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UNITED STATES COURT OF INTERNATIONAL TRADE
ONE FEDERAL PLAZA
NEW YORK, NY 10278-0001

CHAMBERS OF
GREGORY W CARMAN
CHIEF JUDGE

03-CR-E

October 10, 2003

Honorable Anthony J. Scirica
Chief Judge
United States Court of Appeals for the Third Circuit
22614 James A. Byrne United States Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106

Dear Chief Judge Scirica: (old)

Enclosed please find a draft of an article entitled *Fairness at the Time of Sentencing: The Accuracy of the Presentence Report* that I co-authored with my law clerk Tamar Harutunian. The article highlights problems caused when the United States Bureau of Prisons uses contested, unadjudicated information in presentence reports that the Bureau of Prisons employs in making post-sentencing decisions affecting prisoners. The article will be published in the January 2004 issue of the *St. John's Law Review.*

As you know, under Rule 32 of the Federal Rules of Criminal Procedure, if the sentencing judge determines he or she will not utilize certain information in the presentence report in determining the sentence to be imposed because the information is not relevant for sentencing purposes, the information nevertheless remains in the presentence report. The information, whether accurate or inaccurate, is used by the Bureau of Prisons in making decisions pertaining to the prisoner's conditions of confinement.

The article suggests that where a defendant challenges the accuracy of information in the presentence report even though the information is not used in sentencing, the accuracy or inaccuracy of such information should be determined by the sentencing judge at the sentencing hearing where the information will affect the defendant's post-sentence treatment. The article urges that Rule 32 be amended to require the sentencing judge to determine the accuracy of contested information by a preponderance of the evidence and strike from the presentence report that information that the judge finds is inaccurate and will affect post-sentencing decisions.

I would appreciate any comments you have on this topic.

Cordially yours,

Gregory W. Carman
Chief Judge

Enclosure

FAIRNESS AT THE TIME OF SENTENCING: THE ACCURACY OF THE PRESENTENCE REPORT

Gregory W. Carman and Tamar Harutunian***

The presentence investigation report or presentence report ("PSR") is considered to be the most important document in the sentencing and correctional processes involving criminal defendants.[1] Its primary purpose is to assist the court in determining the appropriate sentence for the defendant after a conviction or a guilty plea.[2] The PSR is particularly important when there is a guilty plea because there has been no trial; thus, the PSR serves as the main source of information about the defendant.[3] Although primarily used for sentencing, the United States Bureau of Prisons ("BOP") also uses the PSR after sentencing to classify the inmate for security and program purposes, designate the inmate to a facility, and make programming and release

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* Chief Judge, United States Court of International Trade. Chief Judge Carman has sat by designation in various district courts and federal circuit courts and has served as a trial judge and as an appellate judge on numerous criminal matters. Chief Judge Carman has served as a standing member of the Judicial Conference of the United States for eight years.

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[1] *See United States v. Cesaitis*, 506 F. Supp. 518, 520-21 (E.D. Mich. 1981); Timothy Bakken, *The Continued Failure of Modern Law to Create Fairness and Efficiency: The Presentence Investigation Report and its Effect on Justice*, 40 N.Y.L. SCH. L. REV. 363, 364 (1996); Keith A. Findley & Meredith J. Ross, Comment, *Access, Accuracy and Fairness: The Federal Presentence Investigation Report under* Julian *and the Sentencing Guidelines*, 1989 WIS. L. REV. 837, 837-38 (1989); THE HISTORY OF THE PRESENTENCE REPORT (Just. Pol'y Inst. ed., 2002), *available at* http://www.cjcj.org/pubs/psi/psireport.html (last visited July 31, 2003) [herinafter *History of the PSR*].

