CASE COMMENT

DEFENDANT'S RIGHT TO DISCLOSURE OF PRESENTENCE INVESTIGATION REPORTS IN CAPITAL CASES

Gardner v. Florida, 430 U.S. 439 (1977)

In *Gardner v. Florida*,[1] the Supreme Court expanded the procedural protections which defendants convicted of capital crimes are entitled to at sentencing. Except in carefully circumscribed situations,[2] the due process clause of the fourteenth amendment[3] prohibits a state from imposing the death sentence on the basis of an undisclosed presentence investigation (PSI) report.

Petitioner was convicted in Florida of first degree murder,[4] which is punishable by either life imprisonment or death.[5] In accordance with Florida law,[6] there was a separate sentencing hearing before a jury.[7] The trial judge rejected the jury's advisory sentence of life imprisonment and, on the basis of portions of a court-ordered PSI report[8] that was neither disclosed to the defendant nor included in the trial record,[9] imposed the

1. 430 U.S. 349 (1977).
2. *See* notes 82 & 99 *infra* and accompanying text.
3. U.S. CONST. amend. XIV, § 1.
4. 430 U.S. AT 351.
5. FLA. STAT. ANN. § 775.082 (West 1976).
6. "Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment." FLA. STAT. ANN § 921.141(1) (West Supp. 1977). The constitutionality of FLA STAT. ANN. § 921.141 was upheld in Proffitt v. Florida, 428 U.S. 242 (1976). *See generally* Note, *Bifurcating Florida's Capital Trials: Two Steps Are Better Than One*, 24 U. FLA. L. REV. 127 (1971).
7. 430 U.S. at 352. The jury, in accordance with FLA. STAT. ANN. § 921.141(5)-(6) (West Supp 1977), considered the aggravating and mitigating circumstances of the crime.
8. Use of a presentence investigation and report is usually within the trial judge's discretion, but is required when a minor or first offender is involved. FLA. R. CRIM. P. 3.710. Although defendant had an extensive police record, this was his first felony conviction and a presentence report was mandatory.
9. FLA. R. CRIM. P. 3.713 requires disclosure of factual material in a presentence report, but permits nondisclosure of evaluative and other material that the trial judge determines is proper to withhold. The rule attempts to effectuate the policies of full disclosure, while protecting confidential sources of information. FLA. R. CRIM. P. 3.713, Comm. Notes. The Florida death penalty statute does not include a mandatory disclosure provision, FLA. STAT. ANN. § 921.141 (West Supp. 1977), but is subject to FLA. R. CRIM. P. 3.713.

death penalty. The Supreme Court of Florida affirmed the conviction and sentence;[10] the United States Supreme Court, however, vacated the sentence[11] and *held*: the imposition of the death sentence based on considerations neither disclosed to the defendant nor incorporated in the trial record violated the due process clause of the fourteenth amendment.[12]

The due process clause of the fourteenth amendment provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law."[13] It specifically ensures that the principles of "fundamental fairness"[14] guaranteed at the federal level by the Bill of Rights[15] are applied to state criminal proceedings.[16] In addition, the clause [17] entitles litigants to fair procedures—due process—whenever their rights may be adversely affected.[18] What process is "due"[19] is determined by balancing the effect of the proceeding on the defendant's rights[20] and the state's interests.[21]

10. Gardner v. State, 313 So. 2d 675 (Fla. 1975), *rev'd*, 430 U.S. 349 (1977).

11. By plurality. *See* note 75 *infra*.

12. 430 U.S. at 362.

13. U.S. CONST. amend. XIV, § 1.

14. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968); Adamson v. California, 332 U.S. 46 (1947); Palko v. Connecticut, 302 U.S. 319 (1937). *See generally* J. SCARBORO & J. WHITE, CONSTITUTIONAL CRIMINAL PROCEDURE: CASES, QUESTIONS, AND NOTES 67-82 (1977).

15. U.S. CONST. amends. I-X.

16. *See, e.g.*, Benton v. Maryland, 395 U.S. 784 (1969) (fifth amendment prohibition of double jeopardy applied to states by fourteenth amendment); Duncan v. Louisiana, 391 U.S. 145 (1968) (sixth amendment right to jury trial); Miranda v. Arizona, 384 U.S. 436 (1966) (fifth amendment right against self-incrimination); Pointer v. Texas, 380 U.S. 400 (1965) (confrontation of witnesses); Malloy v. Hogan, 378 U.S. 1 (1964) (self-incrimination); Mapp v. Ohio, 367 U.S. 643 (1961) (exclusionary rule to enforce fourth amendment prohibition of illegal searches and seizures); *In re* Oliver, 333 U.S 257 (1948) (right to a public trial).

17. *See* note 13 *supra* and accompanying text.

18. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471 (1971) (parole revocation); *In re* Winship, 397 U.S. 358 (1970) (proof of guilt in juvenile proceeding); Mempa v. Rhay, 389 U.S. 128 (1967) (deferred sentencing); Rochin v. California, 342 U.S. 165 (1952) (illegal search).

19. Morrissey v. Brewer, 408 U.S. 471, 484 (1971) ("[T]he process that is due" connotes a flexible due process standard.).

20. *See* Morrissey v. Brewer, 408 U.S. 471 (1971) (parolee's liberty interest); *In re* Gault, 387 U.S. 1 (1967) (juvenile's liberty interest); Kent v. United States, 383 U.S. 541 (1966) (juvenile's interest to be tried as such).

21. Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961) ("consideration of what procedures due process may require under any given set of

An accused person, having a recognized liberty interest in his life, has traditionally been accorded due process in pre-trial and trial procedures.[22] Once convicted, however, the defendant stood at the mercy of the state, stripped of his rights,[23] with only minimal due process protection.[24] Because convicted defendants were considered slaves of the state,[25] legislatures vested courts and corrections officials with virtually unbridled discretion.[26] In response to modern penal theories, later courts also

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circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by government action") (military security interest); *see* Goss v. Lopez, 419 U.S. 565, 580 (1975) (school administration); Wolff v. McDonnell, 418 U.S. 539, 561 (1974) (prison administration); United States Civil Serv. Comm'n v. National Assoc. of Letter Carriers, 413 U.S. 548, 564 (1972) (state interest in efficient civil service). *Cf.* Brewer v. Williams, 430 U.S. 387, 415-16, 422 (1977) (Burger, C.J., dissenting) (cost to society from misapplied exclusionary rule).

22. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968); Pointer v. Texas, 380 U.S. 400 (1965); Gideon v. Wainwright, 372 U.S. 335 (1963); *In re* Oliver, 333 U.S. 257 (1948); Powell v. Alabama, 287 U.S. 45 (1932).

23. Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871).

> [The defendant] has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State. He is *civiliter mortuus*; and his estate, if he has any, is administered like that of a dead man.
>
> The bill of rights is a declaration of general principles to govern a society of freemen, and not of convicted felons and men civilly dead. Such men have some rights it is true, such as the law in its benignity accords to them, but not the rights of freemen. They are the slaves of the State undergoing punishment for heinous crimes committed against the laws of the land. While in this state of penal servitude, they must be subject to the regulations of the institution of which they are inmates, and the laws of the State to whom their service is due in expiation of their crimes.

Id. at 795-96.

