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THE CONTINUED FAILURE OF MODERN LAW TO CREATE FAIRNESS AND EFFICIENCY: THE PRESENTENCE INVESTIGATION REPORT AND ITS EFFECT ON JUSTICE

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I. THE PRESENTENCE INVESTIGATION REPORT AND RULE 32

In a criminal justice system permeated by guilty pleas,[1] the determination of the sentence imposed, rather than the determination of guilt, is often the most critical phase of evaluation in the criminal justice

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1. *See* GEORGE F. COLE, THE AMERICAN SYSTEM OF CRIMINAL JUSTICE 417 (6th ed. 1992); CHARLES H. WHITEHEAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE 625 (1993) (concluding that 90-95% of all cases are resolved through plea agreements).

process.[2] The key document at both the sentencing phase and during the correctional process is the defendant's presentence investigation report (PSIR).[3] The PSIR, prepared by a probation officer, presents the sentencing judge with relevant facts about the defendant and is intended to portray the defendant as a "living human being."[4] The PSIR has a significant influence not only on the sentence a judge may impose, but also on a defendant's correctional and post-incarceration life. The PSIR aids the probation officer in supervision efforts, and assists the Federal Bureau of Prisons in classifying defendants for security purposes.[5] When a defendant is in prison, the PSIR may be used to determine a defendant's "visitation, mail privileges, sentence credit, work study, and transfers."[6]

The PSIR is designed to be an objective and relatively exhaustive summary of a defendant's life and criminal history.[7] If used properly, it is a document that can improve the efficiency and fairness of the criminal justice system. Many amendments to the Federal Rules of Criminal Procedure (most recently in December, 1994) have permitted greater

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2. *See, e.g.*, United States v. Rosa, 891 F.2d 1074 (3d Cir. 1989) (concluding that the prior statements of witnesses testifying at a sentencing hearing must be disclosed to the defense under The Jencks Act, 18 U.S.C. § 3500 (1994)).

3. *See* Stephen A. Fennell & William N. Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 HARV. L. REV. 1613, 1616 (1980). *See generally* John C. Coffee Jr., *The Future of Sentencing Reform: Emerging Legal Issues in the Individualization of Justice*, 73 MICH. L. REV. 1361, 1369 (1975); Keith A. Findley & Meredith J. Ross, *Access, Accuracy and Fairness: The Federal Presentence Investigation Report Under* Julian *and the Sentencing Guidelines*, 1989 WIS. L. REV. 837 (1989); Christina Rush & Jeremy Robertson, *Presentence Reports: The Utility of Information to the Sentencing Decision*, 11 LAW & HUM. BEHAV. 147 (1987) (discussing in detail relevant issues surrounding the PSIR); Note, *A Proposal to Ensure Accuracy in Presentence Investigation Reports*, 91 YALE L.J. 1225 (1982).

4. Fennell & Hall, *supra* note 3, at 1627 (quoting J. HOGARTH, SENTENCING AS A HUMAN PROCESS 246-47 (1971)).

5. ADMIN. OFF. OF THE U.S. CTS., THE PRESENTENCE INVESTIGATION REPORT 1 (Jan. 5, 1978; revised Sept. 25, 1978, 1984, 1987 & 1992). Section 604 of Title 28 U.S.C. (1994) defines the duties of the director of the Administrative Office. Generally, the Administrative Office supervises the daily clerical and personnel matters of the courts, but under § 604(a)(9) of Title 28, Congress has vested the Office with the responsibility of establishing pretrial services pursuant to 18 U.S.C. § 3152 (1994). The pretrial services that Congress has mandated are varied and include such responsibilities as collecting information regarding pretrial release, supervising persons in custody, informing the court and United States Attorney of violations of pretrial release, and developing a system to monitor bail activities. 18 U.S.C. § 3154(1)-(13) (1994).

6. Findley & Ross, *supra* note 3, at 841.

7. *Id.*

disclosure of PSIRs to defendants, thereby ensuring greater scrutiny and accuracy of the information therein.[8] Presumably, the more accurate the PSIR, the fairer the decisions informed by the PSIR's contents will be. However, with the abolition of parole for all defendants whose offenses were committed on or after November 1, 1987,[9] and the establishment of the Sentencing Commission and the Sentencing Commission's Guidelines,[10] judges have lost much of their sentencing discretion, giving rise to the perception that judges need less guidance in their sentencing decisions.[11] The perceived value of the PSIR has eroded accordingly: the narrower the latitude of discretion of the sentencing judge, the less relevant the PSIR becomes. The less value ascribed to the PSIR, the greater the potential tolerance for procedural hurdles that may foster inaccurate or incomplete PSIRs.

Nonetheless, to the defendant seeking individualized treatment, the PSIR is important. Judges may still rely on the PSIR to determine proper sentences within the latitude permitted by the sentencing guidelines.[12] For defendants facing incarceration, restrictions on a judge's ability to temper a statutorily prescribed sentence are exceedingly important. At the very least, the PSIR can influence a defendant's prison security level and relationship with social service agencies upon release.[13]

This Article discusses how Rule 32 of the Federal Rules of Criminal Procedure, which governs PSIRs, could be amended to ensure greater fairness and efficiency in sentencing and correctional processes through more open disclosure of the PSIR before and during the sentencing hearing, thereby providing protections similar to those contained in pretrial hearings. The current absence of procedural safeguards and the possible

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8. *Id.* at 839.

9. *See id.* at 842 n.24.

10. *See* 28 U.S.C. §§ 991, 994, & 995 (1994) (establishing the United States Sentencing Commission, directing the Commission to create sentencing guidelines, and outlining the powers of the Commission). For an explanation of the sentencing guidelines and their source, see *infra* note 38.

11. Sections 991, 994, and 995 (a)(1) of Title 28 of the United States Code operate to "consolidate . . . the power that had been exercised by the sentencing judge and the Parole Commission . . . by creating the United States Sentencing Commission to devise guidelines to be used for sentencing" and to abolish the Parole Commission. Mistretta v. United States, 488 U.S. 361, 367 (1989).

12. Findley & Ross, *supra* note 3, at 845.

13. *See* United States v. Bartholomew, 974 F.2d 39 (5th Cir. 1992) (concluding that the defendant should be permitted to challenge his PSIR on a motion under 28 U.S.C. § 2255 (habeas corpus for federal prisoners), because a possible error in the PSIR could not have been discovered in time for the defendant's direct appeal or a motion under FED. R. CRIM. P. 35 (motion to correct the sentence)).

concealment of diagnostic opinions, sentencing recommendations, and sources of crucial information creates an unnecessary environment of arbitrariness in the justice system. This article will demonstrate that despite many salutary amendments to Rule 32, the PSIRs can still contain many inaccuracies. Defendants still do not have adequate access to the reports in their entirety, nor, at times, a meaningful opportunity to correct inaccurate information in them. It is important to note that while Rule 32 applies to federal cases, the guidelines it provides for use of the PSIR are equally applicable to state cases, as federal law often serves as a model for state law.

II. THE INHERENT INADEQUACIES OF RULE 32

"The principal problem with the [PSIR]" is its "potential for introducing inaccurate or misleading information" into "a setting [sentencing hearing] virtually free of trial-like procedural safeguards."[14] Indeed, a defendant's right to due process is violated when he or she is sentenced on the basis of "materially untrue" information.[15] Although probation officers do attempt to verify data in the PSIR by personally contacting interested parties and by basing their conclusions on such documents as letters, facsimiles, and certified statements, and by clearly labeling "all unverified information,"[16] some "available data on the federal probation officer's work load indicates that little, if any, verification of information is possible."[17]

The importance of disclosure of the PSIR to the defendant and the correlation between disclosure and accuracy is acknowledged in the legislative history of Rule 32. Before the 1989 amendment to Rule 32,[18] a judge only had to disclose the PSIR to the defendant "[a]t a reasonable

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14. Fennell & Hall, *supra* note 3, at 1622.

15. Townsend v. Burke, 334 U.S. 736, 741 (1948) (holding that a defendant's right to due process of law was violated when the defendant was sentenced on the basis of misleading information or inaccurate assumptions about his prior criminal record).

16. ADMIN. OFF. OF THE U.S. CTS., *supra* note 5, at 3.

17. Rafael Guzman, *Defendant's Access to Presentence Reports in Federal Criminal Courts*, 52 IOWA L. REV. 161, 167 (1966). Current data indicates that the probation officer's caseload is "huge" and "oversized," averaging 115 cases and sometimes reaching 300 cases. COLE, *supra* note 1, at 641-42.

18. FED. R. CRIM. P. 32(c)(3)(A) (amended in 1989 to mandate disclosure of the PSIR at least 10 days prior to sentencing, instead of within a "reasonable time" before sentencing).

time before imposing the sentence."[19] However, even before the 1989 amendment, the Administrative Office of the United States Courts had explicitly encouraged judges to disclose the PSIR "sufficiently prior to the imposition of sentence to afford the parties a reasonable opportunity to be informed of its contents and prepare a challenge to alleged factual inaccuracies."[20] Also, in notes accompanying the many amendments to Rule 32, the advisory committee[21] has advocated greater openness surrounding the PSIR in sentencing because "the sentence imposed on the defendant is the most critical stage of criminal proceedings."[22]

Despite such admonitions and salutary changes to Rule 32, a more meaningful disclosure of the PSIR to the defendant before sentencing is still necessary to correct factual errors. The permissible timetable of disclosure of PSIRs exacerbates the problem of the potential inclusion of inaccurate information. For example, under the current Rule 32, probation officers must provide defendants and their attorneys with the PSIR "[n]ot less than 35 days before the sentencing hearing."[23] However, if defendants timely notify probation officers of their objections to the PSIR,[24] the defendants may receive a revised PSIR (which may merely note and dismiss their objections)[25] as late as "7 days before the sentencing hearing."[26] With these time constraints, defendants cannot

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19. Fed R. Crim. P. 32 (1983). For a summary of the amendments to Rule 32, see the advisory committee's notes; *see also* United States Dep't of Justice v. Julian, 486 U.S. 1, 14 (1988). In *Julian*, two prison inmates requested, but were denied, copies of the PSIR. In granting the inmates' requests, the Court's decision in *Julian* virtually mandated changes to Rule 32. The Court held that the federal PSIR is an agency record of the United States Parole Commission and, under the Freedom of Information Act, 5 U.S.C. § 552 (1994), is, thus, subject to disclosure to the individual who is the focus of the PSIR (i.e., the defendant). *Id.* at 14. Rule 32 now largely obviates the need for inmates to request copies of the PSIR, because PSIRs are now provided to defendants before sentencing. FED. R. CRIM. P. 32(b)(6)(A)-(C).

20. ADMIN. OFF. OF THE U.S. CTS., *supra* note 5, at 2.

21. *See generally* FED. R. CRIM. P. 32 advisory committee's notes (advocating as much disclosure to the defendant as possible, while recognizing the increased burdens placed upon judges).

22. FED. R. CRIM. P. 32 advisory committee's note (1993 amendment).

23. FED. R. CRIM. P. 32(b)(6)(A).

24. FED. R. CRIM. P. 32(b)(6)(B).

25. FED. R. CRIM. P. 32(b)(6)(B) requires the probation officer to prepare "an addendum setting forth any unresolved objections, the grounds for those objections, and the probation officer's comments on the objections." *Id.*

26. FED. R. CRIM. P. 32(b)(6)(C).

mount effective challenges to inaccurate PSIRs because sentencing hearings are not fully adversarial.[27]

Although nothing in Rule 32 prevents a court from ordering disclosure of the PSIR more than thirty-five or seven days before sentencing,[28] judges may not be inclined to use their discretion to order earlier disclosure. Moreover, there is evidence to suggest that judges rarely use their discretion to order earlier disclosure of the PSIR. For example, in a survey conducted in 1980, before the Federal Sentencing Guidelines (when PSIRs had an arguably greater impact on the imposition of sentence), when judges were required to disclose PSIRs at a "reasonable time" before sentencing,[29] at least twenty-seven federal district courts (thirty percent of the courts in the survey) disclosed the PSIR only on the day of sentencing.[30] Eight percent of the actual physical disclosures of the PSIRs occurred in the courtroom,[31] where reading may have been "hurried and careless,"[32] or in the judge's chamber where a "defense attorney's desire to make a detailed examination [of the PSIR may have been hampered]."[33] Moreover, defense attorneys were allowed possession of the PSIR only for a short time, although fifty-five percent of the courts surveyed permitted "extensive" note taking.[34]

The amendments to Rule 32 have eliminated most of these institutional impediments to examination and possession of the PSIR.[35] Under the current Rule, both defendants and defense attorneys are entitled to receive and retain a copy of the PSIR before the imposition of sentence. Also, the role of the Sentencing Commission[36]—creating uniform, but sometimes rigid sentences—diminished the potential impact of the information contained in the PSIR, at least with respect to the vast discretion judges

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27. *See* Williams v. New York, 337 U.S. 241 (1949) (holding that cross-examination at a sentencing hearing is not constitutionally required).

28. *See generally* FED. R. CRIM. P. 32(b)(6) (regarding disclosure).

