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Disclosure of Presentence Reports in Capital Cases

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alternatives. It is uncertain upon what factors the court will rely in weighing the alternatives if more than one is shown, since, in the instant case, the court found that the majority stockholders had not shown a legitimate business purpose for their actions and thus did not reach the question of less harmful alternative courses of action.

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DISCLOSURE OF PRESENTENCE REPORTS IN CAPITAL CASES

After petitioner was convicted of first degree murder, a separate hearing was held before the trial jury[1] to determine whether the sentence to be imposed would be the death penalty or life imprisonment. After hearing testimony offered by the defendant, the jury recommended imposition of a life sentence, finding that the mitigating circumstances outweighed those in aggravation of the offense.[2] The trial judge, however, disregarded this recommendation and entered a judgment sentencing the petitioner to death, relying on evidence presented at both stages of the bifurcated proceeding, arguments of counsel and information contained in a presentence report.[3] On appeal to the Florida Supreme Court,[4] petitioner contended that it was error to consider the presentence report in imposing the death penalty. The per curiam decision expressed no opinion on this argument, but instead recited the trial judge's findings and affirmed the sentence,[5] over the dissent of two justices who noted that the record on appeal did not appear to include the confidential portion of the report. The United States Supreme Court, in reversing, ***held*** that petitioner had been deprived of due process of law when the death sentence was imposed, at

1. *See* FLA. STAT. ANN. § 921.141 (West Supp. 1976-77), which requires a sentencing hearing in all capital cases.

2. The statute enumerates the circumstances in aggravation or mitigation of the crime which may be considered in determining the sentence to be imposed. After considering these, the jury must return an advisory verdict, based on whether there are aggravating circumstances and whether there are sufficient mitigating circumstances to outweigh any aggravating circumstances found. The judge is not bound by this advisory verdict. *Id.*

3. Neither petitioner nor his counsel was given a complete copy of the presentence report, nor had such a copy been requested by counsel.

4. Gardner v. State, 313 So. 2d 675 (Fla. 1975).

5. *Id.* at 676-77.

least in part, on the basis of information which he had no chance to rebut. *Gardner v. Florida*, 97 S. Ct. 1197 (1977).

Capital punishment has, in recent years, become a particularly difficult problem for the Supreme Court. In the landmark decision of *Furman v. Georgia*,[6] a narrowly divided Court considered Georgia's statute calling for discretionary jury verdicts and concluded in a per curiam opinion that "the imposition and carrying out of the dealth penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[7] Each of the nine Justices filed his own opinion, explaining why the cases should or should not be reversed. Justices Douglas, Stewart, and White each found the manner in which the death penalty was imposed to be violative of the eighth amendment,[8] while Justices Brennan and Marshall went further, claiming that the death penalty itself was "cruel and unusual."[9] The four dissenters were of the opinion that the Court was going beyond its powers in deciding the issue on the basis of moral values and the efficacy of the punishment.[10]

Following the decision in *Furman*, legislative bodies made attempts to reinstate the death penalty in an acceptable form, thus forcing the Court to turn its attention once again to the constitutionality of capital punishment provisions. In 1976, the Court decided five cases dealing with death sentences meted out under new state laws.[11] Again, the Court was unable

6. 408 U.S. 238 (1972).

7. *Id.* at 239-40.

8. Justice Douglas, relying primarily on the equal protection clause, found that the discretionary death penalty statutes served as a vehicle for unlawful discrimination against minority groups. *Id.* at 255 (Douglas, J., concurring). He declined, however, to reach the issue of the unconstitutionality per se of the sentence of death. Justice Stewart also refused to reach this question, but noted that there is a difference between the death penalty and all other forms of punishment, "not in degree but in kind." *Id.* at 306 (Stewart, J., concurring), and concluded that the eighth and fourteenth amendments could not tolerate capital punishment where it was "so wantonly and so freakishly imposed." *Id.* at 310. Justice White observed the penalty from the state's point of view and stated that "the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice." *Id.* at 313 (White, J., concurring).

9. Justice Brennan's conclusion was based on a purported rejection of the punishment by contemporary American society and on his belief that the death penalty is no more effective than a term of years in advancing penal purposes. *Id.* at 305 (Brennan, J., concurring). Justice Marshall's opinion presented the most exhaustive statistical analysis of the subject and determined that "there is no rational basis for concluding that capital punishment is not excessive." *Id.* at 369 (Marshall, J., concurring).