24. *See* Solesbee v. Balkcom, 339 U.S. 9 (1950); Betts v. Brady, 316 U.S. 455 (1942), *overruled*, Gideon v. Wainwright, 372 U.S. 335 (1963); Snyder v. Massachusetts, 291 U.S. 97, 129 (1934) (Roberts, J., dissenting); Calvaresi v. United States, 216 F.2d 891, 900-01 (10th Cir. 1954), *rev'd*, 348 U.S. 961 (1955); Bailey v. United States, 284 F. 126, 127 (7th Cir. 1922); People v. Riley, 376 Ill. 364, 33 N.E.2d 872, *cert. denied*, 313 U.S. 586 (1941); Mempa v. Rhay, 68 Wash. 2d 882, 892, 416 P.2d 104, 110 (1966), *rev'd*, 389 U.S. 128 (1967). *See generally* Pugh & Carver, *Due Process and Sentencing: From* Mapp *to* Mempa *to* McGautha, 49 TEX. L. REV. 25 (1970); Note, *Right of Criminal Offenders to Challenge Reports Used in Determining Sentence*, 49 COLUM. L. REV. 567, 568 (1949).

25. *See* note 23 *supra*.

26. *See* Dorszynski v. United States, 418 U.S. 424 (1974); Williams v. Oklahoma, 358 U.S. 576, 582-83 (1959); Williams v. New York, 337 U.S. 241 (1949); United States v. Dockery, 447 F.2d 1178, 1189 (D.C. Cir.) (Wright, J., dissenting), *cert. denied*, 404 U.S. 950 (1971); Beckett v. United States, 84 F.2d 731, 732-33 (6th Cir. 1936); Gurera v. United States, 40 F.2d 338, 341 (8th Cir. 1930); State v. Levice, 59 Ariz. 472, 478, 130 P.2d 53, 55-56 (1942); Pugh & Carver, *supra* note 24. *But see* K. DAVIS, DISCRETIONARY JUSTICE: A

considered the best interests of the convicted defendant in determining punishment.[27]

To aid in the fashioning of individualized sentences, many courts and legislatures authorize presentence investigations into the offender's background and the circumstances of the crime.[28] Because the offender had

PRELIMINARY INQUIRY 133-41 (1969). *See generally* Chandler, *Latter Day Procedures in the Sentencing and Treatment of Offenders in the Federal Courts*, 37 VA. L. REV. 825 (1951).

As long as the sentence is within the range authorized by statute the convicted may not challenge it. *See* United States v. Weston, 448 F.2d 626, 631 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972); Bowman v. United States, 350 F.2d 913, 917 (9th Cir. 1965), *cert. denied*, 383 U.S. 950 (1966); Jones v. United States, 327 F.2d 867 (D.C. Cir. 1963); Beckett v. United States, 84 F.2d 731, 732-33 (6th Cir. 1936); Gurera v. United States, 40 F.2d 338 (8th Cir. 1930). *But see* Woosley v. United States, 478 F.2d 139 (8th Cir. 1973); United States v. McKinney, 466 F.2d 1403 (6th Cir. 1972); United States v. Daniels, 446 F.2d 967 (6th Cir. 1971).

Procedural due process did not obtain as of right after defendant had been convicted. *See* Solesbee v. Balkcom, 339 U.S. 9 (1950); People v. Riley, 376 Ill. 364, 33 N.E.2d 872, *cert. denied*, 313 U.S. 586 (1941); K. Davis, *The Requirement of a Trial-Type Hearing*, 70 HARV. L. REV. 193, 256-59 (1956); Note, *Due Process and Legislative Standards in Sentencing*, 101 U. PA. L. REV. 257, 261 (1952). *See generally* Cohen, *Sentencing, Probation and the Rehabilitative Ideal: The View from* Mempa v. Rhay, 47 TEX. L. REV. 1 (1968).

27. *See* Williams v. Oklahoma, 358 U.S. 576, 585-86 (1959); Williams v. New York, 337 U.S. 241, 246-47 (1949); United States v. Vandermark, 522 F.2d 1019, 1021 (9th Cir. 1975); United States v. Johnson, 507 F.2d 826, 829 (7th Cir. 1974), *cert. denied*, 421 U.S. 949 (1975); United States v. Hopkins, 464 F.2d 816, 822 (D.C. Cir. 1972); United States v. Strauss, 443 F.2d 986, 990 (1st Cir.), *cert. denied*, 404 U.S. 851 (1971); United States v. Malcolm, 432 F.2d 809, 817 (2d Cir. 1970); Chandler, *supra* note 26, at 828-30; Yankwich, *Individualization of Punishment in the Federal Courts*, 21 FED. PROBATION 3 (1957); Note, *Statutory Structure for Sentencing Felons to Prison*, 60 COLUM. L. REV. 1134 (1960); *cf.* United States v. Schwartz, 500 F.2d 1350, 1352 (2d Cir. 1974) (sentence vacated as too mechanically imposed). *But see* United States v. Dockery, 447 F.2d 1178, 1189 (D.C. Cir.) (Wright, J., dissenting), *cert. denied*, 404 U.S. 950 (1971); Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1291-93 (1952).

28. *E.g.*, FED. R. CRIM. P. 32 (c) provides: "The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation." It is common practice in state criminal procedure to require or permit the *use* of presentence reports. *See, e.g.*, CAL. PENAL CODE § 1203.10 (Deering 1970) (discretionary); IOWA CODE ANN. § 789A.3 (West Supp. 1977) (mandatory); MO. ANN. STAT. § 549.245 (Vernon Supp. 1977) (discretionary); FLA. R. CRIM. P. 3.710 (discretionary unless minor or first felony conviction in which case it is mandatory); 8A MOORE'S FEDERAL PRACTICE ¶ 32.03[1], at 32-28 to 32-32 (2d ed. 1977); 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE, § 522, at 389 (1969); Lehrich, *The Use and Disclosure of Presentence Reports in the United States*, 47 F.R.D. 225 (1969); Parsons, *Aids in Sentencing*, 35 F.R.D. 423 (1964); Note, *Use of the Presentence Investigation in Missouri*, 1964 WASH. U.L.Q. 396. *See generally* Note, *Disclosure of Presentence Reports in Federal Court: Due Process and Judicial Discretion*, 26 HASTINGS L.J. 1527 (1975); Note, *Due Process in Sentencing: A Right to Rebut the Presentence Report?*, 2 HASTINGS CONST. L.Q. 1065 (1975) [hereinafter cited as Note, *Due Process in Sentencing*].

no recognized property or liberty interest entitled to due process protection at sentencing, courts held that he could not object to the use of the PSI report[29] and, consequently, he had no right to its diclosure.[30] The sentencing court may, however, in its discretion, disclose the PSI report.[31] Proponents of nondisclosure claim it serves the following state interests: maximizing the offender's rehabilitation by not disclosing confidential and detrimental psychological information; protecting confidential sources of information; avoiding delay of criminal trials; and, preserving the sentencing court's discretion.[32]

A sample presentence report appears in F. REMINGTON, D. NEWMAN, E. KIMBALL, M. MELLI, & H. GOLDSTEIN, CRIMINAL JUSTICE ADMINISTRATION, MATERIALS AND CASES 690-96 (1969).

29. *See* Williams v. New York, 337 U.S. 241, 251-52 (1949); United States v. Dockery, 447 F.2d 1178, 1182-83 (D.C. Cir.), *cert. denied*, 404 U.S. 950 (1971); United States v. Lloyd, 425 F.2d 711, 712 (5th Cir. 1970); People v. Peace, 18 N.Y.2d 230, 233, 219 N.E.2d 419, 420, 273 N.Y.S.2d 64, 66 (1966), *cert. denied*, 385 U.S. 1032 (1967).

