FEDERAL PRESENTENCE REPORTS: MULTI-TASKING AT SENTENCING

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I. INTRODUCTION

Sentencing convicted criminals is a solemn undertaking by which courts pass judgment based upon all sorts of background information. Federal Sentencing Guidelines (Guidelines) prescribe an array of factors which judges must employ in imposing sentences. Under federal law, the court is primarily informed of relevant factors by a presentence investigation report (PSR) prepared by a probation officer. The report is disclosed to the defendant, who is given the opportunity to rebut incorrect information in the PSR. The trial judge must then resolve those disputes by making findings of fact and submitting a written record of them to accompany the report for both appellate and incarceration purposes.

Although defendants who stand before the court prepared to plead guilty are told that, if they do so, there will not be "a trial of any kind," there usually is a trial of sorts addressing factual disputes at the sentencing phase. Indeed, the sentencing hearing has become as much a trial as the guilt phase because it invariably resolves new facts crucial to the sentence. Adjudication of facts at sentencing hearings under the Guidelines loosely resembles an abbreviated version of civil pretrial and trial practice. However, the PSR usually contains proof in the form of hearsay, unconstrained by rules of evidence. Consequently, the sentencing "trial" is often a summary one. It is a most informal set of fact-finding procedures, unlike those governing any other federal tribunals.

This Article compares adjudication of disputed facts at sentencing with that of civil and other criminal issues. In particular, the Article focuses on the probation officer's PSR as a multiple-purpose document created by the officer to fulfil three different roles: (1) prosecutor; (2) investigator and witness; and (3) adjudicative officer. Although much has been written on probation officers' diverse duties in preparing the PSR[1] and on the

[1] *See generally* Sharon M. Bunzel, *The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows*, 104 YALE L.J. 933 (1995) (an excellent article chronicling the transformation of the mission of the federal probation scheme under the Guidelines and examining the suitability of probation officers for their new

Constitutional[2] and evidentiary[3] aspects of Guidelines sentencing, this Article will focus on the several distinct uses of the PSR in the sentencing process. Its integral involvement in the development of the sentencing record—charging, proving, and resolving sentencing issues—has no analogue in federal law.

II. SENTENCING PROCEDURES

A. *Constitutional Procedure*

Sentencing has traditionally been accorded a special place in criminal procedure. The stakes for a criminal defendant include prison terms, fines, forfeiture of property, and restitution obligation.[4] Yet, unlike pretrial and trial procedures in the guilt phase of trial, virtually no sentencing procedures are mandated by the Constitution. For example, the Sixth Amendment right to counsel extends only to proceedings which are "critical stages" of the case.[5]

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role); United States v. Silverman, 976 F.2d 1502, 1519-33 (6th Cir. 1992) (Merritt, C.J., dissenting).

[2] *See* Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 208-10 (1991) (federal judge's article arguing that application of the Guidelines violates the Due Process Clause); Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 323-25 (1992) (arguing that due process mandates higher burdens of proof and more procedural protections for resolution of factual disputes); *see generally* Edward R. Becker, *Insuring Reliable Fact Finding in Guidelines Sentencing: Must the Guarantees of the Confrontation and Due Process Clauses be Applied?*, 22 CAP. U. L. REV. 1 (1993) (federal circuit judge's argument that Due Process Clause requires courts to afford defendant benefit of more procedural rights before and during sentencing hearing and a heightened standard of reliability for considering hearsay). *See also generally* Daniel J. Capra, *Sentencing Guidelines and the Fifth Amendment*, 205 N.Y.L.J. 3 (Jan. 3, 1991).

[3] Randolph N. Jonakait, *Insuring Reliable Fact Finding in Guidelines Sentencing: Why Not Real Evidence Rules?*, 22 CAP. U. L. REV. 31, 39-41 (1993) (questioning distinction between guilt and trial phase as unprincipled); Deborah Young, *Untested Evidence: A Weak Foundation for Sentencing*, 5 FED. SENT. REP. 63, 65-66 (1993) (noting that use of Federal Rules of Evidence at sentencing would greatly enhance the reliability of factual findings).

[4] The sanctions attending most criminal convictions include incarceration, fines, and restitution. Federal law authorizes levying a $250,000 fine against an individual convicted of most felonies. 18 U.S.C. § 3571(b)(3) (1992). Many drug felonies trigger much heavier fines. *See, e.g.*, 21 U.S.C. § 841(b)(1)(A) (1992) (providing that illegal possession of one kilogram of heroin carries fine of $4 million). Generally, a court may also award restitution to the victims of the defendants' crime. *See* 18 U.S.C. §§ 3663-64 (1992). Restitution awards are enforceable by execution in the same manner as a civil judgment. 18 U.S.C. § 3663(h)(2) (1992). Under the Guidelines, the court "shall" impose a fine in all cases, except "where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine." U.S.S.G. § 5E.1.2(a).

[5] Kirby v. Illinois, 406 U.S. 682, 689-90 (1972) (post-indictment line-up of suspects

Although the sentencing itself is such a stage of the prosecution,[6] the defendant does not have a Sixth Amendment right to have counsel present at his presentence interview with the federal probation officer.[7] In most cases, there is no Fifth Amendment right against compelled testimony at sentencing. Rather, upon a plea or verdict of guilty, the defendant must submit to an interview with the probation officer.[8] Moreover, because the sentencing hearing is distinct from trial on the issue of guilt, federal courts have held that most other provisions of the Bill of Rights generally do not apply. For example, there is no Sixth Amendment right to jury trial at sentencing, even in a capital case.[9] Similarly, while the Due Process Clause requires that elements of the offense must be proven by proof beyond a reasonable doubt to support a conviction,[10] the preponderance standard of proof has been found sufficient for facts germane to sentencing.[11]

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including defendant is "critical stage of the prosecution" requiring presence of counsel under Sixth Amendment).

6 United States v. Souder, 782 F.2d 1534, 1538 (11th Cir. 1986). In *Souder*, the government conceded that absence of defendant's counsel was in error and resentencing was therefore necessary. *Id.* *See also* Mempa v. Rhay, 389 U.S. 128, 135-37 (1967) (concluding that the Due Process Clause requires states to ensure right to counsel at sentencing hearing which had been deferred until after a 30-day jail term).

7 The federal courts of appeal have been unanimous in ruling that the presentence interview does not constitute a critical stage of the prosecution. United States v. Tisdale, 952 F.2d 934, 939-40 (6th Cir. 1992). Because probation officers do not act on behalf of the prosecution, a presentence interview conducted by the officer does not present a "critical stage" of the prosecution requiring counsel. *Id.* at 939; United States v. Hicks, 948 F.2d 877, 885-86 (4th Cir. 1991); United States v. Rogers, 899 F.2d 917, 921-22 (10th Cir. 1990); United States v. Jackson, 886 F.2d 838, 844-45 (7th Cir. 1989).

8 *See* FED. R. CRIM. P. 32(b)(2). *See id.* (guaranteeing that "[o]n request, the defendant's counsel is entitled to notice and a reasonable opportunity to attend any interview of the defendant by a probation officer in the course of a presentence investigation"). *But see* Estelle v. Smith, 451 U.S. 454 (1981). In *Estelle*, the Court, in a capital murder case, addressed an issue relating to a pretrial psychiatric examination conducted for the purpose of determining competency to stand trial. *Id.* at 463, 470-71. The Court held that such examination could not be the basis for doctor's testimony at death sentencing hearing, because Sixth Amendment right to counsel was implicated as a result of the "'critical stage' of the aggregate of the proceedings against the defendant." *Id.* at 470.

9 *See* Spaziano v. Florida, 468 U.S. 447, 459 (1984). In *Spaziano*, the jury's recommendation of life imprisonment in capital case was held not to be constitutionally binding upon the trial judge imposing a death sentence. *Id.* at 461-63.

10 *See* In re Winship, 397 U.S. 358, 364 (1970) (explaining that the requirement of proof beyond reasonable doubt is one of the "essentials of due process and fair treatment").

11 McMillan v. Pennsylvania, 477 U.S. 79, 84 (1986). In *McMillan*, a state statute prescribed a mandatory minimum sentence if the judge found by a preponderance of evidence that defendant "visibly possessed [a] firearm" in committing the crime. The

The primary constitutional protection at sentencing is the Due Process Clause of the Fifth and Fourteenth Amendments.[12] Due Process protects the criminal defendant from being sentenced based on materially inaccurate information.[13] It also requires that the defendant have some meaningful opportunity to challenge the information on which the sentence is based.[14] However, the United States Supreme Court has held that there is no constitutional restriction on the source of evidence to be considered in sentencing. Accordingly, hearsay has traditionally been held fairly admitted at the sentencing.

In *Williams v. New York*,[15] a trial judge overruled a jury's recommendation of life imprisonment and sentenced the defendant to death for first-degree murder. The defendant claimed that his due process rights had been violated by the trial court's reliance on the PSR, which related reports of burglaries for which he had not been convicted and other disparaging background information. The Supreme Court found that federal and state courts have traditionally drawn on the broadest sources of information about a convicted defendant. The Court concluded that the Due Process Clause did not limit courts from considering unsworn or out-of-court information relative to the circumstances of the crime and the convicted person's life and characteristics. Further, the Court distinguished sentencing from other phases of a criminal proceeding, stating that the proceeding was not properly limited by the rules of evidence governing determinations of guilt at trial.[16] Addi-

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Court held that because the fact is not an element of guilt for the offense, the preponderance standard was constitutional. *Id.* at 87-88, 91-93.

12 The Fifth Amendment to the United States Constitution provides, in part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. The Fourteenth Amendment provides, in part: "No State shall . . . deprive any person of life, liberty or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

13 Townsend v. Burke, 334 U.S. 736, 741 (1948) (sentencing defendant based upon "assumptions concerning his criminal record which were materially untrue" held to violate due process). Accordingly, prior convictions obtained in violation of the Sixth Amendment right to counsel cannot fairly be considered in enhancing the sentence. United States v. Tucker, 404 U.S. 443, 447-48 (1972).

14 *See, e.g.*, Gardner v. Florida, 430 U.S. 349, 360-62 (1977) (holding that a capital sentence based in part on information in PSR that defendant had no opportunity to contest is unconstitutional).

15 337 U.S. 241 (1949).

16 Ironically, the *Williams* Court contrasted the guilt phase of trial—governed by formal rules of evidence—as designed in part by the necessity of preventing a "time-consuming and confusing trial on collateral issues." *Id.* at 246-47. As will be demonstrated, the irony is that federal courts today declare that *not* using the Federal Rules of Evidence prevents time-consuming sentencing trials.

tionally, federal courts have consistently read *Williams* to support the conclusion that the Confrontation Clause of the Sixth Amendment does not apply at sentencing.[17]

B. Common Law Procedure

Historically, few procedural protections are afforded criminals facing sentence in the federal courts. The accused has a right of allocution under Federal Rule of Criminal Procedure 32 to speak on his own behalf prior to the imposition of sentence.[18] Beyond this, however, sentencing judges in this country have customarily conducted sentencing hearings on their own terms.

For nearly a century prior to 1987, federal sentencing was an "indeterminate" system. Criminal statutes carried penalties such as imprisonment, fines, or probation and essentially only limited sentencing judges by prescribing the maximum imprisonment or fine. A sentence within the statutory range was within the court's discretion and insulated from appellate review. The actual length of imprisonment was left to the United States Parole Commission, which determined whether and when to return the offender to society under the "guidance and control" of a parole officer.[19]

Consistent with a "rehabilitation" model of criminal justice, judges were charged with predicting the defendant's future conduct and general potential to abide by the law. To assist in this daunting task, judges were accorded the broadest latitude in drawing on sources of information concerning "the defendant's character and propensities"[20] and "every [other] aspect of his life."[21] Accordingly, federal courts have long sanctioned receipt of information from all manner of sources. Statements of law enforcement officials and victims have long been received by federal judges in the privacy of their chambers[22] and on the record.[23]

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17 *See* United States v. Silverman, 976 F.2d 1502, 1511 (6th Cir. 1992); United States v. Wise, 976 F.2d 393, 398-401 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1592 (1993); United States v. Beaulieu, 893 F.2d 1177, 1180-81 (10th Cir.), *cert. denied*, 497 U.S. 1038 (1990).

18 The Federal Rules of Criminal Procedure provide that "[b]efore imposing sentence, the Court must . . . address the defendant personally and determine whether the defendant wishes to make a statement and to present any information in mitigation of the sentence." FED. R. CRIM. P. 32(c)(3)(C).

19 Mistretta v. United States, 488 U.S. 361, 365-66 (1989).

20 Pennsylvania *ex rel.* Sullivan v. Ashe, 302 U.S. 51, 55 (1937).

21 Williams v. New York, 337 U.S. 241, 249-50 (1949) (emphasizing that probation officers responsible for making presentence reports are trained to aid—not to prosecute—criminal offenders).

22 Stephan v. United States, 133 F.2d 87 (6th Cir.), *cert. denied*, 318 U.S. 781 (1943), *reh'g denied*, 319 U.S. 783 (1944). In *Stephan*, upon a treason conviction, a trial

Judges are free to summon information from defense counsel that might be germane to the sentence.[24] They may also subpoena witnesses whose testimony would not have been admissible on the issue of guilt or innocence.[25] In 1970, Congress codified the rule by statutorily prohibiting any limits to the sources of the sentencing judge's data on the defendant.[26]

C. *Federal Rules of Evidence*

Sentencing hearings are expressly outside the scope of the Federal Rules of Evidence. Federal Rule of Evidence 1101(d) excludes them in the same way as grand jury proceedings, arrest and search warrant applications, and bail and suppression hearings.[27] Courts and commentators have emphasized that the sentencing judge must be allowed to employ less rigid procedures for proofs than those that apply in determining guilt at trial.[28]

One traditional justification for distinguishing sentencing is that judges are better equipped than juries to discriminate between reliable and unreliable hearsay.[29] By employing a preponderance

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judge interviewed in his chambers the defendant, defendant's wife, FBI agents, the chief probation officer, defense counsel, and prosecutors. Although the Sixth Circuit believed that the better practice would be to conduct an open hearing, the resultant death sentence was held not to constitute an abuse of discretion. *Id.* at 100.

23 Roberts v. United States, 445 U.S. 552, 556 (1980) (stating that "'a . . . judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come'") (quotation omitted).

24 *See* Stobble v. United States, 91 F.2d 69, 71 (7th Cir. 1937) ("After the court had found [defendant] guilty, it was quite proper for it to acquire any available information . . . which would enable it to properly determine the appropriate punishment.").

25 Hunter v. United States, 149 F.2d 710, 711 (6th Cir. 1945), *cert. denied*, 326 U.S. 787 (1946).

26 Organized Crime Control Act of 1970, P.A. 91-452, 84 Stat. 951. The statute, formerly codified at 18 U.S.C. § 3557, now § 3661, provides: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661 (1992).

27 The Federal Rules of Evidence provide that "[t]he rules do not apply" to sentencing. FED. R. EVID. 1101(d)(3).

28 *See* United States v. McDowell, 888 F.2d 285, 291 (3d Cir. 1989). In *McDowell*, the Third Circuit held that a preponderance standard is appropriate for resolving disputed facts at sentencing. *Id.* at 290-91. In doing so, the court stressed the "long history of judicial sentencing and strong policy reasons, including judicial economy, persuade [courts] that a defendant's rights in sentencing are met by a preponderance of evidence standard." *Id.* at 291.