10. *Id.* at 375 (Burger, C.J., dissenting); *Id.* at 414 (Blackmun, J., dissenting); *Id.* at 418 (Powell, J., dissenting); *Id.* at 467 (Rehnquist, J., dissenting).

11. Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428

to reach a majority opinion, and each of the Justices felt compelled to express his own views in at least one of the decisions. Justices Stewart, Powell, and Stevens combined in each case to express the opinion of the Court, while other Justices filed concurring or dissenting opinions.

Perhaps the most important of these decisions is *Gregg v. Georgia*,[12] for in it the Court resolved the issue of the constitutionality of the death penalty per se. Basing its decision on the historical acceptance of the punishment,[13] the apparent continued acceptance by the public,[14] its deterrent and retributive functions,[15] and the belief that the death penalty is not invariably disproportionate to the crime,[16] the plurality held that the death penalty may be imposed under appropriate circumstances.[17] The Court concluded that the scheme employed by Georgia had eliminated the faults enunciated in *Furman*, particularly the unbridled discretion allowed in the earlier statutes.[18]

Different results were reached, however, in *Woodson v. North Carolina*[19] and *Roberts v. Louisiana*.[20] Both North Carolina and Louisia-

U.S. 280 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); and Gregg v. Georgia, 428 U.S. 153 (1976). For an excellent study of *Furman v. Georgia* and these five cases, *see* Note, 52 NOTRE DAME LAW. 261 (1976).

12. 428 U.S. 153 (1976).

13. *Id.* at 176-78. The Court pointed to the fact that capital punishment had been in existence at the time the Constitution was adopted, and that, since then, the Court on several occasions had upheld different forms of execution. *See* Trop v. Dulles, 356 U.S. 86 (1958); Francis v. Resweber, 329 U.S. 459 (1947); *In re* Kemmler, 136 U.S. 436 (1890); Wilkerson v. Utah, 99 U.S. 130 (1878).

14. 428 U.S. at 179-82. The Court noted that, since its decision in *Furman*, thirty-five states and Congress had reinstated the death penalty. However, the Court failed to note that only one state did not have the death penalty before *Furman*, "perhaps indicating a renewal and updating of penal codes rather than an overwhelming mandate from the public." Note, 1976 DET. C. OF L. REV. 645, 654.

15. 428 U.S. at 183-86. The plurality refused to find retribution as an improper consideration in imposing sentence, though it did note that it was not the primary objective or purpose of criminal law. *See* Williams v. New York, 337 U.S. 241, 248 (1949). The Court was inconclusive as to the deterrent effect of capital punishment, but felt it to be a decision for the legislature.

16. 428 U.S. at 187.

17. *Id.*

18. *Proffitt v. Florida*, 428 U.S. 242 (1976) was decided on the same grounds as *Gregg*, as the Florida statutory scheme closely paralleled the plan implemented in Georgia. The same result was also reached in *Jurek v. Texas*, 428 U.S. 262 (1976), although the Texas penalty scheme was somewhat different. In each of these decisions, the Chief Justice and Justices White, Blackmun, and Rehnquist concurred, while Justices Brennan and Marshall dissented.

19. 428 U.S. 280 (1976).

20. 428 U.S. 325 (1976).

na had responded to *Furman* by imposing mandatory death penalties for narrowly defined categories of crimes.[21] The plurality opinions pointed to the "constitutional vice of mandatory death sentence statutes—lack of focus on the circumstances of the particular offense and the character and propensities of the offender . . . ."[22] Justice Stewart noted that mandatory death sentences have been rejected throughout history as "unduly harsh and unworkably rigid."[23]

Thus, the problems with capital punishment are far from over. Having determined that the death penalty is not per se "cruel and unusual," the Court must further define the procedural framework under which the penalty may be imposed without violating the principles announced in *Furman*.

One of the procedural problems which has troubled courts and legal scholars involves the presentence report and the defendant's ability to learn its contents. In *Williams v. New York*,[24] petitioner had challenged the imposition of the death penalty on due process grounds, alleging that the trial judge had improperly considered information contained in a presentence report, even though the factual details of the report had been read to the petitioner in open court. Justice Black, writing for the majority, held that the trial judge had not erred in considering the information, although it could not have been admitted as evidence at trial.[25] Almost

21. LA. REV. STAT. ANN. § 14:30 (1973); N.C. GEN. STAT. §§ 14-17 (Supp. 1975).

22. Roberts v. Louisiana, 428 U.S. 325, 333.

23. Woodson v. North Carolina, 428 U.S. at 293. Justice Stewart adds: "While a mandatory death penalty statute may reasonably be expected to increase the number of persons sentenced to death, it does not fulfill *Furman's* basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." *Id.* at 303.