30. *See* Gregg v. United States, 394 U.S. 489, 492 (1969) (dictum); cases cited note 29 *supra*.

31. *See* United States v. Dace, 502 F.2d 897 (8th Cir. 1974), *cert. denied*, 419 U.S. 1121 (1975); United States v. Gorden, 495 F.2d 308 (7th Cir.), *cert. denied*, 419 U.S. 833 (1974); United States v. Lloyd, 425 F.2d 711 (5th Cir. 1970); Cook v. Willingham, 400 F.2d 885 (10th Cir. 1968); United States v. Fischer, 381 F.2d 509 (2d Cir. 1967), *cert. denied*, 390 U.S. 973 (1968); Hoover v. United States, 268 F.2d 787 (10th Cir. 1959); United States v. Durham, 181 F. Supp. 503 (D.D.C.), *cert. denied*, 364 U.S. 854 (1960); People v. Peace, 18 N.Y.2d 230, 219 N.E.2d 419, 273 N.Y.S.2d 64 (1966), *cert. denied*, 385 U.S. 1032 (1967); Katkin, *Presentence Reports: An Analysis of Uses, Limitations and Civil Liberties Issues*, 55 MINN. L. REV. 15 (1970); Lehrich, *supra* note 28, at 228 & n.19. *But see* United States v. Dockery, 447 F.2d 1178, 1186 (D.C. Cir.) (Wright, J., dissenting), *cert. denied*, 404 U.S. 950 (1971).

32. *See, e.g.*, United States v. Dace, 502 F.2d 897, 899 (8th Cir. 1974), *cert. denied*, 419 U.S. 1121 (1975); United States v. Knupp, 448 F.2d 412, 413 (4th Cir. 1971) (per curiam); United States v. Dockery, 447 F.2d 1178, 1185 & n.13 (D.C. Cir.), *cert. denied*, 404 U.S. 950 (1971); Hoover v. United States, 268 F.2d 787, 790 (10th Cir. 1959); United States v. Durham, 181 F. Supp. 503, 504 (D.D.C.), *cert. denied*, 364 U.S. 854 (1960); McCormack v. State, 332 So. 2d 117, 118 (Fla. Dist. Ct. App. 1976); Morgan v. State, 142 So. 2d 308, 311-12 (Fla. Dist. Ct. App. 1962); Brief for Respondent at 19-22, 29-34, Gardner v. Florida, 430 U.S. 349 (1977); Roche, *The Position for Confidentiality of the Presentence Investigation Report*, 29 ALB. L. REV. 206, 217-24 (1965); Note, *Due Process in Sentencing*, *supra* note 28, at 1068-70.

The state's interest in fair and efficient sentencing of offenders outweighed the defendant's minimal procedural rights:

> Under the practice of individualizing punishments, investigational techniques have been given an important role. Probation workers making reports of their investigations have not been trained to prosecute but to aid offenders. Their reports have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guesswork and inadequate information. To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cau-

In *Townsend v. Burke*,[33] the Supreme Court considered whether an uncounseled offender's due process right was denied by a court that sentenced him on the basis of "materially untrue" information.[34] The Court held that the absence of representation by counsel at the sentencing hearing denied this offender due process of law.[35] Read broadly, *Townsend* held that sentencing on the basis of misinformation was a denial of due process, and that an offender was entitled to the protection of counsel.[36] The logical implication was that information on which the sentence is based, including the PSI report, must be disclosed so that the offender's counsel could rebut inaccurate information.[37] Read more narrowly, the *Townsend* Court was shocked by the irresponsible behavior of the trial judge—not only his reliance on misinformation, but his abuse of the uncounseled offender.[38] This interpretation does not compel the

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> tiously adopted throughout the nation after careful consideration and experimentation. We must recognize that most of the information now relied upon by judges to guide them in 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.

Specht v. Patterson, 386 U.S. 605, 606 (1967) (quoting Williams v. New York, 337 U.S. 241, 249-50 (1949)).

33. 334 U.S. 736 (1948).

34. *Id.* at 740-41. The erroneous information the sentencing judge relied on had been disclosed to the defendant. The court did not inquire into how a defendant or his counsel might challenge erroneous information if it were undisclosed. *See* United States v. Tucker, 404 U.S. 443 (1972) (reliance on past invalid convictions); Kent v. United States, 383 U.S. 541 (1966) (errors in juvenile department report); United States v. Weston, 448 F.2d 626 (9th Cir. 1971) (unreliable conclusions in presentence report), *cert. denied*, 404 U.S. 1061 (1972). *See also* Collins v. Buchkoe, 493 F.2d 343 (6th Cir. 1974); United States v. Rollerson, 491 F.2d 1209, 1213 (5th Cir. 1974); United States v. Picard, 464 F.2d 215, 220 (1st Cir. 1972); United States v. Malcolm, 432 F.2d 809, 816 (2d Cir. 1970); Baker v. United States, 388 F.2d 931, 934 (4th Cir. 1968).

35. 334 U.S. at 740-41 ("counsel might not have changed the sentence, but he could have taken steps to see that the conviction and sentence were not predicated on misinformation or misreading of court records"). *See* Kent v. United States, 383 U.S. 541, 563 (1966) (duty of counsel to "denigrate" questionable information); United States v. Dockery, 447 F.2d 1178, 1193 (D.C. Cir.) (Wright, J., dissenting), *cert. denied*, 404 U.S. 950 (1971); Gray, *Post-Trial Discovery: Disclosure of the Presentence Investigation Report*, 4 U. TOL. L. REV. 1, 8-9 (1972); Note, *supra* note 26 at 263-71; 50 N.C.L. REV. 925, 928 (1972).

36. 334 U.S. at 740-41. *See* notes 34-35 *supra* and accompanying text.

37. United States v. Dockery, 447 F.2d 1178, 1193 (D.C. Cir.) (Wright, J., dissenting), *cert. denied*, 404 U.S. 950 (1971). *But see* Williams v. New York, 337 U.S. 241 (1948) (Court did not mention *Townsend*).

38. 334 U.S. at 740-41.

disclosure of information on which a sentence is based to an offender or his counsel.[39]

In deciding *Williams v. New York*[40] one year later, the Court read *Townsend*[41] narrowly. A jury convicted Williams of first degree murder and recommended a life sentence.[42] On the basis of a PSI report, however, the judge sentenced the defendant to death.[43] At the sentencing hearing, the judge stated the information he relied on; neither the defendant nor his attorney attempted to refute it.[44] Although Williams claimed that failure to allow rebuttal testimony and cross examination at the sentencing hearing denied him due process,[45] the Supreme Court endorsed the modern sentencing theory that punishment should fit the offender, and the use of PSI reports to accomplish this goal.[46]

The Court in *Williams*, citing *Townsend*,[47] recognized that the sentencing process was not immune from due process requirements,[48] and

39. *See, e.g.*, Collins v. Buchkoe, 493 F.2d 343, 345 (6th Cir. 1974) (by implication); United States v. Rollerson, 491 F.2d 1209, 1213 (5th Cir. 1974); United States v. Weston, 448 F.2d 626, 634 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972); United States v. Dockery, 447 F.2d 1178, 1183 (D.C. Cir.), *cert. denied*, 404 U.S. 950 (1971); United States v. Malcolm, 432 F.2d 809, 816 (2d Cir. 1970); United States v. Trigg, 392 F.2d 860 (7th Cir.), *cert. denied*, 391 U.S. 961 (1968); Baker v. United States, 388 F.2d 931, 933 (4th Cir. 1968); United States v. Weiner, 376 F.2d 42, 43 (3d Cir. 1967).