[2] *See Cesaitis*, 506 F. Supp. at 520; Note, *A Proposal to Ensure Accuracy in Presentence Investigation Reports*, 91 YALE L.J. 1225, 1226 (1982) [hereinafter *Proposal*]; U.S. Probation Office for the W. Dist. of N.C., *The Presentence Investigation Report: A Guide to the Presentence Process for Defense Attorneys*, *at* http://www.ncwd.net/probation/psida.html (last visited May 27, 2003) [hereinafter *Guide*].

[3] *See* Bakken, *supra* note 1, at 384; *Proposal*, *supra* note 2, at 1228.

planning decisions.[4] Before the abolition of parole, the United States Parole Commission also relied on the PSR in making parole determinations.[5]

If a defendant has an objection to information contained in the PSR, the defendant may raise that objection at the time of sentencing.[6] If the judge determines that the information does not affect sentencing or will not be considered in sentencing, then the information remains in the PSR and the PSR is forwarded to the BOP.[7] The BOP is then free to use all information contained in the PSR, including the challenged information, to make critical decisions involving the inmate's confinement. The use of disputed information to make post-sentencing decisions may be considered an additional penalty imposed upon the inmate without due process of law. We suggest that the Federal Rules of Criminal Procedure should be amended to require the sentencing court to resolve disputes over information in the PSR that may affect the inmate's confinement. Use of accurate information in making post-sentencing decisions would preserve the integrity of the criminal justice system and provide a sense of fairness for the inmate.

I. Background on presentence investigation reports

Under 18 U.S.C. § 3552(a), and in accordance with Federal Rule of Criminal Procedure 32(c), a United States probation officer is required to prepare the defendant's PSR and present it to the court before sentencing.[8] Rule 32 requires that the PSR include the defendant's history and characteristics; verified information as to financial, social, psychological, and medical impact on victims of the defendant's offense; the probation officer's calculations of the defendant's offense level and criminal history category under the United States Sentencing Guidelines; the

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[4] *See* Bakken, *supra* note 1, at 364, 370; Gary M. Maveal, *Federal Presentence Reports: Multi-Tasking at Sentencing*, 26 SETON HALL L. REV. 544, 553 (1996); *Proposal*, *supra* note 2, at 1229; *Guide*, *supra* note 2; Valerie Stewart, *Frequently Asked Questions Regarding Clients Facing Designation to the Federal Bureau of Prisons*, 7 NEV. LAW. 15, 15-16 (1999).

[5] *See* Findley& Ross, *supra* note 1, at 841, 845; Maveal, *supra* note 4, at 553.

[6] FED. R. CRIM. P. 32(i)(1)(C)-(D).

[7] *Id.* 32(i)(3)(B)-(C).

[8] 18 U.S.C. § 3552(a) (2000); *see also* FED. R. CRIM. P. 32(c).

resulting sentencing range and kinds of sentences available; and any other information required by the court.[9] The information may be obtained through interviews with the defendant, his or her attorneys, investigating officers, victims, and the defendant's family members.[10] The probation officer may also obtain employment records, substance abuse treatment records, psychiatric and medical records, and information regarding prior arrests and/or convictions.[11] The Federal Rules of Evidence, other than with respect to privileges, do not apply to sentencing proceedings, and hearsay may be included in PSRs.[12] The following items are excluded from the report: "(A) any diagnoses that, if disclosed, might seriously disrupt a rehabilitation program;" (B) information from confidential sources; and "(C) any other information that, if disclosed, might result in physical or other harm to the defendant or others."[13]

Once completed, the PSR must be disclosed to the defendant, the defendant's attorneys, and the prosecutor at least 35 days before the sentencing hearing.[14] Any "objections to material information, sentencing guideline ranges, and policy statements" in the report by any parties must be communicated to the probation officer in writing within 14 days after receipt of the PSR.[15] In considering the objections, the probation officer may meet with the parties and conduct further investigation.[16] The officer may then decide to either revise the report or to retain it as originally

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[9] FED. R. CRIM. P. 32(d).

[10] *See Guide, supra* note 2.