Justices Brennan and Marshall concurred in both decisions, each on the basis of his own dissent in *Gregg v. Georgia*, while Justice Blackmun dissented in both for the reasons he set forth in his dissent in *Furman*. Justice Rehnquist filed a lengthy dissent in *Woodson*, stating his disagreement with the introduction of what appeared to him to be due process procedural guarantees into the eighth amendment. *Id.* at 324. Justice White filed a long dissent in *Roberts*, stating that he was unwilling to equate jury nullification (in this case the power to convict the defendant of a lesser offense in defiance of the court instruction, where the evidence clearly supported the greater) with the unlimited discretion of pre-*Furman* statutes. Roberts v. Louisiana, 428 U.S. at 347.

24. 337 U.S. 241 (1949).

25. Justice Black, after noting the great importance of the presentence report to the sentencing judge, added: "We must recognize that most of the information now

twenty years later, in *Specht v. Patterson*,[26] Justice Douglas began his opinion by stating that the holding of *Williams* was that the due process clause did not require a judge to hold a sentencing hearing in which the defendant is given an opportunity to participate.[27] The Court went on, however, to distinguish *Williams* and to hold that a defendant sentenced under a Sex Offenders Act must be allowed a presentence hearing at which he can confront the witnesses against him and offer his own evidence.[28]

Following the apparent lead of the Supreme Court in *Williams* and *Specht*, the federal courts of appeals have been virtually unanimous in stating that it is not a violation of due process for a defendant to be denied access to his presentence report, and have held that the decision to allow the defendant to see all or part of the report is within the trial judge's discretion.[29] In some decisions the sentence was vacated,[30] although no

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relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable *if information were restricted to that given in open court by witnesses subject to cross-examination*. And the modern probation report draws on information concerning every aspect of a defendant's life. The type and extent of this information make totally impractical if not impossible *open court testimony with cross-examination*. Such a procedure could endlessly delay criminal administration in a retrial of collateral issues." *Id.* at 250 (emphasis supplied) (footnote omitted). See text at note 37, *infra*.

26. 386 U.S. 605 (1967).

27. *Id.* at 606.

28. As explained by Justice Douglas, under the Sex Offenders Act, persons convicted under one statute, but not sentenced under it, may be sentenced under another which is brought into play where the judge feels those persons constitute a threat to the public, are habitual offenders, or are mentally ill. Under the Sex Offenders Act, the judge may impose an indeterminate sentence of one day to life. *Id.* at 607. *See, e.g.*, COLO. REV. STAT. ANN. §§ 16-13-201-216 (1973). The basis for the distinction in *Specht* was that the sentencing under the Sex Offenders Act was not based on the commission of a specific crime, but upon evidence concerning whether the defendant fits into one of the above categories. Justice Douglas pointed out that this was a new finding of fact that was not an "ingredient of the offense charged." *Id.* at 608. Thus, the defendant is entitled to a full hearing with counsel, and an opportunity to confront witnesses and offer evidence. *Id.* at 610.

29. *See* Davis v. United States, 527 F.2d 1110 (9th Cir. 1975), *cert. denied*, 425 U.S. 953 (1976); United States v. Horsley, 519 F.2d 1264 (5th Cir. 1975), *cert. denied*, 424 U.S. 944 (1976); United States v. Pugh, 509 F.2d 766 (8th Cir. 1975); United States v. Murphy, 497 F.2d 126 (5th Cir. 1974); United States v. Gardner, 480 F.2d 929 (10th Cir.), *cert. denied*, 414 U.S. 977 (1973); United States v. Dreer, 457 F.2d 31 (3d Cir. 1972); United States v. Dockery, 447 F.2d 1178 (D.C. Cir.), *cert. denied*, 404 U.S 950 (1971); Baker v. United States, 388 F.2d 931 (4th Cir. 1968).