29. Fed. R. Crim. P. 32(c)(3)(A) (1980). Rule 32 was amended in 1989 to require disclosure "at least 10 days prior to sentencing." Fed. R. Crim. P. 32(c)(3)(A) (1989); *see supra* note 18.

30. Fennell & Hall, *supra* note 3, at 1644.

31. *Id.* at 1646.

32. *Id.*

33. *Id.* at 1645.

34. *Id.* at 1647.

35. *See, e.g.*, 1983 amendment to Rule 32 (mandating automatic disclosure of the PSIR at a reasonable time before sentencing and requiring the sentencing judge to make a finding as to controverted matter in the PSIR); 1989 amendment (mandating disclosure of the PSIR at least ten days before sentencing).

36. *See* 28 U.S.C. § 991 (1994).

previously exercised in weighing virtually any information in the PSIR in their determination of discretionary sentences.

For judges and defense attorneys, the sentencing hearing is most likely the last interaction with the defendant. From the judge's perspective, the case of a defendant who pleads guilty is resolved, unless the sentencing determination is reversed on appeal. Because the PSIR's role in shaping sentences has been supplanted by the sentencing guidelines that legally authorize their sentences, judges have fewer incentives to ensure the accuracy of the PSIR. Since the amendments to Rule 32, lower courts have examined the PSIR less thoroughly with regard to due process issues.[37] Ironically, just when the amendments to Rule 32 have mandated better access to more accurate PSIRs than ever before, judges and attorneys may have devalued the PSIR because of the limitations upon sentencing discretion that the sentencing guidelines engender.[38]

III. THE LEGAL SYSTEM'S APPROACH TO PRESENTENCE INVESTIGATION REPORTS

The legal system's historical approach to presentence investigation reports has been one of disinterested acceptance. Even after preliminary changes to Rule 32, "the majority of district [courts] . . . failed to develop procedures that encourage, or sometimes even permit, the discovery of factual errors."[39] The 1983 amendment to Rule 32 mandated automatic disclosure of the PSIR at a "reasonable time before sentencing," because

> [u]nless disclosure is made sufficiently in advance of sentencing to permit the assertion and resolution of claims of inaccuracy prior to the sentencing hearing, the submission of additional information by the defendant when appropriate, and informed comment on the presentence report, the purpose of promoting accuracy by permitting the defendant to contest erroneous information is defeated.[40]

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37. Findley & Ross, *supra* note 3, at 858.

38. "Sentences under the new system are based on complicated guidelines that eliminate much of the sentencing discretion previously vested in the sentencing judge . . . . The new PSI[R] is tailored to provide the information and analysis necessary to compute the sentencing guidelines." *Id.* at 842-43. The sentencing guidelines are contained in United States Sentencing Commission, Federal Sentencing Guidelines (West Supp. 1995). The guidelines are promulgated pursuant to 28 U.S.C. § 994(a) (1994), but they are compiled under Title 18 and have a unique section enumeration ("1B1.1-8E1.3").

39. Fennell & Hall, *supra* note 3, at 1690.

40. Fed. R. Crim. P. 32(c)(3)(A)-(C) advisory committee's note (1983).

The rationale behind early disclosure of the PSIR is still sound because of the continued utility of the PSIR as a legal device, in spite of its seeming devaluation with the advent of the sentencing guidelines and the reliance on the PSIR as a comprehensive correctional assessment device.[41]

The PSIR is used by every official and bureaucracy within the criminal justice system. It must be prepared after every conviction, even, for example, where a defendant convicted of escape had not been out of prison since his last PSIR had been prepared.[42] Of course, judges may use the PSIR to fashion a sentence within the latitude of the sentencing guidelines,[43] and the Bureau of Prisons will use the PSIR when instituting a correctional program.[44] For example, the Bureau may use the PSIR to determine the defendant's place of incarceration with the goal of placing the defendant in the least restrictive facility.[45] Social service agencies use the PSIR to administer treatment programs and reintegrate the defendant into the community.[46] Some of the information contained in the PSIR, such as the defendant's criminal history, is used to determine sentencing under the sentencing guidelines,[47] and the PSIR must be included in the appellate record[48] to facilitate appeals of sentences under the guidelines.[49]

Despite its comprehensive use, the PSIR may still contain highly damaging and inaccurate information. Ironically, while every earlier

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41. *See* Schmolesky & Thorson, *The Importance of the Presentence Investigation Report After Sentencing*, 18 CRIM. L. BULL. 406 (1982).

42. United States v. Turner, 905 F.2d 300 (9th Cir. 1990) (vacating the sentence, concluding that a defendant should not be permitted to waive the PSIR and that Rule 32 and the sentencing guidelines must be followed strictly with regard to the preparation of the PSIR).

43. *See generally* 18 U.S.C. § 3552(a)-(c) (1994); FED. R. CRIM. P. 32 (each permitting the sentencing judge to utilize probation officers, the Bureau of Prisons, consultants, psychologists, and psychiatrists to acquire information on which to base a sentence).

44. *See* FED. R. CRIM. P. 32(c)(1); Findley & Ross, *supra* note 3, at 841.

45. 28 U.S.C. § 994(q)(2) (1994).

46. *See* United States v. Bartholomew, 974 F.2d 39, 43 (5th Cir. 1992) (concluding that the PSIR may affect the defendant's "relationships to various social service agencies on . . . release from prison").

47. FED. R. CRIM. P. 32(b)(4)(B).

48. 18 U.S.C. § 3742(d)(2) (1994).

49. *Id.* § 3742(e)(2).

substantive amendment to Rule 32[50] guaranteed increased or earlier disclosure of the PSIR or witness statements, the 1994 amendment actually mandated, in part, greater *non*-disclosure. Prior to the 1994 amendment, for example, a judge did not have to reveal to the defendant diagnostic opinions in the PSIR if the diagnostic opinions "in the opinion of the court . . . might seriously disrupt a program of rehabilitation."[51] With the 1994 amendment, Rule 32 now dictates that diagnostic opinions with serious disruptive potential "must" be excluded from the PSIR.[52] The judge may rely on such excluded opinions in imposing a sentence, so long as the judge merely "summarizes" them for the defendant and gives "defen[se] counsel a reasonable opportunity to comment on that information."[53]

Before the 1994 amendment, Rule 32 read as though sentencing judges, in their discretion, could disclose to the defendant potentially sensitive information.[54] With the 1994 amendment to Rule 32, the entire PSIR may exclude a probation officer's recommendation on sentence[55] and "must" exclude:

1. diagnostic opinions that might seriously disrupt a program of rehabilitation;[56]

2. sources of information obtained upon a promise of confidentiality;[57] or

3. any other information that might result in harm, physical or otherwise, to the defendant, or any other person.[58]

No one could reasonably oppose these limitations on disclosure if the limitations would prevent a defendant from physically harming himself or

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50. *See, e.g.*, 1979 amendment (guaranteeing the production of witness statements in Rule 32(e)); 1983 amendment (mandating automatic disclosure of the PSIR in Rule 32(c)(3)(A)); 1989 amendment (mandating disclosure of the PSIR at least ten days before sentencing in Rule 32(c)(3)(A)).

51. Fed. R. Crim. P. 32(c)(3)(A) (1989).

52. FED. R. CRIM. P. 32(b)(5)(A).

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

54. Fed. R. Crim. P. 32 (1989).

55. FED. R. CRIM. P. 32(b)(6)(A).

56. FED. R. CRIM. P. 32(b)(5)(A).

57. FED. R. CRIM. P. 32(b)(5)(B).

58. FED. R. CRIM. P. 32(b)(5)(C).

others. For example, it would obviously be foolhardy to reveal sources of information to the head of an organized crime family at his sentencing.

However, the Rule 32 limitations are so broad that they could arguably prevent the disclosure of statements from virtually all persons with any connection to the defendant's case or past life. Neither Rule 32 nor the notes of the Rule 32 advisory committee reveal any empirical, theoretical, or factual basis for these limitations. Yet the effect of the limitations is to shield from scrutiny and critical evaluation the opinions, recommendations, and statements of probation officers and mental health professionals (mainly psychiatrists), as well as the identity of victims and witnesses.

IV. CURRENT RULE 32 LIMITATIONS ON DISCLOSURE

A. *Disclosure of Sentencing Recommendations*

Although they could be rendered by other professionals, sentencing recommendations are most likely to be offered by probation officers as part of the PSIR.[59] Ironically, Findley and Ross conclude that "it appears that the information most frequently withheld from the defendant is the probation officer's sentence recommendation,"[60] presumably because disclosure will "interfere with the relationship between the officer and the defendant."[61]

However, neither the "relationship" rationale nor any other rationale adequately supports nondisclosure of sentencing recommendations. Potential harm to the probation officer would certainly be a legitimate rationale, but the cause and effect relationship between a recommendation and harm is tenuous. Under the sentencing guidelines, the probation officer's recommendation is based on a rigid formula, leaving the officer little room for interpretation. Any final sentencing recommendation will be largely based upon a defendant's prior criminal record and the nature of his or her present offense,[62] two determinate and relatively fixed

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59. By implication, 28 U.S.C. § 995(a)(9) (1994) gives probation officers with the authority to make sentencing recommendations. Under this section, the sentencing commission may "monitor the performance of probation officers with regard to sentencing recommendations, including the application of the Sentencing Commission guidelines and policy statements." *Id.*

60. Findley & Ross, *supra* note 3, at 863-64.

61. Such a rationale was asserted by the advisory committee to Rule 32 in the committee's note accompanying the 1974 amendment to Rule 32. *See id.* at 864 n.130.

62. John Rosecrance, *Maintaining the Myth of Individualized Justice: Probation Presentence Reports*, 5 JUST. Q. 235, 240-46, 251-52 (1988). Rosecrance interviewed 37 probation officers in two medium sized California counties which were governed by

criteria. Furthermore, it is the judge who makes the final sentencing decision.

By nature and design, the defendant's relationship with the probation officer is relatively cooperative—so far as a defendant allows it—and serves partly to assist the defendant by objectively noting favorable information. Conversely, the defendant's relationship with the prosecutor is adversarial, and with the judge, neutral. If the defendant were inclined to blame or harm anyone it would be the judge or prosecutor. The probation officer is the least likely professional in the presentence process to be perceived by the defendant as a threatening figure. A probation officer's sentencing recommendation, based on neutral criteria, arguably should not effect the officer's relationship with the defendant.

Moreover, the effect of probation officers' recommendations on judges' sentencing decisions is questionable, if there is any significant effect at all. Although their recommendations may carry greater weight with correctional and social service agencies, one study found that it is a prosecutor's, rather than a probation officer's, sentencing recommendation that the judge is most likely to adopt.[63] The judge and prosecutor share a similar legal background and must work cooperatively to dispose of cases. This relationship fosters trust, or at least reliance on each other, often to the exclusion of outside professionals. In other studies, Rosecrance[64] and Cohn[65] found that even if probation officers'

California's determinate sentencing policies. The officers who prepared the presentence reports did not supervise defendants, which is the prevalent procedure in most jurisdictions. *See generally* TODD CLEAR & GEORGE COLE, AMERICAN CORRECTIONS (1986). Rosecrance found that "[i]n the great majority of presentence investigations, the variables of present offense and prior criminal record determine the probation officer's final sentencing recommendation. The influence of these variables is so dominant that other considerations have minimal influence on probation recommendations." Rosecrance, *supra* at 240.

63. John Rosecrance, *The Probation Officers' Search for Credibility: Ball Park Recommendations*, 31 CRIME & DELINQ. 539, 550-51 (1985). However, data and research from the 1950s through the 1970s indicate that probation officers' sentencing recommendations were often followed, although this research focused on states and other countries, not the federal system. I.G. Campbell, *The Influence of Psychiatric Pre-Sentence Reports*, 4 INT'L J.L. & PSYCHIATRY 89, 96-97 (1981). In any event, recommendations of probation officers may be less influential in the United States than in other countries. *Id.* at 98.

64. Rosecrance, *supra* note 62, at 251-54. "[P]robation officers emphasize the variables of instant offense and prior criminal record." *Id.* at 251. To prevent courts from deferring to scientists, some suggest that there should be no sentencing recommendation. Campbell, *supra* note 63, at 98.

65. Yona Cohn, *Recommended: No Recommendation*, 48(3) FED. PROBATION 70 (1984).

sentencing recommendations carry some weight, the effect of the recommendations can be nullified by the defendant's present crime and prior record.

The substance of a probation officer's sentencing recommendation may be questionable as well. Probation officers attempt to satisfy judges and tend to collect information that supports the officers' initial sentencing recommendations.[66] They become selective in reporting information that contradicts their recommendations, which led Cohn to recommend the abolition of sentencing recommendations altogether.[67]

Of course, even if sentencing recommendations are not included in the PSIR, probation officers, as a natural part of their duties, may communicate with judges informally and influence them subtly. Such communication may create a hazard for defendants, because even where a probation officer has an *ex parte* contact with a judge before sentencing, a court may be reluctant to find a violation of Rule 32.[68] Thus, when either specific written or informal oral sentencing recommendations are not revealed to defendants, they cannot contest whether the recommendations are supported by accurate information.