The due process clause protects a citizen's right to challenge the factual basis of governmental action that affects him. *See, e.g.*, Greene v. McElroy, 360 U.S. 474 (1959). In criminal sentencing this has been applied to permit rebuttal of facts the court explicitly relied upon. *See, e.g.*, Shelton v. United States, 497 F.2d 156, 159 (5th Cir. 1974); United States v. Powell, 487 F.2d 325, 329 (4th Cir. 1973). The due process right to an accurate factual basis for sentencing might be nullified by nondisclosure of potentially erroneous PSI reports. An attorney in *Townsend* could have protected the defendant. *See* United States v. Dockery, 447 F.2d 1178, 1193 (D.C. Cir.) (Wright, J., dissenting), *cert. denied*, 404 U.S. 951 (1971) ("How many . . . travesties of justice are hidden by nondisclosure of the presentence report?"); Guzman, *Defendant's Access to Presentence Reports in Federal Criminal Courts*, 52 IOWA L. REV. 161, 164-66 (1966) (incidents of undetected errors in presentence report).

Undetected errors in presentence reports have resulted in harsh sentences. *See* State v. Killian, 91 Ariz. 140, 370 P.2d 287 (1962); State v. Pohlabel, 61 N.J. Super. 242, 160 A.2d 647 (App. Div. 1960). *See also* State v. Kunz, 55 N.J. 128, 259 A.2d 895 (1969).

40. 337 U.S. 241 (1949).

41. 334 U.S. 736 (1948).

42. 337 U.S. at 242.

43. *Id.*

44. *Id.* at 244.

45. *Id.* at 245.

46. *Id.* at 247-50.

47. *Id.* at 252 n.18.

48. *Id.*

may, therefore, have only endorsed the use of PSI reports.[49] By affirming the trial judge's sentence despite his nondisclosure of the PSI report before the hearing and his failure to provide the defendant an opportunity to rebut,[50] however, the Court apparently sanctioned the discretionary use—including nondisclosure—of PSI reports.[51] Following *Williams*, many state and lower federal courts have held that failure to disclose a PSI report or to allow confrontation and cross examination of sources contained therein does not violate due process.[52]

Since the *Williams* decision in 1949, the Supreme Court has recognized that convicted offenders have a limited liberty interest which is entitled to due process protection in post-trial proceedings.[53] In *Mempa*

49. *See* Gardner v. Florida, 430 U.S. 349, 356 (1977); Note, *Due Process in Sentencing*, *supra* note 28, at 1073 & n.34.

50. 337 U.S. at 252.

51. *Id.* at 250. *But see id.* at 252-53 (Murphy, J., dissenting).

52. United States v. Dace, 502 F.2d 897 (8th Cir. 1974), *cert. denied*, 409 U.S. 1121 (1975); United States v. Queen, 435 F.2d 66 (D.C. Cir. 1970); United States v. Lloyd, 425 F.2d 711, 712 (5th Cir. 1970); Cook v. Willingham, 400 F.2d 885 (10th Cir. 1968); United States v. Fischer, 381 F.2d 509 (2d Cir.), *cert. denied*, 390 U.S. 973 (1967); Powers v. United States, 325 F.2d 666 (1st Cir. 1963); Stephan v. United States, 133 F.2d 87 (6th Cir. 1943); United States v. Durham, 181 F. Supp. 503 (D.D.C.), *cert. denied*, 364 U.S. 854 (1960); McCormack v. State, 332 So. 2d 117 (Fla. Dist. Ct. App. 1976); Morgan v. State, 142 So. 2d 308 (Fla. Dist. Ct. App. 1962); People v. Peace, 18 N.Y.2d 230, 233, 219 N.E.2d 419, 420, 273 N.Y.S.2d 64, 66 (1966), *cert. denied*, 385 U.S. 1032 (1967). *Contra*, United States v. Dockery, 447 F.2d 1178, 1186 (D.C. Cir.) (Wright, J., dissenting), *cert. denied*, 404 U.S. 950 (1971).

In *Williams*, 337 U.S. at 246, the court justified the use of out-of-court information because of the sentencing judge's wide discretion in fashioning individualized sentences. For a criticism of this view, *see* K. DAVIS, *supra* note 26.

53. *See* Gagnon v. Scarpelli, 411 U.S. 778 (1973) (parole revocation); Morrissey v. Brewer, 408 U.S. 471 (1972) (parole revocation); United States v. Tucker, 404 U.S. 443 (1972) (sentencing); Mayberry v. Pennsylvania, 400 U.S. 455, 465 (1971) (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)) ("justice must satisfy the appearance of justice"); Witherspoon v. Illinois, 391 U.S. 510 (1968) (sentencing in capital case); Mempa v. Rhay, 389 U.S. 128 (1967) (deferred sentencing); Specht v. Patterson, 386 U.S. 605 (1966) (separate sentencing act); Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821 (1968); Note, *supra* note 26, at 263-71.

The right-privilege distinction, previously used to justify denials of post-trial due process, has been repudiated. The distinction was founded on the assumption that any proceeding considering a sentence less than the statutory maximum was a privilege and not a right entitled to procedural safeguards. *E.g.*, Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (criminal). *See also* Graham v. Richardson, 403 U.S. 365, 374 (1971) (civil); Bell v. Burson, 402 U.S. 535, 539 (1971) (civil); Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (civil); Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969) (civil); Sherbert v. Verner, 374 U.S. 398, 404 (1963) (civil); United States v. Dockery, 447 F.2d 1178, 1190 & n.15 (D.C. Cir.) (Wright, J., dissenting) (criminal), *cert. denied*, 404 U.S. 450 (1971). *See generally* Van

v. Rhay,[54] the Court held that defendant's liberty interest warranted representation by counsel at sentencing.[55] Following this decision, defendants have argued that their inability to challenge undisclosed errors in PSI reports renders meaningless this due process protection at sentencing by preventing detection of potential errors.[56]

Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

Due process denials can no longer be based on either the distinction between criminal trial and criminal post-trial proceedings or between criminal and civil proceedings. *See In re* Winship, 397 U.S. 358, 365-67 (1970) (juvenile proceedings); *In re* Gault, 387 U.S. 1, 49-50 (1967) (juvenile proceedings); Cheff v. Schnackenberg, 384 U.S. 373 (1966) (contempt arising from administrative law enforcement); Kent v. United States, 383 U.S. 541 (1966) (waiver of juvenile court jurisdiction); Harris v. United States, 382 U.S. 162 (1965) (contempt); *The Supreme Court, 1965 Term*, 80 HARV. L. REV. 1, 125 (1969) (noting change from practice of labelling to functional due process analysis). *Cf.* Judice v. Vail, 430 U.S. 327 (1977) (civil contempt proceedings); Trainor v. Hernandez, 431 U.S. 434 (1977) (civil enforcement proceeding); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (civil seizure).

54. 389 U.S. 128 (1967).

55. *Id.* at 134 (citing Townsend v. Burke, 334 U.S. 736, 740-41 (1948) ("appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected").

