CRIMINAL LAW—DISCLOSURE OF THE PRESENTENCE INVESTIGATION REPORT—NEW RULE IN NEW JERSEY—*State v. Kunz*, 55 N.J. 128, 259 A.2d 895 (1969).

Henry Kunz was convicted of knowingly purchasing a stolen automobile, in violation of N.J. Stat. Ann. 2A:139-1.[1] Prior to sentencing, the court reviewed a presentence investigation report which contained information from the reports of investigators and portions of the prosecutor's file. Although these reports labelled defendant as the New Jersey contact for a stolen car ring, no proof of this was presented at the trial. At the time of sentencing, counsel for defendant requested an opportunity to review the presentence report. The trial judge denied the request and sentenced defendant to the State Prison to serve a term of not less than one nor more than two years. Defendant appealed his conviction to the Appellate Division on the ground that he or his counsel had a right to see the presentence report for aid in argument or mitigation of sentence. The Appellate Division, in an unreported opinion, affirmed.

Having granted certification,[2] the Supreme Court of New Jersey affirmed the conviction, but set aside the sentence and remanded the case for resentencing. The court ruled that in all future sentence proceedings, defendants would be entitled to disclosure of the presentence report with fair opportunity to be heard on any adverse matters relevant to the sentencing.[3]

In 1953,[4] preparation of presentence reports became mandatory in New Jersey for all criminal proceedings in the Superior and County Courts. Subsequently, such preparation also became mandatory on waiver in the municipal courts.[5] The question of access to presentence investigation reports was not dealt with in the Court Rules, and in practice there was little, if any, disclosure.[6] In 1954, The American Law Institute proposed that prior to sentencing, defendants should have the right to examine and controvert any information in presentence reports.[7]

1 N.J. STAT. ANN. 2A:139-1 (1969) provides: "Any person who receives or buys any goods or chattels, or choses in action, or other thing of value stolen from any other person or taken from him by robbery or otherwise unlawfully or fraudulently obtained . . . is guilty of a high misdemeanor."

2 State v. Kunz, 53 N.J. 273, 250 A.2d 137 (1969).

3 State v. Kunz, 55 N.J. 128, 259 A.2d 895 (1969).

4 N.J.R.R. 3:7-10(6) (1953) (now R.3:21-2).

5 State v. Alvarado, 51 N.J. 375, 240 A.2d 677 (1968).

6 55 N.J. at 139, 259 A.2d at 901.

7 MODEL PENAL CODE § 7.07(5) (Tent. Draft No. 2, 1954).

In 1956, two articles in the *New Jersey Law Journal* discussed the arguments for and against disclosure.[8] In his article, Professor Knowlton[9] advocated disclosure of the presentence report to defendants. It was his opinion that the caseload of probation officers is too great for them to do adequate research for presentence investigation reports, and that consequently there exists a greater possibility of error.[10] Professor Knowlton compared disclosure of presentence investigation reports to disclosure of investigation reports required in several federal cases.

In *Gonzales v. United States*,[11] the Supreme Court reversed a conviction for refusing to report for induction because the Selective Service Appeal Board failed to show the Justice Department's report to the registrant. Although the statute did not require the Board to give the registrant the report,[12] the Court ruled that the overall procedures provided in the statute and regulations, designed to be fair and just in their operation, required that the registrant receive a copy of the report and be given a reasonable opportunity to file a reply thereto.[13] Professor Knowlton also compared the situation in presentence investigation report cases to that in another federal case, *Parker v. Lester*.[14] Under the Magnuson Act[15] and its directives,[16] the Commandant of the Coast Guard could, without warning, blacklist merchant seamen as poor security risks. Although the order could be appealed, the individual was not informed of the allegations against him. The court ruled that the regulations, as enforced by the Coast Guard, operated to deny due process of law.[17] Disclosure was required

---

8 Knowlton, *Should Presentence Reports Be Shown to Defendants?*, 79 N.J.L.J. 409 (1956); Gaulkin, *Should Presentence Reports Be Shown to Defendants?*, 79 N.J.L.J. 421 (1956).

9 Prof., Rutgers, The State Univ. School of Law, Newark; J.D., 1949, State Univ. of Iowa; L.L.M., 1952, Univ. of Penn.; Admitted: Iowa, 1949; New Jersey, 1962; Ass't. Prof., Rutgers, Camden, 1950-51; 1952-53; Assoc. Prof., 1953-56; Prof., 1957-59; Prof., Rutgers, Newark, since 1959.