30. *See* United States v. Robin, 545 F.2d 775 (2d Cir. 1976) (sentence vacated where trial judge gave defense counsel report for only a brief period of time, trial judge had not presided over the trial and was presumed to rely heavily on the report); United States v. Read, 534 F.2d 858 (9th Cir. 1976) (sentence vacated when

decisions have ever squarely held that the due process clause *requires* that the defendant or his counsel see the report. Most cases were decided under the Federal Rules of Criminal Procedure, which left the decision to the trial judge's discretion.[31] The applicable rule has recently been amended,[32] and now requires disclosure in most cases, all but eliminating the controversy in federal courts.[33]

As a result of the rather cursory treatment given the issue by the courts, there is little discussion to be found in the case law concerning the rationale underlying the decision whether the presentence report should be made available to the defendant, or at least to his counsel. The subject has received extensive attention, however, in law journals by both proponents and opponents of disclosure.

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trial judge relied on information not in the presentence report and not part of record for review); United States v. Picard, 464 F.2d 215 (1st Cir. 1972) (presentence report's substance should be made known to the defendant); United States v. Janiec, 464 F.2d 126 (3d Cir. 1972) (defendant has constitutional right to disclosure of list of prior convictions upon request).

31. FED. R. CRIM. P. 32(c)(2). This rule stated in pertinent part: "The Court before imposing sentence *may* disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon." (emphasis supplied).

32. FED. R. CRIM. P. 32(c)(3):

> (A) Before imposing sentence the court *shall* upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons; and the court *shall* afford the defendant or his counsel an opportunity to comment thereon and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report.
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> (B) If the court is of the view that there is information in the presentence report which should not be disclosed . . . , the court in lieu of making the report or part thereof available *shall* state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and *shall* give the defendant or his counsel an opportunity to comment thereon.

(Emphasis supplied). (As amended Apr. 22, 1974, effective Dec. 1, 1975).

33. For a good discussion of FED. R. CRIM. P. 32(c) and the newer FED. R. CRIM. P. 32(c)(3)(A) & (B), *see* Note, *Disclosure of Presentence Reports in Federal Court: Due Process and Judicial Discretion*, 26 HASTINGS L.J. 1527, 1544-50 (1975). For an excellent discussion of federal and state court practices, *see* Lehrich, *The Use and Disclosure of Presentence Reports in the United States*, 47 F.R.D. 225 (1969).

Five major arguments have been advanced by those who oppose disclosure. First, opponents claim, disclosure will result in a "drying up" of sources of information. The second argument considers the need to protect the defendant and others, such as the suppliers of the information, to outweigh the need for disclosure. Third, the non-disclosure camp argues that disclosing such information will disrupt the rehabilitative process by damaging the rapport between the defendant and the investigating probation officer. Additionally, it is said that the defendant could suffer from being forced to look at what others think of him. The final argument against disclosure envisions long delay in the sentencing proceeding caused by the requirement of a complete new hearing on the information contained in the report.[34]

On the other side, proponents of disclosure argue that there is no indication of any substantial drying up of sources or of any unnecessary delay in jurisdictions where disclosure is the general rule.[35] Those favoring disclosure point to the fact that there are much less drastic means of protecting the defendant and informants, such as preserving the confidentiality of the informer or making partial disclosure. The primary argument for disclosure, however, is that the need for reliability outweighs the need for availability of information.[36]

In the instant case, the State of Florida presented essentially the same arguments that opponents of disclosure had maintained over the years. Writing a plurality opinion in which Justices Stewart and Powell joined, Justice Stevens first distinguished *Williams v. New York* on two grounds. First, it was noted, the defendant in *Williams* had been given an opportunity to challenge the accuracy of the presentence report when the trial judge recited the factual details it contained. Justice Stevens also relied upon Justice Black's recognition of the Court's obligation to re-examine capital sentencing procedures in light of the evolutionary nature of due

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34. *See generally* Barnett & Gronewold, *Confidentiality of the Presentence Report*, 26 FED. PROB. 26 (March, 1962); Parsons, *The Presentence Investigation Report Must be Preserved as a Confidential Document*, 28 FED. PROB. 3 (March, 1964); Roche, *The Position for Confidentiality of the Presentence Investigation Report*, 29 ALB. L. REV. 206 (1965); Sharp, *The Confidential Nature of Presentence Reports*, 5 CATH. U. L. REV. 127 (1955).