[11] *Id.* Rule 32 provides that upon request, the defendant's attorney is entitled to "notice and a reasonable opportunity to attend the interview" of the defendant by the probation officer during preparation of the PSR. FED. R. CRIM. P. 32(c)(2).

[12] FED. R. EVID. 1101(d)(3); *see also Dorman v. Higgins*, 821 F.2d 133, 137 (2d Cir. 1987); *Proposal, supra* note 2, at 1229-30.

[13] FED. R. CRIM. P. 32(d)(3).

[14] *Id.* 32(e)(2).

[15] *Id.* 32(f)(1).

[16] *Id.* 32(f)(3).

drafted.[17] The officer must submit the final report to the court no later than 7 days before the sentencing hearing, along with "an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them."[18] The revised report and addendum are also sent to the defendant, the defendant's attorneys, and the prosecutor.[19]

The defendant may raise objections to the PSR for consideration by the court at the sentencing hearing.[20] The court has discretion to allow the parties to introduce testimony or other evidence.[21] Rule 32(i)(3)(B) and (C) provide that the court:

> (B) must - for any disputed portion of the [PSR] or other controverted matter - rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and
> (C) must append a copy of the court's determinations under this rule to any copy of the [PSR] made available to the [BOP].[22]

Thus, if the disputed information may affect sentencing, the sentencing judge must rule on the dispute.[23] There is no requirement to resolve the dispute if the sentencing judge does not rely upon the information or it did not effect the determination of the sentence.[24] In that case, information that has been disputed, but does not affect sentencing, remains in the PSR.

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[17] *Id.*

[18] *Id.* 32(g); *Guide*, *supra* note 2.

[19] *See supra* note 18.

[20] FED. R. CRIM. P. 32(i)(1)(C)-(D).

[21] *Id.* 32(i)(2).

[22] *Id.* 32(i)(3)(B)-(C).

[23] *See Warren v. Miller*, 78 F. Supp. 2d 120, 131 (E.D.N.Y. 2000) (citing *Townsend v. Burke*, 334 U.S. 736 , 741 (1948); *Torres v. United States*, 140 F.3d 392, 404 (1998)).

[24] *See* Bakken, *supra* note 1, at 394 (noting that "[e]ven where the judge does not rely on the controverted information, the defendant, in almost all cases, is not entitled to have the information excised from the [PSR]. The defendant will have to challenge any inaccuracies through administrative procedures." (footnotes omitted)).

Following sentencing, the inmate is designated to a particular institution by the BOP in accordance with Bureau of Prisons Program Statement 5100.07, also referred to as the Security Designation and Custody Classification Manual.[25] Every judicial jurisdiction has a community corrections manager ("CCM"), who determines the inmate's designation upon receiving the request for designation from the United States marshal.[26] If the PSR has not been provided to the CCM already, the CCM must request it from the probation officer.[27] The document is used throughout the remainder of the designation process. Some commentators note that the PSR "is known as the 'bible' by prisoners and BOP staff alike."[28] Objections to the information that the BOP relies upon in its designation and classification can be raised during the review of the information by the BOP.[29]

II. Effect of inaccuracies in the presentence report in the post-sentencing phase

Some of the issues that have been raised regarding presentence reports are the means of addressing inaccuracies in the report, the use of hearsay, and the use of evidence excluded from trial proceedings.[30] Since the 1980s, various commentators have raised concerns that PSRs may contain inaccuracies that the sentencing court did not expunge from the reports, but which the BOP relies upon in its correctional decisions.[31] Even if objections are raised before the sentencing court pursuant to Rule 32 and the court decides not to amend the report because the

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[25] *See* U.S. BUREAU OF PRISONS, PS 5100.07 SECURITY DESIGNATION AND CUSTODY CLASSIFICATION MANUAL CH. 1, 1 (Jan. 2002), *available at* http://www.bop.gov/progstat/5100_007.pdf [hereinafter BOP MANUAL]; *see also* Alan Ellis et al., *Federal Prison Designation and Placement: An Update*, 15 CRIM. JUST. 46, 46 (2000).