B. *Disclosure of Diagnostic Opinions*

Rule 32 also mandates that PSIRs exclude diagnostic opinions, if the opinions might "seriously disrupt a program of rehabilitation."[69] These opinions often consist of psychiatric reports regarding a defendant's future dangerousness. Ironically, while psychiatric diagnostic opinions as to dangerousness have little predictive value, their influence on the sentencing and correctional processes can be significant.

American courts are unable or unwilling to properly use psychiatric evidence. Traditionally, courts in common law countries, relying on a rehabilitation model, used forensic psychiatry to provide treatment and

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66. Rosecrance, *supra* note 62, at 252. "The type of information and observation contained in the final presentence report is generated to support the original recommendation decision. Probation officers do not regard defendant typings as tentative hypotheses to be disproved through inquiry but rather as firm conclusions to be justified in the body of the report." *Id.*

67. Cohn, *supra* note 65, at 71.

68. *See* United States v. Houston, 745 F.2d 333 (5th Cir. 1984) (holding that a judge need not disclose information upon which he or she does not rely, such as conversations with probation staff and recommendations made by probation officers), *cert. denied*, 470 U.S. 1008 (1985).

69. FED. R. CRIM. P. 32(b)(5)(A).

leniency to mentally debilitated offenders.[70] This is a proper use of psychiatry because if an offender is not mentally disabled, he is responsible for his actions, and is thus blameworthy. The mentally responsible offender should be sentenced based on standard factors, such as the magnitude of the crime and the offender's prior history.

In a startling but subtle and pervasive extension of the use of psychiatric evidence, Congress and the courts are now using psychiatry to peer into the offender's mind to predict future dangerousness. This trend, virtually embodied in Rule 32, results in unfairness. For example, in his research, Campbell has inferred that "courts appear to be ready to discount or devalue psychiatric pre-sentence recommendations for lenience or lenience-related treatments . . . but rarely exhibit reluctance in accepting recommendations for long custodial dispositions or treatment recommendations that entail close security."[71]

Psychiatric diagnostic opinions are most harmful when courts use them as a means to predict dangerousness, which, paradoxically, is virtually impossible to predict, or even define. In focusing on whether future violence can be predicted, the authors of one study simply concluded that "the objective of [developing] a standardized, reliable, generalized set of criteria" by which to predict dangerousness in law and mental health "is still an elusive and distant objective."[72]

There is neither general nor specific agreement on what constitutes dangerousness. In a World Health Organization study focused on determining standards of dangerousness in six countries (Brazil, Denmark, Egypt, Swaziland, Switzerland, and Thailand), researchers found little use of standard dangerousness criteria and "no evidence that psychiatrists agree among themselves on dangerousness assessments more readily than nonpsychiatrists."[73] In his work with psychiatric reports (used by courts

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70. Campbell, *supra* note 63, at 105-06. Defendants convicted of sexual offenses and other serious offenses are more likely than other defendants to be referred for psychiatric presentence reports. *Id.* at 92.

71. *Id.* at 105-06.

72. Robert Menzie, et al., *The Dimensions of Dangerousness Revisited: Assessing Forensic Predictions About Violence*, 18 LAW & HUM. BEHAV. 1, 25 (1994). Psychiatric predictions of future violence may result in an extensive rate of error. Campbell, *supra* note 63, at 91. Moreover, Rule 32 does not provide any definition of "dangerousness" or "harm." While virtually all countries employ a dangerousness standard, the standard is poorly and haphazardly defined. *See infra* notes 74, 89 & 258 and accompanying text. For a general discussion of the concepts of dangerousness and harm in the United States, see *infra* note 88.

73. T.W. Harding & H. Adseballe, *Assessments of Dangerousness: Observation in Six Countries. A Summary of Results from a WHO Coordinated Study*, 6 INT'L J.L. & PSYCHIATRY 391, 397 (1983). As a legal concept, dangerousness was incorporated into

to assess defendants) and psychiatric evidence used in court, Shea concluded "that psychiatrists have no particular expertise in this area [predicting dangerousness] and that their track record in predicting dangerousness is, on the available evidence, poor."[74]

Most portentously, it has been suggested that standards of dangerousness be deflated to extremely low levels. Greenberg has recommended that when evaluating a patient (i.e., a defendant) psychiatrists should use a low standard for the dangerousness determination so that psychiatrists will not be exposed to civil liability.[75] Greenberg advocated the lower standard, even if the results are "additional commitment hearings [and] . . . restriction [of] civil liberty . . . [and prison] overcrowding."[76] Confronted with this "psychiatrist's dilemma" (i.e., a low threshold of dangerousness that restricts civil liberties in tension with a higher threshold that invites civil liability), Greenberg rationalized that a low threshold standard should be implemented until psychiatrists receive immunity from civil lawsuits for their discretionary judgments. Greenberg concluded that "[b]y using a low threshold of dangerousness as a basis for retaining [i.e., imprisoning] a patient . . .

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civil and criminal law at the beginning of the nineteenth century. As a "medico-legal" concept, dangerousness determinations became accepted when physicians began testifying as legal experts in commitment procedures for mentally ill persons. The release of mentally ill persons from mental hospitals has diverted some of these persons into the prison system. *Id.* at 391-92. In the World Health Organization study, the researchers concluded "that dangerousness is not a single medico-legal entity, but an ill defined notion haphazardly applied." *Id.* at 394.

74. PETER SHEA, PSYCHIATRY IN COURT: THE USE(FULNESS) OF PSYCHIATRIC REPORTS AND PSYCHIATRIC EVIDENCE IN COURT PROCEEDINGS 136 (1993). A concept of dangerousness cannot be agreed upon, *id.* at 121-25, and psychiatrists are not able to predict dangerousness, however the concept might be defined. *Id.* at 131-37. At the extremes, it may be possible for different professionals to agree generally on who is dangerous. For example, a majority of raters (61%) may agree that a multiple murderer who evinces suicide threats and severe psychotic illness is "extremely dangerous," while a large majority of raters (72-86%) may agree that an offender with no history of violence is not dangerous. Harding & Adseballe, *supra* note 73, at 396-97. But even these levels of agreement about behavior at the extremes of human action seem unreliably low. An agreement level of 61% with regard to a multiple murderer would leave tremendous room for disagreement about any defendant who had killed fewer people, not to mention a mere robber or burglar. A random level of agreement would be a little less than 35%. *Id.* at 397.

75. Linn T. Greenberg, *The Psychiatrist's Dilemma*, 17 J. PSYCHIATRY & L. 381 (1989). In contrast, Campbell, *supra* note 63, at 96, has concluded that the role of a psychiatrist is to moderate a defendant's punishment. *Id.*

76. Greenberg, *supra* note 75, at 386.

psychiatrists [will] avoid malpractice[,] . . ." which will encourage society to give immunity to psychiatrists.[77]

The danger of such self-interested reasoning is that if Greenberg's arbitrarily formulated threshold of dangerousness standard is used by the criminal justice system to process a defendant, that process will involve erroneous and unprofessional judgment. "Prominent forensic psychiatrists almost uniformly express the view that pre-sentence reports ought to advocate lenient, individualized treatment."[78] But because Rule 32 now mandates that sentencing courts exclude some diagnostic opinions from PSIRs, the defendant may have little effective opportunity to contest an erroneous opinion (regardless of Rule 32's requirement that any information not disclosed to the defendant but relied upon in sentencing be summarized by the court). Even the Rule 32 advisory committee, commenting on the 1989 amendment, "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."[79] Inexplicably, the committee, citing no rationale, "decided not to recommend at this time [1989] a change in the rule."[80] With diagnostic opinions "that might seriously disrupt a program of rehabilitation" now excluded from the PSIR altogether,[81] defendants have virtually no chance to adequately contest these opinions—which may significantly affect their sentencing and incarceration, but which may be unsound.[82]

The Rule 32 diagnostic exclusion still exists even though the Supreme Court long ago denounced the proposition that diagnostic evaluations and opinions in presentence investigation reports relied upon in sentencing should be withheld from a defendant. In 1977 the Supreme Court heard *Gardner v. Florida*,[83] in which the trial court judge had sentenced the defendant to death. The sentence was based partly on confidential information, never disclosed to the defendant, but which was contained in the PSIR. In arguing that the defendant was not entitled to review the undisclosed confidential information, the State contended "that full disclosure of presentence reports, which often include psychiatric and

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77. *Id.* Greenberg's argument is especially dangerous, because psychiatrists already tend to rate patients as more dangerous than do non-psychiatrists. *Id.* Harding & Adseballe, *supra* note 73, at 397.

78. Campbell, *supra* note 63, at 95.

79. Fed. R. Crim. P. 32(c)(3)(A) (1989) (advisory committee's note).

80. *Id.*

81. FED. R. CRIM. P. 32(b)(5)(A).

82. *See supra* notes 69-82 and accompanying text.

83. 430 U.S. 349 (1977).

psychological evaluations, will occasionally disrupt the process of rehabilitation."[84] Simply dismissing the State's rationale, a plurality of the Supreme Court concluded that "[t]he argument, if valid, would hardly justify withholding the report from defense counsel."[85] Rejecting the defendant's death sentence, the Court held that withholding information relied on in sentencing, which the defendant had no opportunity to controvert or explain, denied the defendant due process of law.

C. *Disclosure of Confidential Information*

The amended Rule 32 mandates that the following information must be excluded from the PSIR: "any diagnostic opinions that, if disclosed, might seriously disrupt a program of rehabilitation[,][86] sources of information obtained upon a promise of confidentiality[,][87] or any other information that, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons."[88] Two of the historic rationales for

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84. *Id.* at 360.

85. *Id.*

86. FED. R. CRIM. P. 32(b)(5)(A).

87. FED. R. CRIM. P. 32(b)(5)(B).

88. FED. R. CRIM. P. 32(b)(5)(C). Rule 32 provides judges with no standards to determine what types of information may cause future harm to the defendant or third persons. The lack of any discernable standard flows from the semantical unpredictability of future dangerousness. *See supra* notes 73-78 and accompanying text.

The federal sentencing guidelines do allow judges to consider a defendant's "likelihood of recidivism and future criminal behavior . . . [t]o protect the public from further crimes." U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL §§ 4A1.1-4B1.4, Introductory Commentary to Chapter Four (West 1995). However, courts may evaluate a defendant's past behavior rather than the probability of his or her future dangerousness. *See* United States v. Gonzales, 765 F.2d 1393, 1399 (9th Cir. 1985) (court properly relied on probation officer's belief that defendant's forgery "was a part of [defendant's] continuing criminal behavior," which included previous sex offenses), *cert. denied*, 474 U.S. 1068 (1986). Criminal courts should usually, like in *Gonzales*, base a defendant's sentence on past behavior, not possible future actions. Yet, to some extent, future dangerousness should be considered, i.e., where a sentence is imposed only for retribution, and the PSIR contains information that the defendant is a habitual offender, most likely to harm society again.

In sum, individual judges make subjective determinations of harm and use those determinations to withhold information in the PSIR from the defendant. *See* Berry v. Department of Justice, 733 F.2d 1343, 1354 (9th Cir. 1984) (permitting the "potentially harmful parts" of a PSIR to be withheld, but not defining "harm"). Without statutory guidance, the semantics of harm and danger could describe virtually any kind of deleterious behavior. For example, Black's Law Dictionary defines danger as "jeopardy" and "exposure to loss or injury." BLACK'S LAW DICTIONARY 393 (6th ed.

nondisclosure—unnecessary delays in sentencing and the drying up of sources of information—have not arisen, despite prior Rule 32 amendments that expanded disclosure.[89] Although Rule 32 requires only that the "sources" of confidental information must be excluded from the PSIR,[90] nothing limits who may promise confidentiality; similarly, Rule 32 does not prescribe who may receive a promise of confidentiality. With virtually any governmental agent promising confidentiality, and any witness demanding confidentiality, severe nondisclosure of certain material in the PSIR could become commonplace, rather than a limited exception.[91]

The absence of any opportunity to challenge confidential information could result in a defendant being sentenced and later treated on the basis of inaccurate information. As Rule 32 now reads, defendants will not know sources of information given upon a promise of confidentiality.[92] In addition, if a judge relies upon controverted information at sentencing, the court "must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing."[93] Furthermore, the court need only append a written record of its findings to the PSIR before it is handed over, with the defendant, to the Bureau of Prisons.[94] As a

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1990). Harm is defined as "[t]he existence of loss or detriment in fact of any kind to a person resulting from any cause." *Id.* at 718. A leading legal encyclopedia defines danger, in part, as an "injury, loss, pain or other evil." 25A C.J.S. *Danger* § 465 & n.48 (1966) (citing BLACK'S LAW DICTIONARY (page, edition, and year unknown)). In addition, the nominative form of harm is defined as "damage, hurt, injury, [or] misfortune," whereas the active form is defined as "to damage . . . hurt . . . or injure." 39A C.J.S. *Harm* § 357 & n.44 (1976) (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY (page, edition, and year unknown)). Harm is a vague concept; judges may exclude information based on the probability that the defendant or others may be harmed in the future. *See* FED. R. CRIM. P. 32(b)(5)(C). Because harm is a subjective determination, Congress needs to establish statutory guidance for these definitions, or exclude this provision from Rule 32.