35. See note 54, *infra*.

36. *See generally* Bach, *The Defendant's Right of Access to Presentence Reports*, 4 CRIM. L. BULL. 160 (1968); Higgins, *Confidentiality of Presentence Reports*, 28 ALB. L. REV. 12 (1964); Lehrich, *supra* note 33; Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281 (1952); Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821 (1968).

process. However, it should be noted that Justice Stevens might have gone much further in distinguishing *Williams*, for, although the case has been given a broad interpretation over the years, the only issue was whether the trial judge could properly consider the presentence report at all.[37] Nowhere in the *Williams* opinion did Justice Black express the view that the defendant had no right at least to be informed of the report's contents. Given the opportunity to explain the true holding in *Williams*, the plurality should not have restricted itself to such a narrow distinction.

Satisfied with this limited distinction, however, the plurality opinion turned to other issues, pointing out that five of the Justices presently on the Court distinguish the death penalty from all other forms of punishment[38] and that the due process clause is applicable to the sentencing stage of criminal proceedings.[39] Having laid this groundwork, the plurality considered the justifications offered by the State for withholding the presentence report.

In reply to the argument that disclosure will dry up sources, Justice Stevens pointed out that *quality* as well as *quantity* must be considered and that, in a capital case, the interest in the reliability of the information outweighs that of its availability, since the chances of the defendant's being sentenced to death on the basis of erroneous information are obviously greater when he has no chance to challenge the report. The argument that disclosure will cause unnecessary delay was dismissed with a suggestion that disputed material simply be disregarded by the trial court unless the matter is of vital importance, in which case the time is well spent

37. As Justice Stevens noted, the defendant in *Williams* was apprised of the information in the report. This was not at issue, though much discussion of the merits of the report was contained in the case. In *Williams*, the Court only rejected the notion that a complete second trial with cross-examination of witnesses and full procedural rights was necessary. In concluding, Justice Black stated, "We cannot say that the due process clause renders a sentence void merely because a judge gets additional out-of-court information to assist him in the exercise of this awesome power of imposing the death sentence." 337 U.S. at 252. See also text at note 25, *supra*. For additional support for the proposition that *Williams* does not stand for what it has been interpreted to say, *see* Bach, *supra* note 36, at 167-68; Guzman, *Defendant's Access to Presentence Reports in Federal Criminal Courts*, 52 IOWA L. REV. 161, 172 (1966); Higgins, *supra* note 36, at 20. *See also* United States v. Dockery, 447 F.2d 1178, 1189 (D.C. Cir.), *cert. denied*, 404 U.S. 950 (1971) (Wright, J., dissenting); United States v. Picard, 464 F.2d 215, 218-19 n.4 (1st Cir. 1972).

38. 97 S. Ct. at 1204. Cited by Justice Stevens were Justices Stewart, Powell and Stevens (plurality opinion in *Gregg v. Georgia*); Justice Marshall (dissenting in *Furman v. Georgia*); and Justice Brennan (concurring in *Furman*).

39. *Id.* at 1205. Justice Stevens pointed out, however, that the fact that due process applies does not bring into play all the procedural guarantees that are required at trial. *Id.* at 1206 n.9.

because the defendant's life hangs in the balance. As for the claim that disclosure will disrupt the rehabilitative process, Justice Stevens concluded that this argument has no merit in a capital case, where the possibility of rehabilitation is extinguished. Moreover, the opinion reasoned, a fear of disrupting rehabilitation would not justify withholding the report from *counsel*. Finally, in response to the argument that the trial judge can be trusted not to abuse his discretion in allowing the defendant to see the report, the Court simply stated that this argument was foreclosed by *Furman*.

The plurality also reasoned that even if withholding the report in some circumstances were permissible, there would be no excuse for not making the entire report a part of the record so that it could be reviewed on appeal such a failure would result in the same infirmities found in *Furman*, because the reviewing court would have no way of knowing what factors motivated the sentencing authority to believe that death was the appropriate punishment.[40] Finally, the plurality stated that the failure of counsel to request the full report was not a waiver of the constitutional error.[41] Thus, the Court concluded that the petitioner had been denied due process of law when he was sentenced to death, at least in part, on the basis of confidential information which he could not rebut.[42]

In a concurring opinion, Justice White asserted that the decision should rest solely on *Woodson v. North Carolina* and the eighth amendment.[43] Quoting extensively from *Woodson*,[44] he concluded that this case

40. *Id.* at 1206.