[26] *See supra* note 25.

[27] BOP MANUAL, *supra* note 25, Ch. 3, at 1.

[28] Ellis, *supra* note 25, at 50.

[29] Stewart, *supra* note 4, at 16.

[30] *See History of the PSR*, *supra* note 1.

[31] *See, e.g.*, Bakken, *supra* note 1, at 386-87; Ellis, *supra* note 25, at 50; Findley & Ross, *supra* note 1, at 871-74; Maveal, *supra* note 4, at 553; *Proposal*, *supra* note 2, at 1229-30.

information will not affect the sentence, the BOP is not bound to disregard that information and may rely on it to make significant decisions involving the defendant, such as designation, visitation, and transfers.[32]

An example of how the PSR can affect the prisoner is seen in the BOP's assessment of public safety factors in designating an appropriate facility for the defendant.[33] One such factor is labeled "sex offender," and applies to an inmate "whose behavior in the current term of confinement or prior history" includes nonconsensual, aggressive, abusive, or deviant sexual contact.[34] The BOP's classification manual indicates:

> A conviction is not required for application of this [public safety factor] if the [PSR], or other official documentation, clearly indicates [the offensive conduct] occurred in the current term of confinement or prior criminal history. . . . [I]n the case where an inmate was charged with an offense that included one of the following elements, but as a result of a plea bargain was not convicted, application of this [public safety factor] should be entered.[35]

Thus, even if the prisoner had objected to an alleged instance of sexual offense contained in the PSR before the probation officer or sentencing judge, the BOP could still use this disputed information to assign the prisoner to a higher security prison if the statement remains in the

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[32] Bakken, *supra* note 1, at 364; Findley & Ross, *supra* note 1, at 872-73. Before parole was abolished, many courts had held that the Parole Commission also could rely on information in the PSR that the sentencing judge had decided not to consider. *See United States v. Rosenberg*, 108 F. Supp. 2d 191, 210-11 (S.D.N.Y. 2000) (noting that the Second, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits had acknowledged that the Parole Commission could consider information that the sentencing judge did not consider in sentencing).

[33] If any of the "public safety factors" listed in the BOP's classification manual are present, then increased measures of security may be required. *See* BOP MANUAL, *supra* note 25, Ch. 7, at 1.

[34] *Id.*, Ch. 7, at 2.

[35] *Id.* The illustration that the BOP MANUAL includes to demonstrate when the "sex offender" factor should be used is that of an inmate whose PSR indicates that he was involved in a sexual assault but who pled guilty to simple assault. *Id.*

PSR.[36] Once the designation is made, the information in the PSR is also used to determine "prison employment, prison transfers, visitation and mail privileges, sentencing credit, work study, and physical and mental health treatment."[37]

An inmate faces great difficulty in trying to have the PSR amended after sentencing.[38] The sentencing court does not have jurisdiction to correct the PSR after sentencing, thus creating a jurisdictional obstacle for the inmate.[39] As Findley and Ross point out, "[t]he defendant may try to have the [PSR] corrected on direct appeal. The appellate courts will consider whether the district court complied with the requirements of [Rule 32] and will remand if the district court failed to make the proper written findings or disclaimer of disputed information in the [PSR]. Most courts, however, have allowed no [PSR] correction on appeal, holding that the only recourse is an administrative appeal."[40]

As noted, objections to the BOP's reliance on disputed information in the PSR can be raised during the BOP's initial classification of the inmate.[41] A means of correcting the PSR after sentencing is through the BOP's Administrative Remedy Program.[42] The purpose of the

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[36] *See* Ellis, *supra* note 25, at 50.

[37] Bakken, *supra* note 1, at 387 (citing Findley& Ross, *supra* note 1, at 841.

[38] *See* Bakken, *supra* note 1, at 395; Findley & Ross, *supra* note 1, at 875.