After *Mempa*, the Court continued to afford defendants post-trial due process protection. *See* Humphrey v. Cady, 405 U.S. 504, 516 (1972) (counsel required at time of sentencing under a special commitment act); Witherspoon v. Illinois, 391 U.S. 510, 521 (1968) (impartial sentencing body); Pugh & Carver, *supra* note 24; Note, *Procedural Due Process at Judicial Sentencing for Felony*, *supra* note 53; Note, *Disclosure of Presentence Reports: A Constitutional Right to Rebut Adverse Information by Cross-Examination*, 3 RUT.-CAM. L.J. 111, 113-15 (1971).

56. 50 N.C.L. REV. 925 (1972).

> In a sector of the judicial process in which the stakes for society and the defendant are so high as they are at sentencing, and in which procedural safeguards are inadequate, there is a strong case for developing a body of substantive standards to ensure that sentences are not based on inaccurate assumptions of little probative value.

Id. at 936. *See* Townsend v. Burke, 334 U.S. 736 (1948). *See also* United States v. Weston, 448 F.2d 626 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972); United States v. Dockery, 447 F.2d 1178, 1186, 1193 (D.C. Cir.) (Wright, J., dissenting) *cert. denied*, 404 U.S. 950 (1971) (same harm prohibited by *Townsend* results from reliance on undisclosed misinformation as from disclosed misinformation); Verdugo v. United States, 402 F.2d 599, 609 (9th Cir. 1968) (dictum), *cert. denied*, 397 U.S. 925 (1969) (disclosure of sentencing information needed to effectuate right to counsel).

The convicted person has the burden of demonstrating error in the facts relied upon in sentencing, although he may not have access to the PSI report. *See, e.g.*, Collins v. Buchkoe, 493 F.2d 343 (6th Cir. 1974); United States v. Rollerson, 491 F.2d 1209 (5th Cir. 1974).

The tension between due process rights and sentencing discretion has stirred much debate over PSI report disclosure. For arguments against disclosure, see Barnett & Gronewold, *Confidentiality of the Presentence Report*, 26 FED. PROBATION 26 (1962);

The Supreme Court's reevaluation of capital punishment and capital sentencing procedures also implicates the nondisclosure of PSI reports.[57] In *Furman v. Georgia*,[58] *Gregg v. Georgia*,[59] *Woodson v. North Carolina*,[60] and *Proffitt v. Florida*,[61] the Court recognized that capital punishment is unique[62] and that it would conform to the eighth amendment's[63] proscription against cruel and unusual punishment only if the *process* by which it is imposed is and appears to be fair.[64] The process mandated by

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Higgins, *Confidentiality of Presentence Reports*, 28 ALB. L. REV. 12 (1964); Higgins, *In Response to Roche*, 29 ALB L. REV. 225 (1965); Parsons, *The Presentence Investigation Report Must be Preserved as a Confidential Document*, 28 FED. PROBATION 3 (1964); Parsons, *supra* note 28; Roche, *supra* note 32; Sharp, *The Confidential Nature of Presentence Reports*, 5 CATH. U.L. REV. 127 (1954); Thompsen, *Confidentiality of the Presentence Report: A Middle Position*, 28 FED. PROBATION 8 (1964); Note, *Use of the Presentence Investigation in Missouri*, *supra* note 28, at 405 (1964) (97% of Missouri judges that responded believe nondisclosure of presentence reports does not violate due process).

For arguments in favor of disclosure, see A.B.A., STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 4.1-4.6 (Tent. Draft 1968); MODEL PENAL CODE § 7.07(5) (Tent. Draft 1962); Gray, *supra* note 35; Lehrich, *supra* note 28; Pugh & Carver, *supra* note 24; Note, *Procedural Due Process at Judicial Sentencing for Felony*, *supra* note 53; Note, *Due Process in Sentencing*, *supra* note 28; Note, *Disclosure of Presentence Reports: A Constitutional Right to Rebut Adverse Information by Cross-Examination*, *supra* note 55; 50 N.C.L. REV. 925 (1972); 33 OHIO ST. L.J. 960 (1972). For additional sources, see Buchea v. Sullivan, 262 Or. 222, 226 n.7, 497 P.2d 1169, 1171 n.7 (1972).

57. In the past, PSI report disclosure did not depend on potential punishment. *See* Williams v. New York, 337 U.S. 241, 252 (1948) (capital); Segura v. Patterson, 402 F.2d 249, 253 (10th Cir. 1968) (capital), *rev'd on other grounds*, 403 U.S. 946 (1971); McCormack v. State, 332 So. 2d 117 (Fla. Dist. Ct. App. 1976) (capital).

58. 408 U.S. 238 (1972).

59. 428 U.S. 153 (1976).

60. 428 U.S. 280 (1976). On the same day, the Court invalidated Louisiana's mandatory death penalty statute in Roberts v. Louisiana, 428 U.S. 325 (1976).

61. 428 U.S. 242 (1976). On the same day, the Court upheld Texas' discretionary death penalty statute in Jurek v. Texas, 428 U.S. 262 (1976).

62. Gardner v. Florida, 430 U.S. 349, 357-58 (1977); Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Proffitt v. Florida, 428 U.S. 242, 250-51 (1976); Gregg v. Georgia, 428 U.S. 153, 188 (1976); Furman v. Georgia, 408 U.S. 238, 286 (1972).

63. U.S. CONST. amend. VIII provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

64. Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Proffitt v. Florida, 428 U.S. 242, 259 (1976); Gregg v. Georgia, 428 U.S. 153, 188-95 (1976); Furman v. Georgia, 408 U.S. 238, 306, 311 (1972) (Stewart & White, J.J., concurring); State v. Dixon, 283 So. 2d 1 (Fla. 1972). For source of requirement that decisions must appear to be and actually be fair, see Mayberry v. Pennsylvania, 400 U.S. 455, 465 (1971) (criminal contempt); Offutt v. United States, 348 U.S.11, 14 (1954) (criminal contempt). Gardner v. Florida, 430 U.S. 349 (1977), adopts this standard.

See M. MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT (1973); England, *Capital Punishment in the Light of Constitutional Evolution: An*

the eighth amendment[65] requires a consideration of the character and record of the offender, and reliability in determining whether the death penalty is appropriate in the particular case.[66] Nondisclosure of presentence reports appears to violate this requirement.[67]

Analysis of Furman *and* Gregg, 52 NOTRE DAME LAW. 596 (1977); Tao, *The Constitutional Status of Capital Punishment: An Analysis of* Gregg, Jurek, Roberts, *and* Woodson, 54 U. DET. J. URB. L. 345 (1977); Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690 (1974); Note, *Capital Punishment: A Review of Recent Supreme Court Decisions*, 52 NOTRE DAME LAW. 261 (1976); Comment, Furman v. Georgia—*Deathknell for Capital Punishment?* 47 ST. JOHN'S L. REV. 107 (1972); Note, *Capital Sentencing—Effect of* McGautha *and* Furman, 45 TEMP. L.Q. 619 (1972); 41 FORDHAM L. REV. 671 (1973).

65. The eighth amendment embodies an evolving standard of decency. Trop v. Dulles, 356 U.S. 86, 101 (1958). The recent capital punishment cases may demonstrate an evolution toward absolute fairness and reliability in "the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (sentencing procedures controlled to insure reliability). *See also* Furman v. Georgia, 408 U.S. 238, 278 (1972) (Brennan, J., concurring).