29 *See generally* Kenneth C. Davis, *Hearsay in Nonjury cases*, 83 HARV. L. REV. 1362 (1972); *see also* Margaret A. Berger, *Rethinking the Applicability of Evidentiary Rules at Sentencing: Of Relevant Conduct and Hearsay and the Need for an Infield Fly Rule*, 5 FED.

standard and accepting hearsay—requiring only that the defendant be afforded an opportunity to rebut it and that the court find it reliable—sentencing proceeds quickly. At sentencing, there is no the delay inherent in presenting witnesses who are the source of hearsay statements, whether the facts consist of prior convictions or the defendant's role in the offense of conviction. Many courts candidly state that the purpose of excepting sentencing from the Federal Rules of Evidence is to prevent the hearing from becoming a "full-blown trial" with an endless parade of witnesses.[30]

III. THE PSR'S TRADITIONAL ROLE IN SENTENCING

A. *Background—Federal Probation*

Federal probation was borne of the original Probation Act of March 4, 1925.[31] The statute conferred upon federal judges the power to direct probation eight years after the Supreme Court had held that they had no inherent authority to suspend a sentence provided by Congress.[32] Under the Probation Act, the judges of each federal judicial district were authorized to appoint one or more probation officers to monitor persons who had been sentenced to probation and report to the court regarding their compliance with conditions of probation. Probation officers employ "all suitable methods" to help probationers and to improve their "conduct and condition."[33] Traditionally, they have supervised their charges by summoning them to monthly meetings while monitoring their employment, social contacts, and travel.[34] If the of-

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SENT. REP. 96 (1992) ("Juries, either because they are unsophisticated or irrational, or both, must be shielded from inadmissible evidence whereas, judges, by virtue of their training, can rationally and unemotionally reach a decision completely ignoring the improper evidence.").

30 United States v. Johnson, 997 F.2d 248, 254 (7th Cir. 1993).

31 Act of March 4, 1925, ch. 521, 43 Stat. 1259.

32 *See Ex parte* United States, 242 U.S. 27, 49-50 (1916) (rejecting suggestion that courts could suspend sentence upon condition that the defendant would remain on "good behavior").

33 Act of March 4, 1925, ch. 521, sec. 4, 43 Stat. 1259, 1260.

34 The Code of Federal Regulations lists standard conditions for persons released from custody on probation (now known as "supervised release") which are typical of those long imposed at common law:

> (3) The parolee shall not leave the limits fixed by his certificate of parole without written permission from the probation officer; (4) The parolee shall notify his probation officer within two days of any change in his place of residence; (5) The parolee shall make a complete and truthful written report . . . to his probation officer between the first and third day of each month [and] report to [the] officer [as directed]; (6) The parolee shall not violate any law, nor shall he associate with persons

ficer learned of violations of the conditions, he[35] must advise the court and can arrest the probationer without a warrant.[36]

Probation officers thus traditionally specialized in rehabilitating offenders through their supervisory efforts. The officers' attitudes toward offenders have generally been influenced by that role and they were viewed as social workers employed by the courts.[37] Under current law, probation officers still supervise probationers. However, the primary responsibility for persons who have been committed to the Attorney General's custody by sentence and parole now rests with the Bureau of Prisons; the role of the Probation Service is an ancillary one.[38] Additionally, probation officers are still charged with writing PSRs, which were first addressed by rule in 1933.[39]

B. The Presentence Investigation Report (PSR)

The Rules Committee initially designed the PSR to give the sentencing court a complete picture of the defendant who is to be sentenced and of the conduct which resulted in the conviction. The PSR typically included information from all nature of sources on the subject. Federal Rule of Criminal Procedure 32 required that comprehensive data on the "defendant's history and characteristics" be included along with any other circumstances which affect his behavior.[40] Most PSRs thus included details on the defendant's family and upbringing, schooling, employment, health, acquaintances, and spirituality. One deputy chief U.S. probation officer described the PSR as "a narrative of the individual from the day of his birth to the moment of his conviction."[41] The

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> engaged in criminal activity . . . (8) parolee shall work regularly unless excused by his probation officer . . . .

28 C.F.R. § 2.40 (1995).

35 I use the pronoun "he" throughout this paper in referring to probation officers, judges, and defendants for ease of reference, and ask the reader to understand that it refers to both males and females.

36 18 U.S.C. §§ 3603(9) and 3606 (1992).

37 *See* Gagnon v. Scarpelli, 411 U.S. 778, 785 (1973) ("The parole officer's attitude towards [revocation] decisions reflects the rehabilitative rather than punitive focus of the probation/parole system").

38 18 U.S.C. § 3603(a)(4)-(6).

39 *See* Rules of Practice and Procedure, after plea of guilty, verdict or finding of guilt, in Criminal Cases brought in the District Courts of the United States and in the Supreme Court of the District of Columbia, 292 U.S. 661. (1934). After a plea or verdict of guilty, a court is to impose sentence without delay unless, among other reasons, the condition or character of the defendant or other pertinent matters should be investigated before final imposition of the sentence. *Id.* at 661-62.

40 FED. R. CRIM. P. 32(b)(4)(A).

41 Garry Sturgis, U.S. v. Barry: *They've Only Just Begun; A Web of Appellate, Sentencing,*

investigation would include not only the defendant's attitude toward the offense, but also his hobbies, ambitions, religion, and general tendencies.[42] The defendant, family members, former associates, and public records were consulted in an effort to generate "an objective, unbiased report leaning neither to the defense nor the prosecution."[43] Such information was thought to enhance the court's understanding of the background on the defendant's character beyond that usually revealed at trial or at the time of a guilty plea.

While the PSR's primary purpose is, of course, to assist the court in determining the appropriate sentence, it is also intended for long-term use by agencies other than the sentencing court. For example, the U.S. Bureau of Prisons utilizes the report to classify the offender for placement, programming, and release planning. Similarly, prior to the Sentencing Reform Act, the PSR guided the U.S. Parole Commission in deciding parole issues. The PSR also assists probation officers in their supervisory duties during probation and, formerly, parole. Finally, the report serves as a source of information for future research.[44] In summary, the need for accurate information about the offender extends beyond simply ensuring that the sentence was well grounded. The information extends to become a permanent resource influencing the defendant's continuing custody and supervision.

IV. THE SENTENCING GUIDELINES

An overview of the Guidelines is essential for understanding the transformation undergone by the PSR in the last decade. The following provides a capsule description of the primary features of the Guidelines.[45]

Retrial Issues Still Looms, LEGAL TIMES, August 20, 1990, at 1 (quoting Arthur Carrington of the U.S. Probation Office in the District of Columbia).

42 Pre-Sentence Investigation and Report, 2 FED. PROBATION 9 (1938). *See id.* at 10 (including topics in a "suggested outline" for the PSR).

43 *Id.* at 9.

44 United States v. Belgard, 694 F. Supp. 1488, 1502-08 (D. Or. 1988), *aff'd*, 894 F.2d 1202 (9th Cir. 1990), *cert. denied*, 498 U.S. 860 (1990) (citing PROBATION DIVISION, ADMINISTRATIVE OFFICE OF U.S. COURTS, THE PRESENTENCE INVESTIGATION REPORT 1 (Jan. 1978) (hereinafter *Publication 105*)). *See* United States v. Charmer Industries, Inc., 711 F.2d 1164, 1170 & n.6 (2d Cir. 1983) (detailing the use of the PSR by corrections officials in addition to the court).

45 The official publication for applying the Guidelines is the UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL (1994). *See* Stinson v. United States, 113 S. Ct. 1913, 1915 (1993) ("[C]ommentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution, or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.").

In 1987, the Guidelines took effect to govern sentencing for crimes committed after its effective date.[46] Through the Sentencing Reform Act of 1984 (SRA), Congress created the United States Sentencing Commission as an independent agency of the judicial branch charged with the promulgation of guidelines to bring uniformity to sentencing of defendants with similar criminal records and convicted of the same offense.[47] Accordingly, these two factors are the primary determinants of a sentence.

The Guidelines as promulgated[48] establish sentencing ranges by use of a grid, with the seriousness of the offense of conviction on the vertical axis and the defendant's prior criminal history on the horizontal.[49] The grid—or "Sentencing Table"—sets forty-three offense levels and six criminal history levels.[50] The sentence is determined at the intersection of categories of offenses, referencing the "offense level," and offenders, that is, the "criminal history category." Both factors are arranged in order of increasing severity.[51]

The first step under the Guidelines is to find a "base offense level" for the specific offense: Appendix A to the Guidelines lists federal offenses and refers to Chapter 2, which details the types of criminal conduct and lists an offense level for each. For example, the Guidelines differentiate between types and quantities of controlled substances distributed and ascribe different graded offense levels for each.[52] The second step is to find the guideline in Chapter 2 that identifies "specific offense characteristics" of the crime and prescribes increases in the base offense level for each. An example of such a characteristic for a drug offender is possession of a firearm; such a finding results in increasing the offense two levels.[53] Third, the base offense level may be adjusted further depending on whether there is a special type of victim, the defend-

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Two other expert Guidelines sources for the practitioner include THOMAS W. HUTCHISON & DAVID YELLEN, FEDERAL SENTENCING LAW AND PRACTICE (2d ed. 1994) and the two-volume work, GERALD T. MCFADDEN ET AL., FEDERAL SENTENCING MANUAL (1994).

46 The United States Sentencing Commission, created by the Sentencing Reform Act of 1984, drafted the Sentencing Guidelines. Pub. L. No. 98-473, Title II, 98 Stat. 1837 (1984) (codified at 18 U.S.C. §§ 3551-3674 and 28 U.S.C. §§ 991-998 (1992)).

47 28 U.S.C. § 991(b)(1)(B).

48 The Guidelines and amendments thereto are officially published by the Administrative Office of U.S. Courts in the UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL (November 1994) (hereinafter "U.S.S.G").

49 U.S.S.G., Ch. 5, pt. A, comment (n.1).

50 Chapter 5 of the Guidelines, part A, contains the Sentencing Table. *See id.*

51 This summary of Guidelines procedure is outlined in Chapter 1, Part B of the Sentencing Guidelines, "General Application Principles." U.S.S.G. § 1.B1.1.

52 U.S.S.G. § 2D1.1(c) (Drug Quantity Table).

53 U.S.S.G. § 2D1.1.

ant's role in the offense, or obstruction of justice. Chapter 3 specifies these factors.[54] Fourth, if there are multiple counts of conviction, the Guidelines require that the first three steps be repeated for each of the counts.[55] Fifth, if the defendant accepted responsibility for the offense, Chapter 3 allows for a decrease of the offense level by one or two levels.

These calculations result in the "total offense level," which provides a number (1-43) to assign to the vertical axis of the Sentencing Table. The other determinant under the Guidelines is the "criminal history category" found on the horizontal axis of the grid. Chapter 4 assigns points for prior criminal convictions depending upon the length of sentence.[56] The chapter also requires that points be added if defendant committed the current offense while in custody or under supervision by virtue of a previous conviction in any jurisdiction.[57] The Guidelines mandate that all felony offenses be counted, generally restricting the consideration of misdemeanors and petty offenses.[58] The defendant's scoring on criminal history places him in one of six categories, and the intersection of that level with the offense level prescribes a sentence ranging from zero to six months to life imprisonment.[59] The SRA authorized the Sentencing Commission's guidelines to take into account "the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense."[60] As a result, the Sentencing Guidelines analyze the current offense

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54 For example, obstruction of justice may be demonstrated when the defendant threatens a witness or destroys evidence. U.S.S.G. § 3C1.1. Such an obstruction results and results in increasing the offense level by two levels. *Id.* In addition, upward adjustments for specific types of victim include a two-level adjustment for a "vulnerable" victim (U.S.S.G. § 3.A1.1) and a three-level upward departure when the victim is a government employee. U.S.S.G. § 3.A1.2.

55 U.S.S.G. § 1B1.1(d) (citing U.S.S.G., Ch. 3, pt. D).

56 The Guidelines "award" points for prior convictions as follows:

> (a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month; (b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a); (c) Add 1 point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this item.

U.S.S.G. § 4A1.1.

57 U.S.S.G. § 4A1.1(d)-(e). "Supervision" status includes probation, parole, supervised release, imprisonment, work release, and escape. *See id.*

58 U.S.S.G. § 4A1.2(c). Specified categories of petty offenses and misdemeanors (such as gambling, prostitution, and trespass) are not counted unless: "(A) the sentence was a term of probation of at least one year or a term of imprisonment of at least thirty days; or (B) the prior offense was similar to the instant offense." *Id.* § 4A1.2(a).

59 U.S.S.G., Ch. 5, pt. A, Sentencing Table.

60 28 U.S.C. § 994(c)(4) (1992).

by considering those facts necessarily present as elements of the crime for which the defendant was convicted. The defendant's "relevant conduct," which defines the offense, includes acts "during, in preparation of, or in the course of attempting to avoid detection or responsibility" for the offense.[61] Relevant conduct also includes other crimes which form part of the same "course of conduct or common scheme or plan" as the offense of conviction.[62]

Courts must use the Guidelines to fix the sentence in all cases unless (1) the Government moves for a downward departure from the prescribed sentence on grounds that the defendant has furnished "substantial assistance" in the investigation or prosecution of another person;[63] or (2) the court finds (with or without either parties' request) that the Guidelines do not consider adequately consider facts presenting unique aggravating or mitigating circumstances.[64]

The SRA further increased the stakes for sentenced defendants by abolishing the United States Parole Commission and the possibility of parole. Sentences under the guidelines are "true" prison terms not reducible by any other agency. In combination with mandatory minimum sentences, the result for many defendants is a judgment and commitment order mandating their long-term incarceration.[65] The Guidelines have been upheld against

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[61] The Guidelines provide:

> Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter 3, shall be determined on the basis of the following: All acts and omissions committed, aided, counseled, commanded, induced, procured, or willfully caused by the defendant.

U.S.S.G. § 1B1.3(a)(1)(A).

[62] U.S.S.G. § 1B1.3(a)(2).

[63] U.S.S.G. § 5K1.1. provides that, upon such a motion, the appropriate reduction shall be determined for stated reasons which may include:

> (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of [it]; (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant; (3) the nature and extent of the defendant's assistance; (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance; (5) the timeliness of the defendant's assistance.

Id.

[64] 18 U.S.C. § 3553(b) (1992); U.S.S.G. § 5K2.0. If a court so finds, its "departure" from the Guidelines may be appealed by the party opposing the departure. 18 U.S.C. §§ 3742(a)(3) and (b)(3).

[65] The good news for such defendants is that they may appeal their sentences on the grounds of an erroneous application of the Guidelines. 18 U.S.C. § 3742(a)(2). Under prior law of indeterminate sentences, as in most jurisdictions that do not have

constitutional challenges arguing that the framework of the U.S. Sentencing Commission violates separation of powers principles[66] and that the "relevant conduct" Guideline violates the Double Jeopardy Clause.[67]

V. ANALYZING THE PSR'S FUNCTIONS AND EVIDENTIARY ROLE

Under the Guidelines, the PSR is a critical tool for the court in fixing the appropriate sentence. The PSR—the probation officer's work product—fulfills several vital roles under the Guidelines. Although the PSR was historically a document intended for the judge's eyes only, it is now disclosed to the defendant as a matter of course. The report will often charge the defendant for the first time with criminal conduct or acts potentially increasing the punishment for which he has been convicted. In this regard, it is analogous to a pleading, in which allegations limit the potential scope of trial. Similarly, while former practice saw the judge rely on the PSR as a source of factual information, the report's evidentiary status was never as crucial to the resulting sentence as it is today. The PSR is now frequently cited as a reliable source proving the facts it recites, often of a hearsay nature. Finally, the probation

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specific guidelines for sentencing, defendants who were sentenced to a term of years within a statutory range of sentences had no right to appeal. As will be seen, however, the bad news for defendants relates to the deferential standard of review for facts determining the sentence under the Guidelines, which insulate the findings from piercing scrutiny on appeal.

The ironic aspect of practice under the Guidelines is the enormous litigation spawned by their procedures. Although sentencing is a streamlined process in which the "endless parade of witnesses" is routinely avoided and no "full-blown" trial ensues, appeals are routine and clog the courts of appeal. The Administrative Office of U.S. Courts reported that between 1989-93, federal criminal appeals increased 33% and attributed the rise to appeals newly-authorized by the Sentencing Reform Act. Administrative Office of U.S. Courts, *Federal Judicial Caseload: A Five-Year Review, 1989-1993.*

Moreover, a national legal newspaper reported that, between 1988-92, nearly one-half of all federal appeals involved issues under the Sentencing Guidelines. Cris Carmody, *Sentencing Overload Hits the Circuits: Appellate Judges Stagger Under Guideline-Generated Appeals*, NAT'L L.J., April 5, 1993, at 1.

66 *See* Mistretta v. United States, 488 U.S. 361, 411-12 (1989) (noting that neither the Sentencing Reform Act's delegation of legislative authority to the U.S. Sentencing Commission for the promulgation of Guidelines nor vesting in the President the power to remove Article III judges from the Commission violate constitutional strictures of separation of powers).