[39] Bakken, *supra* note 1, at 395-96; Findley & Ross, *supra* note 1, at 875.

[40] Findley & Ross, *supra* note 1, at 875 (footnotes omitted).

[41] *See supra* note 29 and accompanying text.

[42] *See* 28 C.F.R. §§ 542.10 - 542.19 (2003). See U.S. BUREAU OF PRISONS, PS 1330.13 ADMINISTRATIVE REMEDY PROGRAM (Aug. 2002), *at* http://www.bop.gov/progstat/1330_013.pdf, for BOP's rules implementing 28 C.F.R. §§ 542.10 - 542.19. In their article addressing access to and the accuracy of PSRs, Findley and Ross note that the Parole Commission did not believe that it had the authority to correct PSRs. Findley & Ross, *supra* note 1, at 875-86. This policy created a significant problem for inmates: courts held that the only post-sentencing remedy to correct the PSR would be through administrative appeal, but the administrative agency asserted that it did not have authority to make corrections. *Id.* It does not appear that the BOP has taken a similar stance. The BOP allows inmates to make administrative appeals to address concerns regarding the accuracy of their PSRs. *See* Stewart, *supra* note 4, at

program is "to allow an inmate to seek formal review of an issue relating to any aspect of his/her own confinement."[43] Generally, the inmate first must inform the BOP staff of his or her complaint so that an attempt may be made to resolve it informally.[44] "The deadline for completion of informal resolution and submission of a formal written Administrative Remedy Request . . . is 20 calendar days following the date on which the basis for the Request occurred."[45] The inmate is to fill out a form raising the disputed issues and requesting review and submit it to the institution staff member designated to receive such requests.[46] If the inmate's request is accepted, the warden or CCM must respond within 20 calendar days of filing.[47] If the inmate is not satisfied with the response, he or she may appeal to the appropriate Regional Director of the BOP within 20 calendar days of when the warden's response was signed.[48] The Regional Director has 30 calendar days within which to respond.[49] If the Regional Director's response is also unsatisfactory, the inmate may appeal to the General Counsel of the BOP within 30 days of the Regional Director's signing of his or her response.[50] The General Counsel must respond within 40 calendar days.[51] This is the final administrative appeal, and courts have held that the inmate must exhaust all administrative remedies before seeking judicial resolution of

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[43] 28 C.F.R. § 542.10.

[44] *See id.* § 542.13(a).

[45] *Id.* § 542.14(a).

[46] *Id.* § 542.14(c).

[47] *Id.* § 542.18.

[48] *Id.* § 542.15(a).

[49] *Id.* § 542.18.

[50] *Id.* § 542.15(a).

[51] *Id.* § 542.18.

issues.[52]

While the importance of administrative remedies must be acknowledged, there are various reasons why administrative appeals do not adequately protect inmates. If the inmate's challenge is not heard until the BOP accepts the inmate's Administrative Remedy Request and conducts an investigation, the delay may cause information crucial to the determination to be lost.[53] Additionally, witnesses may not be readily available at the time that the BOP conducts its investigation. For example, if the crime, trial, and sentencing took place in New York, and the inmate was then incarcerated in Kansas, it may not be feasible for the inmate to get the witnesses to travel to Kansas for an administrative hearing. Even if the witnesses were able to appear at the administrative hearing, the relevant information may not be fresh in their minds at that point. If the challenges to the PSR were considered during the sentencing hearing, the witnesses and the parole officer who drafted the PSR may be more readily available to testify and may have better recollection of relevant facts.[54] Additionally, when the inmate seeks administrative remedies, the inmate does not have a right to appointed counsel.[55] He or she is entitled to assistance from other inmates, institution staff, family, and attorneys in preparing the request form, but no one may submit an Administrative Remedy Request on an inmate's behalf, and there is no right to appointed counsel at the administrative hearing.[56] One commentator posits that the inmate "will stand alone in the abyss of a prison to confront and attempt to refute a document, prepared years earlier, that an untutored defendant may not be able to read, let alone comprehend. The lack of procedural safeguards inherent in Rule 32 will unfairly burden and punish a defendant far beyond

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[52] *Id.* § 542.15(a); *see, e.g., Maynard v. Havenstrite*, 727 F.2d 439, 441 (5th Cir. 1984).