10 Knowlton, *supra* note 8, at 417.

11 348 U.S. 407 (1955).

12 Universal Military Training and Service Act, 62 Stat. 612, as amended, 50 U.S.C. App. § 456(j) (1948).

13 348 U.S. at 417.

14 227 F.2d 708 (9th Cir. 1955).

15 64 Stat. 427, 1038, 50 U.S.C. 191, 192, 194 (Supp. III, 1950). This act provided that "Whenever the President finds that the security of the United States is endangered by reason of actual or threatened war, or invasion . . . the President is authorized to institute such measures and issue such rules and regulations . . . to safeguard against destruction, loss . . . . "

16 3 C.F.R. § 356 (1949-53 comp.).

17 227 F.2d at 723.

despite the Government's contention that valuable sources of information, vital to the nation's security, could be foreclosed.[18] Professor Knowlton concluded that if disclosure is required at the federal level, it should also be required at the state level.

Although his article demonstrated the disadvantages of disclosure of presentence reports, Judge Gaulkin[19] first discussed some of the popular arguments in favor of disclosure.[20] Among them were: (1) that due process requires it;[21] (2) that even if due process does not compel disclosure, common decency demands that the defendant should have the opportunity to disprove falsehoods contained in the report which might cause him to be punished beyond his due;[22] and (3) that, in addition to avoiding the injustice of excessive punishment, disclosure will make the officers who prepare the reports more careful and give the judges a check on the officers' accuracy and judgment,[23] enable more defendants to prove themselves worthy of probation, and acquaint the defendant with the reasons for his sentence, so that he will not be embittered by it, thus facilitating rehabilitation. In concluding that there should be no disclosure,[24] Judge Gaulkin observed that if there were, there would result: a greater delay in the administration of criminal justice; a foreclosure of valuable sources of information; and the undesirable possibility that the contents of the report disclosed might be the basis of suits for libel and slander against citizens and even against probation officers.[25]

The expansion of defendants' rights at sentencing in New Jersey became apparent as early as 1957. In that year, the court held that a defendant, after conviction, could not be sentenced as a second offender without first having been afforded proper notice and the opportunity to contest that status.[26] In the same year, the Supreme Court of New

18 *Cf.* State v. Kunz, 55 N.J. 128, 259 A.2d 895 (1969).

19 L.L.B., New York Univ., 1928; Prosecutor, Essex County, 1952-53; Judge, Essex County Court, 1953-58; Judge, Appellate Division, N.J. Superior Court, 1958-69; Presiding Judge, 1963-69; Retired from Bench, September, 1969.

20 Gaulkin, *supra* note 8, at 421.

21 *See also* Parker v. Lester, 227 F.2d 708 (9th Cir. 1955).

22 *See also* State v. Kunz, 55 N.J. 128, 144, 259 A.2d 895, 903 (1969). The court stresses the fact that the case is not being decided on constitutional grounds but on grounds of rudimentary fairness.

23 *See also* Smith v. United States, 223 F.2d 750 (5th Cir. 1955). In this case it was alleged that an F.B.I. agent had given false information prior to sentencing.

24 Gaulkin, *supra* note 8, at 425.

25 *See also* State v. Kunz, 55 N.J. 128, 147, 259 A.2d 895, 905 (1969). For a comprehensive list of articles and reports concerning disclosure of presentence reports *see Id.* at 148, 259 A.2d at 905-06.

26 State v. Laird, 25 N.J. 298, 135 A.2d 859 (1957). *See also* State v. Booker, 88 N.J. Super. 510, 212 A.2d 849 (App. Div. 1965).