67 Witte v. United States, 115 S. Ct. 2199 (1995). In *Witte*, the Court clarified that under the Guidelines, imposition of a sentence is "punishment" only for offense of conviction; therefore, the Fifth Amendment Double Jeopardy Clause is not violated by considering as "relevant conduct" other acts for which the defendant had been previously charged and convicted. *See id.*

officer's role of assessing the relevant offense conduct and criminal history of the defendant on the Guidelines grid is a quasi-judicial function akin to that of a federal magistrate judge.

A. *The PSR as a Charging Document*

A PSR under the Guidelines is designed to frame factual and legal issues for sentencing. Contrasting this practice with traditional models of civil and criminal pretrial practice reveals that the report performs notice and issue-defining functions more akin to civil pretrial procedures than those governing criminal charges. In particular, unlike a general plea of guilty or not guilty to an initial charge, defendants must specifically challenge all facts contained in the PSR that they contend are inaccurate; if they do not, they waive their right to contest them at sentencing. Although probation officers have traditionally "charged" persons under their supervision with violations in prosecuting revocation of probation,[68] their charging role under the Sentencing Guidelines is much more prominent.

For purposes of comparing the PSR's pleading function, a brief overview of civil and criminal pleading and pretrial procedures may be helpful.

1. Federal Rules of Civil Procedure

Rule 8 of the Federal Rules of Civil Procedure contains a general "notice" requirement for pleading a claim. All that is required in a complaint is a "short and plain statement of the claim showing that the pleader is entitled to relief."[69] The sufficiency of the complaint's factual allegations may be challenged by a motion for more a definite statement.[70] However, the motion will not be granted unless the pleading is so vague or ambiguous that the adverse party cannot reasonably be able to frame a responsive pleading.[71] A court may also dismiss a pleading for failure to allege an actionable claim,[72] but such motion will be denied unless it appears beyond

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68 *See* Schiff v. Dorsey, 877 F. Supp. 73, 79 (D. Conn. 1994) (holding that an officer's petition to revoke probation initiates "adversarial proceedings").

69 FED. R. CIV. P. 8(a)(1).

70 FED. R. CIV. P. 12(e).

71 In practice, a motion for a more definite statement is restricted to cases where a pleading suffers from "unintelligibility rather than the want of detail." United States v. Board of Harbor Comm'rs, 73 F.R.D. 460 (D. Del. 1977) (citing 2A JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶12.18[1], at 2389 (2d ed. 1975) and 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1376 (1990).

72 FED. R. CIV. P. 12(b)(6).

doubt that the pleader will be unable to prove any set of facts that would justify relief under the law.[73] This is plainly a liberal standard designed to promote trial on the merits by delaying scrutiny of evidentiary support for disputed facts until trial. Such a practice also confirms that the civil complaint performs a largely "notice-giving" function.

Defendant's answer to a civil complaint must respond to each and every allegation by admission, denial, or disclaiming the requisite knowledge to do either.[74] Matters admitted are not issues for trial and may provide the basis for disposing of the case on a motion for summary judgment.[75] Matters denied will generally be the focus of reciprocal discovery. In any event, the pleadings serve as a first attempt at narrowing the factual issues for trial.

The pleading rules are supplemented by the rules of discovery, summary judgment, and mandatory pretrial conferences—all of which further narrow the factual issues for trial. The discovery rules authorize and regulate the scope and enforcement of procuring testimonial and physical evidence for trial, both from the adversaries and from witnesses. Interrogatories, depositions, and requests for production of documents are the most common discovery devices; the frequency or order of their use is essentially unrestricted in the absence of a protective order.[76] In most cases, discovery will be the subject of a scheduling order issued after one or more pretrial conferences.[77]

The motion for summary judgment allows a party to obviate the need for a trial by persuading the court that there is no real dispute regarding the facts and that the only issues presented by

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73 Conley v. Gibson, 355 U.S. 41, 47-48 (1957).

74 FED. R. CIV. P. 8(b).

75 JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 5.18, at 284-85 (2d ed. 1993) ("Unless the answer is amended, [admissions in the answer] will bind defendant at trial and obviate any need by plaintiff to offer proof on the matters admitted.").

76 The federal practice rules provide in part:

> Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

FED. R. CIV. P. 26(d).

77 Federal Rule of Civil Procedure 16(a) encourages the court to convene pretrial scheduling conferences to explore "discouraging wasteful pretrial activities," including unnecessary discovery. Specifically, Federal Rule of Civil Procedure 16(c)(6) authorizes the court to control and schedule discovery by protective orders. Federal Rule of Civil Procedure 26(f) directs the attorneys to meet and confer in advance of the initial scheduling conference in order to agree upon a planned course of discovery.

the case are legal ones.[78] Because the judge (and not the jury) decides questions of law, a "summary" judgment—that is, a judgment without a trial—will often determine the question of liability.[79]

Finally, prior to trial in nearly every civil case, a final pretrial conference is held to preview the trial's scope and to promote an orderly trial.[80] The assigned judge conducts the pretrial in most cases inasmuch as the conference provides the court with an opportunity to prepare it for its role in presiding at trial.[81] Many local rules require that the parties present pretrial orders in exhaustive detail of claims and contested issues of fact and law, listing potential witnesses, exhibits, elections of trial witnesses who will be called to testify, estimating the required time for the trial, and reporting the status of settlement negotiations.[82]

Federal civil procedure is an elaborate pretrial system. Although most civil cases settle, their pretrial phase can last a few months or a few years. That time is largely dedicated to the pursuit of narrowing the issues for trial using the discovery and summary judgment devices.

2. The Federal Rules of Criminal Procedure

Criminal pleading and pretrial rules, on the other hand, define a more streamlined set of procedures. Rule 7 requires only that the indictment allege a "plain, concise, and definite" statement of the "essential facts" constituting the charge.[83] Rule 12 allows for a motion challenging the sufficiency of the indictment.[84] An indictment is sufficient, however, if it pleads all of the essential

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78 FED. R. CIV. P. 56.

79 Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986) ("Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'") (quoting FED. R. CIV. P. 56).

80 The federal practice rules provide:

> Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

FED. R. CIV. P. 16(d)

81 *See* J. Skelly Wright, The Pretrial Conference, 28 F.R.D. 141, 148 (1962).

82 *See* E.D. MICH LOC. R. 16.2(b) (1995).

83 FED. R. CRIM. P. 7(c)(1).

84 FED. R. CRIM. P. 12(b)(2) provides that among the motions that must be made before trial are "defenses and objections based on defects in the indictment," besides those based on jurisdictional grounds or failure to charge an offense.

elements of the offense, fairly informs the defendant of the charge, and gives such information as would allow him to plead double jeopardy as a bar.[85] Courts read indictments liberally, and they will ordinarily be upheld unless no reasonable construction of the allegations would charge an offense.[86]

Criminal defendants must respond to indictments at a formal arraignment in court. The court reads the charges and calls for a plea to the whole of it.[87] The plea is thus a "general" one—guilty, not guilty, or *nolo contendere*[88]—which addresses all of the charges at once.[89] The defendant is not required to take issue with discrete factual allegations as in a civil case. Rather, his plea of not guilty puts all facts alleged in the indictment at issue.[90]

The pretrial phase in the criminal case includes generous discovery rights for the defendant. Under Rule 16, a defendant is entitled to receive copies of his statements in the Government's possession, his prior criminal record, and all documents and things that are either material to his defense or intended to be used against him.[91] The defendant, however, is not entitled to statements made by other witnesses prior to their testifying on direct examination at trial.[92] Besides Rule 16, due process entitles the defendant to demand production of evidence favorable to his defense, so-called *Brady* material.[93]

Pretrial proceedings in the criminal case thus focus on afford-

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85 United States v. Hamling, 418 U.S. 87, 117 (1974) (maintaining that an "indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend and, second, enables him to plead an acquittal or conviction in bar to future prosecutions for the same offense") (citing Hagner v. United States, 285 U.S. 427, 431 (1932)).

86 *See, e.g.*, United States v. Frankel, 721 F.2d 917, 919 (3d Cir. 1983). In *Frankel*, the federal appeals court upheld a district court's dismissal on the grounds that the indictment's allegation that defendant's presentation of a worthless check was not a "false statement" and therefore could not support a charge of mail fraud under federal mail fraud statute. *Id.* (citing 18 U.S.C. § 1341 (1976)).

87 FED. R. CRIM. P. 10.

88 FED. R. CRIM. P. 11(a)(1).

89 Hamilton v. Alabama, 368 U.S. 52, 55 n.4 (1961) ("Under federal law an arraignment is a *sine qua non* to the trial itself—the preliminary stage where the accused is informed of the indictment and pleads to it, thereby formulating the issue to be tried.").

90 HARRY I. SUBIN ET AL., FEDERAL CRIMINAL PRACTICE: PROSECUTION AND DEFENSE § 13.10 n.7 (1992) (citing United States v. Holby, 345 F. Supp. 639 (S.D.N.Y. 1972), *rev'd on other grounds*, 477 F.2d 649 (2d Cir. 1973)).

91 FED. R. CRIM. P. 16(a)(1)(A)-(E).

92 FED. R. CRIM. P. 26.2(a). Rule 26.2(a) restates the requirement of the Jencks Act. *See* 18 U.S.C. § 3500 (1992).

93 Brady v. Maryland, 373 U.S. 83, 87 (1963) ("Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evi-

ing the accused notice of the charges and, to a more limited degree, the evidence against him. They are only indirectly concerned with narrowing issues for the trial. Stipulations of fact are usually made, if at all, in a negotiated guilty plea agreement encompassing all issues under Rule 11.[94]

3. The Charging Function of the PSR

Federal Rule of Criminal Procedure 32 provides that the PSR frame the factual and legal issues and that they be tested at an adversary hearing. As noted above, Rule 32 was amended by the Sentencing Reform Act of 1984 to provide that the report include the classification of the offense, the defendant, and the resulting sentencing range under the Guidelines.[95] The result has been to transform the PSR from a background summary to a critical document for the parties and the court. The PSR sets out recommended findings on the two major determinants—offense level and offender status—for the court to employ at sentencing. A major task of the probation officer is to provide the court with verifiable information it may employ in making those findings.[96] The PSR also performs an equally important function in notifying the defendant of the probation officer's assessment of relevant conduct and of facts that justify adjustments to the base offense level.

Rule 32 has also been continually amended to afford the defendant (as opposed to simply the sentencing judge) notice of the probation officer's position of what the facts and law governing his offense are, and to allow the defendant to object to and rebut the assertions before the sentencing judge. An outline of this progressive trend toward disclosure of the factual and legal basis for the sentence reveals the unmistakable notice-giving function of the PSR.

a. *The Probation Officer's Charging Task*

Although the district court is required to apply the Guidelines in arriving at a criminal sentence, the calculations are made in the first instance by the probation officer. Rule 32 mandates that the PSR contain "the classification of the offense and the defendant" under the Guidelines "as the probation officer believes to be appli-

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dence is material *either to guilt or to punishment*, irrespective of the good faith or bad faith of the prosecution.") (emphasis added).

94 FED. R. CRIM. P. 11(e).

95 Comprehensive Crime Control Act of 1984, S. Rep. No. 225, 98th Cong., 2nd Sess., *reprinted in* 1984 U.S.C.C.A.N. 3182, 3340.

96 *Publication 105*, *supra* note 44, at 2.

cable to the defendant's case."[97] In particular, the officer must describe the "relevant conduct," which determines the base offense level and specific offense characteristics under the Guidelines.

The Guidelines require that the base offense level, specific offense characteristics, and other adjustments consider all of the defendant's "relevant conduct," defined to include all acts committed by the defendant while committing the offense for which he was convicted, or while planning to do so or attempting to avoid responsibility for it.[98] The relevant conduct provision has been construed to mandate consideration of conduct that has not been the subject of conviction, including conduct for which the defendant has been acquitted.[99] By identifying the defendant's conduct, isolating the applicable Guidelines, and articulating the resulting range of sentence, the probation officer serves notice to the defendant of his potential exposure.

b. *Disclosure of the PSR to the Defense*

The last generation has seen an evolution from no disclosure of the PSR to mandatory disclosure. Prior to 1966, there was no requirement that PSR reports be revealed to the defendant. In fact, PSRs have been routinely disclosed to the defendant and his counsel only since 1974.[100] Rule 32 now requires disclosure of the PSR to defendant no less than thirty-five days before the sentencing hearing.[101]

The 1966 amendment allowed that the court, before imposing sentence, "may disclose" it to the defendant and his counsel and afford them an opportunity to "comment" on it.[102] Rule 32 has, since that time, provided for disclosure of the report in advance of

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

98 U.S.S.G. § 1B1.3(A).

99 *See* United States v. Martin, 972 F.2d 349 (6th Cir. 1992) (affirming a lower court holding that a verdict of acquittal is irrelevant and a court must increase sentence for relevant conduct if it believes the conduct occurred).

100 Arguments and recommendations for compulsory disclosure of the report had been made by the Advisory Committee on Rules in 1944, 1962, 1964, and 1966, before passage of the 1974 Amendment to Rule 32.

101 The rules of federal criminal procedure require that:

> Not less than 35 days before the sentencing hearing—unless the defendant waives this minimum period—the probation officer must furnish the presentence report to the defendant, the defendant's counsel, and the attorney for the Government. The court may, by local rule or in individual cases, direct that the probation officer not disclose the probation officer's recommendation, if any, on the sentence.

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

102 FED. R. CRIM. P. 32(c), effective July 1, 1966.

the sentencing. As incredible as it may now seem, the rule change displaced scores of cases holding that the defendant and his lawyer simply had no right to examine the report for possible errors that might be rebutted.[103] Yet some courts, notably the United States Court of Appeals for the Second Circuit, had for many years prior to 1974 advocated that fairness urged a liberal and generous use of the power to disclose the PSR.[104]

In 1974, Rule 32 required that the PSR be disclosed, if requested, "[b]efore imposing sentence." The rule prescribed no advance time for the disclosure. Under this version of the Rule, courts wrestled with the issue of fair timing. Despite this focus, however, the case law reveals no hard and fast rules from the period. One court noted that the "better practice" was to make the PSR available "more than five minutes before sentencing."[105] In 1983, the Rule was further amended to require the disclosure, whether requested by the defendant or not, at a "reasonable time" before the sentencing hearing.[106]

In 1984, the Sentencing Reform Act mandated by statute that the PSR be disclosed at least ten days prior to the date set for sentencing.[107] The legislative history cited the PSR as a "critical factor" in sentencing and that early disclosure would facilitate counsels' preparation to properly address the issues at the hearing.[108] In recognition of the critical role that the PSR plays in Guidelines sentencing, Rule 32 was amended further in 1994 to conform its disclosure requirement to the statute.[109] The Rule now provides that the PSR must be disclosed thirty-five days in advance

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103 *See generally* Richard S. Lehrich, The Use and Disclosure of Presentence Reports in the United States, 47 F.R.D. 225 (1969) (collecting cases and presenting historical overview of the issue).

104 United States v. Brown, 470 F.2d 285, 288 (2d Cir. 1972); United States v. Fischer, 381 F.2d 509, 512 (2d Cir. 1967), *cert. denied*, 390 U.S. 973 (1968).

105 United States v. Williams, 499 F.2d 52, 54-55 (1st Cir. 1974). In *Williams*, a defendant objected to the PSR, claiming that it contained materially untrue statements about his role in the offense. Defendant, however, did not request an evidentiary hearing or continuance and did not allude to evidence he wished to offer to rebut it. The First Circuit in *Williams* found no error in the district court's reliance on the PSR despite defendant's claims. *Id.* at 55.

106 1983 Amendments to FED. R. CRIM. P. 32, Notes of the Advisory Committee on Rules. The amendments were designed to address the disparate routine practices in federal districts in furnishing the PSR to the defense.

107 Pub. L. No. 98-473, Title II, § 212(a), 98 Stat. 1837 (1984) (codified at 18 U.S.C. § 3552(d) (1992)). Section 3552(d) provided that the 10-day advance notice of the contents of the PSR could be waived by the defense.