[53] *See Proposal, supra* note 2, at 1248.

[54] *See id.* (noting that "at sentencing, the probation officer who wrote the [PSR] is readily available to testify while the information in the report is still fresh in his or her mind").

[55] Bakken, *supra* note 1, at 396; *see also* Findley & Ross, *supra* note 1, at 878 (noting that before the abolition of parole, inmates were often unrepresented during administrative hearings before the Parole Commission to correct presentence reports).

[56] *See* 28 C.F.R. § 542.16(a); Bakken, *supra* note 1, at 396; Findley & Ross, *supra* note 1, at 878.

the day of sentencing."[57]

III. A proposal allowing correction of presentence reports during sentencing hearings

Arguably, the BOP's use of the disputed information in the PSR is an additional penalty imposed on the inmate without due process of law. Critical decisions regarding the inmate's imprisonment are made based on information in the PSR that might be inaccurate and might have been provided by sources who have hidden biases and who the defendant has not confronted.[58] One recommendation is to require the sentencing court to inform and explain to the defendant the various uses of the PSR for correctional purposes.[59] This could be done before asking the defendant if there are any objections to the PSR's content.[60] Another suggestion is to require the sentencing court to make factual findings on controverted matters that are relevant to correctional decisions, followed by amendment of the PSR to reflect the findings.[61] At its April 2001 meeting, the Advisory Committee on the Federal Rules of Civil Procedure ("Advisory Committee") considered a proposal to amend Rule 32 to require the sentencing judge "to rule on any 'unresolved objection to a material matter' in the presentencing report, whether or not the

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[57] Bakken, *supra* note 1, at 397.

[58] Bakken, *supra* note 1, at 382-85, 389 ("Although defendants have a Rule 32 right and due process right to challenge allegedly inaccurate information contained in the [PSR], defendants have no constitutional right to procedural safeguards commonly guaranteed at trial, such as the right of confrontation and cross-examination."); *Proposal*, *supra* note 2, at 1230.

[59] Findley & Ross, *supra* note 1, at 879.

[60] *Id.*

[61] *Id.* at 873, 879-80; *Proposal*, *supra* note 2, at 1243-48. Findley and Ross note that this change was suggested to the Advisory Committee on Rule 32 in 1983 and was supported by the Criminal Law Committee Association of the Bar of the City of New York, the California State Bar Federal Courts Committee, the Jerome N. Frank Legal Services Organization of the Yale Law School, the Criminal Justice Section of the American Bar Association, and the San Diego Criminal Defense Lawyers Club, among others. *See* Findley & Ross, *supra* note 1, at 874 n.178. As discussed earlier, sentencing courts must either make factual findings on disputed information affecting sentencing or disclaim reliance upon the disputed information in sentencing. FED. R. CRIM. P. 32(i)(3)(B).

court will consider it in imposing an appropriate sentence."[62] The Advisory Committee decided that the potential problems raised by inaccurate information in the PSR should not be addressed in Rule 32 itself and instead should be addressed in the Advisory Committee Note to Rule 32.[63] In the Advisory Committee Note, the Advisory Committee stated:

> To avoid unduly burdening the [sentencing] court, the [Advisory] Committee elected not to require resolution of objections that go only to service of sentence. However, because of the [PSR's] critical role in post-sentence administration, counsel may wish to point out to the court those matters that are typically considered by the [BOP] in designating the place of confinement. . . . If counsel objects to material in the [PSR] that could affect the defendant's service of sentence, the court may resolve the objection, but is not required to do so.[64]