66. Roberts v. Louisiana, 428 U.S. 325, 335 (1976); Woodson v. North Carolina, 428 U.S. 280, 304-05 (1976); Proffitt v. Florida, 428 U.S. 242, 259 (1976) (the eighth amendment requires "informed, focused, guided, and objective inquiry into the question whether [defendant] should be sentenced to death"); Gregg v. Georgia, 428 U.S. 153, 188-95 (1976); State v. Dixon, 283 So. 2d 1 (Fla. 1973). The eighth amendment has, in effect, been used to provide procedural fairness consistent with the value of the capital defendant's interests.

The use of the eighth amendment to mandate sentencing procedures is unusual. It is founded on the premise that without structured fact finding hearings addressed solely to the choice of life or death, capital punishment could not be imposed consistently. Lack of consistency in capital punishment was the basis for the concurrences of Justices Stewart and White in Furman v. Georgia, 408 U.S. 238, 309, 313 (1972) (Stewart and White, J.J., concurring). This unique use of the eighth amendment may mean that McGautha v. California, 402 U.S. 183 (1971), is overruled. *McGautha* held that the unfettered discretion of capital sentencing juries did not violate due process. *See* Comment, *supra* note 64, at 139 ("McGautha v. California, which upheld the discretionary system of sentencing offenders to death, has clearly been dealt a most fatal blow"); Note, *Capital Sentencing—Effect of* McGautha *and* Furman, *supra* note 64, at 626 (*Furman* requires the same procedures denied in *McGautha* but on eighth amendment grounds).

Chief Justice Burger in *Furman*, 408 U.S. at 400, argued that the control of sentencing procedures was "essentially and exclusively a procedural due process question." He and Justice Rehnquist believed that the eighth amendment only applied to testing *certain types* of punishment. *Id.* at 398. *See also* Note, *Capital Punishment: A Review of Recent Supreme Court Decisions*, *supra* note 64, at 265-67; Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, *supra* note 64, at 1695 n.27, 1699-1712 (list of states repealing or amending their capital punishment statutes).

67. In addition, two other trends in penology militate in favor of PSI report disclosure: First, the move toward uniform mandatory prison terms for the same crime committed under similar circumstances dictates that all relevant facts concerning the crime and the offender be established accurately before the sentencing body. The goal of equal punishment for equal crimes, with exceptions permitted only in unusual circumstances,

The use and disclosure of presentence reports depends upon the jurisdiction. Most states as well as the federal judiciary require or permit the use[68] and disclosure[69] of presentence reports.[70] Even those jurisdictions

cannot be achieved unless defendants, their counsel, and the courts can identify sufficient mitigating circumstances. Uniformity, therefore, is served if PSI reports, a determinative factor in sentencing, are disclosed. For sources discussing mandatory uniform sentences, see CAL. PENAL CODE § 1170 (Deering Supp. 1977); Comment, *Criminal Law: Mandatory Prison Sentences—A Case Study Approach*, 28 OKLA. L. REV. 614 (1975) (problems, constitutional and otherwise, with Oklahoma mandatory sentence act); Comment, *Senate Bill 42—The End of the Indeterminate Sentence*, 17 SANTA CLARA L. REV. 133 (1977) *See generally* F. MILLER, R. DAWSON, G. DIX, R. PARNAS, SENTENCING AND THE CORRECTIONS PROCESS 265-340 (1976); Diamond & Zeisel, *Sentencing Councils: A Study of Sentence Disparity and its Reduction*, 43 U. CHI. L. REV. 109, 110-16 (1976).

Second, the increasing availability of appellate review of sentences underscores the need for PSI report disclosure. One factor used in determining the constitutionality of a capital punishment statute is the availability of appellate review. *See* Proffitt v. Florida, 428 U.S. 242, 250-51, 258-59 (1976); Gregg v. Georgia, 428 U.S. 153, 204-06 (1976); State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973). Although noncapital sentences within the statutory range have traditionally enjoyed immunity from appellate review, courts have begun to scrutinize the fairness of all sentences. An accurate sentencing record is essential for effective appellate review, and courts should require it to ensure the accuracy of the record on appeal. For sources discussing appellate review, see Yates v. United States, 356 U.S. 363 (1958) (by implication); United States v. Hopkins, 531 F.2d 576 (D.C. Cir. 1976); Woosley v. United States, 478 F.2d 139 (8th Cir. 1973); United States v. McKinney, 466 F.2d 1403 (6th Cir. 1972); United States v. Daniels, 446 F.2d 967 (6th Cir. 1971); Scott v. United States, 419 F.2d 264 (D.C. Cir. 1969); Thurlkill v. State, 551 P.2d 541 (Alas. 1976); People v. Cooke, 117 Ill. App. 2d 296, 300, 254 N.E.2d 293, 295 (1969); A.B.A., STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES § 1-3.4 (1968); M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 75-85 (1973); Blake, *Appellate Review of Criminal Sentences in the Federal Courts*, 24 KAN. L. REV. 279, 302-03 (1976); Note, *Appellate Review of Sentences and the Need for a Reviewable Record*, 1973 DUKE L.J. 1357, 1370-71; Note, *The Rule of Nonreview: A Critical Analysis of Appellate Scrutiny of Criminal Sentences*, 17 WM. & MARY L. REV. 184, 184-99 (1975). *But see* Dorszynski v. United States, 418 U.S. 424 (1974); United States v. Gamboa, 543 F.2d 545 (5th Cir. 1976); United States v. Sand, 541 F.2d 1370 (9th Cir. 1976); Gurera v. United States, 40 F.2d 338 (8th Cir. 1930); State v. Malory, 113 Ariz. 480, 557 P.2d 165 (1976); People v. Bradley, 43 Ill. App. 3d 463, 357 N.E.2d 696 (1976); State v. Betts, 196 Neb. 572, 244 N.W.2d 195 (1976). Both of these trends challenge the rationale for nondisclosure.

68. *See* notes 28-29 *supra* and accompanying text.

69. Disclosure is required by either legislation, court rule, or case law. By legislation: *see, e.g.*, CAL. PENAL CODE § 1203d (Deering 1970); KAN. STAT. ANN. § 21-4605 (Vernon 1971). By court rule: *see e.g.*, State v. Vance, 117 Ohio App. 169, 191 N.E.2d 737 (1962) (capital cases only); N.Y. CRIM. PROC. LAW § 390.50 (McKinney Cum. Supp. 1977-1978); WASH. SUPER. CT. R. CRIM. P. 7.2(c) (Supp. 1975). By case law: *see, e.g.*, State v. Rolfe, 92 Idaho 467, 444 P.2d 428 (1968); Haynes v. State, 19 Md. App. 428, 311 A.2d 817 (1973); State v. Kunz, 55 N.J. 128, 259 A.2d 895 (1969).

70. In federal court, disclosure is provided by FED. R. CRIM. P. 32(c)(3)(A):

requiring disclosure, however, usually provide for exceptions to full disclosure with attendant procedures for partial or nondisclosure.[71]

In *Gardner v. Florida*,[72] the Supreme Court confronted the issue of whether, in the context of capital punishment, the Constitution compels the disclosure of PSI reports, and held that, except in extraordinary cases,[73] the due process clause requires disclosure. States must make known to the defendant or his counsel the information on which the sentencing decision is based, and afford the defendant an opportunity to comment thereon.[74]

(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.