108 S. Rep. 225, 98th Cong., 2d Sess., *reprinted in* 1984 U.S.C.C.A.N. 3182, 3254-56.

109 1989 Amendments to FED. R. CRIM. P. 32, Notes of the Advisory Committee on Rules. The notes reveal that earlier disclosure was thought to be a matter of fair

of the "sentencing hearing."[110]

c. *Challenges to the Presentence Investigation Report*

In addition to requiring that the PSR be furnished to the defendant thirty-five days in advance of the hearing, Rule 32 and the Guidelines require a written response from the defendant (or prosecution) to officially take issue with its contents. While challenges were routine in previous practice, "[m]ore formality is . . . unavoidable" if the sentencing is to be "accurate and fair" under the Guidelines.[111] Rule 32 requires that objections be made to the probation officer within fourteen days of receiving a PSR addressing "material information" and Guideline issues contained or omitted in the report.[112] The officer may then conduct a further investigation and revise the PSR if deemed appropriate.[113] At least seven days before the sentencing, the officer must submit the PSR to the court and the parties, along with an addendum detailing unresolved objections, and his views on resolving them.[114] The court may accept the PSR as findings of fact with regard to matters to which counsel does not object.[115]

The Guidelines do not specify further pretrial or trial requirements for sentencing issues.[116] Rather, the Guidelines require that the court afford the parties the "opportunity to present information" to the court bearing on relevant facts.[117] Under a Model Lo-

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exercise of discretion: "Nothing in the statue [*sic*] or the rule prohibits a court from requiring disclosure at an earlier time before sentencing." *Id.*

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

111 U.S.S.G. § 6A1.3 cmt.

112 FED. R. CRIM. P. 32(b)(6).

113 *Id.*

114 FED. R. CRIM. P. (b)(6)(C).

115 *See* FED. R. CRIM. P. 32(b)(6)(D) ("Except for any unresolved objection under subdivision (b)(6)(B), the court may, at the hearing, accept the [PSR] as its findings of fact.").

116 Regarding disclosure of the PSR, generally, the Guidelines promote the adoption of "procedures to provide for the timely disclosure of the PSR; the narrowing and resolution, where feasible, of issues in disputed in advance of the sentencing hearing; and the identification for the court of issues remaining in dispute." U.S.S.G. § 6A1.2.

117 *See* U.S.S.G. § 6A1.3. In the portion of the Guideline section entitled *Resolution of Disputed Factors*, the Sentencing Commission advised that:

> (a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

cal Rule adapted in most district courts, the timing for the PSR disclosure and objections thereto may modify the Rule 32 requirements.[118]

The defendant must take issue with all facts that he believes are inaccurate (as well as any Guidelines applications he feels are in error) or else be deemed to waive objection.[119] Many courts characterize the failure to object as agreement that the facts in the PSR are true and accurate.[120] Further, the defendant must specifically dispute the accuracy of particular facts; it is not enough to simply "deny" the contentions in the PSR.[121] Once a defendant objects, the probation officer may meet with the parties to discuss the objection or investigate the matter further.[122] The officer may revise the report or may be required by a court's local rule to simply file a response concerning the disputed matter.[123]

d. *Discovery and Pre-Sentencing Conference*

Although Rule 32 makes no provision for either discovery or pre-sentencing conferences, courts have employed both on occasion. Recent years have seen defense counsel attempting to pursue discovery of information relevant to disputed facts and, further, facts in the Government's possession of which the defense may as yet be unaware. However, the constitutional and rule-based obligations upon the prosecutor continue through the sentencing phase.[124]

Federal statutes and rules do not contain any express authority for requesting presentencing conferences. While the Model Local Rule of the Judicial Conference and most local district court rules

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Id.

118 Committee on the Administration of the Probation System, Judicial Conference of the United States, Model Local Rule for Guideline Sentencing (1987); E. D. MICH. LOC. R. 232.1; W.D. MICH. LOC. R. 50. A specimen "Procedural Order re: Sentencing Hearing" based upon Rule 32 may be found in LLOYD WEINREB, CRIMINAL PROCESS 1282-83 (5th ed. 1993).

119 United States v. Plisek, 657 F.2d 920, 925 (7th Cir. 1981) (stating that "defendant had a full and fair opportunity to comment on the [PSR]," but, because he failed to do so, he waived his objection to the report's accuracy).

120 *See, e.g.*, United States v. Pilgrim Market Corp., 944 F.2d 14, 21 (1st Cir. 1991); United States v. Wise, 881 F.2d 970, 972 (11th Cir. 1989) (comparing PSRs that are not objected to with pretrial stipulations in a civil case).

121 See United States v. Jones, 907 F.2d 929, 931 (9th Cir. 1990) (stating that information in a PSR will be considered accurate unless the defendant raises a reasonable factual dispute to the contrary).

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

123 Burns v. United States, 501 U.S. 129, 134 n.3 (1991) (collecting local rules on the practice).

124 *See* MCFADDEN et al., *supra* note 45, at ¶¶ 11.02[4], 11.02[1].

contemplate that the court will at some point determine whether an evidentiary hearing is necessary, they include no provision for pretrial.[125]

e. *Adversary Hearings on Factual Disputes*

The PSR and addendum reveal both the agreed-upon facts and the disputed issues.[126] Resolution of disputes need not result in formal procedures unless the court orders a full hearing. The Guidelines policy statement suggests that, though within the discretion of the court, trial-type hearings not be the norm.[127] Even with the advent of the Guidelines, Rule 32 does not require that the court take testimony on disputed facts.[128] Federal courts have spe-

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125 There are many reasons for conducting a pre-sentencing conference. Chief among these is the benefit of resolving potential disputes by way of stipulation. Most courts will entertain stipulations between the counsel on the offense conduct or loss to a victim. Failing that, such a conference can offer an exchange of anticipated testimony on the disputed issues and require disclosure of potential witnesses. Moreover, the sentencing of the convicted defendant is a traumatic event and the court appearance is an emotionally draining one. Family and friends are often present to show support and inevitably witness the subject in a most vulnerable state. One federal trial judge, a former chief federal defender, says that requests for adjournments of sentencings are a common symptom of failure to conduct a pre-sentencing conference. Telephone interview with United States District Judge Paul D. Borman, Eastern District of Michigan (July 18, 1995).

126 United States v. Castellanos, 882 F.2d 474, 475 (11th Cir. 1989) (noting that PSR and addendum serve the same purpose as pretrial stipulation of factual and legal issues in a civil bench trial).

127 U.S.S.G. § 6A1.3. The commentary to § 6A1.3 provides in part:

> Although lengthy sentencing hearings should seldom be necessary, disputes about sentencing factors must be resolved with care. When a reasonable dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counselor affidavits of witnesses may be adequate under many circumstances. An evidentiary hearing may sometimes be the only reliable way to resolve disputed factual issues .... The sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law.

Id. (citing United States v. Fatico, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979)).

128 When adding the 1974 Amendments to the Guidelines, the Committee recounted that:

> Experience in jurisdictions which require disclosure does not lend support to the argument that disclosure will result in less complete presentence reports or the argument that sentencing procedures will become unnecessarily protracted. It is not intended that the probation officer would be subjected to any rigorous examination by defense counsel, or that he will even be sworn as a witness to testify. The proceedings may be very informal in nature unless the court orders a full hearing

FED. R. CRIM. P. 32(c)(3)(A), notes to 1974 amendment.

cifically held that the decision of whether to conduct an evidentiary hearing remains within the discretion of the trial judge.[129] If the matter is not settled,[130] the court may conduct a hearing at which time the probation officer may testify along with other witnesses. However, because the rules of evidence do not apply to such hearings, the witnesses need not even be sworn.[131]

The trial judge's resolution of disputed facts thus resembles a truncated form of trial.[132] Defendant's who tender guilty pleas are told that "there will not be a trial of any kind."[133] Yet the predicate findings for the Guidelines determination indeed represent the court's resolution of competing versions of fact. At sentencing, the Court must make a finding on the disputed facts in the PSR or decide that no such finding is required because the fact is irrelevant and will not be considered at trial.[134] The courts of appeal have generally held that a defendant bears a burden of alleging factual inaccuracies in the report.[135] Once he does, however, the Government assumes a burden of proving the alleged fact's accu-

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129 United States v. Peterman, 841 F.2d 1474, 1484 (10th Cir. 1988), *cert. denied*, 488 U.S. 1004 (1989).

130 One former Deputy General Counsel to the U.S. Sentencing Commission described the probation officer's role as follows:

> Before sentencing, the parties will review the report and file their factual and legal objections with their probation officer. At that time, they must specify the evidence and legal arguments that will be presented at the sentencing hearing. Based on these objections, the probation officer may investige and prepare an addendum to the report. The report will articulate the areas of factual dispute, the material that will be presented in support of the respective positions, the factors that argue for aggravation or mitigation of the sentence or departure from the guideline range, and the sentencing decisions the court must make.

Donald A. Purday, Jr. & Michael Goldsmith, *Better Do Your Homework: Plea Bargaining Under the New Federal Sentencing Guidelines*, 3 CRIM. JUST. 2, 35 (1988).

131 United States v. Blyth, 944 F.2d 356, 363 (7th Cir. 1991).

132 The official manual for federal judges recognizes that resolution of such issues requires, at a minimum, receiving exhibits and hearing testimony, yet states that "[t]he decision to hold an evidentiary hearing is in the discretion of the court." FEDERAL JUDICIAL CENTER, BENCH BOOK FOR U.S. DISTRICT COURT JUDGES, § 1.18A(7) (3d ed. 1986).

133 The Federal Rules of Criminal Procedure require that the court advise the defendant prior to accepting a plea of guilty or nolo contendere that if the plea is accepted, "there will not be a trial of any kind, so that by pleading . . . the defendant waives the right to a trial." FED. R. CRIM. P. 11(c)(4).

134 Federal Rule of Criminal Procedure 32(c)(3)(D) provides, in part: "For each matter controverted, the court must make either a finding on the allegation or a determination that no such finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing." FED. R. CRIM. P. 32(c)(3)(D).

135 United States v. Dennino, 29 F.3d 572, 580 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1117 (1995).

racy. With regard to facts warranting upward departures, the Government bears the burden of proof, while defendant must prove facts upon which to base a downward departure.[136] Factual findings need only be supported by a preponderance of evidence.[137]

Thus, Rule 32, as amended by the Sentencing Reform Act, contains a regime for adversarial development of the factual and legal issues raised by the Sentencing Guidelines. Pre-sentencing practice revolving around the probation officer's PSR has become a unique sort of practice with its own specialists. Treatises warn that attorneys who are preparing for Guidelines sentencing must utilize aggressive advocacy skills on a new frontier.[138] Probation officers also are working on newly-assigned duties to articulate the offense conduct upon which the court is to base its decision.

As a result, the PSR routinely reads as if written by the defendant's adversary in ascribing criminal conduct to him. As often as not, that conduct is extrinsic to the offense for which defendant has been convicted—that is, it is not a part of the jury's finding of guilt or his guilty plea. In this regard, the PSR is not simply a report of facts that were necessarily the basis of a jury's verdict or some other such public record. Rather, the probation officer is the functional equivalent of a "third adversary" competing with both the Government and the defendant.[139] The probation officer is not bound by the prosecutor's appraisal of which Guidelines apply and in what manner. He is often viewed by both parties suspi-

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136 Cases holding that the prosecutor shoulders the burden of establishing a fact that would increase a sentence include United States v. Levy, 992 F.2d 1081, 1083 (10th Cir. 1993) and United States v. Monroe, 978 F.2d 433, 435 (8th Cir. 1992). For a case finding that the defendant bears the burden on matters that would decrease a sentence, see United States v. Urrego-Linares, 879 F.2d 1234, 1238-39 (4th Cir.), *cert. denied*, 493 U.S. 943 (1989).

137 *See* United States v. Restrepo, 946 F.2d 654, 657 (9th Cir. 1991) (*en banc*); United States v. Madwell, 917 F.2d 301, 306 (7th Cir. 1990) (holding that the preponderance of evidence standard at sentencing satisfied due process requirements).

138 MCFADDEN et al., *supra* note 45, ¶ 11.02[1] ("[T]he sentencing guideline system necessitates reevaluation . . . of the approach to pretrial procedures.").

139 Jerry D. Denzlinger & David D. Miller, *The Federal Probation Officer: Life Before and After Guideline Sentencing*, 55 FED. PROBATION 49, 51 (1991). Denzlinger and Miller explained that because the PSR now:

> initiates the critical step of determining the defendant's sentencing range, both the officer and the [PSR] have become the focus of what is now a very adversarial sentencing system. . . . [The officer] is often seen as the "third adversary" in the courtroom, the enemy of the plea agreement, a view often simultaneously held by the judge, the Government, and the defendant.

Id.

ciously as a "second prosecutor."[140] The PSR is generally "the primary manner by which the defendant is notified of the proposed findings of facts and of the possibility of any departure" from the Guidelines.[141]

Most federal courts eschew characterizing the PSR as the equivalent of an indictment for purposes of constitutional protections such as assistance of counsel.[142] Yet, in the context of making sense of the Guidelines, they often use such terminology.[143] If not inconsistent with the officer's other traditional roles, this aspect of his work is one that is unique to federal employment which does not require formal legal training. The officer is called upon to determine which facts will establish a certain offense level at a future hearing—a classic prosecutorial role. Like the prosecutor, the probation officer deliberates the consequences of the decision to select among grades of offenses.

The Supreme Court implicitly recognized the charging function in *Burns v. United States*.[144] *Burns* held that a sentencing court could not effect a *sua sponte* departure from the Guidelines on a grounds not identified in either the PSR or some other pre-sentencing hearing submission without giving reasonable notice to the parties of its intention to do so. In addressing the defendant's right to notice of his potential exposure under the Guidelines, the Court observed that "[i]n the ordinary case, the [PSR] or the Government's own recommendation will notify the defendant that an upward departure will be at issue and of the facts that allegedly

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140 Bunzel, *supra* note 1, at 962. Bunzel wrote that "the new PSR format forces the probation officer to 'become the focus of . . . a very adversarial sentencing system' in which the probation officer is in 'the business of lawyering.'" *Id.* (quoting Judy Clarke, *Ruminations on* Restrepo, 2 FED. SENT. REP. 135, 135 (1989)).

Indeed, some defendants have commissioned outside firms to present a competing PSR with that prepared under the auspices of the court. In California and other states, privately-generated presentence reports often compete with official ones. Defendants may spend up to $5000 for private "sentencing advocates" to compile evaluations that include character references, psychological evaluations, and a community service plan designed to persuade the court to grant probation. *See* James Granelli, *Presentence Reports Go Private*, NAT'L L.J. May 2, 1983, at 1.

141 Thomas W. Hutchison & David Yellen, *supra* note 45, § 6A1.3, authors' cmt. 6, at 650.

142 *See, e.g.*, United States v. Tisdale, 952 F.2d 934, 939-40 (6th Cir. 1992). *Cf.* United States v. Scroggins, 880 F.2d 1204, 1209 n.11 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1816 (1990) (holding that Guideline sentencing is an adversarial process, with a PSR serving same purpose as a pretrial stipulation in civil cases).

143 United States v. Castellanos, 904 F.2d 1490, 1495 (11th Cir. 1990) (explaining that the Guidelines establish "an adversarial fact finding process" where the PSR initiates the process).

144 501 U.S. 129 (1991).

support such a departure."[145]

4. Conclusion

Rule 32 thus presents a system of pleading whereby the probation officer fulfills the role of "notice pleading" traditionally assigned the plaintiff in a civil case. Defendant must articulate challenges to each and every factual and legal error in the PSR prior to sentencing. The defendant's failure to do so waives all future objection and thus narrows the scope of issues left for trial. Defendant's default obviates the need for formal proof, much like the summary judgment device in a civil case.

B. The PSR as an Exhibit Proving Criminal Conduct

The evidentiary status of the PSR is an amorphous one. Because the rules of evidence have always been held inapplicable to sentencing, little attention has been given to its value as evidentiary proof. Although courts use differing formulations to define the PSR's probative value, they all agree that it is "evidence" in some sense.

In line with the historical practice, federal courts have considered the document to have been generated—if not "for their eyes only"—at least for them to employ in the first instance at their discretion. The difficulty arises under the Guidelines when the defendant objects to a statement of fact in the PSR. As discussed above, the Government is then held to assume a burden of proof of that fact at a hearing. At such a hearing, is the PSR admissible? The short answer is yes because the Federal Rules of Evidence do not apply at sentencing.[146] The traditional doctrine and 18 U.S.C. § 3661 allow no limitation on the sources of information that the court may consider for sentencing.

