an awkward mechanism for PSI correction. A Rule 35(b) motion for sentence reduction must be filed within 120 days of sentencing,[190] yet the defendant may not realize within this time that the PSI is causing problems at the institution. A Rule 35(a) motion to correct an illegal sentence, which has no time limit, is by definition confined to information upon which the court re-

186. Letter from Patrick J. Glynn, General Counsel to the U.S. Parole Commission, by Rockne Chickinell, to Law Student JoAnn Joncs of Legal Assistance to Institutionalized Persons (Dec. 4, 1986). Again, it should be stressed that whatever limited authority the Parole Commission might have to correct errors applies only to defendants sentenced under indeterminate sentencing. *See supra* note 183.

187. *See, e.g.*, United States v. Sarduy, 838 F.2d 157, 158 (6th Cir. 1988); United States v. Peloso, 824 F.2d 914, 915 (11th Cir. 1987); United States v. Fischer, 821 F.2d 557, 558 (11th Cir. 1987); United States v. Edwards, 800 F.2d 878, 883 (9th Cir. 1986); United States v. Burkhead, 567 F. Supp. 1425, 1427 (W.D. Mo. 1983); Ostrer v. Luther, 615 F. Supp. 1568, 1573 (D. Conn. 1985).

188. *See, e.g.*, United States v. Jones, 856 F.2d 146, 148 (11th Cir. 1988); United States v. Weichert, 836 F.2d 769, 772 (2d Cir. 1988); United States v. Katzin, 824 F.2d 234, 235 (3d Cir. 1987); Kramer v. United States, 798 F.2d 192, 193 (7th Cir. 1986); United States v. Castillo-Roman, 774 F.2d 1280, 1283 (5th Cir. 1985); United States v. Velasquez, 748 F.2d 972, 974 (5th Cir. 1984). These cases, however, involve an attack on the sentence itself; it is unlikely that a court would allow Rule 35 jurisdiction to correct items in the PSI unconnected to sentencing.

189. Comprehensive Crime Control Act of 1984, Pub. L. 98-473, reprinted in 1984 U.S. Code Cong. & Ad. News (98 Stat.) 1837.

190. FED. R. CRIM. P. 35(b), repealed and amended rule adopted, Pub. L. 98-473, reprinted in 1984 U.S. Code Cong. & Ad. News (98 Stat.) 1837.

lied in sentencing.[191] Yet, there may be information in the PSI that was not relevant to sentencing, but that is important to correctional decisions.

Many defendants have attempted to have their PSIs corrected through collateral attack by filing a motion in the sentencing court to vacate, correct, or modify a sentence pursuant to 28 U.S.C. section 2255. But most courts have followed the reasoning of the Court of Appeals for the Eighth Circuit in *United States v. Leath.*[192] In this 1983 case, the defendant filed a section 2255 motion alleging that misinformation in his PSI was affecting correctional decisionmaking. The Eighth Circuit held that the sentencing court has no jurisdiction under section 2255 to correct the PSI because a motion to correct a PSI on the grounds that it is causing problems in prison is a challenge to the execution of a sentence rather than to the sentence itself.[193] The *Leath* court held that the defendant must exhaust administrative remedies with the Parole Commission. Only if these proved unsuccessful could the defendant file a habeas corpus petition pursuant to 28 U.S.C. section 2241 in the federal district court in the district of confinement.[194] The habeas corpus petition would have to demonstrate a constitutional due process violation in the Parole Commission's use of inaccurate information in the PSI.[195] Because this is such a high standard, few section 2241 motions have succeeded. Furthermore, defendants sentenced under the guidelines do not have even this limited mechanism for correction, be-

191. FED. R. CRIM. P. 35(a), repealed and amended rule adopted, Pub. L. 98-473, reprinted in 1984 U.S. Code Cong. & Ad. News (98 Stat.) 1837.

192. 711 F.2d 119, 120 (8th Cir. 1983). The Seventh Circuit, for example, has adopted this approach in Johnson v. United States, 805 F.2d 1284, 1287 (7th Cir. 1986) and United States v. Mittelsteadt, 790 F.2d 39, 40-41 (7th Cir. 1986). The Ninth Circuit has held that a defendant must show a due process violation to get section 2255 jurisdiction. Jones v. United States, 783 F.2d 1477, 1481 (9th Cir. 1986).