89. Findley & Ross, *supra* note 3, at 862.

90. *See* FED. R. CRIM. P. 32.

91. Namely, information withheld includes sources of confidential information, whether those sources are the basis of diagnostic opinions or information that, because it could cause "harm," would also be excluded by the court. *See* FED. R. CRIM. P. 32(b)(5).

92. FED. R. CRIM. P. 32(b)(5)(B).

93. FED. R. CRIM. P. 32(c)(1).

94. *Id.*

result, at no point in time is the defendant able to receive a full hearing on controverted information.[95]

1. Disclosure After a Guilty Verdict

It is unlikely that any confidential information, or its sources, would remain after a defendant has been found guilty at trial. Through pretrial discovery and trial testimony, including that elicited on cross-examination,[96] a defendant would be apprised of all victims, witnesses, and interested parties, as well as their prior statements.[97] Therefore, for these types of defendants, there is little need to withhold further information in the sentencing phase. For example, sources of confidential information should not be excluded from the defendant's PSIR because the victim would have already testified at trial.[98]

Moreover, in *Payne v. Tennessee*,[99] the Supreme Court laid the groundwork for expansive use of victim impact statements (VIS) during the sentencing phase. Through VISs, attached to or contained within the PSIR, the sentencing judge will be exposed to subjective and emotional assessments of the defendant and the crime. But, while the information in the VIS might be relevant, it might also be inaccurate. All defendants, though, have a due process right to be sentenced on the basis of accurate and objective information.[100] Yet, because the court must only make a written finding on controverted information relied upon in and during sentencing,[101] a defendant may receive a harsher sentence as a result of a VIS that had more effect in court than should have been warranted.

However, because Rule 32 mandates exclusion of "sources of information obtained upon a promise of confidentiality,"[102] the defendant may never have an adequate opportunity to contest the information contained in a VIS. For example, in a survey of one hundred seventeen state probation officers in thirty-three states, McLeod found that virtually

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95. *See id.*

96. *See* U.S. CONST. amend. VI (guaranteeing cross-examination and confrontation).

97. *See* 18 U.S.C. § 3500(a), (b) (1994) (mandating disclosure of the prior statements of a witness).

98. *See, e.g.*, FED. R. CRIM. P. 32(b)(5)(B).

99. 501 U.S. 808, 827 (1991) (permitting victim impact statements at the sentencing phase of a capital case).

100. *See* Townsend v. Burke, 334 U.S. 736, 740-41 (1948).

101. *See* FED. R. CRIM. P. 32(c)(1).

102. FED. R. CRIM. P. 32(b)(5)(B).

all VISs are reported to the court through the PSIR;[103] they are contained in the PSIR or attached to it.[104] Victims, themselves, appear at sentencing in less that eighteen percent of the cases, and they give oral statements in just over nine percent of the cases.[105] The victims' absence or lack of participation at sentencing magnifies the importance of the VISs, which will most frequently report the economic costs and the seriousness of physical injuries sustained by the victims of a crime.[106]

Additionally, victims may also send letters to sentencing judges.[107] At most, the judge may only have to summarize the statements.[108] Thus, the defendant may be sentenced, imprisoned, released, and treated on the basis of confidential hearsay information (i.e., statements made outside of court, but which are introduced into evidence in court, without the testimony of the person who made the statements[109]). The defendant will have no means by which to effectively challenge the hearsay in court.

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103. Maureen McLeod, *An Examination of the Victim's Role at Sentencing: Results of a Survey of Probation Administrators*, 71 JUDICATURE 162, 163-64 (1987).

104. *Id.*

105. *Id.* Witnesses who are victims of violent crimes usually appear at sentencing and look for closure. *Id.*

106. *Id.* at 164-65. The monetary loss usually relates to medical expenses, stolen property, and destroyed property.

107. *See* United States v. Scalzo, 716 F.2d 463, 469 (7th Cir. 1983) (noting that "reliance upon hearsay and other types of admissible information to assess factors affecting punishment is not per se improper"); United States v. Sustaita, 1 F.3d 950, 952-53 (9th Cir. 1993) (stating that hearsay is admissible at sentencing, and "violates due process only if the sentencing judge relied upon information [that] is materially false or unreliable[;]" the standard of proof regarding United States Sentencing Commission Guideline factors was a preponderance of the evidence). *Cf.* United States v. Curran, 926 F.2d 59 (1st Cir. 1991) (vacating defendant's sentence because the victim's letters were not disclosed to the defense, when they were used in sentencing without being summarized).

108. *See* FED. R. CRIM. P. 32(c)(3)(A), which states that "[i]f the court has received information excluded from the presentence report under subdivision (b)(5) the court—in lieu of making that information available—must summarize it in writing, if the information will be relied upon in determining sentence." The court may only allow a defendant and his or her counsel the opporunity to comment on that information before imposing sentence. *Id.*

109. FED. R. EVID. 801(c).

Because hearsay evidence is admissible at sentencing, the sentencing judge may consider allegations regarding unproven criminal activity.[110] With the 1994 amendment to the PSIR, the sentencing court may "[e]xcept for any unresolved objection under subdivision (b)(6)(B) . . . at the hearing, accept the [PSIR] as its findings of fact."[111] While such findings may not be made if the court allows, with good cause, for the defendant to object to "material information" or matters regarding sentencing,[112] the permissible findings may be extremely damaging to a defendant during the correctional or treatment process. Relatively mundane matters at sentencing, or matters on which the court places no weight for the purpose of sentencing, i.e., allegations of prior drug use, are important to the Bureau of Prisons. This potentially inaccurate criminal resume, which follows the defendant for the remainder of his or her sentencing "career," determines the defendant's appropriate prison classification and informs probation officers or therapists with historical data relevant to the defendant's supervision and treatment. Yet, because the information in the PSIR may be relatively unimportant to the court in terms of the imposition of a proper sentence, the defense may not have a full opportunity to adequately challenge the allegations.

One potential danger to the defendant is that the judge might weigh inaccurate hearsay information to determine a defendant's sentence under the sentencing guidelines without an adequate hearing by which a defendant could challenge such information. At a minimum, the sentencing judge should hold a hearing on the disputed information that is relied upon in passing sentence.[113] However, another safeguard is needed to ensure fairness to the defendant, because an additional danger

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110. *See* United States v. Hershberger, 962 F.2d 1548 (10th Cir. 1992) (court may permit hearsay evidence at sentencing because the Sixth Amendment's Confrontation Clause is inapplicable); *see* Gelfuso v. Bell, 590 F.2d 754 (9th Cir. 1978). In *Gelfuso*, the sentencing judge relied, in part, on hearsay information in the PSIR, and concluded that the defendants were involved in a "conspiracy . . . [,] agreement or . . . partnership to engage in a gambling enterprise [that] has organized gambling implications." *Id.* at 756 n.5. The court of appeals upheld the court's decision to rely, in part, on the hearsay information to sentence the defendants.

111. FED. R. CRIM. P. 32(b)(6)(D).

112. *See* FED. R. CRIM. P. 32(b)(6)(B).

113. *See* United States v. Cifuentes, 863 F.2d 1149, 1155 (3d Cir. 1988) (vacating defendant's sentence because it was uncertain whether the trial judge relied upon disputed hearsay information to determine the sentence; "if [the court] relies on [hearsay, the court] should grant a hearing."); United States v. Robertson, 15 F.3d 862, 875 (9th Cir. 1994) (vacating defendant's sentence because the district court "did not make an explicit finding as to the accuracy of [defendant's] statement [, n]or did it unambiguously and expressly state that it would not take the controverted matter into consideration when imposing the sentence.").

exists. In a hearing, information might be elicited through probation officers recounting their interviews with the victims, testimony that, in itself, is hearsay.[114] Even so, the advisory committee to Rule 32 contemplated that a probation officer would not testify, especially with regard to cross-examination by the defense.[115] Judges who follow the advisory committee's recommendation would then have only the PSIR to rely upon for sentencing.[116] The defendant would have no opportunity to adequately challenge the person who might have made an erroneous, damaging statement that is quoted in the PSIR, or the person who recorded that statement.[117]

2. Disclosure After a Guilty Plea

It is more likely that victims and witnesses would be unknown to a defendant and would wish to remain confidential when that defendant is sentenced pursuant to a plea agreement. It is especially in these guilty plea cases "in which there has usually been no development of facts at trial[] [that] the PSI[R] is the court's primary tool for making a sentence determination under the [sentencing] guidelines."[118] Still, the rationale for excluding sources of confidential information, diagnostic opinions, or hearsay remains suspect (except where disclosure would subject a person to possible harm).[119] If a defendant has pleaded guilty, as opposed to having been found guilty after trial by jury, the sentencing judge and the criminal justice system will be in greater need of accurate information.

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114. FED. R. EVID. 801(c).

115. *See* United States v. Scalzo, 716 F.2d 463, 469 (7th Cir. 1983) (concluding that the sentencing judge had properly summarized the undisclosed portions of the PSIR, and outlining the procedures the judge should take to permit the court of appeals to analyze the judge's summarization).

116. *See* FED. R. CRIM. P. 32(b), (c).

117. *Cf.* FED. R. CRIM. P. 32(c)(3). Before imposing sentence, the court must provide defendant and defendant's counsel a "reasonable opportunity to comment" on the disputed information that the court relied upon for sentencing. *Id.* However, a "reasonable opportunity to *comment*" in no way protects the defendant from being sentenced based on potentially inaccurate information. *Id.* (emphasis added). Additionally, potentially inaccurate information may follow the defendant through incarceration, probation, and rehabilitation.

118. Findley & Ross, *supra* note 3, at 843; *see* FED. R. CRIM. P. 32 advisory committee's note ("We believe the sentence imposed on a defendant is the most critical stage of criminal proceedings, and is, in effect, the 'bottom-line' for the defendant, particularly where the defendant has pled guilty.").

119. *See* FED. R. CRIM. P. 32(b)(5)(A)-(C).

Conversely, a trial has many procedural safeguards through which to obtain the truth. Witnesses are subject to perjury charges for lying,[120] irrelevant information and hearsay are not admissible,[121] and defendants may cross-examine the prosecution's witnesses[122] and call their own witnesses.[123] The trial, therefore, provides a reservoir of relatively reliable information from which to render a decision pertaining to guilt, sentencing, or the correctional process.

A plea of guilty, however, guarantees no such procedural safeguards from the sifting of facts and allegations. The comparable reservoir of information comes from the PSIR.[124] If sources of confidential information, diganostic opinions, or hearsay information are excluded from the PSIR under Rule 32,[125] defendants will have virtually no opportunity to challenge information that might provide a significant portion of the basis for their sentences. Likewise, if the sentencing judge relies upon such information to sentence defendants,[126] then the Bureau of Prisons and other institutions within the criminal justice system could use the relatively unreliable information to later punish, process, and treat them.

To a significant degree, a defendant's sentence will be based on the nature of the present crime and the extent of the prior record.[127] However, the remaining discretion surrounding the sentencing decision and, more importantly, the correctional process will be based on information contained in the PSIR, the VIS, and any diagnostic opinions.[128] The need for reliable information is, therefore, much greater. But the safeguards for assuring that the information is reliable are far more limited than if the defendant had gone to trial.

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120. 18 U.S.C. § 1621 (1994).

121. *Cf.* FED. R. EVID. 803 (setting forth 24 exceptions allowing the admission of hearsay even though the declarant is available to testify at trial).

122. *See* U.S. CONST. amends. VI, XIV; *see also* Pointer v. Texas, 380 U.S. 400 (1965).

123. *See* U.S. CONST. amends. VI, XIV; *see also* Washington v. Texas, 388 U.S. 14 (1967).

124. *See* FED. R. CRIM. P. 32(b)(3).

125. FED. R. CRIM. P. 32(b)(5)(B).

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

127. *See* 28 U.S.C. § 994(c)(1)-(7), (d)(10) (1994); Rosecrance, *supra* note 62, at 240-41, 251-52. Rosecrance found that probation officers rely, to the exclusion of other considerations, mainly on a defendant's prior record and present crime to arrive at a sentence recommendation because "'[t]hat's the way judges want it.'" *Id.* at 240; *see also* Findley & Ross, *supra* note 3, at 843.

128. *See* Findley & Ross, *supra* note 3, at 844.