Prior to the 1975 amendment of the rule, disclosure had been discretionary. When the discretionary rule was adopted in 1966, Justice Douglas argued:

> [W]hile the formal rules of evidence do not apply to restrict the factors which the sentencing judge may consider, fairness would, in my opinion, require that the defendant be advised of the facts—perhaps very damaging to him—on which the judge intends to rely. The presentence report may be inaccurate, a flaw which may be of constitutional dimension. *Cf.* Townsend v. Burke, 334 U.S. 736.

1966 Amendments to FED. R. CRIM. P., 383 U.S. 1087, 1092-93 (dissenting statement of Douglas, J.).

See Brief for Petitioner at 1a-44a, 1b-5b, Gardner v. Florida, 430 U.S. 349 (1977). *See generally* Note, *Due Process in Sentencing*, *supra* note 28. Discretionary disclosure is still the rule in some states. *See, e.g.*, IOWA CODE ANN. § 789A.5 (West Supp. 1977); LA. CODE CRIM. PRO. ANN. art. 877 (1967); R.I. SUPER. CT. R. CRIM. P. 32(c)(2). Still other states make no statutory provision regarding disclosure. *See, e.g.*, Griffith v. State, 504 S.W.2d 324, 329 (Mo. Ct. App. 1974). MISS. CODE ANN. § 47-7-9 (1976); MO. R. CRIM. P. 27.07(b).

71. *See* FED. R. CRIM. P. 32(c)(3)(A), *supra* note 70.

FED. R. CRIM. P. 32(c)(3)(B) established procedures upon nondisclosure under Rule 32(c)(3)(A).

> (B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, 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. The statement may be made to the parties in camera.

See, e.g., ARIZ. R. CRIM. P. 26.4(b) (Supp. 1977); MICH. GEN. CT. R. 785.12; WASH. SUPER. CT. R. CRIM. P. 7.2(c)(2) (Supp. 1976). Some states that permit partial nondisclosure also require the sentencing judge either to include the confidential portions in the trial record or summarize their contents. *See, e.g.*, OR. REV. STAT. § 137.079 (1975); ARIZ. R. CRIM. P. 26.4(b) (Supp. 1977); WASH. SUPER. CT. R. CRIM. P. 7.2(c)(2) (Supp. 1976). Brief for Petitioner at 1a-44a, 1b-5b, Gardner v. Florida, 430 U.S. 349 (1977).

72. 430 U.S. 349 (1977).

73. *Id.* at 360-61.

74. *Id.* at 362.

Justice Stevens, writing for a plurality,[75] distinguished *Williams v. New York*[76] on three grounds: In *Williams*, the material portions of the PSI report were communicated to the defendant in open court; in *Gardner* they were not and, accordingly, defense counsel did not have the opportunity to challenge the information.[77] Secondly, society's attitude toward capital punishment had changed so much since *Williams* that the Court was justified in reexamining capital punishment procedures in light of the eighth amendment's proscription against cruel and unusual punishment.[78] Finally, the extension of flexible due process requirements to sentencing proceedings rendered the procedural discretion sanctioned by *Williams* inapposite;[79] defendants' recently recognized liberty interest in post-trial proceedings requires more protection than *Williams* offers.[80] The plurality then examined the state's justifications for nondisclosure[81] and concluded that they were outweighed in a capital case by the defendant's paramount interest in procedural fairness in sentencing and by the unique status of the death penalty.[82]

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75. The plurality consisted of Justices Stevens, Powell, and Stewart. These were the same justices who constituted the plurality in Woodson v. North Carolina, 428 U.S. 280 (1976). The Chief Justice and Justices White and Blackmun concurred. Justices Brennan, Marshall, and Rehnquist dissented.

76. 337 U.S. 241 (1949).

77. 430 U.S. at 356.

78. *Id.* at 357-58. The plurality cites Justice Black's broad language in *Williams* to license reevaluation of capital sentencing procedures "against evolving standards of procedural fairness in a civilized society." *Id.* at 357 (citing Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972); McGautha v. California, 402 U.S. 183 (1971); Witherspoon v. Illinois, 391 U.S. 510 (1968)).

79. 430 U.S. at 358 (citing Mempa v. Rhay, 389 U.S. 128 (1967); Specht v. Patterson, 386 U.S. 605 (1967)).

The plurality may be analogizing the special sentencing proceedings in capital punishment to the special proceedings in *Mempa* (hearing on termination of deferred sentence) and *Specht* (commitment under a special Sex Offenders Act). By citing *Mempa* and *Specht* together the Court may be undermining the distinction between ordinary sentencing and sentencing under special commitment acts. *See also* McConnell v. Rhay, 393 U.S. 2 (1968).

80. 430 U.S. at 358, 360-61. The Court implicitly adopted the following balancing test:

> As applied to procedural rights at the sentencing hearing, due process analysis requires us to weigh three interests: (1) the defendant's interest in the substantive outcome of the hearing, (2) his interest in the particular right to know and meet the evidence in the presentence report, and (3) the governmental interest in continued secrecy of the report.

United States v. Dockery, 447 F.2d 1178, 1190 (D.C. Cir.) (Wright, J., dissenting), *cert. denied*, 404 U.S. 950 (1971).

81. *See* Brief for Respondent at 20-22, 29-34.

82. 430 U.S. at 358-61. The justifications proffered were protection of confidential sources, enhancement of rehabilitation, prevention of delay, and preservation of sentencing discretion. *Id.*

Justice White, concurring on eighth amendment grounds,[83] argued that *Gardner* violated the procedural requirements established in *Woodson v. North Carolina*.[84] To comply with the *Woodson* requirement that the sentencing court consider the character of the offender and offense, a PSI report was necessary; to ensure reliability in the imposition of the death penalty, disclosure of all information was required.[85] By confining his concurrence to the eighth amendment, Justice White would limit the disclosure of PSI reports to capital cases.[86]

The Court's ordering of PSI report disclosure in capital cases *sub silentio* overruled the broad reading of *Williams v. New York*.[87] Although *Williams* remains authority for the use of presentence investigative information, *Gardner* shatters the due process balance struck in *Williams* favoring wide sentencing discretion.[88]

The most significant aspect of the *Gardner* opinion is the plurality's apparently conscious decision to analyze PSI report disclosure under the due process clause[89] rather than the eighth amendment, as argued by

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Justice Stevens, however, eschews uniform mandatory disclosure in capital cases by acknowledging the possibility of partial or nondisclosure in exceptional circumstances. But even in those cases, due process would require that the PSI report appear in the trial record to facilitate appellate review. *Id.* at 360-61. *See* Proffitt v. Florida, 428 U.S. 242, 258-59 (1976); State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973).

83. 430 U.S. at 362-64 (White, J., concurring). The Chief Justice concurred without opinion, and Justice Blackmun's concurrence was based on the eighth amendment analysis in Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts v. Louisiana, 428 U.S. 325 (1976).

84. 428 U.S. 280 (1976).

85. 430 U.S. at 363-64.

86. *Id.* at 364. Justices Brennan and Marshall dissented on the ground that the death penalty itself is unconstitutional. *Id.* at 365. In addition, Justice Brennan agreed with the plurality's finding that nondisclosure in this case violated due process. Marshall said that the Florida Death Penalty Act, FLA. STAT. ANN. 921.141 (West Supp. 1977), violated the eighth amendment, because it sanctions the discretion and arbitrariness banned by Furman v. Georgia, 408 U.S. 238 (1972). The Florida Death Penalty Act, approved by the Court in Proffitt v. Florida, 428 U.S. 242 (1976), contains, argued Marshall, many procedural deficiencies. Accordingly, he advocated reconsideration of *Proffitt*. 430 U.S. at 370.