While the Advisory Committee's indication that the sentencing court *may* resolve the objection to allegedly inaccurate information is a step in the right direction, it does not change the fact that important post-sentence decisions might be made based on false information. The process we suggest to resolve this problem can be summarized as follows: Once the defendant has received the PSR from the probation officer, he or she would, consistent with present practice, inform the probation officer of any objections to the report's content.[65] After the probation officer investigates the objection and decides whether to keep the contested information in the report, the PSR and all remaining objections would be forwarded to the sentencing court.[66] At the sentencing hearing, the any objections to the PSR's content, including

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[62] FED. R. CRIM. P. 32, Advisory Committee Notes for 2002 Amendments.

[63] Minutes of the Advisory Committee on Federal Rules of Criminal Procedure (Apr. 25-26, 2001), *available at* http://www.uscourts.gov/rules/Minutes/Min4-2001.pdf. In an 11 to 1 vote, the Advisory Committee decided that the suggested change to Rule 32 would be withdrawn. *Id.* The Advisory Committee considered a motion that the issue not be addressed in the Advisory Committee Note, but the motion failed by a vote of 5 to 6. *Id.*

[64] FED. R. CRIM. P. 32, Advisory Committee Notes for 2002 Amendments.

[65] FED. R. CRIM. P. 32(f); *see also Proposal*, *supra* note 2, at 1243.

[66] *See supra* note 65.

those objections dismissed by the probation officer, relevant to sentencing and/or correctional decisions will be addressed. After the defendant has raised his or her objections to the information in the PSR, the sentencing court would decide whether to hear evidence to resolve the dispute.[67] Only disputes as to information relevant to sentencing and/or conditions of imprisonment would have to be considered.[68] With regard to information in the PSR that the court disclaims reliance upon for sentencing purposes but which may affect correctional decisions, the judge would either hear evidence to determine its accuracy or excise the information from the PSR.[69] Therefore, as Findley and Ross proposed, findings of fact could be made by the sentencing judge as to information affecting both sentencing and post-sentencing decisions.[70] If the judge decides to consider evidence to resolve the dispute, the prosecution would have the burden of proving the accuracy of the disputed information by a preponderance of the evidence.[71] "First the burden of production should be on the defendant. Unless the defendant challenges [PSR] information at sentencing, its validity should be accepted. . . . Once a defendant raises a sufficient challenge, the burden of persuasion should shift to the

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[67] *See* Bakken, *supra* note 1, at 389-90 (noting that under the present Rule 32, the sentencing judge has broad discretion to allow evidence or hold a hearing regarding disputed PSR content").

[68] *See Proposal, supra* note 2, at 1248.

[69] *See* Findley, *supra* note 1, at 879-80.

[70] *See id.*; *see also Proposal, supra* note 2, at 1243 (suggesting that disputes over PSR accuracy be resolved at the sentencing hearing and that "[i]nformation the judge finds to be unsupported or irrelevant to the sentencing or parole decisions would be excised from the [PSR]").

[71] The preponderance of the evidence standard applies when the sentencing court relies upon information in the PSR in sentencing the defendant. *See United States v. Blanco*, 888 F.2d 907, 909 (1st Cir. 1989); *Dorman v. Higgins*, 821 F.2d 133, 138 (2nd Cir. 1987). Some commentators have suggested that the standard should be the higher "clear and convincing evidence" standard. *See, e.g.*, Findley & Ross, *supra* note 1, at 871; *Proposal, supra* note 2, at 1245; *see also United States v. Johnson*, 682 F. Supp. 1033, 1035 (W.D. Mo. 1988) (acknowledging the strong policy arguments in favor of a clear and convincing evidence standard but ultimately applying the preponderance of the evidence standard).

government."[72] If the information is not important to the sentencing decision and the judge does not hear evidence to determine its accuracy, the disputed information would be removed from the report before it is forwarded to the BOP.[73] Similarly, if the prosecution wishes to retain the material, its accuracy could be assessed at the sentencing hearing.[74]