V. THE HARMFUL EFFECTS OF PARTIAL DISCLOSURE OF THE PRESENTENCE INVESTIGATION REPORT: THE EXCLUSION OF RELEVANT INFORMATION

Rule 32 now requires that the PSIR exclude what should be the essence of a complete and accurate report: diagnostic opinions, sources of confidential information, and any other information that might cause harm to any person.[129] In addition, the court may, in its discretion, exclude sentencing recommendations from the defendant.[130] Even as early as 1989, though, the Rule 32 advisory committee ironically expressed severe misgivings about partial disclosure.[131] The committee questioned "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."[132] Moreover, the committee concluded that "[i]nformation provided by confidential sources and information posing a possible threat of harm to third parties was particularly troubl[esome] . . . since this information is often extremely negative and thus potentially harmful to a defendant."[133] But, without offering any rationale, the committee determined "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."[134]

Although Rule 32 excludes diagnostic opinions and sources of confidential or harmful information from full disclosure to the defendant, Rule 32 permits judges, in their discretion, to disclose confidential information to the defendant in writing if it will be relied upon for sentencing.[135] Under Rule 32(c)(3)(A), if, at sentencing, a judge relies on material that has been mandatorily excluded under Rule 32 (i.e., diagnostic opinions and sources of confidential or harmful information),[136] then that judge must summarize the material in writing,

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129. FED. R. CRIM. P. 32(b)(5)(A)-(C).

130. FED. R. CRIM. P. 32(b)(6)(A).

131. *See* Fed. R. Crim. P. 32 advisory committee's note (1989).

132. *Id.*

133. *Id.*

134. *Id.* The committee stated, in essence, that a court's summarized disclosure to the defendant of information relied upon for sentencing, and the due process concerns that could arise, serve as an efficient doorstop to disallow a defendant from enjoying full disclosure. *Id.*

135. FED. R. CRIM. P. 32(b)(5)(A)-(C).

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

"in lieu of making that [material or] information available"[137] to the defendant. If judges in their discretion must make such information available to the defendant (e.g., in the form of providing relevant documents, such as psychiatric diagnostic reports), then the mandatory exclusion of this information from PSIRs is unnecessary.

At a minimum, the mandatorily excluded material should be included in the PSIR. The initial inclusion of all material would require the government to seek to exclude from the PSIR (before the PSIR is revealed to the defendant) information over which the government, through its witnesses and evidence, has exclusive knowledge and control. As Rule 32 now reads, defendants must seek disclosure of information that they might not know about and over which they have no control.[138] It is far more efficient and equitable to require the party that is privy to information to demonstrate that the information should be included in or excluded from the PSIR. The party with access to information can best introduce evidence that will prove a particular assertion regarding the information. The party (i.e., the defendant) with no knowledge of particular information has little ability (in any type of litigation) to make a reasoned assertion about the information, which may be summarized only on the last day of trial litigation (i.e., the sentencing).[139]

The information mandatorily excluded (diagnostic opinions and sources of confidential or harmful information)[140] is extremely important both during and beyond the correctional and treatment processes.[141] Information not relied upon for sentencing that still remains in the PSIR, "excluded information" because of its importance and relevancy, is transmitted to the Bureau of Prisons and social service agencies.[142] If the sentencing judge does not rely on the excluded information, and thus does not even summarize the information,[143] the defendant could be placed in a difficult and ironic situation. Sentenced based on other information, this hypothetical defendant will have never seen the excluded information that actually determines part of his or her sentence: where the defendant is incarcerated and what, if any, rehabilitation he or she receives. In addition, he or she might not even know that the information

137. *Id.*

138. FED. R. CRIM. P. 32(b)(5)(A)-(C), (b)(6)(A)-(D).

139. *See* FED. R. CRIM. P. 32(b)(6)(D).

140. *See* FED. R. CRIM. P. 32(b)(5)(A)-(C).

141. *See generally* Findley & Ross, *supra* note 3.

142. *See id.* at 845.

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

exists, because Rule 32 places no requirement upon anyone to reveal the existence of the damaging material.[144]

Thus, even if the information is not used to arrive at a sentence, the Bureau of Prisons and social service agencies may use the information contained in the PSIR to determine the type of prison (e.g., maximum or minimum security) in which the defendant will be incarcerated.[145] In addition, prison employment, prison transfers, visitation and mail privileges, sentencing credit, work study, and physical and mental health treatment may also be based upon the PSIR.[146] However, under Rule 32, the defendant will have had no opportunity to challenge the basis of these types of decisions by nonjudicial agencies and institutions.[147] Indeed, under Rule 32, the defendant may not even know of the existence of the information used to reach these decisions.[148]

Moreover, it is unreasonable that defendant information important to institutional agencies after sentencing would be excluded from the PSIR during the sentencing process.[149] For example, diagnostic opinions (should they ever be useful) and sources of confidential information might be vital to the Bureau of Prisons to place the defendant in an appropriate prison. For example, imagine that a psychiatrist has concluded that the defendant is the most dangerous person alive. Additionally, a confidential source has reported that the defendant plans to kill correctional officers if, in doing so, he could escape from prison. Assuming this scenario, it would be extremely dangerous to exclude this information from the PSIR, or not transmit it throughout the justice system. However, if the sentencing judge does not rely on such information, which will not be contained in the PSIR, then governmental and social service agencies may never gain access to such information. If the judge does not rely on the information and somehow the Bureau of Prisons or other agencies gain access to it, and thus use it to treat the defendant, the defendant will still not have had an opportunity to contest the accuracy of the information. If the information is relevant, however, the information is important to society and should be made known to the criminal justice bureaucracy.

Because the criminal justice system needs information compiled about a defendant, that information should, as a matter of common sense, be fully evaluated. To make a fair evaluation of the information, all affected parties must have access to it. Then, in an adversarial proceeding before

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144. *See* FED. R. CRIM. P. 32.

145. *See* Findley & Ross, *supra* note 3, at 841.

146. *Id.*

147. *See* FED. R. CRIM. P. 32(c)(3)(A).

148. *See* FED. R. CRIM. P. 32(c)(1)-(3).

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

the court, the information can be rejected, or adopted and used by the defendant and the criminal justice system. Otherwise, the information should not be allowed in the court to sentence the defendant, or to pave with fool's gold the road the defendant walks upon after sentencing: possible inaccurate information has no place in the criminal justice system. Such "noncollection," with the accompanying loss of relevant information, seems like a strange and ineffective remedy for the mandatory nondisclosure in Rule 32[150] of potentially important, relevant, and vital information.

VI. DEFENDANTS' OBJECTIONS TO THE PRESENTENCE INVESTIGATION REPORT

Generally, defendants' rights at sentencing are more limited than those of defendants in any other judicial proceeding. With regard to PSIRs, defendants must rely on the discretion of the sentencing judge acting within the range of the sentencing guidelines.[151] Diagnostic opinions and sources of confidential or harmful information will be mandatorily excluded from the PSIR,[152] and probation officers' sentencing recommendations will be excluded at the court's discretion.[153] If the court relies on the mandatorily excluded information at sentencing, then "the court . . . must summarize [the information] in writing [and] . . . give the defendant and the defendant's counsel a reasonable opportunity to comment on that information."[154] Rule 32 currently contains no requirement that the court summarize probation officers' undisclosed sentencing recommendations.[155]

If the defendant repudiates information in the PSIR, the judge must (1) make a finding as to whether he or she credits the controverted matter for purposes of sentencing, or (2) make a determination that no finding is necessary because the judge will not consider the contested information to determine the defendant's sentence.[156] Rule 32 requires that a written record[157] (often a copy of the sentencing transcript[158]) of the judge's

150. FED. R. CRIM. P. 32(b)(5)(A)-(C).

151. The sentencing guidelines enumerate the types and ranges of sentences for various offenses committed by categories of defendants. *See, e.g.*, 28 U.S.C. § 994 (1994).

152. FED. R. CRIM. P. 32(b)(5).

153. FED. R. CRIM. P. 32(b)(6)(A).

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

155. *See* FED. R. CRIM. P. 32.

156. FED. R. CRIM. P. 32(c)(1).

157. *Id.*

findings and determinations be appended to any copy of the PSIR that is made available to the Bureau of Prisons.[159]

Although defendants have a Rule 32 right[160] and a due process right[161] to challenge allegedly inaccurate information contained in the PSIR, defendants have no constitutional right to procedural safeguards commonly guaranteed at trial, such as the right of confrontation and cross-examination.[162] Under Rule 32, the sentencing judge might limit the defendant's challenge to a "comment" on controverted matters.[163] While sentencing judges must make findings regarding controverted matters (or not rely on those matters in passing sentence[164]), there are no particular standards to guide judges in making their findings.[165] In their discretion, judges may allow defendants to comment on the disputed material (in accord with Rule 32),[166] or even allow the parties to introduce evidence.[167] Although Rule 32 gives judges the discretion to admit testimony,[168] the defendant has no right to a hearing in which to challenge any disputed material in the PSIR,[169] especially if the

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158. For purposes of transmitting the findings and determinations of the sentencing judge to the Bureau of Prisons, one court of appeals approved a process by which the United States Attorney's office sent a copy of the sentencing transcript to the Probation Office instructing that the transcript be attached to the PSIR. United States v. Slaughter, 900 F.2d 1119, 1123 n.2 (7th Cir. 1990).

159. FED. R. CRIM. P. 32(c)(1).

160. FED. R. CRIM. P. 32(b)(6)(B).

161. *See* United States v. Romano, 825 F.2d 725, 728 (2d Cir. 1987).

162. *See* Williams v. New York, 337 U.S. 241 (1949) (holding that due process is not violated if a judge obtains out-of-court information for assistance to determine a defendant's sentence).

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

164. *Id.*

165. *See, e.g., Romano*, 825 F.2d 725. In *Romano*, the sentencing judge disclaimed reliance on the defendant's PSIR and used information from a previous trial in which the defendant, who pleaded guilty, was precluded from testifying. Despite the defendant's objections to information in the PSIR and the information gleaned from the related trial, the court of appeals approved the sentencing judge's use of information from that previous trial. *Id.*

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

167. FED. R. CRIM. P. 32(c)(1).

168. *Id.*

169. The defendant does not have the right to a "full blown" hearing. *Romano*, 825 F.2d. at 728; *see also* United States v. Charmer Indus., Inc., 711 F.2d 1164 (2d Cir. 1983) (concluding that the defendant may only have the right to comment upon disputed material that the sentencing judge will consider). *Charmer*, however, is a decision mitigated by subsequent amendments to Rule 32.

sentencing judge does not consider the material in passing sentence.[170]

The defendant, therefore, has virtually no procedurally comphrehensive, adversarial method to ensure the correction of an inaccurate PSIR, especially once the defendant is processed beyond the actual day of sentencing. Under the 1994 amendment to Rule 32, judges must now "verify that the defendant and defendant's counsel have read and discussed the presentence report."[171] But this perfunctory inquiry refers only to the PSIR submitted to the defendant thirty-five days before sentencing,[172] a version of the PSIR upon which the defendant may lodge objections with the probation officer.[173] Rule 32 does not require any comparable judicial inquiry with regard to the revised version of the PSIR, which must contain the probation officer's response to the defendant's initial objections and be submitted to the defendant only seven days before the sentencing hearing.[174]

The defense must also bear significant responsibility for inaccurate PSIRs: if the defendant's attorney does not fully realize the importance of the PSIR, the attorney will not adequately challenge it. Rule 32 historically required no judicial inquiry into the defendant's understanding of the PSIR.[175] In a salutary change, the 1994 amendment to Rule 32 required that judges "verify that the defendant and defendant's counsel have read and discussed the presentence report."[176]

While such a required inquiry should illustrate the importance of the PSIR to the defense, the inquiry does not go very far to ensure the accuracy of the PSIR. Before the 1994 amendment to Rule 32, appellate courts almost unanimously concluded that sentencing judges need only have determined that defendants and their attorneys had received the PSIR and been given the opportunity to comment on it; judges did not have to

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

171. *Id.*

172. FED. R. CRIM. P. 32(b)(6)(A).

173. FED. R. CRIM. P. 32(b)(6)(B).

174. FED. R. CRIM. P. 32(b)(6)(C). The addendum must contain any of the defendant's unresolved objections, grounds for them, "and the probation officer's comments on the objections." *Id.* Yet "the court may, at the hearing, accept the presentence report as its findings of fact." FED. R. CRIM. P. 32(b)(6)(D). Only the unresolved objections communicated fourteen days prior to the hearing are excepted. *See* FED. R. CRIM. P. 32(b)(6)(B).

175. *See, e.g.*, FED. R. CRIM. P. 32 advisory committee's notes.

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

provide an adversarial hearing[177] or inquire into the defendant's opportunity to read and discuss the PSIR.[178] Now that Rule 32 requires some judicial inquiry into the defendant's reading and discussion of the PSIR that is received thirty-five days before sentencing[179] (but not the revised PSIR that is received at least seven days before sentencing),[180] it it unlikely that appellate courts will require further judicial inquiry into defendant's understanding of the PSIR.

In stark contrast to the level of judicial participation during sentencing, judges must make searching inquiries and hold hearings before accepting guilty pleas[181] or admissions of confessions.[182] Judges must be sure that guilty pleas are made voluntarily[183] and that the defendant's Fifth Amendment right to remain silent was waived validly.[184] However, unlike at a pretrial hearing or trial, if at sentencing a defendant contests the accuracy of an allegation in a revised PSIR (which he or she might not receive until only seven days before sentencing[185]), the defendant must prove the inaccuracy, in many cases by a preponderance

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177. *See, e.g.*, United States v. Hershberger, 962 F.2d 1548, 1553 (10th Cir. 1992) (concluding that an adversarial hearing may be provided at the discretion of the trial judge); United States v. Monaco, 852 F.2d 1143, 1148 (9th Cir. 1988) (holding that a judge's decision "to deny a request for an evidentiary hearing on alleged inaccuracies in a presentence report must be reviewed for abuse of discretion"), *cert. denied*, 488 U.S. 1040 (1989).