Still, however, the Due Process Clause precludes reliance upon materially inaccurate information. Rule 32(c)(3)(D), while prescribing the means for resolution of disputed factual issues, does not specify the evidentiary status of the PSR. The Rule provides that, as to matters alleged to be inaccurate by the defendant or his counsel, the court must make a finding of fact on each or determine that none is necessary because the matter will not be considered in sentencing. The Guidelines do not require that an evidentiary hearing be held in the event of a dispute. They simply

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145 *Id.* at 135 & n.5. The Court saw no distinction between notification via Government submission of its version of the offense or the PSR itself. *See id.* at 135.

146 *See generally* Part II(C), *supra.*

provide that the parties shall have the opportunity "to present information to the court."[147] The federal courts have consistently construed this provision to mean that hearings are a matter of the judge's discretion.[148]

This part of the Article examines the PSR as evidence and contrasts that use with the treatment given government reports under the Federal Rules of Evidence applicable at trial. The section assesses the PSR under Rule 803(8) of the Federal Rules of Evidence, which draws upon common law and state statutes long recognizing a hearsay exception for public records. The exception generally allows hearsay proof of the activities of a federal agency, matters observed by its employees pursuant to a statutory duty, and factual findings resulting from authorized investigations. Police records, however, are categorically excluded from the exception and cannot be used in a criminal trial. The anomoly of practice under the Guidelines is that crimes (and other relevant facts) are routinely proven through those same law enforcement reports inasmuch as the reports often serve as the basis for information contained in the PSR. Because the probation officer's position is in many respects aligned with law enforcement, this section suggests that the traditional suspicions reflected in the Federal Rules of Evidence demand courts' strict adherence to the requirement that hearsay statements be found reliable before they are considered at sentencing.

1. The PSR's Evidentiary Status as a Conduit for Hearsay

Most federal courts consider the completed PSR as prima facie proof of the facts it contains, to the extent that the defendant has not taken issue with them. In line with the waiver principles in Rule 32 (discussed in Part V(A)(3) above), if the defendant did not specifically object to facts in the PSR, the court may rely on those

147 The Guidelines provide:

> (a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an opportunity to present information to the court regarding that factor. In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

U.S.S.G. § 6A1.3(a), *Resolution of Disputed Factors.*

148 *See* United States v. Fatico, 603 F.2d 1053, 1057 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980).

facts as the sole basis for its finding.[149] Some courts imply that the PSR is automatically part of the sentencing record and a proper source for determination of a disputed fact by a preponderance of the evidence.[150]

In cases in which the defendant has disputed facts, the Guidelines allow the court to rely upon any information so long as it carries "sufficient indicia of reliability."[151] Accordingly, regardless of the rules of evidence, hearsay statements related in the PSR may be considered upon a finding that the statements are reliable.[152]

Federal courts routinely rely upon the hearsay evidence presented in the PSR.[153] One treatise on the topic finds that they do so with "extraordinary liberality."[154] A common scenario sees the Government's version of the offense accepted by the probation officer as his own and, in turn, by the court unless the defendant can disprove it by a preponderance of the evidence. As a safeguard, courts question whether the sources of information cited by the probation officer are demonstrably reliable.[155] Where the PSR alludes to a confidential informant, surrounding circumstances must be found to sufficiently corroborate his report.[156] Still, cases

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149 *See, e.g.*, United States v. Streich, 987 F.2d 104, 107 (2d Cir. 1993) (holding that a defendant's failure to contest allegations, as required by the court's orders, results in court accepting the allegations as true); United States v. Streeter, 907 F.2d 781, 791-92 (8th Cir. 1980) (in the absence of an objection, PSR alone presents a preponderance of evidence).

150 *See, e.g.*, United States v. Adames, 56 F.3d 737, 748-49 (7th Cir. 1995). In *Adames*, the sentencing judge relied on information contained in the PSR to enhance a sentence for a convicted drug felon. In addressing the trial court's reliance on the PSR to establish an aggravating role in the conspiracy, the Seventh Circuit wrote that because the "finding is supported by the trial and sentencing records, it is not clearly erroneous." *Id.* at 749. *See also* United States v. Tavano, 12 F.3d 301, 306-07 (1st Cir. 1993) (clarifying that findings may properly be drawn from the trial record, the PSR, or a party's new information presented at the sentencing hearing).

151 *See* U.S.S.G. § 6A1.3.

152 *See* United States v. Hicks, 948 F.2d 877, 883 (4th Cir. 1991) (due process is satisfied if factual evidence relied upon has some "minimal indicia of reliability"); United States v. Restrepo, 832 F.2d 146, 161 (11th Cir. 1987).

153 *See, e.g.*, United States v. Agyemang, 876 F.2d 1264, 1272 (7th Cir. 1979) (approving trial court's extensive reliance on hearsay, so long as the defendant has a "reasonable opportunity to rebut contested hearsay").

154 DAVID J. GOTTLIEB, PRACTICE UNDER THE NEW SENTENCING GUIDELINES, 194.7-194.8 (2d ed. 1994).

155 *See* United States v. Simmons, 964 F.2d 763, 775-76 (8th Cir. 1992). In *Simmons*, the Eighth Circuit held insufficient a PSR statement alluding to "information" from trial and witness interviews that crack cocaine was distributed, without identifying names of witnesses. *Id.* at 776. *See also* United States v. Shacklett, 921 F.2d 580, 584 (5th Cir. 1991) (holding that it was clear error for court to sentence on the basis of the PSR, which did not refer to the sources of the facts contained therein).

156 *See, e.g.*, United States v. Reid, 911 F.2d 1456, 1463-64 (10th Cir. 1990). In *Reid*,

and anecdotal evidence from prosecutors and defense counsel alike suggest that the prosecution's "official" version of the offense commonly becomes the probation officer's as well.[157]

A few common examples help to understand the trend. The Guidelines provide that an offense level shall be increased ("enhanced") two levels if the defendant "willfully obstructed or impeded" justice.[158] It is not unusual for the Government to prove the threat or attempted escape by relying on the PSR, which simply restates contents of a hearsay report from an official or witness.[159] Similarly, the Guidelines call for increasing imprisonment for higher quantities of drugs sold. Following a guilty plea or trial, the exact amounts are tallied by the probation officer in the PSR based upon Government reports, which in turn cite other sources of hearsay information.[160]

Some types of disputed hearsay receive less scrutiny of their reliability than others. In many cases dealing with criminal history, for example, the PSR is deemed admissible evidence to establish prior convictions without additional corroboration.[161] Even if the

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the district court relied upon a PSR relating that the officer had reviewed an affidavit by an Alcohol, Tobacco, and Firearms agent which, in turn, had reported an inmate's statement quoting the defendant as having promised revenge against two witnesses. The Tenth Circuit ruled that the trial court's reliance on the multiple hearsay was proper. *Id.* at 1464.

157 *See* United States v. Canino, 949 F.2d 928, 951 (7th Cir. 1991) (where judge told the defendant that he would accept the prosecution's version in the PSR as true unless the defendant presented evidence that the challenged statements were inaccurate or not credible); United States v. Moran, 845 F.2d 135, 139 (7th Cir. 1988) (same); United States v. Slaughter, 900 F.2d 1119, 1123 (7th Cir. 1990) (same).

158 U.S.S.G. § 3C1.1 provides that obstruction includes both attempts to escape custody and threats to witnesses. *See id.*

159 *See* United States v. McGill, 32 F.3d 1138, 1143-44 (7th Cir. 1994). In *McGill*, the probation officer reported that he had received a written report from a prison officer stating that, upon hearing noise in the defendant's cell, the latter officer had found the defendant standing on top of the toilet with his head protruding through a hole in the ceiling tiles. The officer who was said to have observed the incident did not appear as a witness, nor was his report introduced into evidence. Instead, the probation officer testified at the sentencing hearing and related the contents of the report. Defense counsel cross-examined the officer, suggesting that defendant's conduct may have been a suicide attempt. The officer did not agree. His testimony was accepted as credible and the court found the defendant guilty of a willful attempt to escape before trial, resulting in an enhanced offense level. *See generally id. See also* United States v. Nowicki, 870 F.2d 405, 406-07 (7th Cir. 1989) (holding that trial court may consider hearsay report of the defendant's threat as aggravating factor).

160 United States v. Silverman, 976 F.2d 1502, 1529 (6th Cir. 1992) (Merritt, C.J., dissenting), *cert. denied*, 113 S. Ct. 1595 (1993).

161 *See e.g.*, United States v. Frushon, 10 F.3d 663, 665-66 (9th Cir. 1993); United States v. Flores, 875 F.2d 1110, 1112 (5th Cir. 1989) (allowing sentence enhancement based on PSR and testimony of probation employee).

defendant denies the fact of previous convictions referenced in the PSR, courts have considered the PSR an adequate evidentiary basis and have rejected arguments that the denial triggers a requirement that certified copies of those judgments be presented at sentencing.[162] This result might be justified on the grounds that law enforcement records are inherently reliable because courts' public records of felony convictions are excepted from hearsay treatment under the Federal Rules of Evidence.[163]

At the same time, some federal courts say that the PSR itself carries no real evidentiary weight in the face of defendant's specific challenges to facts recited therein. Courts facing the issue directly have held that the PSR cannot be considered evidence proving the contested issue.[164] The PSR—as opposed to the probation officer's sworn testimony, reference to a trial transcript, or some other source—is not "clearly reliable evidence."[165] Even if the PSR contains a narrative of facts, and not simply a conclusion of fact, it is not competent evidence upon which a court may rely to resolve contested issues.[166] In accordance with the view that the PSR is not

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162 United States v. Watkins, 54 F.3d 163, 167 (3d Cir. 1995). In *Watkins*, the Third Circuit held that a requirement of three prior violent felonies for sentence enhancement under the Armed Career Criminal Act (ACCA) can be established by reference to statutory citations of convictions in the presentence report. *Id.* at 166-67 (citing 18 U.S.C § 924(e) (1992)). The federal appellate court found no justification for inflexible rules that would require certified copies of convictions. *See id. See also* United States v. Taylor, 495 U.S. 575, 600 (1990) (ACCA "generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense").

163 *See* FED. R. EVID. 803(22).

164 *See, e.g.*, United States v. McMeen, 49 F.3d 225, 226 (6th Cir. 1995); United States v. Hammer, 3 F.3d 266, 272-83 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1121 (1994) (stating that PSR is not evidence and is therefore not a legally sufficient basis for making findings on contested issues of material fact).

165 United States v. Potter, 895 F.2d 1231, 1238 (9th Cir.) *cert. denied*, 497 U.S. 1008 (1990). The United States Court of Appeals for the Ninth Circuit considered the seriousness of a 15-year mandatory enhancement under the ACCA. The court held that the sentencing court must receive copies of judgments to determine whether defendant had been previously convicted of violent felonies because the presentence investigation report is not clearly reliable evidence to establish such prior convictions. *Id.*

166 *See, e.g., McMeen*, 49 F.3d at 226. In United States v. Gadson, 829 F. Supp. 435, 438 (D.D.C. 1993), the court rejected the notion that the PSR was sufficiently reliable to prove facts of drug transactions recited therein or that the court could take judicial notice of the facts recited therein. *See generally id.* The judge noted that the probation officer's information on such facts was often furnished by the Government prosecutors. In the absence of any witnesses having been called by the Government, the court found no preponderance of evidence presented by the PSR alone. The court stated that it could not "accept unverified facts as true for purposes of a civil case where no liberty interest is involved. . . . Therefore, the Court conclude[s] that it [is] improper to deprive a Defendant of his liberty interest based only upon the broadly

strictly evidence, courts also look to whether it cites trial testimony or other sources, such as government reports or witnesses.[167]

Although not bound by them, courts often justify their reliance upon hearsay in the PSR by citing to provisions of the Federal Rules of Evidence.[168] Usually, courts cite to a recognized hearsay exception as grounds for dispatching with the objection.[169] Thus, under the Sixth Amendment Confrontation Clause, reliance on a "clearly recognized" exception to the common law hearsay rule furnishes sufficient reliability for the statement.[170]

As will be shown, however, the irony of current practice is that PSRs are routinely found to be reliable based upon police reports that would themselves be undebatably inadmissible at a criminal trial. To compare the PSR with other government records used in criminal trials against the defendant, a review of the evidentiary rules governing law enforcement and investigative reports is in order. Evidence Rule 803(8), the standard for whether public records are admissible as an exception to the hearsay rule, may help one to appreciate the enhanced evidentiary value assigned to the PSR. To the extent that PSRs routinely rely upon law enforcement agencies as the ultimate sources of facts, the policy underlying this inapplicable rule raises special credibility concerns. Is the

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asserted, unverified information contained in the [PSR] in this case." *Id.* at 438 (citing FED. R. CIV. P. 56).

167 United States v. Willard Makes Room for Them, Jr., 49 F.3d 410, 417-18 (8th Cir. 1995) (holding that the trial court erred in relying on the PSR to establish defendant's aggravated role in the offense where no trial or sentencing hearing testimony was cited). *See also generally McMeen*, 49 F.3d at 255.

168 United States v. Castellanos, 904 F.2d 1490, 1495 n.8 (11th Cir. 1990). In *Castellanos*, the sentencing judge resolved a dispute over the quantity of cocaine ascribed to defendant in the PSR by relying on defendant's previous testimony in a co-defendant's trial. The *Castellanos* court upheld the enhancement, considering the finding proper under Federal Rule of Evidence 801(d)(A). *See id.* at 1495.

169 United States v. Johnson, 971 F.2d 562, 574 (10th Cir. 1992) (citing FED. R. EVID. 801(d)(2)(A)); United States v. Wright, 873 F.2d 437, 441 (1st Cir. 1989) (same).

170 The seminal Supreme Court decision, Ohio v. Roberts, 448 U.S. 56 (1980), held that the Confrontation Clause requires the prosecution offering the hearsay evidence to demonstrate both unavailability of the declarant and "indicia of reliability" in the evidence. *Id.* at 65. However, in United States v. Inadi, 475 U.S. 387 (1986), the Court authorized receipt of co-conspirators' hearsay statements without need for demonstrating unavailability. *See id.* at 399-400.

In United States v. Bourjaily, 483 U.S. 171 (1987), the Court found the co-conspirator exception to the hearsay rule to be a "firmly-rooted" one carrying the requisite inherent reliability. *Id.* at 182-83. In *Idaho v. Wright*, 497 U.S. 805, 817 (1990), the Court said that the State's version of Federal Rule of Evidence 803(24) was not a firmly-rooted exception and that the reliability of the statements had to be demonstrated from the totality of the circumstances surrounding them.

court weighing the credibility of the police or the probation officer? Arguably, at least, the court is doing both, and that routine reliance upon the probation officer's ultimate version of facts contained in the PSR deserves special scrutiny. More importantly, the probation officer himself is in some respects a law enforcement officer whose report is given overwhelming weight under the Guidelines.

2. Analyzing the PSR as a "Public Record" Under Evidence Rule 803(8)

The "public" nature of the PSR is amorphous. Although Evidence Rule 803(8) carries no requirement that the record be "public" in the sense of being open to inspections by all persons, the issue reveals the special treatment given the PSR by courts. The PSR was, before the last twenty-five years, considered the court's confidential source.[171] The report was traditionally considered to be strictly confidential, although Rule 32 now mandates disclosure of the PSR to the defendant and his counsel barring exceptional circumstances. The PSR is not publicly filed as a court record.[172] Before the Rule 32 amendments for liberal disclosure, courts disclaimed publicity of the PSR as contrary to the need to procure candid information from all sources, including the defendant.[173] Consequently, the PSR was rarely disclosed to third parties in the course of civil or criminal discovery.[174] Despite the trend toward early disclosure to the defendant inherent in Rule 32, courts still refuse to acknowledge any significant public interest in the PSR that would dictate a right of access to it by third persons. The PSR is not freely accessible by the general public or the press under the Freedom of Information Act.[175]

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171 *See* Bunzel, *supra* note 1, at 964 ("In these circumstances, the district judge may be forced to pass formal judgment on the credibility and judgment of professionals who . . . should enjoy a close and confidential relationship with the district judges.").