41. *Id.* The Court gave four reasons: (1) the state did not urge that there had been a waiver; (2) the Florida Supreme Court had considered its duty to be to consider the total record; (3) since two members of the Florida Supreme Court had considered the issue, it was presumed the whole court had passed on it; (4) there was no basis for presuming a "knowing and intelligent" waiver. Moreover, the Court noted that since the trial judge disagreed with the jury as to the existence of mitigating circumstances, and the only material which the trial judge had that was not before the jury was the presentence report, a full review was required. *Id.* at 1206-07.

42. *Id.* at 1207. The Court remanded the case to the Florida Supreme Court with instructions to order further proceedings at the trial court level. *Id.* at 1207. In the view of the plurality, merely making the confidential portion of the report part of the record to be reviewed by the Florida high court would not fully correct the error.

The plurality had also refused to inspect the confidential part of the report, which had been included in the State's brief, stating, "It is not the function of this Court to evaluate in the first instance the possible prejudicial impact of facts and opinions appearing in a presentence report." *Id.* at 1203 n.5.

43. *Id.* at 1208 (White, J., concurring).

44. *Id.* at 1207.

"fails to meet the 'need for reliability in the determination that death is the appropriate punishment' which the court indicated was required in *Woodson*."[45] He objected to the use of the due process clause except as a vehicle for imposing the eighth amendment on the states, apparently for fear that the case would serve as precedent for holding that the due process clause requires disclosure of the presentence report in non-capital as well as capital cases.

This fear is well-founded, for the reasoning of the plurality opinion in refuting the state's arguments applies equally well to non-capital cases. Although Justice Stevens was careful to qualify his statements, reminding the reader that the case is a capital one, the logic of his arguments against non-disclosure is no less forceful when the defendant is facing a substantial prison term.[46] Of course, the fact that this was a death penalty case adds great weight to the argument for disclosure, but one cannot help wondering why Justice White's view was not adopted by the plurality if this were to be merely another procedural problem limited to capital cases—after all, the introduction of procedural guarantees into the eighth amendment's ban on "cruel and unusual" punishments had already been accomplished in *Furman* and its successors. The fact that the due process clause was used rather than the eighth amendment could be an indication that the Court might extend the holding to non-capital sentencing proceedings in a future case.[47]

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45. *Id.* at 1208.

46. On the secrecy of information, for example, Justice Stevens noted: "Assurances of secrecy are conducive to the transmission of confidences which may bear no closer relation to fact than the average rumor or item of gossip . . . . The risk that some of the information accepted in confidence may be erroneous, or may be misinterpreted, by the investigator or by the sentencing judge, is manifest." *Id.* at 1205. Certainly this argument has no less weight when the defendant is facing a sentence short of death. Also, the plurality felt that the likelihood of significant delay is overstated (*id.*); this appears so regardless of the potential punishment. Further, the opinion's refutation of the argument that disclosure will disrupt the rehabilitative process seems less than certain that such disruption will occur in *any* case. *Id.* at 1206. Only the argument that trial judges can be trusted in their discretion was dismissed primarily on the grounds of the peculiarities of capital punishment, and even here the Court recognized the importance of having adversary proceedings to ferret out the truth. *Id.* It appears now that, having made such a strong case for disclosure, the Court may now have trouble not recognizing its validity in all cases.

47. For this reason, the dissenting opinions by Justices Brennan and Marshall are extremely important, for while each dissented on the basis of his belief in the unconstitutionality of the death penalty per se, each also expressly stated that he agreed with the plurality opinion's statement that a defendant facing a death sentence is denied due process when the sentence is imposed, at least in part, on the basis of confidential information.

Another factor which suggests that the Court might use the rationale in deciding future cases is the assertion that due process applies to the sentencing proceeding[48] and that sentencing is a critical stage at which the defendant is entitled to counsel.[49] This raises the question whether counsel can be effective in assuring that the defendant is not sentenced on the basis of erroneous information if neither counsel nor the defendant is entitled to the presentence report.[50] It has long been held that sentencing the defendant on the basis of false information violates due process,[51] but cases have also consistently held that the defendant has no constitutional right to know what is in the presentence report.[52] Only those who have been lucky enough to discover the report's contents have been able to appeal successfully.[53] Thus the defendant is given a right which has, in practical effect,

48. 97 S. Ct. at 1205.

49. *Id.* at 1205. In making this statement, the Court relied on *Mempa v. Rhay*, 389 U.S. 128 (1967).

50. "Since counsel is powerless to correct errors of which he is unaware, nondisclosure would appear to be the equivalent, in practical effect, to lack of counsel. It would seem anomalous to hold that although a sentence based upon erroneous information which counsel could correct violates due process, counsel need not be given access to the information." Verdugo v. United States, 402 F.2d 599, 613 (9th Cir. 1968) (separate opinion of Browning, J.) (footnote omitted).