193. *Leath*, 711 F.2d at 120.

194. *Id.* The Eighth Circuit itself appears to be retreating from its position in *Leath*. The court recently held that some Rule 32 violations are subject to collateral attack under section 2255, if they demonstrate a "fundamental defect which inherently results in a complete miscarriage of justice" or "an omission inconsistent with the rudimentary demands of procedure." Poor Thunder v. United States, 810 F.2d 817, 822 (8th Cir. 1987) (citing Hill v. United States, 368 U.S. 424, 428). While this is a very strict test, some PSI motions have passed it. The First Circuit, for example, allowed section 2255 jurisdiction for a PSI correction motion where the defendant alleged that the PSI had been altered after he read it. United States v. Mosquera, 845 F.2d 1122 (1st Cir. 1988).

It should be noted that several courts have tried to have it both ways, denying that they have jurisdiction to correct the PSI, while correcting it or ordering it amended anyway. *See, e.g.*, United States v. Fraser, 688 F.2d 56, 58 (8th Cir. 1982) (although denying the sentencing court section 2255 jurisdiction to correct the PSI, the appellate court ordered the Parole Commission to correct it); United States v. Burkhead, 567 F. Supp. 1425, 1429 (W.D. Mo. 1983) (while denying Rule 32 jurisdiction to correct the PSI, the sentencing court ordered the Parole Commission to correct it).

195. At least one such habeas petition based on an erroneous PSI has succeeded. Barton v. Lockhart, 762 F.2d 712 (8th Cir. 1985).

cause they have no recourse to the Parole Commission in the first place.[196]

Finally, even if the defendant does manage to clear these jurisdictional hurdles, the sentencing court is unlikely to correct the PSI. The court need only state that it did not rely on the disputed information in sentencing, and it is absolved of all responsibility under Rule 32(c)(3)(D) to make factual findings. The fact that the Bureau of Prisons and Parole Commission may use the information despite the court's disclaimer is dismissed as irrelevant.[197]

A defendant who wishes to have his or her PSI corrected thus faces a procedural nightmare. At the sentencing hearing, the defendant can attempt to challenge information that is "irrelevant" to sentencing, but he or she will probably find the challenge dismissed upon the court's statement of nonreliance. If, however, the defendant does not raise the objection at sentencing, he or she may find that any later challenge has been waived. Meanwhile, the disputed information remains in the PSI. Attempts to correct PSIs after sentencing through direct appeals, "Rule 32 motions," Rule 35 motions, or section 2255 motions have more often than not been dismissed for lack of jurisdiction.[198] Courts have stated emphatically that the inmate should raise the issue with the Parole Commission, but the Parole Commission has stated just as emphatically that only the sentencing court has jurisdiction to correct a PSI;[199] and in any case, the Parole Commission has no authority over defendants sentenced under the guidelines.

It makes little sense to assert, as the courts have done, that the Parole Commission is the proper tribunal for PSI correction. A parole hearing is a poor factfinding forum: it often takes place years after the incidents in dispute and may be in a different part of the country. The inmate is often unrepresented and has little power to compel testimonial or documentary evidence from the institution. Because the Supreme Court has held that an inmate is entitled to only limited process at a parole hearing, factfinding may be perfunctory.[200] Moreover,

196. *See supra* note 183.

197. Several circuits have held that the Parole Commission can base its decisions on information that the sentencing court disclaimed for sentencing purposes. Blue v. Lacy, 857 F.2d 479, 481 18th Cir. 1988); Levesque v. Brennan, 864 F.2d 515 (7th Cir. 1988); Kramer v. Jenkins, 803 F.2d 896, 900 (7th Cir. 1986); Ochoa v. United States, 819 F.2d 366, 372 (2d Cir. 1987). To reach this conclusion, the courts in *Blue* and *Ochoa* rejected dicta in Wixom v. United States, 585 F.2d 920, 921 (8th Cir. 1978), which stated that if the sentencing court had not relied on the information, it would be inappropriate for the Parole Commission to consider it.