172 *See* United States v. Trevino, 556 F.2d 1265, 1266 (5th Cir. 1977) (noting that the PSR is not a prosecutorial tool, but, rather, an informative document offering guidance to the court during sentencing).

173 *See generally* United States v. Corbitt, 879 F.2d 224 (7th Cir. 1989) (discussing First Amendment and common law claims regarding general access to sentencing materials).

174 *See, e.g.*, United States v. Charmer Industries, Inc., 711 F.2d 1164, 1171 (2d Cir. 1983) (explaining that a PSR is not a public record but is a "confidential report[ ] to the trial judge for use in his effort to arrive at a fair sentence"). *See also id.* at 1174 (stating that courts should allow discovery of the PSR to third persons absent "compelling showing" that the interests of justice require disclosure).

175 Cook v. Willingham, 400 F.2d 885 (9th Cir. 1968) (ruling that United States courts are not "agencies" under the Freedom of Information Act and, therefore, the

Hearsay is not admissible unless authorized by statute or rule.[176] A major exception to the hearsay bar is Evidence Rule 803(8), commonly known as the "public records" provision.[177] Rule 803(8) delineates three different classes of hearsay within its exception: (A) records of the "activities" of an office or agency; (B) "matters observed" under a legal obligation to do so; and (C) "factual findings" made upon an investigation authorized by law. The latter two categories carve out significant "exceptions to the exception," but expressly withhold that advantage from the prosecution in a criminal case.

One of the sources of reliability of a public record is the fact that it is "public." In the United States, records are deemed to carry a circumstantial guarantee of trustworthiness when they are created pursuant to a legal duty by a public officer. Professor Wigmore said that the reliability of public reports stemmed not so much from their being products of "habit" common to routine business entries, but from an "official duty" to make an accurate statement, which usually suffices "to incite the officer to its fulfillment."[178] In the same vein, Professor Saltzburg writes that the ex-

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PSR is not subject to disclosure). *Cf.* United States Dept. of Justice v. Julian, 486 U.S. 1, 10-11 (1988) (noting that a defendant has an interest in the disclosure of his own PSR under the Act). In this manner, the PSR is treated like FBI "rap sheets," which are held exempt from disclosure to the public under the Freedom of Information Act. *See* United States Department of Justice v. Reporter's Committee for Freedom of the Press, 489 U.S. 749 (1989) (stating that rap sheets—which are computerized compilations of criminal records, including arrests, charges, convictions, and sentences—are exempt from the Act because public interest in disclosure is outweighed by the invasion of the subject's privacy).

176 FED. R. EVID. 802. The rules of evidence define hearsay as follows: "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c).

177 Federal Rule of Evidence 803(8) provides an exception to the rule against hearsay, applying to:

> Records, reports, statements, or data compilations, in any form, of public officer or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

FED. R. EVID. 803(8).

178 5 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 1632 (Chadbourn rev. 1974). Wigmore found support for this common law rule in Chesapeake & D. Canal Co. v. United States, 240 F. 903 (3d Cir. 1917), wherein the court stated:

> [W]hen a public officer is required, either by statute or by the nature of

ception reaches public records because it is "assumed" that public officials perform their duties properly.[179]

Most justifications of Evidence Rule 803(8) have emphasized efficiency rather than reliability of public records—that is, the necessity of some practical limitation on public servants' time in producing court records.[180] Irving Younger noted that a second rationale—preserving the integrity of original records—spawned the practice of authenticating copies of public records.[181]

a. *Reports of "Matters Oberved" Under Evidence Rule 803(8)(B)*

The Federal Rules of Evidence provide that the following public records are admissible over a hearsay objection:

> Records, reports, statements, or data compilations, in any for, of public officer or agencies, setting forth . . . matters observed pursuant to any duty imposed by law as to which matters there was a duty to report, excluding however, in criminal cases, matters observed by police officers and other law enforcement personnel.[182]

Evidence Rule 803(8)(B) also protects a criminal defendant's right to confront witnesses against him by delimiting police and investigative reports from the exception. Police reports and others prepared by law enforcement personnel setting forth "matters observed" by them are not admissible in a criminal trial. The legislative history suggests that Congress recognized an inherent bias in such reports against potential defendants.[183] Any police officer ob-

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> his duty, to keep records of transactions occurring in the course of his public service, the records thus made . . . are ordinarily admissible, although the entries have not been testified to by the person who actually made them, and although he has therefore not been offered for cross examination. As such records are usually made by persons having no motive to suppress or distort the truth or to manufacture evidence, and, moreover, are made in the discharge of a public duty, and almost always under the sanction of an official oath, they form a well-established exception to the rule excluding hearsay and, while not conclusive, are "prima facie" evidence of relevant facts.

240 F. at 907.

179 3 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 1416 (6th ed. 1994).

180 *See* CHRISTOPHER MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 8.48 (1995) (noting that necessity underlies the exception); WILLIAM CAHALAN, EVIDENCE REVISITED, NATIONAL DISTRICT ATTORNEYS ASSOCIATION, THE PROSECUTOR'S DESKBOOK 517, 526 (2d ed. 1977).

181 IRVING YOUNGER, HEARSAY: A PRACTICAL GUIDE THROUGH THE THICKET § 4.8 (1988).

182 FED. R. EVID. 803(8)(B).

183 *See* JACK B. WEINSTEIN & MARGARET A. BERGER, 4 WEINSTEIN'S EVIDENCE ¶

serving a crime is duty bound to report it and writes the report as a potential witness against the subject.[184] Toward achieving the same objectives as the Confrontation Clause at the guilt phase of trial, police reports of criminal conduct are not admissible by the Government.[185]

More specifically, Evidence Rule 803 prohibits reports setting out "matters observed by police officers *and other law enforcement personnel*."[186] The term "law enforcement personnel" has been broadly construed in accordance with the Rule's purpose to include many public employees whose duties are auxiliary to police and investigative agents. For example, U.S. Customs Service laboratory chemists have been found to be law enforcement personnel because of their importance in prosecuting narcotics cases through testimony on chemical analysis and chain of custody of seized drugs.[187] Other courts, however, have held that officials only tangentially related to the police are not within the scope of the limitations.[188] These courts consider whether the official, though employed in a law enforcement agency or capacity, was making the particular report as a matter of routine observation of many persons or was focused upon a subject as a targeted perpetrator.[189]

803(8)[01] (1995) (citing comments of Representative Hungate in floor debate in House of Representatives and stating that police reports would be excluded from the exception of Federal Rule of Evidence 803(8)(B) because they are "frequently prepared for use of prosecutors, who use such reports in deciding whether to prosecute").

184 S. Rep. No. 1277, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7064.

185 Although Federal Rule of Evidence 803 purports to bar such reports whether or not the author (the "declarant") is available to testify at trial, another hearsay exception might allow use of the report if the author appears as a witness in the case. Typically, a police report may be furnished to a witness to either refresh the witness's recollection or, if that fails, to be read to the jury under the exception for records of past recollection recorded (per Federal Rule of Evidence 803(5)). *See generally* United States v. Sawyer, 607 F.2d 1190 (7th Cir. 1979), *cert. denied*, 445 U.S. 943 (1980).

186 FED. R. EVID. 803(8)(B).

187 *See, e.g.*, United States v. Oates, 560 F.2d 45, 67-68 (2d Cir.), *on remand*, 445 F. Supp. 351 (E.D.N.Y. 1977), *aff'd*, 591 F.2d 1332 (2d Cir. 1978).

Similarly, border inspectors' routine observations have been held admissible under the rule even though they might technically fit the description of "law enforcement personnel." In United States v. Orozco, 590 F.2d 789 (9th Cir. 1978), *cert. denied*, 442 U.S. 920 (1979), the court considered computerized records that the defendant's car had crossed the Mexican border and held that such recording of license plate numbers did not implicate the concerns of adversary confrontation that the rule is designed to protect. *See id.* at 793-94.

188 United States v. Rosa, 11 F.3d 315, 332 (2d Cir. 1993) (allowing medical examiner's report bearing indicia of criminality because the examiners have no law enforcement training and no responsibility for enforcing the criminal laws).

189 *See* United States v. Enterline, 894 F.2d 287, 289-91 (8th Cir. 1990) (collecting

Are probation officers law enforcement officers? While "law enforcement personnel" may not accurately describe federal probation officers in their capacities as authors of PSRs, their background and vantage point frequently align them much more closely with law enforcement than the judicial branch.

Prior to the Sentencing Reform Act of 1984, federal probation officers' expertise in social science dominated their work of analyzing and monitoring offenders.[190] They relied upon the federal prosecutors and defense counsel to furnish them with their respective factual versions of the offense. Most of the probation officer's efforts in compiling the PSR consisted of verifying criminal history and investigating the defendant's background.[191] In line with now-discarded goals of rehabilitation in the federal criminal justice system, the officers routinely included in their PSRs their subjective opinion of the defendant's capacity to change his attitude and behavior. Their recommendations on the actual sentence to be imposed were meant to consider, as appropriate, the separate sentencing goals of deterrence, punishment, incapacitation, and rehabilitation.[192]

An additional point of reference for considering the law enforcement duties of probation officers emanates from their historical role in documenting and prosecuting violations of probation terms.[193] The officers are authorized to make warrantless arrests for such violations.[194] Like other law enforcement officers, probation officers typically swear affidavits of facts underlying what they

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cases and adopting rationale of *Orozco* in concluding that border-crossing observations of customs officers is not "crime scene" or an otherwise adversarial setting within the ambit of Federal Rule of Evidence 803(8)(B)).

190 *See* Henry P. Chandler, The Administrative Office of the U.S. Courts, 2 F.R.D. 53, 66 (1941) (remarks of the Director before the Ninth Circuit Judicial Conference, analogizing federal probation to "social service" agencies in urging adequate funding).

191 John S. Dierna, *Guideline Sentencing: Probation Officer Responsibilities and Interagency Issues*, 53 FED. PROBATION 3, 4 (1989); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1722 (1992).

192 *Publication 105*, *supra* note 44, at 15-17.

193 18 U.S.C. § 3603(4) (1992).

194 Section 3606:

> If there is probable cause to believe that a probationer or a person on supervised release has violated a condition of his probation or release, he may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. A probation officer may make such an arrest wherever the probationer or releasee is found, and may make the arrest without a warrant.

18 U.S.C. § 3606 (1988).

believe to be a violation. Indeed, prior to the Guidelines, the Supreme Court recognized state probation officers as "peace officers" affiliated with law enforcement.[195] Still, federal courts have held that probation officers are not "law enforcement officers" for purposes of the Federal Tort Claims Act.[196]

Under the Guidelines, it is widely recognized that the probation officer is even more closely attuned to concerns of public safety than under prior practice. While they still instruct probationers on the conditions of their release and work to improve the conduct of those persons by supervision,[197] they have a concurrent obligation to protect the public in doing so.[198] Clearly, many state probation officers today serve a role in law enforcement by monitoring the conduct of probationers.[199] Indeed, some states license their probation officers with the arrest powers of law enforcement officers.[200] Other states involve the probation officers in many aspects of criminal investigations, such as discovering and seizing forfeitable assets.[201] Despite the importance to the mission of probation, the policing aspects remain largely in the background of the job description.[202]

In documenting facts for the PSR, the probation officer will be

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195 *See* Minnesota v. Murphy, 465 U.S. 420, 432 (1984) (probation officer "is a peace officer, and as such is allied, to a greater or lesser extent, with his fellow police officers").

196 *See, e.g.*, Wilson v. United States, 959 F.2d 12, 15 (2d Cir. 1992); Duross v. Delaware, 494 A.2d 1265, 1270 (Del. 1985) (allowing probation officer to testify to facts in the PSR under modified version of Federal Rule of Evidence 803(8) because they are not "law enforcement officers" and reports are more routine in nature than targeted investigations).

197 18 U.S.C. § 3603 (1992 & Supp. 1995).

198 Weissich v. United States, 4 F.3d 810, 814 (9th Cir. 1993) (noting that the probation service guidelines impose dual obligation on probation officer to protect public and promote rehabilitation of probationer), *cert. denied*, 114 S. Ct. 2705 (1994).

199 Maria E. Camposeco, *Benefits Too Low to Take Risks, Probation Officers Tell Placer*, SACRAMENTO BEE, July 9, 1993, at B3 (detailing county probation officers' demand for salary parity with street police on account of risks attending their work in apprehending and transporting probation violators and conducting unannounced searches); *Armed Probation Officers Proposed for Oakland*, SAN FRANCISCO CHRONICLE, April 14, 1992, at A16 (county supervisor quoted as declaring "[c]ertainly, probation officers are law enforcement, but they are also social workers"); Letter to the Editor, ST. PETERSBURG TIMES, May 15, 1992, at 15A (noting that Florida probation officers have option of carrying firearms while on duty for personal safety).

200 David Lundy, *Two Cities Privatize—Probation Firm Offers Supervision, Collects Fines*, THE ATLANTA JOURNAL AND CONSTITUTION, April 22, 1993, at 1 (noting that Georgia law recognizes certified probation officers as "law enforcement officers" under state law with arrest powers).

201 David Hasemyer, *Probation Department Goes After Drug Assets to Stretch Tight Budget*, SAN DIEGO UNION-TRIBUNE, Feb. 16, 1992, at A-7.

202 The New Jersey Supreme Court forbids its probation officers to maintain mem-

privy to most of the details of the Government's investigation. In addition, during the usual investigation, it is customary for the officer to interview case agents and the defendant.[203] However, it is common knowledge among prosecutors and defense counsel that the pressures of time upon probation officers require that they rely upon written submissions of facts from both parties. That written report will have been distilled from either agency investigative reports (the kind targeted by Evidence Rule 803(8)(B)) or grand jury transcripts contained in the prosecutor's file.[204] In many cases, prosecutors simply furnish the probation officer with copies of the case agent's reports. Time often does not allow the probation officer to corroborate the facts contained in those reports, and they may thus be adopted as the facts upon which the officer bases a decision.[205] One survey of probation officers revealed that most did not have the time or resources to conduct their own full investigations into the scope of the defendant's crime.[206] In any event, the reality is that the PRS usually reflects the Government's view of offense conduct.[207]

The probation officer's law enforcement slant is revealed to the defendant when the defendant submits for his pre-sentence interview. The potential for giving the probation officer incriminating information at the pre-sentence interview is clear. Defense counsel have therefore urged that the protections of *Miranda v. Arizona*[208] be accorded to the defendant at that time. In *Minnesota*

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bership in police organizations. *See* Kirchgesser v. Wilentz, 884 F. Supp. 901, 906-07 (D.N.J. 1995).

203 Dierna, *supra* note 191, at 4 (indicating that interviews with case agents are helpful and necessary).

204 *See generally* Julian A. Cook, Jr., *The Changing Role of the Probation Officer in the Federal Court*, 4 FED. SENT. REP. 112 (1991). The Chief United States District Court Judge for the Eastern District of Michigan reviewed the transformation of the probation officer's role and observed that

> today, because of their perceived role as an adversary in the sentencing process, probation officers are viewed by some defendants when they appear in the probation office for the requisite presentence interview, as working on behalf of the attorney for the government.

Id.

205 *See generally id.* (describing the tremendous increase in the time involved in preparation of the PSR by probation officers).

206 Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 169 (1991).

207 Subin et al., *supra* note 90, §19.9(b) (stating that, in most cases, PSRs "reflect the government's version of events"). As a former prosecutor, the author remains open to the suggestion that the reason for this is simply that the Government is usually right in its version of the crime.

208 384 U.S. 436 (1966). *See generally id.* (adopting a prophylactic rule to ensure

v. Murphy,[209] the Supreme Court held that *Miranda* warnings need not be given by probation officers before speaking with convicts at meetings that are held as part of a condition of probation. Although a defendant's pre-sentence meeting with the officer is not "routine" in the same sense as probationary meetings, the federal courts have nearly unanimously held that the setting is not so inherently coercive as to constitute custodial interrogation triggering the need for *Miranda* warnings.[210]

The 1994 amendment to Rule 32, requiring that defense counsel, upon request, be allowed to attend any such meeting with the probation officer recognized the significance of the interview to the defendant.[211] Federal courts have recognized in some ways that the officer's interview is a crucial part of the investigation of the defendant's criminal conduct.[212] One appellate panel expressed disbelief that a defense attorney would forego the opportunity to attend such a meeting with the client, implying the

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that the warnings of both the Fifth Amendment right against self-incrimination and the Sixth Amendment right to counsel must precede "custodial interrogation").