Jersey ruled that presentence reports may not be used in a manner which is so unfair as to infringe on fundamental concepts of justice and due process.[27]

Subsequently, in *State v. Pohlabel*,[28] the Superior Court, Appellate Division held that, although it is not necessary to disclose the contents of a presentence report to a defendant or his counsel, the defendant is entitled to have his sentence vacated, if certain portions of the report are inaccurate, and that a new presentence report should be prepared and defendant resentenced. This ruling presented an interesting question which the majority opinion in *Kunz* noted—If a defendant is entitled to be resentenced if his presentence report is inaccurate, how is he to know of its inaccuracy if he is not entitled to see it?[29] Under *Kunz* the obvious dilemma of the *Pohlabel* ruling[30] is resolved in the defendant's favor. By making presentence reports available to a defendant, inaccuracies can be challenged and unfairness and error may be avoided.[31]

While full disclosure apparently has considerable merit, it is not without objection. The dissenting opinion of Justice Haneman in *Kunz* accurately states the two primary objections to full disclosure: "(1) a drying up of the factual and opinion information obtainable and includable for consideration by the judge,[32] and, (2) the further burdening of an already overburdened criminal judicial system, by according a defendant the right to a full trial of the facts and opinion contained in the report."[33] Justice Haneman also points out that the recently promulgated rule[34] concerning presentence reports should not

27 State v. Wingler, 25 N.J. 161, 135 A.2d 468 (1957). Defendant was convicted of morals charges, and in accordance with the Sex Offender's Act (N.J. STAT. ANN. 2A:164-3 (1953)), was committed to the Diagnostic Center for a complete mental and physical examination. As a result of the report of the Diagnostic Center, defendant was committed to the New Jersey State Hospital at Marlboro for an indefinite period, without having seen the report and without a hearing. Defendant applied for a writ of habeas corpus and the court reversed and remanded the case for further proceedings. The court ruled that the interests of justice would be advanced if the trial court, before imposing sentence under the Sex Offender Act, submits the Diagnostic Center's report to the defendant and affords him an opportunity to be heard.

28 61 N.J. Super. 242, 160 A.2d 647 (App. Div. 1960).

29 Rubin, *Sentences Must Be Rationally Explained*, 42 F.R.D. 203, 217 (1968).

30 61 N.J. Super. 242, 160 A.2d 647.

31 State v. Kunz, 55 N.J. 128, 141, 259 A.2d 895, 901 (1969). *See also* State v. Myers, 374 F.2d 707 (3d Cir. 1967); State v. Killian, 91 Ariz. 140, 370 P.2d 287 (1962); State v. Barbato, 89 N.J. Super. 400, 215 A.2d 75 (App. Div. 1965); State v. Leckis, 79 N.J. Super. 479, 192 A.2d 161 (App. Div. 1963).

32 *See also* Evjen, *Some Guidelines In Preparing Presentence Reports*, 37 F.R.D. 111, 177 (1964).

33 State v. Kunz, 55 N.J. 128, 149, 259 A.2d 895, 906 (1969).

34 R. 3:21-2 became effective September 8, 1969.

be eliminated by one case, but should be fully discussed by probation officers and sentencing judges prior to any change.[35]

Complete disclosure of the presentence report affords a defendant rights beyond those previously granted in any court. The majority in *Kunz* observed that while many states permit disclosure of the presentence report, New Jersey is the first state which requires that defendants be permitted to examine the report and to rebut any prejudicial information it contains.

The California Penal Code provides:

> No court shall pronounce judgment upon any defendant, as to whom the court has requested a probation report pursuant to Section 1203.10, unless a copy of the probation report has been made available to the court, the prosecuting attorney, and the defendant or his attorney. . . . If the defendant is not represented by an attorney, the court . . . [shall order] the probation officer who prepares the report to discuss its contents with the defendant.[36]

Though this and similar statutes seemingly provide for full disclosure, matters deemed exceedingly confidential come before the court in a separate notation or letter and are not disclosed to any other persons.[37] This qualification is compatible with the rationale of *Craemer v. Superior Court In and For County of Marin*.[38] In that case a California court ruled that public policy demands that certain documents and records be treated as confidential. Generally, within this classification are those records concerning condition, care and treatment of inmates, and others involving execution of laws relating to apprehension, prosecution, and punishment of criminals. Consequently, indiscriminate inspection should not be allowed in these cases even though the records are in custody of a public officer and are of a public nature.

Maryland, also, seemingly has a policy of full disclosure of presentence investigation reports, promulgated through case law. In *Driver v. State*,[39] the court held that any information which might influence a court's judgment from a presentence investigation report which had not been received from the defendant himself or given in his presence should be called to the accused's attention or to the attention of his counsel so that he may be afforded opportunity to refute or discredit it.