178. *See, e.g.*, United States v. Lewis, 880 F.2d 243, 245 (9th Cir. 1989) (concluding that Rule 32 "does not require the court to directly address a defendant concerning his knowledge of the presentence report"); United States v. Sambino, 799 F.2d 16, 17 (2d Cir. 1987) (concluding that "[i]t is not necessary for the district court to personally question the defendant as to whether he has read the [PSIR]"). *But see* United States v. Rone, 743 F.2d 1169, 1174 (7th Cir. 1984) (requiring the judge to ask the defendant whether he or she (1) has read the PSIR, (2) has discussed it with the defense attorney, or (3) wishes to contest any facts in the PSIR).

179. FED. R. CRIM. P. 32(b)(6)(A).

180. FED. R. CRIM. P. 32(b)(6)(D).

181. *See, e.g.*, FED. R. CRIM. P. 11 (plea agreements).

182. *See* Jackson v. Denno, 378 U.S. 368 (1964) (holding that a judge must determine whether, and find that, a defendant's confession was voluntarily given before it can be submitted to a jury).

183. *See* Boykin v. Alabama, 395 U.S. 238 (1969) (holding that a defendant must voluntarily plead guilty and understand the implications of his or her guilty plea).

184. *See* Miranda v. Arizona, 384 U.S. 436 (1966) (holding that suspects must be informed of and voluntarily waive their Fifth Amendment protections before their statements will be admissible in court).

185. *See* FED. R. CRIM. P. 32(b)(6)(C).

of the evidence.[186] In contrast, at a pretrial hearing, the prosecution must prove the voluntariness of a confession by a preponderance of the evidence;[187] the prosecution must prove every element of a crime beyond a reasonable doubt at trial.[188] At sentencing, the defendant, in high contrast to the entrenched procedures for pre-trial and trial hearings that ensure fairness and accuracy, does not have a comparable ability to ensure an accurate PSIR.

Another problem for the defendant is that it may be difficult, if not impossible, to produce any evidence or sustain any burden of persuasion (even one based on a preponderance of the evidence, the lowest burden of persuasion) because he or she will most likely be in jail awaiting sentencing. Under Rule 32, the names of persons obtained upon a promise of confidentiality[189] must not be contained in the PSIR and, at the judge's discretion, may never be disclosed to the defendant. It follows, then, that the person who made such statements may never be known to the defendant. In reality, the incarcerated defendant will have almost no ability to investigate the statements, if the judge ever discloses them. If the judge does, however, disclose them, the disclosure could only take the form of a written summary on the day of sentencing.[190] In the event that sufficient resources are available, defense attorneys, who may be heavily burdened and unable to completely read the PSIR before the day of sentencing, will unlikely conduct a full investigation. In

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186. *See, e.g.*, United States v. Ratlif, 999 F.2d 1023, 1028 (6th Cir. 1993) (holding that to prove a due process violation based on an inaccurate PSIR "the defendant must raise grave doubt as to the veracity of the information and show that the court relied on that false information in determining the sentence") (quoting United States v. Fry, 831 F.2d 664, 667 (6th Cir. 1987)); United States v. Gracia, 983 F.2d 625, 630 (5th Cir. 1993) (holding that "[a] defendant challenging information presented at sentencing bears the burden of demonstrating its untruth, inaccuracy, or unreliability"); United States v. Silverman, 976 F.2d 1502, 1513 (6th Cir. 1992) (concluding that the judge at sentencing may consider even "second hand" hearsay in PSIRs if the hearsay has "'sufficient or minimally adequate' indicia of reliability"), *cert. denied*, 113 S. Ct. 1595 (1993); *see also* United States v. Sustaita, 1 F.3d 950, 953 (9th Cir. 1993); McMillan v. Pennsylvania, 477 U.S. 79 (1986) (holding that the preponderance of the evidence standard governing findings at sentencing meets due process requirements). *But see* United States v. Fetlow, 21 F.3d 243 (8th Cir. 1994) (holding that the government must prove by a preponderance of the evidence the disputed statements in a PSIR if a judge is to rely upon them for sentencing).

187. Lego v. Twomey, 404 U.S. 477 (1972) (holding that a trial judge must find that the government proved only by a preponderance of the evidence that a defendant's confession was voluntary before submitting it to a jury).

188. *In re* Winship, 397 U.S. 358 (1970).

189. FED. R. CRIM. P. 32(b)(5)(B).

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

addition, what defense attorneys might consider to be insignificant errors not worthy of contesting may very well be important to the defendant during or after sentencing. Under these circumstances, it would be impossible for a defendant to disprove the erroneous allegations and information contained in the PSIR or challenge information excluded from it.

VII. THE JUDICIAL RESPONSE TO INACCURATE INFORMATION

When a defendant alleges that a PSIR contains inaccurate information, the sentencing judge must exercise one of three alternatives under Rule 32.[191] First, the judge may make a "finding" that the information is, indeed, inaccurate. In this instance, the inaccurate information will not harm the defendant because the judge will not rely on it in sentencing, and a copy of the judge's findings regarding the inaccuracy, usually the sentencing transcript,[192] will accompany the PSIR made available to the Bureau of Prisons.[193]

Second, the judge may find that the contested information is accurate. In this instance, the defendant has little recourse because the judge is under no obligation to thoroughly evaluate the information contained in the PSIR, even though the judge could[194] and perhaps should order a hearing.[195] Nonetheless, the defendant has no right to a "full-blown evidentiary hearing at sentencing . . . ."[196]

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191. FED. R. CRIM. P. 32(c)(1).

192. *See* United States v. Slaughter, 900 F.2d 1119, 1123 n.2 (7th Cir. 1990) (stating that submission of a sentencing transcript is "a common and acceptable method of discharging [the writing] requirement of Rule 32"). With regard to controverted material, some form of written finding is required, and the finding must be conveyed to the Bureau of Prisons in an appendix to the PSIR. FED. R. CRIM. P. 32(c)(1). *See also* United States v. Conkins, 9 F.3d 1377 (9th Cir. 1993) (requiring written findings with regard to the ending date of a drug conspiracy).

193. FED. R. CRIM. P. 32(c)(1). The sentencing judge can adopt the PSIR to satisfy the requirement of a finding, United States v. Carreon, 11 F.3d 1225 (5th Cir. 1994), but, with the 1994 amendment to Rule 32, only with regard to uncontested matters. FED. R. CRIM. P. 32(b)(6)(D).

194. *See* FED. R. CRIM. P. 32(c)(1) (stating that "[t]he court . . . may permit the parties to introduce testimony or other evidence on the objections").

195. *See* United States v. Cifuentes, 863 F.2d 1149 (3d Cir. 1988) (concluding that a defendant is entitled to a hearing to contest disputed information, if the sentencing judge relied on the information in imposing sentence).

196. United States v. Romano, 825 F.2d 725, 728 (2d Cir. 1987). A judge's decision to deny completely an evidentiary hearing will be reversed only if the judge abused her or his discretion, an extremely difficult standard for a defendant to prove.

Theoretically, the defendant could appeal the judge's finding, but he or she would be without an actual remedy. If the judge's finding is based on a hearing, it is extremely unlikely that any appellate court would substitute its judgment of the facts for that of the sentencing judge.[197] If the judge does not hold a hearing, the defendant has little recourse because Rule 32, while authorizing a hearing, does not require a hearing.[198] Moreover, under Rule 32, if the defendant does not make a proper and timely objection to the PSIR,[199] the court may accept the PSIR as its findings of fact.[200] Therefore, if the defendant's attorney is not especially vigilant in reading the PSIR and discussing it in detail with the defendant, the defendant could suffer unnecessarily with an inaccurate PSIR.

Under the third alternative, Rule 32 permits the judge to determine that a "finding" is not necessary as to controverted information, if the judge will not rely upon the controverted information at sentencing.[201] Even where the judge does not rely on the controverted information, the defendant, in almost all cases, is not entitled to have the information excised from the PSIR.[202] The defendant will have to challenge any inaccuracies through administrative procedures.[203]

Furthermore, a judge's decision not to make a finding about possible inaccurate information in the PSIR can have grave implications for the defendant in the correctional process. For example, the lack of a finding (regarding alleged inaccuracies) by the sentencing judge under Rule 32 has permitted governmental agencies extraordinary discretion in using controverted material to the defendant's detriment.[204] In *Coleman v.*

United States v. Monaco, 852 F.2d 1143, 1148 (9th Cir. 1988), *cert. denied*, 488 U.S. 1040 (1989).

197. *See* Solem v. Helm, 463 U.S. 277, 290 n.16 (1983) (concluding that "it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence").

198. FED. R. CRIM. P. 32(c)(1).

199. FED. R. CRIM. P. 32(b)(6)(B).

200. FED. R. CRIM. P. 32(b)(6)(D).

201. FED. R. CRIM. P. 32(c)(1).

202. *See* United States v. Legrano, 659 F.2d 17, 18 (4th Cir. 1981). The *Legrano* court did say, however, that the defendant could challenge any contested information through "administrative avenues." *Id.*

203. *Id.*

204. *See, e.g.*, Bayless v. United States, 14 F.3d 410 (8th Cir. 1994); Blue v. Lacy, 857 F.2d 479 (8th Cir. 1988); Ochoau v. United States, 819 F.2d 366 (2d Cir. 1987); Kramer v. Jenkins, 803 F.2d 896, *reh'g granted*, 806 F.2d 140 (7th Cir. 1986). In each of these cases, the court permitted or would permit the Parole Commission (before its

Honsted,[205] the defendant challenged an allegation in the PSIR that his offense involved more than 15 kilograms of cocaine.[206] The Court of Appeals for the Eleventh Circuit held that the Parole Commission could credit and rely on the challenged information (which was extremely damaging to an early parole determination) because the sentencing judge had expressly disregarded the information.[207] In *Coleman*, the Parole Commission (although it could be any governmental agency, such as the Federal Bureau of Prisons or the states' Departments of Corrections) was permitted to make its own factual findings about disputed portions of the presentence investigation report.[208]

Similarly, in *Lewis v. Beeler*,[209] where a defendant was charged with and convicted only of extortion, the sentencing judge stated that there was not a "shred of evidence" to support a prosecutor's suggestion at sentencing that the defendant was guilty of murders committed by placing cyanide in Tylenol.[210] However, the Court of Appeals for the Tenth Circuit upheld the Parole Commission's determination that the defendant had committed the seven "Tylenol murders."[211] The court concluded that the Parole Commission was entitled to make its own findings and thus deny parole, because the sentencing judge had not made a finding within the meaning of Rule 32.[212]

After sentencing, it is nearly impossible for a defendant to correct the PSIR.[213] After the actual sentence, courts do not have jurisdiction under

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abolition) to credit and use against a defendant information in a PSIR that had been disregarded by the sentencing judge. *See also* Vitk v. Jones, 445 U.S. 480 (1980) (concluding that a decision by a state Department of Correctional Services to transfer the defendant/inmate from prison to a mental health facility implicated a due process liberty interest and could be implemented only after an adversary hearing).

205. 908 F.2d 906 (11th Cir. 1990).

206. *Id.* at 907.

207. *Id.* at 907-08.

208. *Id.*

209. 949 F.2d 325 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1972 (1992).

210. *Id.* at 327.

211. *Id.* at 331-32. *See also* United States v. Beatty, 9 F.3d 686, 689 (8th Cir. 1993) (concluding that the PSIR need not be amended to exclude an allegation that the defendant was the main suspect in an uncharged murder).

212. *Lewis*, 949 F.2d at 331.

213. Findley & Ross, *supra* note 3, at 875. Appellate courts will look to determine only whether the sentencing judge complied with the formal requirements of Rule 32. *Id. See also* United States v. Lawal, 810 F.2d 491 (5th Cir. 1987) (remanding for resentencing because the sentencing judge did not clearly indicate, through a finding or determination, whether he relied on disputed material in the PSIR); United States v.

Rule 32 to correct the PSIR.[214] Thus, the lack of a judge's finding as to controverted information in the PSIR may permit all other criminal justice agencies to reach their own conclusions regarding the controverted information. For example, at an administrative hearing, a defendant will have no right to an appointed attorney in contesting a transfer from a prison to a mental health facility so long as he or she is provided with qualified and independent assistance.[215] Even in probation or parole revocation proceedings, the defendant has no absolute right to an appointed attorney,[216] although Congress had provided counsel in parole revocation proceedings at the discretion of the court to serve the interests of justice.[217] Especially in the federal system, where the relatively few prisons are scattered throughout the country, the defendant may be

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Eschweiler, 782 F.2d 1385 (7th Cir. 1986) (requiring a specific finding on disputed matter unless the sentencing judge indicates clearly in a written determination that he or she will not rely on the disputed matter); United States v. Rone, 743 F.2d 1169 (7th Cir. 1984) (requiring reasonable access to the PSIR and a judicial inquiry into whether the defendant (1) read the PSIR, (2) discussed the PSIR with her or his attorney, or (3) wishes to challenge the PSIR).