209 465 U.S. 420 (1984).

210 *See* United States v. Miller, 910 F.2d 1321, 1326 (6th Cir. 1990), *cert. denied*, 498 U.S. 1094 (1991); United States v. Rogers, 899 F.2d 917, 921-24 (10th Cir.), *cert. denied*, 498 U.S. 839 (1990); United States v. Jackson, 886 F.2d 838, 842 n.4 (7th Cir. 1989).

211 FED. R. CRIM. P. 32(b)(2).

212 Indeed, probation officers may be limited in using information gleaned from interviewing the defendant if the prosecutor has granted immunity from its use. The Guidelines address the situation where a plea agreement carries the defendant's promise to cooperate in furnishing details of other suspects' unlawful conduct. If the Government agrees that self-incriminating facts provided under the agreement will not be used against the defendant, the cases hold that the fact that the matters were repeated to a probation officer in the course of a presentence investigation does not alter the immunity protections—that is, the officer may not employ the incriminating facts to determine an applicable offense level.

The Guidelines provide:

> Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant, then such information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement.

U.S.S.G. §§ 1B1.8(a) & 1B1.8 cmt.

See also United States v. Fant, 974 F.2d 559, 562-64 (4th Cir. 1992). In *Fant*, the Government opposed restricted use of incriminating statements made to the probation officer on the grounds that the statements were not made to the "Government" within the meaning of the plea agreement. Although the *Fant* court did not accept the argument, other district courts have. *See, e.g.*, Miller, 910 F.2d at 1325-26 (holding that statements made to a probation officer cannot be construed as statements to the Government under U.S.S.G. § 1B1.8).

existence of an adversarial setting.[213] The adversarial nature is compromised, however, inasmuch as the probation officer has the tremendous power to essentially determine the outcome.[214]

Despite the reservations about their investigative role,[215] federal probation officers continue to view themselves as separated from law enforcement and aligned with the judicial branch.[216] Some characterize themselves as "risk managers" in their capacities as supervisors of probationers.[217] Concerning their duty in generating the PSR, the probation officer's primary function is to document the entirety of the defendant's offense and his criminal history. There is no longer consideration of the prognosis for rehabilitation. As a result, their inquiry of the defendant often reveals incriminating information. While most officers recognize the danger that their review of serious offenders may become tainted by the bias that many of us naturally acquire against criminals, no safeguards can fully protect against the bias. They are cautioned to guard against it by seeking supervision or transfering the matter to another officer.[218]

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213 United States v. Davis, 919 F.2d 1181, 1185-86 (6th Cir. 1990) ("We are troubled . . . by the lawyer's decision not to attend [the interview]. If this had been a civil case, one wonders whether the lawyer would have let his client be deposed without counsel being present.").

214 One commentator maps the potential scenarios for the interview as follows:

> If the defendant tells the truth about the crime, the probation officer will add up the points differently. If the defendant denies the allegations, he or she may get a stiffer sentence for obstruction. If the defendant refuses to talk at all, he or she could preclude credit for accepting responsibility for the crime.

Marcia Chambers, *Probation Officers Sit in Judgment*, NAT'L L.J., April 16, 1990, at 13.

215 For example, the 1990 Federal Courts Study Committee Report evidenced a "growing concern among judges, prosecutors and defense lawyers" that the new investigative role was one for which probation officers were not "particularly well trained or well suited." JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 138 (Apr. 1990).

216 *See generally* Paul W. Brown, *Guns and Probation Officers: The Unspoken Reality*, 54 FED. PROBATION 21 (1990) (postulating that as increasingly dangerous offenders are placed on supervision due to prison crowding, more probation and parole officers will become armed); Richard D. Sluder et al., *Probation Officers' Role: Perceptions and Attitudes Towards Firearms*, 55 FED. PROBATION 3 (1991) (revealing divergent perceptions amongst probation officers as to whether they are a class of law enforcement officer).

217 Harold B. Wooten & Mary K. Shilton, *Reconstructing Probation*, 7 CRIM. JUSTICE 12, 15 (Winter 1993) (article by probation officers characterizing their role and analyzing the supervisory aspects of their work within the federal system).

218 TODD R. CLEAR, OFFENDER ASSESSMENT AND EVALUATION—THE PRESENTENCE INVESTIGATION REPORT 21-22 (1989); *see also* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 34-35 (1973) (discussing errors in presentence investigations resulting from the intrinsic bias of the data collection process).

Determining that probation officers are not law enforcement personnel, however, and concluding that their reports would be admissible to prove the "matters observed" by them, does not end the inquiry. The matters observed in the course of preparing the report are not instances of conduct—facts perceived first hand by the probation officer. Instead, they will consist of reading others' written reports or interviews of witnesses who relate facts. The "matters observed" thus constitute hearsay themselves and, under the Federal Rules of Evidence, would require a separate hearsay exception to warrant their admission into evidence.[219] In short, hearing a statement of fact does not make the fact known to the listener in the sense of imparting personal knowledge of it.[220] It follows that a PSR could not be considered admissible *at trial* to prove the truth of hearsay statements that it contained. Acknowledging that the Federal Rules of Evidence do not apply at sentencing, a stark irony remains: A PSR will very often rely upon other law enforcement reports to prove matters observed by police and agents. In that case, reports that are inadmissible at trial are frequently found sufficiently reliable to warrant their use at sentencing.

b. *Reports of "Factual Findings" Under Evidence Rule 803(8)(C)*

Under Rule 803(8)(C),[221] hearsay is admissible, in a civil case and *against* the government in a criminal trial, if it represents a finding that is the product of a legally-authorized investigation. The rationale for this exception is similar to that of public records generally: The official has a legal duty to certify facts and observations, and also to investigate and render an opinion based upon those facts.[222] Evidence Rule 803(8)(C) thus recognizes that certain government employees are designated as fact-finders, and concludes that receipt of their conclusions should not be limited to

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219 The evidence rules state, with respect to hearsay: "Hearsay included within hearsay is not included under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rules provided in these rules." FED. R. EVID. 805.

220 Meuller & Kirkpatrick, *supra* note 180, § 6.20 (1995) ("Personal knowledge of [a witness under Federal Rule of Evidence 602] means firsthand knowledge that has come to the witness through her own senses and includes two components—perception and memory."). *See also* EDWARD W. CLEARY ET AL., MCCORMICK ON EVIDENCE, § 10 (3d ed. 1984) ("[Personal knowledge rule requires] that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact.").

221 For the text of Evidence Rule 803(8)(C), see *supra* note 177 and accompanying text.

222 WEINSTEIN & BERGER, *supra* note 183, at ¶ 803(8)[02] (1995).

those facts of which they have personal knowledge.[223]

In *Beech Aircraft Corp. v. Rainey*,[224] the Court confirmed the apparent breadth of the so-called "evaluative findings" exception. *Beech Aircraft* addressed an investigative report by a U.S. Navy Lieutenant Commander that was lawfully ordered by the Judge Advocate General (JAG). The JAG Report was the product of a six-week investigation and presented both "findings" and "opinions." One of the opinions addressed the "most likely" and "probable" cause of the accident. The Supreme Court reversed the trial judge's exclusion of the opinions, holding that the Rule did not require exclusion of reports simply because they state a conclusion or opinion.[225] All that is required is that the conclusions be based on a factual investigation and be found trustworthy under the Rule.

As a result, the primary restriction on Evidence Rule 803(8)(C) lies in a clause precluding use of the exception if the investigator's "sources of information or other circumstances indicate" a "lack of trustworthiness" in the findings. Under this provision, the credentials of the investigator and his methodology in conducting the inquiry are addressed on a case-by-case basis. The notes to the Rule suggested proper factors to assess in scrutinizing the reliability of the conclusions.[226] However, courts have determined that this "trustworthiness" clause does not allow courts to second-guess the credibility of the investigator's sources. Rather, the admissibility issue must focus on the methodology and credibility of the public official as author of the report.[227] Nevertheless, if

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223 *See generally* United States v. School Dist. of Ferndale, 577 F.2d 1339 (6th Cir. 1978) (findings contained in investigative reports held admissible under Federal Rule of Evidence 803(8)(C) even though the product of "quasi-judicial hearing").

224 488 U.S. 153 (1988).

225 *Id.*

226 The Advisory Committee's Note on this provision provides:

> Factors which may be of assistance in passing on the admissibility of evaluative reports include: (1) the timeliness of the investigation . . . (2) the special skill or experience of the official . . . (3) whether a hearing was held and the level at which conducted . . . and (4) possible motivational problems suggested by Palmer v. Hoffman, 318 U.S. 109 (1943) . . . .

FED. R. EVID. 803(8)(C) (committee notes).

In *Palmer*, a pre-Rules case involving a railroad accident, the Court questioned whether a firm's investigative report was a matter of routine so as to be admissible under a statutory hearsay exception for business records. The Court suggested that the report's utility in litigation posed a motivational problem to be assessed at the admissibility stage. Palmer v. Hoffman, 318 U.S. 109, 113 (1943).

227 *See* Moss v. Ole South Real Estate, 933 F.2d 1300, 1305-07 (5th Cir. 1991) (determining that "trustworthiness" analysis may include examining bias of the author and the nature of the report's conclusions).

a report relies extensively on hearsay, it is excludable.[228]

No doubt the sense of public duty that the probation officer brings to the task of preparing the PSR propels him to attempt accurate reporting. The officer's review of other official records can likely be assured to be accurate, for example in determining the defendant's prior criminal history from other official sources. However, with respect to other facts not documented in court files—such as uncharged criminal conduct—the officer must evaluate the credibility of his sources before reaching conclusions. In this context, the PSR is much different than the type of report envisioned by Rule 803(8)(C) because the "witnesses" being investigated are themselves furnishing hearsay reports.

3. Conclusion

The PSR is a unique type of public report, long relied upon by federal judges. While it may not neatly fit within the typical model of a "public record" treated by the evidence rules, it has features that make it a special sort of public record, one that is the basis for a criminal sentence and that must, in all cases, be above attack on grounds of inaccuracy.

After comparing it to other public records, its multiple dimensions become apparent. The relationship between the probation officer and the court has abandoned the former emphasis on tailoring a sentence to fit each defendant as a person with unique qualities as an individual assigning the scheduled variables of the Guidelines. As discussed in Part V(A)(3), the pleading function of the PSR eliminates factual disputes by a waiver analysis. Matters not specifically disputed by the defendant are deemed conceded or true. It may seem incongruous not to question the facts recited in the PSR in the absence of a challenge, but to scrutinize them in the event of a challenge to its accuracy. Yet courts routinely rely upon the probation officer's reported version of the facts in the PSR without need for the officer to assume the witness stand. In essence, after isolating the factual issues when the "pleadings" are closed, the PSR becomes evidentiary and proves one version of the facts.

228 *See, e.g.*, United States v. Yin, 935 F.2d 990, 999 (9th Cir. 1991) (holding reliance on reports of convictions unfounded without demonstration of personal knowledge); Jenkins v. Whittaker Corp., 785 F.2d 720, 726 n.15 (9th Cir. 1986) (resulting from a failure to speak with participants with personal knowledge).

C. *The PSR as Akin to a Magistrate Judge's Report and Recommendation*

This section will compare the PSR to a Report and Recommendation (R&R) submitted by a United States Magistrate Judge under the Magistrate's Act.[229] Comparison of the fact-finding and legal decision-making duties that generate both documents confirms their similarity. In many respects, the Guidelines have elevated the probation officer to a judicial officer whose judgment carries significant weight at sentencing.

1. The Magistrate Judge's Role in the Federal System

The Magistrate's Act authorizes district courts to appoint full-time or part-time magistrate judges to assist them in adjudicating all or part of cases in three primary ways.[230] First, 28 U.S.C. § 636 allows a judge to designate a magistrate judge to hear and decide any pretrial motion not seeking injunctive relief, dismissal or judgment on the merits of the complaint or indictment, or certification of a class action.[231] Second, any of the dispositive motions excluded from the first class of matters may be referred to the magistrate judge (as may a prisoner petition or a criminal's post-conviction application) for hearing and a report and recommendation to the district judge for proposed action.[232] Third, a district court may authorize a magistrate judge to preside over trial of a civil or misdemeanor criminal case with or without a jury.[233] A matter referred to the magistrate judge for an evidentiary hearing on claims deputizes him to develop a trial-type record. After the hearing, the magistrate judge prepares a written R&R of proposed findings and decision on the claim. The R&R is furnished to the parties and objections, if any, must be lodged within ten days. A

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229 FEDERAL MAGISTRATES ACT, Pub. L. No. 94-381, 90 Stat. 1119 (codified at 28 U.S.C. §§ 631-36).

230 28 U.S.C. § 636 (1992). Aside from the specific tasks delineated in the text, § 636(b)(3) empowers the magistrate judge to perform "such additional duties as are not inconsistent with the Constitution and laws of the United States." *Id.*

Among the tasks that fall within this reserve of authority are the review and recommended decision on Social Security disability benefits appeals. *See* Mathews v. Weber, 423 U.S. 261, 269-70 (1961). The authority, however, does not extend to selection of a jury in a felony trial. Gomez v. United States, 490 U.S. 858, 870 (1989). *But see* Peretz v. United States, 501 U.S. 923, 940 (1991) (holding that parties may consent to magistrate judge's selection of jury).

231 28 U.S.C. § 636(b)(1)(A) (1988); FED. R. CIV. P. 72(a).

232 28 U.S.C. § 636(b)(1)(B) (1988); FED. R. CIV. P. 72(b).

233 The magistrate judge's authority to conduct civil trials is guided by 28 U.S.C. § 636(c)(1) and Federal Rule of Civil Procedure 73. The criminal provisions are set forth in 18 U.S.C. § 3401 and Federal Rule of Civil Procedure 58(b)(3)(A).

failure to object in a timely fashion operates as a waiver.[234] Upon objections, the district court is required to make a *de novo* determination of the disputed portions of the report. The district court has discretion to "accept, reject, or modify" the findings or the recommendation.[235]

Where the magistrate judge has taken testimony in a matter, review of his findings by the district judge is *de novo* as to contested facts. Although the judge may receive further evidence, he is not obliged to hear the disputed testimony.[236] In *United States v. Raddatz*,[237] the Court held that due process does not require such rehearing, even in cases concerning the voluntariness of a criminal defendant's statements. In doing so, it emphasized that district judges conduct their own hearing as a matter of discretion.[238] The standard of proof remains the same before both the magistrate judge and the district judge. For example, facts bearing on a suppression motion (as involved in *Raddatz*) must be supported by a simple preponderance of the evidence.[239]

It is widely-known that the magistrate judge's R&R is accepted by the district court in the vast majority of circumstances,[240] although this phenomenon does not prove that trial judges abdicate their responsibility of independent review, reality suggests that routinely delegating certain classes of cases to magistrate judges (for example, habeas corpus and Social Security disability) gives those judges the opportunity to develop an expertise that many federal district judges may neither have nor want.

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234 *See* Nettles v. Wainwright, 677 F.2d 404, 410 (5th Cir. 1982) (magistrate's R&R should advise parties of waiver consequences).

235 28 U.S.C. § 636(b)(1) (1992); FED. R. CIV. P. 72(b).

236 *See, e.g.*, United States v. Raddatz, 447 U.S. 667, 675-76 (1980).

237 *Id.*

238 *Id.* at 680-82 & n.7. The *Raddatz* Court stated:

> The issue is not before us, but we assume it is unlikely that a district judge would *reject* a magistrate's proposed findings on credibility when those findings are dispositive and substitute the judge's own appraisal; to do so without seeing and hearing the witnesses or witnesses whose credibility is in question could well give rise to serious questions which we do not reach.

Id. at 681 n.7 (emphasis in original).

239 *Id.* at 678 n. 5 (citing Lego v. Twomey, 404 U.S. 477 (1972) for support that the preponderance standard satisfies due process).