51. *See* Townsend v. Burke, 334 U.S. 736 (1948). In this case the sentence was vacated because it appeared that the trial court had either relied on misinformation or had misread the report, and because the defendant had no counsel to correct the error. Lack of counsel cannot be the basis for the decision, since at the time, there was no right to counsel in a non-capital case. Betts v. Brady, 316 U.S. 455 (1942), *overruled by* Gideon v. Wainwright, 372 U.S. 335 (1963). Sharing this view are United States v. Weston, 448 F.2d 626 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972); United States v. Malcolm, 432 F.2d 809 (2d Cir. 1970); Baker v. United States, 388 F.2d 931 (4th Cir. 1968); Higgins, *supra* note 36, at 20.

52. *See* cases cited in note 29, *supra*.

53. Higgins, *supra* note 36, at 27: "The essential vice of the practice of nondisclosure is that, because it is self-insulative, the extent of error that creeps into the reports is virtually incapable of ascertainment." For an extreme example of the injustice *known* to have occurred, *see State v. Pohlabel*, 61 N.J. Super. 242, 160 A.2d 647 (App. Div. 1960), where the defendent was sentenced to a term of twenty-one to thirty-five years after having written checks totalling $1,467 from a checkbook he had stolen. *Id.* at 649. After serving eight years the defendant learned the contents of the presentence report in which he had been called a "master of deception"; it was alleged that he had "spent the greater part of his life in penal institutions"; and implied that he had numerous prior convictions, including a life term for escape from a California prison. *Id.* at 650-51. As it turned out, he had only one prior conviction, auto theft, for which he had served four years, and this had occurred when he was eighteen. *Id.* at 649. After serving nine years for his conviction, the sentence was reduced when the prosecutor, informed of the discrepancy, joined in a motion to reduce the sentence. *See also* State v. Killian, 91 Ariz. 140, 370 P.2d 287 (1962).

no substance: he has the right to be sentenced only on the basis of accurate information, but he has no opportunity to question the accuracy of the statements, since he has no right to know what they are.

However, perhaps the greatest argument favoring disclosure is simply that in those jurisdictions which have allowed disclosure, the deleterious results feared by those who oppose the practice have not materialized. There has apparently been no cognizable drying up of sources, nor any significant increase in the time necessary to conduct sentence hearings.[54] Moreover, the third major argument of opponents of disclosure, the need to protect the defendant and the informants, only refutes giving the *entire* report to the defendant, and does not militate against either disclosing the report to defendant's counsel, or even submitting to the defendant an edited version which withholds the sources' identities.

Still another factor which supports disclosure is the very nature of the information contained in the report, which lends itself to error and distortion.[55] Much of the information is hearsay, and is elicited from sources which should not be presumed reliable. Moreover, the investigator who prepares the report is not necessarily in an objective position and, because

54. *See* Higgins, *supra* note 36. Higgins conducted a poll, sending questionnaires to 345 judges and obtaining 168 responses. Of these, 75 judges indicated a practice of nondisclosure, 52 gave excerpts, and 41 indicated disclosure. *Id.* at 15-16. Higgins found that: "None of the judges who maintained a practice of disclosure . . . complained of their sources of information drying up." *Id.* at 31. Higgins also noted that none of the judges who disclosed complained of the proceedings becoming unduly protracted. In fact, some of the judges found that disclosure permitted the scope of the proceedings to be limited to the pertinent issues, thus reducing the chances of delay: "The observation was often made that one of the most salutory experiences . . . is that it provoked responses, attitudes, opinions and suggestions which are valuable to the court . . . . It was indicated that, beyond the advantage of having erroneous data ferreted out and the defendant given the opportunity to explain matter contained in the report, defendant and his counsel often have pertinent information that does not appear in the report . . . ." *Id.* at 32. *See also* Lehrich, *supra* note 33, at 239. "It should be pointed out that if defense counsel does not have access to the presentence report, then he must present his own presentence report, thereby prolonging the court process—the very thing the court wants to avoid." Bach, *supra* note 36, at 165.