Justice Rehnquist dissented, stating that the eighth amendment is concerned with the character of a sentence and not with the process by which it is imposed. Capital punishment is not cruel and unusual under the eighth and fourteenth amendments, and they are not violated when the death sentence is imposed if the process has never before been found to violate due process. *Id.*

87. 337 U.S. 241 (1949). *See* note 52 *supra* and accompanying text.

88. *Compare* Gardner v. Florida, 430 U.S. 349 (1977), *with* Williams v. New York, 337 U.S. 241 (1949).

89. 430 U.S. at 357-62.

Justice White.[90] This choice indicates that the Court will end its unique use of the eighth amendment in capital punishment cases.[91] Rather than graft the due process clause onto the eighth amendment and require that the procedures by which courts impose the death penalty be and appear to be fair, the Court will now look directly to the due process clause of the fourteenth amendment. Such reasoning may enable the Court later to extend the disclosure requirement of *Gardner* to noncapital defendants as society's notions about the liberty interest of a convicted defendant and fair procedures evolve.[92] This extension is not required, however, because due process involves a balancing analysis, and the state's interest in nondisclosure may be greater than the defendant's need to know in a noncapital case.[93] Indeed, although the state's rehabilitation argument[94]

90. *Id.* at 362-63 (White, J., concurring).

91. *See* note 66 *supra*. The eighth amendment historically has been used to examine the character of punishments in the abstract and *not* to structure sentencing procedures. Courts have applied it to invalidate entire statutes as well as punishments for specific crimes. *See, e.g.*, Trop v. Dulles, 356 U.S. 86 (1958); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947); Weems v. United States, 217 U.S. 349 (1910). By using a due process analysis in *Gardner*, the Court avoided confronting a statutory scheme that reduced reliability in imposing the death penalty by permitting nondisclosure of part of the sentencing record. FLA. STAT. ANN. 921.141 (West Supp. 1977) had been held constitutional under the eighth amendment in Proffitt v. Florida, 428 U.S. 242 (1976). Florida will have to amend FLA. R. CRIM. P. 3.713, or enact a separate mandatory disclosure rule applicable to capital cases because its general disclosure provision, applicable to both capital and noncapital cases, permits partial nondisclosure. *See* note 9 *supra*.

92. Notions of procedural fairness established in capital cases have often been extended to noncapital cases. For instance, the right to counsel was established in capital cases, and then extended to all cases. *See* Mempa v. Rhay, 389 U.S. 128 (1967) (right to counsel at time of sentencing); Gideon v. Wainwright, 372 U.S. 335 (1963) (indigent's right to counsel at trial); Hamilton v. Alabama, 368 U.S. 52 (1961) (right to counsel at arraignment); Moore v. Michigan, 355 U.S. 155 (1957) (right to counsel at time of pleading); Betts v. Brady, 316 U.S. 455 (1942) (sixth amendment right to counsel held inapplicable to states), *overruled*, Gideon v. Wainwright, 372 U.S. 335 (1962); Powell v. Alabama, 287 U.S. 45 (1932) (counsel required in capital cases because of the defendant's great interest in protecting his rights at trial). *See generally* Cohen, *supra* note 26, at 2; 41 FORDHAM L. REV. 671, 676 & n.53 (1973).

The appellate review of sentences required in capital cases may be extended to noncapital cases. *See* Woodson v. North Carolina, 428 U.S. 280, 303 (1976); Proffitt v. Florida, 428 U.S. 242, 253, 258-59 (1976); Gregg v. Georgia, 428 U.S. 153, 204-06 (1976); note 67 *supra*.

Eighth amendment analysis, and the evolving standards of decency rule, assume that society's conception of fairness and decency evolves through time. *See* Trop v. Dulles, 356 U.S. 86, 101 (1958); Williams v. New York, 337 U.S. 241, 247 (1949). The due process mandated by current eighth amendment analysis of capital punishment may be extended as society changes.

93. It seems no other class of defendants could demonstrate as high an interest as that of capital defendants.

94. Gardner v. Florida, 430 U.S. 349, 360 (1977).

is not meritorious in capital cases because death eliminates any possibility of rehabilitation, in other cases the state's interest in rehabilitation might justify nondisclosure.[95] Thus, by emphasizing the unique interests of a defendant facing a death sentence, the court insulated its holding from extension to noncapital cases.[96] Although an eighth amendment analysis would have explicitly confined the holding to capital cases, the due process decision in *Gardner* does so implicitly.

To comply with *Gardner*, state capital punishment statutes must require PSI report disclosure except in narrowly defined circumstances.[97] When nondisclosure is justified, the full PSI report must nevertheless appear in the trial record.[98] Federal practice under Rule 32 of the Federal Rules of Criminal Procedure remains unchanged because *Gardner* is inapplicable to federal capital cases.[99] If *Gardner* is extended to noncapital cases, however, the exceptions to disclosure in Rule 32 will have to be amended to conform with disclosure exceptions permitted by the Court.[100]

The Court's holding in *Gardner* is inadequate in two respects. First, although it requires disclosure of presentence reports, it does not require the use of PSI reports in all capital cases. Employing an eighth amendment analysis, the Court could have held that PSI reports were indispensable to ensure the procedural fairness required in capital cases.[101] Sec-

95. *See* note 82 *supra*.

96. The extension of due process in this case will not affect the Burger Court's contraction of due process rights because the high interest of the capital defendant is distinguishable from that of other defendants. The trend in the Burger Court may be traced through cases. *See* Brewer v. Williams, 430 U.S. 387 (1977) (Burger, C.J., dissenting); Stone v. Powell, 428 U.S. 465 (1976); United States v. Agurs, 427 U.S. 97 (1976); Schneckloth v. Bustamonte, 412 U.S. 218 (1973); United States v. Russell, 411 U.S. 423 (1973). *See generally* Stephens, *The Burger Court: New Dimensions In Criminal Justice*, 60 GEO. L.J. 249 (1971); 1976 WASH. U.L.Q. 480, 481-82.

The concern that sentencing hearings might evolve into full evidentiary hearings seems unwarranted because of the structure already present in capital sentencing and the ease with which *Gardner* can be distinguished from noncapital cases.

97. *See* notes 82 *supra* & 99 *infra*. *See also* Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, *supra* note 66, at 1691.

98. *See* note 71 *supra* and accompanying text.

99. The sole federal death penalty statute, which pertains to aircraft piracy where another person is killed, has sentencing provisions requiring full disclosure. 49 U.S.C. §§ 1472(i)(1)(B), 1473(c)(2)-(7) (Supp. V 1975). This statute provides for nondisclosure in cases involving national security and the immediate safety of a confidential source. These exceptions might justify nondisclosure in other capital cases.

100. 430 U.S. at 358-61.

101. *See* notes 64-66 *supra* and accompanying text.

ondly, it is anomalous to insure the accuracy of sentencing records only in capital cases. In lieu of alternative means to achieve uniform accuracy of sentencing records, PSI reports should be disclosed whenever they are used. Although the Supreme Court has left open the possibility of mandatory PSI report disclosure in all cases, *Gardner* carefully limits the requirement to capital cases.