240 *See* FEDERAL JUDICIAL CENTER, THE ROLE OF MAGISTRATES: NINE CASE STUDIES 100 (1985) (detailing one study revealing acceptance of R&R over objections in 79% of sampled cases); Christopher E. Smith, *United States Magistrates and the Processing of Prisoner Litigation*, 52 FED. PROBATION 4, 13, 15 (December 1988) (noting risk that volume and repetitive nature of prisoners' litigation handled by magistrates carries danger that judges might "rubber stamp" R&R's rather than apply careful review).

2. Analogizing the PSR to the Magistrate Judge's R&R

To apply the Guidelines, the PSR contains separate sections detailing the defendant's prior criminal history and the probation officer's estimation of how the offense is classified under the Guidelines. Prior to the Guidelines, the "offense" section was distilled from both the prosecution and defense versions of the offense with the goal of depicting an objective view of the true facts.[241] Today, however, the probation officer's work product is very similar to the magistrate judge's R&R. The officer is no longer merely a "conduit" for the prosecution and defense versions of the offense;[242] the officer serves also as a preliminary fact-finder and arbiter of which Guidelines to apply.[243] The PSR must (1) contain a factual assessment of what criminal conduct occurred; and (2) apply the law to the facts by making an analysis of offense level and the offender history on the Guidelines grid.[244] In sum, the PSR details and evaluates the specific offense conduct.

The probation officers' newly-assigned "judicial" role is well recognized.[245] The Administrative Office of the United States Court's Probation Division recognizes that its officer's role is one of investigating and evaluating facts and is radically different from earlier practice.[246] Probation officers themselves also acknowledge that the set of skills—particularly the technical mastery required in applying the Guidelines—emphasized in the preparation of the

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241 Susan Grunin, *The Investigative Role of the United States Probation Officers Under Sentencing Guidelines*, 51 FED. PROBATION 43, 44 (Dec. 1987) (discussing practice prior to promulgation of Guidelines).

242 Charlie E. Varnon, *The Role of the Probation Officer in the Guideline System*, 4 FED. SENT. REP. 63 (1991).

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

244 Denzlinger & Miller, *supra* note 139, at 50.

245 Probation officers have been held to be "quasi-judicial" officers inasmuch as they are absolutely immune from suit in some aspects of their work. For example, they are absolutely immune for their recommendations on the appropriate sentence. The immunity has been extended to cover claims of misconduct in fabricating information used in terminating a defendant's supervised release. Lawrence v. Conlon, 92 C 2992, 1995 U.S. Dist. LEXIS 4463, *12 (N.D. Ill. Mar. 31 1995).

Additionally, the immunity extends to misconduct in investigating and preparing the PSR. *See, e.g.*, Tripati v. I.N.S., 784 F.2d 345, 348 (10th Cir. 1986) (involving allegedly false statements in PSR), *cert. denied*, 484 U.S. 1028 (1988); Spaulding v. Nielsen, 599 F.2d 728, 729 (5th Cir. 1979) (concerning a complaint that officer failed to conduct thorough and accurate investigation); Kauffman v. United States, 840 F. Supp. 641 (E.D. Wis. 1993). *Cf.* Burkes v. Callion, 433 F.2d 318 (9th Cir. 1970) (extending the immunity to cover similar allegations against state probation officer in claim under 42 U.S.C. § 1983), *cert. denied*, 403 U.S. 908 (1971).

246 PROBATION DIVISION, ADMINISTRATIVE OFFICE OF U.S. COURTS, PRESENTENCE INVESTIGATION REPORTS UNDER THE SENTENCING REFORM ACT OF 1984, at 2 (September 1987 with revisions through April 1988) (hereinafter *Publication 107*).

PSR require background in more than the social sciences.[247] The Guidelines' scheme of relying almost exclusively on the classification of facts into discrete categories places a premium on logical reasoning to perform the requisite "intellectual gymnastics."[248]

Like magistrate judges, probation officers customarily discuss cases with judges prior to decision.[249] It has long been customary for district judges to meet *in camera* with probation officers prior to a probation hearing or sentencing. Some courts cite the historical lack of any restriction on a sentencing judge's sources of information about the defendant.[250] Others find that the practice is justified because, like magistrate judges, the probation officer is legally considered to be an arm of the court.[251] Characterizing such discussion as *ex parte* suggests an adversarial relationship between the officer and the defendant. Nevertheless, it appears that no federal court has disapproved of the practice.[252]

The striking feature common to both the R&R and the PSR is that both impose the burden upon the objector to articulate claimed errors. As a tentative finding reached after an evidentiary review—either in or out of court—both documents carry a presumptive authority. Both regimes assign the party facing an adverse report with the duty to object regardless of whether that party would have any burden of proof at trial. Similarly, the judge's resolution of objections to either report may be by way of an expressly

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247 Harry J. Jaffe, *The Pre-Sentence Report, Probation Officer Accountability, and Recruitment Practices*, 53 FED. PROBATION 12 (1989) ("[S]election of new probation officers solely from candidates holding social science degrees and groomed by a previous tour of duty with a state or local probation department may, with the complexities of guideline sentencing, impede rather than promote effective judicial decision making.").

248 *Publication 107*, *supra* note 246, at 13.

249 United States v. Houston, 745 F.2d 333, 334 (5th Cir. 1984), *cert. denied*, 470 U.S. 1008 (1985).

250 United States v. Davis, 527 F.2d 1110, 1112 (9th Cir. 1975), *cert. denied*, 425 U.S. 953 (1976); *see also* United States v. Story, 716 F.2d 1088, 1089-90 (6th Cir. 1983) (holding that probation officer's meeting with the judge prior to sentencing and discussing two defendants' divergent accounts of offense was proper). There is one clear limitation on the practice of presentence conferences without the defendant—the court may not involve the prosecutor at such a private meeting with the probation officer. *See generally*, United States v. Hone, 456 F.2d 495 (6th Cir. 1972).

251 United States v. Johnson, 935 F.2d 47 (4th Cir. 1991) (stating that presentence conference between judge and probation officer is not "critical stage" of the proceeding to which right to presence of defense counsel attaches) (citing United States v. Gonzales, 765 F.2d 1393, 1398 (9th Cir. 1985), *cert. denied*, 474 U.S. 1068 (1986)).

252 United States v. Spudic, 795 F.2d 1334, 1342-44 (7th Cir. 1986) (holding improper a trial court's private meeting with several probation officers, only one of whom had been involved in the writing of the PSR).

wholesale adoption.[253]

A similar danger—that some federal judges may tend to defer to the probation officer's view of the facts and assessment of the Guidelines' application— is clearly present.[254] As with the magistrate judge's R&R, the PSR is not entitled to any legal deference.[255] Nonetheless, probation officers are generally viewed as the experts in the application of the Guidelines.[256] The probation officers, as required by the Sentencing Reform Act, have been intensively trained in this area.[257] In fact, a practitioners' treatise construes the Guideline which mandates preparation of the report as a strong suggestion to counsel to assist in shaping the resulting PSR. Federal sentencing practice guides urge defendants to influence the report by cooperating in furnishing information to the officer, because the PSR will have a "presumption of validity" before the sentencing judge.[258]

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253 In connection with the R&R, *see* United States v. Raddatz, 447 U.S. 667, 676 (1980). With respect to the PSRs, *see* United States v. Morgan, 942 F.2d 243, 245 (4th Cir. 1991); United States v. Upshaw, 918 F.2d 789, 792 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1335 (1991).

254 Charley Roberts, *Bend Sentencing Guidelines Where Appropriate, Judges Urge*, CHI. DAILY L. BULL., February 20, 1992, at 3. Roberts quoted United States District Court Judge William W. Schwarzer, senior judge of the northern district of California, as saying that sentencing judge's independent exercise of discretion as to possible departure from the Guidelines "requires a lot of time and energy, plus skill and expertise [but that] judges are pressed for time and there is a tendency to leave it to probation officers." *Id.*

255 *See* United States v. Schuler, 34 F.3d 457, 461 (7th Cir. 1974) (holding that no deference is due a probation officer's findings or Guidelines analysis because district court is not bound by recommendation and has responsibility for resolving disputed sentencing factors under Rule 32(a)(1) and U.S.S.G. § 6A1.3).

256 Denzlinger & Miller, *supra* note 139, at 50 (noting massive training effort to impart fact-finding and legal analysis skills in the wake of the Guidelines, which resulted in the probation officer remaining in the "sometimes unpopular role of guidelines 'expert,' if such a role is possible").

See also United States v. Jarrett, 956 F.2d 864, 867 (8th Cir. 1992), wherein a prosecutor urged the trial court to accept the probation officer's application of Guidelines because the officer was "the expert in the area of [PSRs] and the area of the [G]uidelines." *Id.* The court's adoption of the officer's view was reversed on appeal as incorrect. *See id.*

257 The U.S. Sentencing Commission trains probation officers pursuant to its statutory charge to "devise and conduct period training programs of instruction in sentencing techniques for judicial and probation personnel and other persons connected with the sentencing process." *See generally* 28 U.S.C. § 995(a)(18) (1988).

258 Hutchison et al., *supra* note 45, § 6A1.1, at 640-41 cmt. 2. Hutchison states that

> [c]ooperation in the preparation of the [PSR] may result in some benefits . . . . The probation officer will often try to resolve disputed facts by consulting with both the prosecution and defense. The defendant can certainly wait to challenge the presentence report at the time of sentencing, but by then the report has a presumption of validity that may be difficult to overcome.

While not discussed in the cases as an evidentiary presumption, it does appear that PSRs are routinely accepted by the district courts both in their factual findings[259] and application of the Guidelines to the facts.[260] Of course, the possible prejudging of issues is an age-old occupational hazard that is not demonstrated to be a problem with federal judges.[261] Accepting that federal judges undertake an independent review of the contested Guidelines issues, the PSR—as the product of the court's staff—is still likely to carry significant weight.[262]

In any event, judges tend to accept the report of the probation officer. This may stem from the officer's position as an extension of the court. Acceptance is undoubtedly influenced by the recurring one-on-one meetings with the employee who is statutorily charged with conducting an impartial review of the matter. It may also be, however, that judges are inclined to find facts pointing the most serious offense level and offender characteristics.[263] Appellate review of findings based upon a PSR is substantially similar to

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Id.

259 *See, e.g.*, United States v. Sanchez-Estrada, 1995 U.S. App. LEXIS 21694 (7th Cir. Apr. 11, 1995) (noting that the PSR recommends no allowance of reduction of offense level for acceptance of responsibility on grounds that defendant lied to the probation officer and accepting that conclusion without an evidentiary hearing emphasizing that defendant's conduct was tantamount to lying to the court); United States v. Attar, 38 F.3d 727, 731 (4th Cir. 1994).

260 *See* Bunzel, *supra* note 1, at 934 n.6 (1994) (stating that "'[w]e [federal judges] find ourselves giving [PSR's] cursory attention because we are usually just checking the probation officer's addition. Whereas sentencing once called for hours spent reflecting on the offense and the person, we judges are becoming rubber-stamp bureaucrats.'") (quoting Judge Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 364 (1992)).

261 United States v. Sciuto, 531 F.2d 842, 845-47 (7th Cir. 1976) is quite clearly an aberration. In *Sciuto*, the record revealed that, prior to a hearing on probation revocation, the judge had expressed his conviction in the credibility of the probation officer's account of facts and also his conclusion that the defendant had been dishonest and deceitful with the probation officer. 531 F.2d at 845-47. The judge's conclusion was based upon an ex parte conversation with the officer.

262 Bunzel, *supra* note 1, at 934. *See also* United States v. O'Meara, 895 F.2d 1216, 1223 (8th Cir.) (stating that "district courts have come increasingly to rely on the recommendations of the probation officers . . . . Consequently, is a sad but true fact of life under the Guidelines that many of the crucial judgment calls in sentencing are now made, not by the court, but by probation officers."), *cert. denied*, 498 U.S. 943 (1990). *But see* William W. Wilkins, Jr., *Observations on Judge Heaney's Study*, 4 FED. SENT. REP. 145 (1990) (U.S. Sentencing Commission Chairman takes issue with any suggestion that federal judges are "rubber-stamping" PSR recommendations).

263 *See also* Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 1033 (1983) (referring to so-called "slow plea of guilty" as a characterization of nonjury trials in Philadelphia, Pittsburgh, and other cities, convened at the insistence of defendants but invariably resulting in a finding of guilt).

that for the recommended findings in a magistrate judge's R&R.[264]

The similarities between the PSR and the R&R suggest that the Guidelines have elevated probation officers to a position akin to that of a judicial officer. Certainly, the probation officer is unique among federal employees in possessing judicial-style duties without any of the protocol usually attending the selection of judges or magistrate judges. They have been called "bureaucratic" and have been compared to Social Security Administration employees who make determinations of disability.[265] The increased importance of the PSR has mandated that more time be invested in its preparation, thus consuming probation officers' hours in a much greater proportion than before the Guidelines. The palpable effects of the increased workload include both a strain on the officers' relationships with defendants prior to their sentencing and a decrease in the amount of their time available to moniter current probationers.[266]

VI. CONCLUSION

Federal courts routinely consider a PSR prior to passing judgment on the appropriate sentence for a criminal defendant. The PSR is prepared by federal probation officers who are employed by the courts to investigate the facts of the offense and the defendant's background before making a sentencing recommendation. Courts consider the PSR at sentencing and often hear testimony from the probation officer to resolve disputed facts contained in the report.

Under the Guidelines, however, the PSR is more than simply an advisory report. It is a charging document that goes beyond the indictment in identifying the specific conduct that the probation officer believes should determine the defendant's punishment

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264 The standard of review employed by courts of appeals is similar to that applied in other civil and criminal cases. The legal interpretation and application of the Guidelines is deemed a question of law for de novo review. *See* United States v. Buenrostro, 24 F.3d 1173, 1174 (9th Cir. 1994) (*per curiam*). Facts that are predicate findings for application of a Guideline, however, cannot be disturbed unless clearly erroneous and the judge's selection of a sentence within an applicable Guideline range is left to its discretion. *See generally* Williams v. United States, 503 U.S. 193 (1992).

265 Jaffe, *supra* note 247, at 12 ("The Social Security bureaucrat interviews the claimant, gathers the necessary documentation and, similar to the probation officer, after consulting a guidelines manual, fixes a determination of disability—full, partial, none. How similar to the probation officer's tasks of fixing punishment—jail, probation, fine.").

266 *See generally* Cook, Jr., *supra* note 204, at 112 (recounting probation officers' expressions of concern regarding the time constraints affecting department morale).

under the Guidelines. The PSR also details the probation officer's view of the true facts of the offense, a version that in many cases is drawn from police and law enforcement reports, rather than from personal interviews of witnesses. That version of facts will be taken as established unless the defendant specifically disputes it. Finally, the PSR serves as a suggested analysis of the Guidelines' application as the officer applies the laws to the facts in the first instance.

The PSR thus functions on three different levels under the Guidelines: (1) as a pleading; (2) as an exhibit; and (3) as a quasi-judicial report and recommendation. None of these analogies alone can fully describe the PSR. Instead, the unique combination of functions explains to some extent the varying evidentiary treatment accorded the PSR by sentencing judges. These divergent roles of the PSR are at the heart of Guideline sentencing and, to a great extent, have eclipsed the role of the sentencing judge. The abbreviated (often summary) trial of facts at federal sentencing underscores the unique nature and effect of the PSR, which has been transformed from a disinterested report to an adversarial one of multiple dimensions. Under the Guidelines, it serves the court in narrowing and proving the issues unlike any other traditional court filing from the parties or pretrial order. As a procedural innovation, it may prove to be a prototype for adaption to civil cases in the form of pretrial order prepared not by the parties, but by magistrate judges, masters, or civil servants in similar roles.

The Sentencing Guidelines have been roundly criticized for effectively removing judicial discretion from the sentencing process and for reassigning much of that discretion to the probation officer. It remains to be seen whether the rare combination of roles detracts from the overall quality of justice at the sentencing stage. Clearly, though, the PSR under the Guidelines has affected the way in which defendants and their counsel view the probation officer and the PSR. The PSR, more than ever before, contains charges against which the defendant must defend. The PSR contains evidence and determinations of fact and law, usually adverse to the defendant's interests. The defendant's impression that the probation officer is no longer a friend, advocate, or even neutral, will no doubt diminish his faith in the legitimacy of the Guidelines sentence.