55. "The danger might not be so great if the presentence report detailed only public, objective, easily verifiable information, such as the prior criminal record. But, in fact, the typical report goes at great depth into very subtle, private, subjective matters . . . . And even more fraught with danger is the report's commentary on the defendant's family life, personal habits and psychological condition. Most of this information is gained from associates of the defendant and other informants who may have any number of personal axes to grind and limited commitment to factual accuracy." United States v. Dockery, 447 F.2d 1178, 1192 (D.C. Cir. 1971) (Wright, J., dissenting).

of the typically heavy caseload, does not generally have the time to make the report as complete as it could be.[56] Beyond this, since eighty to ninety per cent of federal criminal cases and a substantial majority of state criminal cases are decided by guilty pleas,[57] the presentence report becomes of vital importance, since the judge probably knows little if anything about the defendant other than what is contained in the report. Clearly, the interest of the defendant in being apprised of the facts upon which he is being sentenced—not to mention the interest of the courts in seeing that justice is fairly administered—weighs more heavily than the fears maintained by those in opposition to disclosure, especially since the feared results have not materialized in the jurisdictions which allow disclosure. Due process has been held to require as much in other settings.[58]

Perhaps *Gardner* will prove to be the first step toward the Court's holding that due process requires disclosure in all cases, or at least those involving severe penalties. While it must be remembered that the instant case involved the death penalty, and might easily be distinguished on this basis to prevent any expansion of the holding to non-capital cases, it should also be reemphasized that the basis for the decision was the due process clause and not the eighth amendment, a factor which perhaps indicates that the Court is willing to hold at some future time that due process requires at least partial disclosure[59] of the presentence report to the

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56. *See* Bach, *supra* note 36, at 163; Guzman, *supra* note 37, at 166 ("Mere knowledge of the fact that the report was to be made available to defense counsel would itself promote greater accuracy on the part of the probation officer as well as those supplying him with information."). For some examples of bias drawn from presentence reports, *see* Evjen, *Some Guidelines in Preparing Presentence Reports*, 37 F.R.D. 111, 179 (1965).

57. Lehrich, *supra* note 33, at 227, citing from Newman, *Pleading Guilty for Consideration: A Study of Bargain Justice*, 46 J. CRIM. L.C. & P.S. 780 (1956).

58. *See* Greene v. McElroy, 360 U.S. 474 (1959), a case dealing with the revocation of a security clearance, in which Chief Justice Warren stated:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. *Id.* at 496.

59. It is important to recognize that the plurality does seem to recognize that in some cases nondisclosure, at least to the defendant personally, would be proper. *See* 97 S. Ct. at 1206.

defendant or counsel in a non-capital case. On the other hand, as the plurality noted, five Justices, in fact the same five Justices supporting the actual holding of the instant case, had in previous cases distinguished the death penalty from all other forms of punishment. It is hoped that this distinction, which brought much needed reforms to capital sentencing procedures, will not be used to prevent similar and equally needed reforms in the sentencing process for non-capital cases.

John A. Mouton III

THE RIGHT TO COUNSEL: AN ALTERNATIVE TO *MIRANDA*

The accused surrendered on the advice of counsel, was arrested under a warrant, arraigned, and committed to jail in one city for abducting a child in another locality. Although his attorney advised him by telephone not to make any statements to the police while being transported back to the scene of the crime—and made an agreement with the police that no interrogation would occur—the defendant made incriminating disclosures during the trip after a police detective stated that "the parents of this little girl should be entitled to a Christian burial."[1] Notwithstanding his objections to the admission of such evidence, the prisoner's conviction for first degree murder was affirmed by the state supreme court, and he subsequently petitioned for a writ of habeas corpus, securing relief in the federal district court[2] and in the Eighth Circuit.[3] The United States Supreme Court affirmed in a 5-4 decision and ***held*** that the prisoner was denied his constitutional right to the assistance of counsel under the sixth and fourteenth amendments. The Court found that judicial proceedings had been initiated against him before the start of the automobile trip, that the prisoner had a right to legal representation during interrogation, that the police detectives had in fact interrogated him during the return trip, and that there was no reasonable basis for finding a waiver of the right to counsel. *Brewer v. Williams*, 97 S. Ct. 1232 (1977).

One of the most difficult and controversial areas of American criminal procedure today is the subject of pre-trial police interrogation of an

1. Brewer v. Williams, 97 S. Ct. 1232, 1236 (1977).
2. Williams v. Brewer, 375 F. Supp. 170 (S.D. Iowa 1974).
3. Williams v. Brewer, 509 F.2d 227 (8th Cir. 1974).