198. *See supra* text accompanying notes 180-83, 188-96.

199. *See supra* text accompanying notes 186-87.

200. Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979). One author suggests that parole should be viewed as an extension of the sentencing process, and that the due process safeguards of sentencing, particularly the right to be sentenced on

after 1992, there will be no Parole Commission to do any factfinding at all.[201]

The district court in the inmate's district of confinement is similarly unqualified to resolve PSI disputes pursuant to a habeas corpus petition, because it is as far removed from the events underlying the disputes as is the Parole Commission. It makes much more sense for the court that directed the production of the PSI in the first place to undertake correction of the PSI later on.

The large amount of PSI litigation in the last five years indicates that Rule 32(c)(3)(D) has not achieved the resolution it sought. The "hybrid" character of the PSI and the ambiguity sanctioned by Rule 32(c)(3)(D) have allowed the courts and the Parole Commission to bounce a defendant's PSI correction motions back and forth between them. After months or years of PSI litigation, a defendant may find the motion for correction dismissed for being in the wrong forum. In the meantime, the defendant may have passed any parole date he or she would have had based on correct information. Such a situation can only undermine the integrity of the criminal justice system.

Additional amendments to Rule 32 would help to rectify this situation. First, the sentencing court should be required to explain the future correctional use of the PSI to the defendant before asking if he or she has any objections to the PSI.

Second, Rule 32 should establish a post-conviction procedure by which a defendant can file a motion for PSI correction with the sentencing court. Under present procedure, the defendant must demonstrate either an incorrect sentence or a due process violation simply to give a court jurisdiction to correct the PSI.[202] Rule 32 could grant jurisdiction to the sentencing court for a simple PSI correction motion. Under this procedure, the defendant should be directed to write to the probation officer who prepared the PSI, describing the inaccuracies that need correction and requesting that the probation officer prepare an amended copy of the PSI for use by the Bureau of Prisons and Parole Commission. If the defendant is not satisfied with the probation officer's response, Rule 32 should direct the defendant to file a post-conviction motion for PSI correction in the sentencing court. The motion would describe the claimed inaccuracy and explain the problem it is causing in the postsentencing context. The sentencing court should have discretion to decide whether an evidentiary hearing is necessary. If the court decides that the information is inaccurate, it should either amend or

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the basis of accurate information, should extend to parole hearings as well. Note, *supra* note 6, at 1238.

201. *See supra* note 35. This situation is true even now for defendants sentenced under the guidelines since they do not fall under the Parole Commission's jurisdiction.

202. *See supra* text accompanying notes 189-97.

expunge the information and should direct the Bureau of Prisons and Parole Commission to use the amended PSI.

A provision in Rule 32 for a post-conviction PSI correction motion would encourage the courts to make clear findings on the PSI at sentencing, because otherwise they might have to face the defendant again at a later date. More important, the sentencing court is the proper factfinder with respect to the PSI. If the PSI is inaccurate when it leaves the sentencing court, then it is only proper that the court should have jurisidiction to eliminate those inaccuracies.

V. CONCLUSION

With increasing awareness of the risks of error in both sentencing and correctional decisions from inaccurate PSI information, the Supreme Court and the Federal Rules Committee have gradually recognized a greater right to disclosure of the PSI. Recent amendments to Rule 32 take further steps in the direction of adequate access to the PSI. But even with these amendments (assuming that Congress does not alter them before they become effective on December 1, 1989) problematic exceptions to the disclosure rules remain, the standard of proof for factfinding at sentencing is unclear, and the procedures for correcting erroneous PSIs, both before and after sentencing, remain ambiguous and inadequate.

Additional amendments to Rule 32 are needed to remove all exceptions to the disclosure requirements and to establish effective mechanisms for hearing and resolving challenges to the accuracy of the PSI. Such measures would protect the defendant's liberty interest in having sentencing and correctional decisions based on accurate information and would help ensure that the criminal justice system functions fairly and effectively.

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