---

35 State v. Kunz, 55 N.J. 128, 154, 259 A.2d 895, 909 (1969).

36 CAL. PEN. CODE, § 1203(d) (Deering's 1969 Supp.).

37 Higgins, *Confidentiality of Presentence Reports*, 28 ALBANY L. REV. 12, 13 (1964). *See also* Roche, *The Position for Confidentiality of the Presentence Investigation Report*, 29 ALBANY L. REV. 206 (1965).

38 265 Cal. App. 2d 216, 71 Cal. Rptr. 193 (Ct. App., 1st Dist. 1968).

39 201 Md. 25, 28, 92 A.2d 570, 573 (1952).

However, in Maryland, as well as in California, the rule on any disclosure is actually qualified. The procedure is that the report is prepared in two parts. One part sets out the facts while the other part, which is never made available to defendant or his counsel, contains the recommendation of the probation officer. The probation officer is unavailable for cross-examination, and is not called upon to account in any way for the contents of his report. If the body of the report contains any confidential information which the probation officer believes should not be made known to the defendant, he may call that to the attention of the judge and such information may be withheld.[40]

The *Kunz* decision has already aroused considerable controversy in New Jersey. Opponents of full disclosure believe that the decision will result in a delimited presentence report. In support of this theory they contend that the public may refuse to volunteer confidential information for fear of retaliation; that the relationship between probation officers and their charges may be seriously strained; and that the defendant's right to contest any adverse matter in the presentence report may cause serious delay in the administration of justice.[41]

On the issue of public refusal to volunteer information, it is argued that any disclosure of negative comments to a defendant may inhibit members of the public from making such statements, thereby reducing the information available for the presentence report. Proponents of full disclosure contend that a defendant is entitled to confront his accusers, and maintain that fear of retaliation can be overcome by other procedures. One recommendation is to separate the information from its source, thereby allowing the court to withhold the name of the informant if the possibility of retaliation exists. While this method may itself limit disclosure, it is at least an attempt to resolve a dilemma which the court in *Kunz* apparently failed to consider.

The objection that full disclosure could seriously strain the relationship between probation officers and their charges presents an even more serious problem. It has been suggested that a defendant, fully aware of the comments and recommendation of the probation officer, may be less willing to cooperate with him during the period of his probation. Advocates of disclosure suggest that a defendant should be informed of his probation officer's comments so that their accuracy may, if necessary, be challenged. Additionally, they maintain, that such disclosure will insure a more diligent preparation of the report.

---

40 Thomsen, *Confidentiality of the Presentence Report*, FED. PROBATION (March, 1964) 8.

41 *See generally supra* note 8.

A solution to the *cooperation problem* might be to divide the probation department into sections, with one section preparing the presentence reports and the other counselling probationers. However, it seems that New Jersey is presently unwilling to advance the funds for the additional personnel required. Therefore, while a solution is theoretically possible, it is highly improbable.

Since a defendant is now entitled to contest any adverse matter in a presentence report, opponents of disclosure argue that a serious delay may occur in the administration of justice. This delay would be occasioned by the presentence hearing itself as well as by the possibility of subsequent appeals. Advocates of full disclosure believe that one of its primary purposes is the elimination of unfounded and injurious information. Since the period of incarceration is often contingent on the presentence report, the necessity of its validity is a most cogent argument for disclosure. Disclosure advocates also feel that delay could easily be eliminated by increased allocations for the appointment of additional judges. However, as was previously stated, New Jersey appears reluctant to appropriate the needed funds.

If probation officers delimit the presentence report, those favoring disclosure will view the act as grossly irresponsible. The purpose of the presentence report is to benefit a defendant. If the report is limited solely to social aspects of a defendant's history, it could, in addition to being of negligible value to a sentencing judge, be extremely injurious to a defendant. The purpose of the report would clearly be defeated and sentencing with the use of the limited report would, at best, become a mechanical task more appropriately performed by a computer than by a court.

An additional argument in support of disclosure is that many attorneys representing reticent defendants can now rely on the presentence report for information which would otherwise be unavailable to them. If the presentence report is delimited, these attorneys might lose invaluable information necessary for the protection of their clients.

Although the many advantages of full disclosure of presentence reports have been enumerated, adoption of the delimited report remains a strong possibility. If no changes in the criminal judicial system are forthcoming, the difficulties facing a probation officer and the problems of increased delay in the administration of criminal justice seem insurmountable. Therefore, other states may be hesitant to follow the full disclosure rule of New Jersey.