The suggested approach would likely reduce the chance that the BOP will rely on potentially inaccurate information in making determinations regarding the defendant's confinement in prison. As discussed earlier, the witnesses and relevant information would be more readily available at the sentencing hearing than at an administrative hearing after sentencing.[75] It is probable that many of the witnesses that would testify at the sentencing hearing as to matters in the PSR affecting sentencing will also be the same witnesses that would testify as to other matters in the PSR. It would be more efficient to have the witnesses testify while present at the sentencing hearing than to try to reconvene them for an administrative hearing. Additionally, counsel is more likely to be available to the defendant at the sentencing hearing than at an administrative hearing. Information relevant to the disputed portion of the PSR would be before the sentencing judge, who is "an expert in resolving adjudicative disputes," and all unresolved PSR challenges would efficiently be determined in a single hearing.[76]

Criticism of the suggested approach may be that it places too great a burden on sentencing courts and significantly prolongs the sentencing hearing. While the sentencing hearing may take longer to complete if the judge decides to consider evidence regarding the disputed information, the burden may not greatly increase. Consideration of the disputed information may involve examination of many of the same witnesses that would be testifying as to other information in the PSR. Upon making a suggestion similar to the one proposed in this

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[72] *Proposal*, *supra* note 2, at 1244-45 (footnotes omitted).

[73] Findley & Ross, *supra* note 1, at 874, 879-80; *Proposal*, *supra* note 2, at 1243.

[74] *See Proposal*, *supra* note 2, at 1243-45.

[75] *See supra* notes 53-54 and accompanying text.

[76] *Proposal*, *supra* note 2, at 1247.

article, Findley and Ross explain:

> Although such a procedure may prolong the sentencing hearing, it will save litigation later. Furthermore, the defendant is unlikely to make too many frivolous challenges, for fear of alienating the sentencing judge by prolonging the hearing. Any disputed information that the court finds immaterial to sentencing and corrections should be excised from the report. It is important that the [PSR] be altered to incorporate the court's deletions and factual findings; otherwise, inaccurate information remaining in the [PSR] may affect a reader despite an appended correction or disclaimer. . . . In this age of word processors, it is reasonable to require the probation officer to revise the [PSR] to incorporate the sentencing court's deletions and findings of fact.[77]

Giving the sentencing judge discretion to consider disputes involving PSR information affecting service of a sentence may bolster confidence in the criminal justice system and cause inmates to feel that they are at least receiving fair treatment.[78] The sense of fairness that an inmate may develop could assist in his or her rehabilitation and potential return to society.

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[77] Findley & Ross, *supra* note 1, at 873-74 (footnotes omitted). Another commentator making such a proposal has stated:

> Because limited sentencing hearings are currently provided pursuant to Rule 32, the benefits of this proposal are likely to outweigh its expected costs. Costs will largely be attributable to delay from longer sentencing hearings, additional investigation, and loss of unverifiable though possibly accurate information from the [PSR]. Admittedly, the [PSR] challenges under this proposal will inevitably lengthen some sentencing proceedings. To the extent that sentencing is the only opportunity for most defendants to develop the facts upon which their terms of incarceration will be based, however, delays due to more extensive investigations and hearings are justified. In addition, the incidence of frivolous challenges should be minimal in light of defendants' tactical desire to avoid antagonizing the sentencing judge.

Proposal, *supra* note 2, at 1248 (footnotes omitted).

[78] *See Proposal*, *supra* note 2, at 1247.

IV. Conclusion

In order to maintain faith in the criminal system, it is important to ensure that decisions affecting sentences and confinement conditions are based upon accurate and relevant information. Correction of the PSR to prevent reliance upon potentially inaccurate information is one way to preserve the integrity of the system. It also allows for the defendant to consider his or her sentence and decisions affecting confinement to be fair, which in turn may assist in the defendant's rehabilitation. The proposed modification to Rule 32 helps in the achievement of fair and just results in our criminal system.