214. *See* United States v. Warner, 23 F.3d 287 (10th Cir. 1994).

215. *See* Vitk v. Jones, 445 U.S. 480, 495-96 (1980) (concluding that a transfer from a prison to a mental health facility implicated an inmate's due process liberty interest entitling him to an adversary hearing, but concluding that an appointed attorney was not required).

216. *See* Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973) (requiring a hearing before probation revocation but not mandating the appointment of an attorney except "on a case-by-case basis" to ensure "fundamental fairness"); *see also* Morrissey v. Brewer, 408 U.S. 471, 487-89 (1972) (concluding that due process requires a hearing before parole revocation but not deciding whether the appointment of an attorney is required). In *Gagnon*, the Court used its prior holding in *Morrissey* to conclude that parole revocation hearings and processes apply to probation revocation. 411 U.S. at 782. The *Gagnon* Court further stated that the appointment of an attorney in both parole and probation hearings must be made on a case-by-case basis, "[a]lthough the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings . . . ." *Id.* at 790. *See* Black v. Romano, 471 U.S. 606, 612 (1985) (concluding that "the probationer has a right to the assistance of counsel in some circumstances"). With the abolition of parole, hearings regarding parole revocation no longer exist; nonetheless, in the probation context, when a defendant is charged with a probation violation, Congress has provided the indigent defendant with the right to an attorney. 18 U.S.C. § 3006A(a)(1)(C) (1994).

217. 18 U.S.C. § 3006A(a), (g) (1994). With the abolition of parole, this section was amended to delete any reference to parole revocation, effective November 1, 1997. Pub. L. 98-473, tit. II, §§ 223(e)(2), 235, 98 Stat. 2028, 2031 (1984). Parole revocation proceedings were governed by 18 U.S.C. § 4214 (repealed, effective Nov. 1, 1997, by Pub. L. 98-473, tit. II, §§ 218(a)(5), 235, 98 Stat. 2027, 2031 (1984)).

imprisoned hundreds or thousands of miles away from the place of trial. As Findley and Ross noted:

> A defendant who wishes to have his or her PSI[R] 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 [on the controverted information]. If, however, the defendant does not raise the objection at sentencing, he or she may find that any later challenge has been waived. . . . Attempts to correct PSI[R]s after sentencing through direct appeals, "Rule 32 motions," Rule 35 motions [correction of sentence], or section 2255 motions [habeas corpus] have more often than not been dismissed for lack of jurisdiction.[218]

The defendant will be haunted by an inaccurate PSIR. He or she will stand alone in the abyss of a prison to confront and attempt to refute a document, prepared years earlier, that an untutored defendant may not be able to read, let alone comprehend. The lack of procedural safeguards inherent in Rule 32 will unfairly burden and punish a defendant far beyond the day of sentencing.

VIII. THE NEED FOR WIDER DISCLOSURE AND ADDITIONAL PROCEDURAL SAFEGUARDS

Even with its many amendments, Rule 32 still contains structural impediments that lead unnecessarily to inaccurate PSIRs and unfairness in the sentencing and correctional processes. For example, under Rule 32, a judge does not have to summarize undisclosed information if the information will not be relied upon at sentencing.[219] A study, conducted prior to the current Rule 32, found that even when judges chose to summarize undisclosed information, "43.3% [of the judges] do not adequately summarize undisclosed information relied upon in sentencing . . . ."[220] The inadequate summaries by the judges, as well as the failure of many probation officers to communicate the nature of the confidential information withheld from the defendant, create situations where correctional authorities cannot act in a manner consistent with

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218. Findley & Ross, *supra* note 3, at 878.

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

220. Fennell & Hall, *supra* note 3, at 1663.

judge's sentencing decisions.[221] Furthermore, there is little evidence that judge's summaries under more recent versions of Rule 32 better prevent arbitrary and improper treatment of defendants.[222] At the sentencing hearing, even if the defendant could effectively challenge disputed summarized information contained in the PSIR, Fennell and Hall found that "less than one-fourth of the district courts . . . communicate to the correctional agencies the defendant's challenges to information in the presentence report and the resolution of these challenges."[223] This conclusion was made before the 1983 amendment to Rule 32 required transmittal of judge's findings and determinations to the Bureau of Prisons.[224] However, the low rate of transmittal (less than twenty-five percent) existed despite an explicit policy of the Administrative Office of the United States Courts to correct errors in the PSIR.[225] The Administrative Office had directed that "information in the presentence investigation report determined to be factually inaccurate by the court shall be corrected by rewriting those pages which include the error(s)."[226] In addition, long before the Rule 32 disclosure requirements, at least one court of appeals, in *United States v. Picard*,[227] mandated disclosure of the substance of a presentence report.[228] Thus, despite the recent amendments to Rule 32, it is virtually certain that the Bureau of Prisons and social service agencies will continue to base critical decisions concerning an inmate on inaccurate and incomplete information contained in or excluded from PSIRs.

Inaccuracies in PSIRs do not necessarily result from a lack of diligence by probation officers, intentional misrepresentations by persons the probation officers interview, or shoddy record-keeping by governmental agencies. Preparing a PSIR involves a nonadversarial

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221. *Id.* at 1681.

222. *See* Lewis v. Beeler, 949 F.2d 325, 330-31 (10th Cir. 1991) (concluding that a finding does not exist even where a judge at sentencing concludes that there is not a "shred of evidence" to show that the defendant committed the murders alleged in the PSIR, thus permitting the Parole Commission to make its own findings regarding controverted material in the PSIR), *cert. denied*, 112 U.S. 1972 (1992); *see also* United States v. Tunstall, 17 F.3d 245 (8th Cir. 1994) (holding that a finding is not necessary where a court does not rely on disputed information in sentencing).

223. Fennell & Hall, *supra* note 3, at 1680.

224. *See* Fed. R. Crim. P. 32(c)(3)(D) (1983).

225. ADMIN. OFF. OF THE U.S. CTS., *supra* note 5, at 15d.

226. *Id.*

227. 464 F.2d 215 (1st Cir. 1972).

228. *Id.* at 220 (vacating the defendant's sentence because the trial court refused to disclose a portion of the PSIR that was used to pass sentence).

process. The process is unlike a trial where every fact may be challenged and every witness cross-examined. The preparation of the PSIR manifests broader societal considerations that involve victims and their families, defendants, courts, and correctional agencies. Probation officers' assessments and factual compilations probably will not be confronted with the same rigor and intensity as they would be at an adversarial proceeding.

However, even assuming good faith efforts by everyone involved in the preparation of the PSIR, the report will reflect some errors, if only those of perception. For example, if not clarified and explained, a report about a prior arrest or conviction may not truly reflect a defendant's culpability. That is, some prosecutors, even United States Attorneys acting under one federal attorney general, may demand that a defendant plead guilty to the highest possible count for a particular action. Despite institutional guidelines, other prosecutors may routinely agree to a misdemeanor or lower felony plea for the same action. Offenses in urban areas may be characterized far differently than they are in rural areas. These discretionary disparities prevent the characterization of an action (e.g., felony, misdemeanor, infraction, or violation) from accurately depicting a defendant's culpability.

To prevent defendants from being sentenced and treated on the basis of inaccurate information in PSIRs, Rule 32 needs structural tinkering and the criminal justice system's approach to the sentencing hearing needs a complete overhaul. The sentencing hearing is at least as important as a pretrial hearing conducted to determine the admissibility of a defendant's statement to law enforcement personnel[229] or the propriety of law enforcement's seizure of evidence.[230] At a pretrial hearing, the defendant may exercise many of the same procedural safeguards available at trial. At trial, the defendant may confront and cross-examine witnesses,[231] call the defendant's own witnesses,[232] subpoena hostile witnesses,[233] and challenge the sufficiency and basis of the legal document—whether indictment or information—lodged against the

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229. *See* Miranda v. Arizona, 384 U.S. 436 (1966) (requiring a hearing to determine whether a defendant has waived the right to remain silent).

230. *See* United States v. Wade, 388 U.S. 218 (1967) (vacating the conviction pending a hearing to determine the propriety of identification procedures).

231. *See* Pointer v. Texas, 380 U.S. 400 (1965) (guaranteeing an adequate opportunity for cross-examination at trial).

232. *See* Chambers v. Mississippi, 410 U.S. 284 (1973) (holding that a defendant, under certain circumstances, has a due process right to cross-examine his own witness and elicit relevant hearsay, despite rules of evidence to the contrary).

233. *See* FED. R. CRIM. P. 17(a) (providing for the compulsory appearance of witnesses); Washington v. Texas, 388 U.S. 14 (1967) (guaranteeing compulsory process of an alleged co-participant in a crime, despite rules of evidence to the contrary).

defendant.[234] Moreover, at pretrial hearings and trials, the prosecution bears both the burden of production and persuasion with regard to proving the admissibility of confessions and other evidence, as well as the elements of a crime.[235]

The PSIR is often as important as an indictment. Simply, the PSIR may affect significantly a defendant's time in prison, security level, and type of societal supervision upon release from prison. Yet, under Rule 32, the defendant may only "object" to the alleged inaccuracies in the PSIR[236] or "comment" on the judge's summaries of undisclosed portions of the PSIR.[237] Moreover, with one exception,[238] courts have uniformly rejected any right at sentencing to procedural safeguards based on the Sixth Amendment's Confrontation Clause.[239] Thus, any additional safeguards will probably have to be ensured under statutory or rulemaking authority.

The process of correcting inaccurate PSIRs and ensuring fairness in sentencing must first be viewed broadly. The process will involve educating defense attorneys, who often view their role as complete once a finding as to guilt has been made, and judges, who may be reluctant to use courtroom time to make factual determinations about disputed issues arising from the contents of the PSIR or the summaries of information excluded from the PSIR. Defense attorneys might become more involved in the preparation of accurate PSIRs once they realize that doing so will further their client's interests. Both trial and appellate courts should realize that greater disclosure of information will provide more accurate PSIRs; permit the imposition of more appropriate sentences; decrease the amount of fact-finding at sentencing hearings (under a Rule 32 that guarantees a type of pretrial procedural protection); minimize the number of appellate issues in a relatively heavily and unnecessarily litigated area; and yield more effective and fairer decisions by members of the criminal justice system.

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234. Under FED. R. CRIM. P. 12(b)(2), the defendant may challenge the indictment or information by filing a proper motion.

235. *See supra* notes 181-90 and accompanying text.

236. FED. R. CRIM. P. 32(b)(6)(B), (c)(1).

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

238. *See* United States v. Fortier, 911 F.2d 100, 104 (8th Cir. 1990) (holding that a right of confrontation is necessary at sentencing where the PSIR contained "triple hearsay"). In *Fortier*, an informant told a Drug Enforcement Agency agent that a third person said that drugs at issue belonged to the defendant. *Id.* at 103. *But see* United States v. Silverman, 976 F.2d 1502, 1514 (6th Cir. 1992) (rejecting the *Fortier* court's "triple hearsay" analysis), *cert. denied*, 113 S. Ct. 1595 (1993).

239. *See Silverman*, 976 F.2d at 1514 (concluding that trial-like procedural protections at sentencing are not constitutionally required).

IX. AMENDING RULE 32 TO CREATE MORE EFFECTIVE PROCEDURAL SAFEGUARDS

Under Rule 32, disclosure of the original PSIR must occur at least thirty-five days before sentencing.[240] But PSIRs revised upon the objection of the defendant or the prosecution need be disclosed only seven days prior to sentencing.[241] Disclosure of the revised PSIR seven days prior to sentencing is far too short a time in which to prepare for a current or expanded Rule 32 sentencing hearing, especially if the revision, which the government may request, adversely affects the defendant. Although the seven days would be computed as "business," not calendar days,[242] this time period would be especially inadequate for a sentencing hearing that is procedurally similar to a pretrial hearing. At a minimum, partly because of long trial delays, defendants have months, perhaps even a year or more, to prepare for pretrial hearings. In comparison, seven business days in which to prepare for a sentencing hearing is insufficient.

Earlier disclosure of the original and revised PSIR to the defendant and the defense attorney would allow more adequate preparation for a sentencing hearing. The need for earlier disclosure of the PSIR might vary with every case, depending on the nature of the offense and the social and criminal history of the defendant. For example, the PSIR might be less detailed and thus require shorter analysis in a case where a single defendant with no criminal record is found guilty of failing to report income for tax purposes. In more complicated cases, such as those involving far ranging conspiracies, a particular defendant's culpability would have to be evaluated by determining his or her role in the conspiracy, a sometimes complicated task that might require a more detailed PSIR and a lengthy sentencing hearing.

Although determining how much time a defendant needs to examine the PSIR and prepare for a sentencing hearing is relatively arbitrary, it is no more so than determining when, for example, the prosecution must release pretrial discovery to the defendant. In the federal courts, at the request of the defendant, the prosecution must reveal any discoverable evidence.[243] Given that the arraignment and trial can be months, perhaps a year, apart, no one would argue that the prosecution could release discoverable evidence only seven days before trial or a pretrial hearing. In practice, discoverable evidence is released months before trial.

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240. FED. R. CRIM. P. 32(b)(6)(A).

241. FED. R. CRIM. P. 32(b)(6)(C).

242. FED. R. CRIM. P. 45(a).

243. *See* FED. R. CRIM. P. 16.

Similarly, it is not reasonable to release the revised PSIR only seven business days before sentencing. A defendant's need to prepare is exactly the same, whether for pretrial proceedings, the trial, or the sentencing hearing. The rationale behind the early disclosure of information in the PSIR remains the same: defendants need relevant information and a sufficient opportunity to prepare a defense.

Therefore, the original PSIR should be released at least sixty days before the sentencing hearing, and any revised report should be released at least thirty days before the sentencing hearing. Under the federal rules, the thirty day period would translate into only about twenty-two business days.[244] While it continues in existence, the Parole Commission is statutorily required to provide the PSIR to incarcerated defendants at least thirty days prior to a parole hearing.[245] This extra time would allow the defendant and the defense attorney the opportunity to put aside other duties or cases and schedule interviews with relevant persons and conduct a thorough investigation. Although time served in a local jail is probably more uncomfortable than time served in a federal prison, the defendant would not be harmed in terms of the length of her or his sentence, because the time spent incarcerated prior to trial and sentencing would be credited toward the defendant's ultimate sentence.[246]

Assuming earlier disclosure, after reviewing the PSIR, the defendant may find factual errors, misleading perceptions, or improper conclusions, all of which can be investigated by both the defense and the probation officer. The 1994 amendment to Rule 32 already amounts to a significant improvement. Now, even before sentencing, the defendant may raise with the probation officer objections to the PSIR.[247] The probation officer may more thoroughly investigate particular objections and report revised conclusions to the judge in a revised PSIR,[248] which the judge may use as findings of fact.[249] The defendant's assertions can thereby be verified or discounted. The probation officer may even verify a fact that the defendant alleged to be false.

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244. FED. R. CRIM. P. 45(a). In computing a period of time, holiday and weekend days are counted in computing time, unless the prescribed time period is less than eleven days. *Id.*

245. 18 U.S.C. § 4208(b) (1994) (repealed, effective Nov. 1, 1997, by Pub. L. 98-473, tit. II, §§ 218(a)(5), 235, 98 Stat. 2027, 2031 (1984)). See *supra* note 217 for a statutory history of the abolition of parole.

246. 18 U.S.C. § 3624(b) (1994). A prisoner may also be credited with 54 days per year toward service of her or his sentence for satisfactory behavior; a period commonly termed "good time." *Id.*

247. FED. R. CRIM. P. 32(b)(6)(B).

248. FED. R. CRIM. P. 32(b)(6)(C).

249. FED. R. CRIM. P. 32(b)(6)(D).

From the prosecution's point of view, if the PSIR is completed and released sufficiently prior to the sentencing hearing, defendants will be put on notice that their versions of a particular fact or event probably will be discounted, unless evidence to the contrary is presented at the sentencing hearing. If the defense does not properly object to the PSIR, then the defendant will waive any further right to challenge it.[250]

Finally, Rule 32 should be amended so that all information used to assess the defendant, including sentencing recommendations,[251] diagnostic opinions,[252] and confidential information,[253] be revealed to the defendant. Of course, the one exception to the rule relates to information that if revealed "might result in harm, physical or otherwise, to the defendant or other persons."[254] This provision should always be read not to permit disclosure if the release of information creates a reasonable possibility that physical harm to the defendant or another person might result. Otherwise, especially with regard to possible "mental" harm, which is not explicitly mentioned in Rule 32, this provision should be read narrowly. Rule 32's reference to harm, physical "or otherwise," is so broad that presumably it could cover mental harm.

As noted in Section IV above, there are few persons likely to be harmed by the disclosure to the defendant of information in the PSIR or information now excluded from it under Rule 32. However, the disclosure exclusion provision, as now written, is so broad that there is no criterion a judge can use to determine what is "harm" to a defendant. Harm would obviously include suicide, but it seems highly unlikely that the information contained in a PSIR or excluded from it would cause the defendant to commit suicide after he or she has weathered a finding of guilt as to a criminal offense.

Moreover, judges, as well as others involved in the proceedings, are ill trained to determine exactly what in a PSIR, or excluded from the PSIR, could cause harm to a defendant. One study in particular showed that no one, including the psychiatrists, can agree on criteria by which to

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250. *See* United States v. Plisek, 657 F.2d 920, 924-25 (7th Cir. 1981) (holding that the defendant waived a challenge to the PSIR where the defense attorney did not raise an alleged error regarding a prior conviction and where the defense attorney and the defendant attested to the accuracy of the PSIR).

251. FED. R. CRIM. P. 32(b)(6)(A).

252. FED. R. CRIM. P. 32(b)(5)(A).

253. FED. R. CRIM. P. 32(b)(5)(B).

254. FED. R. CRIM. P. 32(b)(5)(C).

evaluate dangerousness.[255] Furthermore, another study showed that dangerousness is nearly impossible to predict.[256] Therefore, it is virtually absurd to advocate uniform standards of dangerousness if, ultimately, it is impossible to predict dangerousness. Yet, in a quest for fairness, some uniform standards must be developed if countries continue to use danger and harm as legal criteria.

Similarly, diagnostic opinions should be routinely revealed to the defendant, not automatically concealed. Although Rule 32 mandates exclusion of "diagnostic opinions that . . . might seriously disrupt a program of rehabilitation,"[257] it is difficult to imagine what those opinions are. Assume, for example, that a psychiatrist's opinion is as detrimental as possible to a defendant. The psychiatrist writes that "the defendant is the most dangerous person alive and should never be released from prison." If a psychiatrist could predict dangerousness, which is highly unlikely,[258] the defendant necessarily has been convicted already of heinous crimes and will probably never be released from prison anyway. If the diagnostic opinion could spur the defendant to harm the psychiatrist or anyone else, then under the broad "harm exception"[259] the diagnostic opinion would never be disclosed to the defendant in the first place.

Moreover, the Rule 32 mandatory diagnostic exclusion defies reason, research, and professional opinion. Clients or patients should develop trust and open communication with their counselors and others who influence their lives.[260] The Rule 32 diagnostic exclusion, however,

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255. *See* Harding & Adseballe, *supra* note 73, at 394-98. Legal definitions of dangerousness lack clarity and precision. *Id.* at 394. Though psychiatrists are more likely to rate a patient as dangerous, psychiatrists are no more likely than other professionals to agree on a standard of dangerousness. *Id.* at 397. "[P]sychiatric expertise does not increase the reliability of [dangerousness] ratings." *Id.* at 398.

256. Menzies, *supra* note 72, at 24 (concluding that "danger, violence, risk, [and] psychopathy" are not amenable to scientific calibration). *See* SHEA, *supra* note 74, at 136 (concluding that psychiatrists cannot predict dangerousness).

257. FED. R. CRIM. P. 32(b)(5)(A).

258. *See generally* Harding & Adseballe, *supra* note 73; SHEA, *supra* note 74, at 131-36.

259. FED. R. CRIM. P. 32(b)(5)(C).

260. *See* WILLIAM A. DONOHUE with ROBERT KOLT, MANAGING INTERPERSONAL CONFLICT 29 (1992); DAVID LESTER & MICHAEL BRASWELL, CORRECTIONAL COUNSELING 3 (1987); BRUCE SHERTZER & SHELLY C. STONE, FUNDAMENTALS OF COUNSELING 102-10 (1968); ROBERT J. WICKS, CORRECTIONAL PSYCHOLOGY: THEMES AND PROBLEMS IN CORRECTING THE OFFENDER 71 (1974); Charles L. Newman, *Concepts of Treatment in Probation and Parole Supervision*, *in* READINGS IN CORRECTIONAL CASEWORK AND COUNSELING 61, 63 (Edward E. Peoples ed., 1975).

promotes suspicion and the withholding of honest communication. Both Rule 32's mandate and judges' speculative conclusions that diagnostic opinions should not be revealed to defendants would prevent some defendants, such as sex offenders, from obtaining proper treatment. Without proper treatment, which arguably might "cure" or "rehabilitate" certain defendants (although rehabilitation is no longer a primary correctional goal at the federal level[261]), defendants will have far fewer chances for any type of success while in prison or after release. If a treatment plan and its expectations are unknown, then a defendant cannot work to change dysfunctional behavior.[262]

With particular regard to Rule 32 and the PSIR, if erroneous diagnostic opinions are not disclosed to the defendant, then the defendant cannot challenge the inaccuracies with his or her expert witnesses. It would be unthinkable in an insanity trial to permit the prosecution, but not the defendant, to hire a psychiatrist. If the Rule 32 diagnostic exclusion prevailed at trial, then neither the defendant nor the defendant's attorney would be permitted to hear the prosecution's psychiatrist testify before the jury. The judge would only summarize the psychiatrist's testimony. In an adversarial system, it is illogical and unfair to deny a defendant the opportunity to confront and refute, if possible, a diagnostic opinion.[263] "The holistic approach to offender rehabilitation requires that each offender receive a thorough diagnosis of his problems, and that an appropriate control and rehabilitation plan be developed with the offender

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261. *See* 18 U.S.C. § 3553(a)(2)(A)-(D) (1994) (declaring that the purpose of a sentence is to punish criminals, deter criminal conduct, and protect the public from further crimes, while providing the defendant with needed training, medical care, or other correctional treatment).

262. Virtually all problems and concerns may be more effectively confronted through open communication. *See* LESTER & BRASWELL, *supra* note 260; Newman, *supra* note 260.

263. Rule 32 also places mental health professionals in an irresolvable quandry. For example, ethically, psychologists must insure that their tests are not misused by others. *See* Ellsworth A. Fersch, Jr., *Ethical Issues for Psychologists in Court Settings, in* WHO IS THE CLIENT: THE ETHICS OF PSYCHOLOGICAL INTERVENTION IN THE CRIMINAL JUSTICE SYSTEM 43, 50-52 (John Monahan ed., 1980). However, psychologists have responsibilities to both their clients and to the courts. An ethically tenuous situation may arise because the psychologists' loyalties may be divided and undefined. They may be tempted to create accurate but superficial reports and evaluations so as to prevent untrained judges, lawyers, and probation officers from misinterpreting or misusing data that may never be revealed to the defendant, the one to whom a psychologist presumably owes the most allegiance.

and carried through."[264] It is the duty of a forensic psychiatrist to moderate punishment and to recommend leniency if at all possible,[265] yet the sciences of psychiatry and psychology are more likely to be used by federal courts to increase punishment.[266]

X. CONCLUSION: FULLER DISCLOSURE WILL CREATE TRUST IN THE LEGAL SYSTEM

The restrictions that Rule 32 places on the defendant with regard to the presentence investigation report would be inconceivable if applied to pretrial or trial proceedings. Yet the sentencing hearing is at least as important as pretrial hearings and sometimes more important than a verdict of guilty or a plea of guilt. Rule 32 should be amended to create earlier and more open disclosure of the PSIR, including material (diagnostic opinions and confidential information) that is now automatically excluded from the PSIR.

The procedure by which to correct information in the PSIR should be more adversarial, thus minimizing the possibility that an isolated but significant error will infect the entire PSIR and the correctional process. Ultimately, however, the procedure might become even more cooperative than it is now. The probation officer's fact gathering process would retain a broad, utilitarian, and neutral perspective because no probation officer wants to harm a defendant through an inaccurate PSIR. The judge's role would remain the same. The judge's time spent at an expanded sentencing hearing would not be significantly increased because many errors now contested at sentencing would be corrected before sentencing. Having worked cooperatively with the probation officer to correct errors before sentencing, the defendant would be less likely to object to the PSIR at sentencing.

Greater accuracy and efficiency would be fostered throughout the remainder of the correctional process. While the net gain in efficiency

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264. Leonard J. Hippchen, *Fundamental Principles to a Holistic Approach, in* HOLISTIC APPROACHES TO OFFENDER REHABILITATION 5, 21 (Leonard J. Hippchen ed., 1982).

265. *See*, Campbell, *supra* note 63, at 96. Forensic psychiatry developed as a tool to aid in an offender's rehabilitation. *Id.* at 89. With the societal rejection of rehabilitation as a correctional goal, 18 U.S.C. § 3553(a)(2)(A)-(D) (1994), psychiatry and psychology are now used by courts to justify punishment, a role for which they were not designed and are poorly suited.

266. *See* Campbell, *supra* note 63, at 105-06. Campbell reviewed the use of psychiatric presentence reports around the world, and concluded that judges are likely to accept recommendations for severe punishment but unlikely to accept recommendations for lenient punishment or treatment. *Id.*

would be notable, most importantly, the defendant would be treated on the basis of more reliable information. Used by competent correctional officials, this information would only serve to enhance the sentencing and correctional processes, not only for the defendant, but also for victims and the public. If people believe the criminal justice system to be fair and reliable, they will assume a more prominent role in its administration. If defendants believe the criminal justice system to be fair and reliable, they will be more likely to accept their fate and seek to change themselves.