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THE PRESENTENCE INTERVIEW AND THE RIGHT TO COUNSEL: A CRITICAL STAGE UNDER THE FEDERAL SENTENCING STRUCTURE

Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he ha[s] a perfect one. He requires the guiding hand of counsel at *every step in the proceedings* against him.¹

[T]here is no question that [the presentence investigation report] is an important step in the proceedings in terms of the consequences to the defendant. A defendant's conduct at the presentence interview can have a significant effect on the sentence recommendation in the presentence report, and district courts rely heavily on the contents of those reports. . . . [A] single finding by the probation officer can significantly affect the ultimate sentencing range.²

Juan Carranza,³ a Mexican immigrant, was arrested and charged with theft. Two years earlier, Carranza had been convicted of driving under the influence and had received a fine, which he paid. With the assistance of counsel, Carranza arranged to plead guilty to the theft charge. Prior to sentencing, the defendant was required to interview with the probation officer who would prepare his presentence report. The judge would rely on the presentence report in determining Juan's sentence.⁴ Because the probation officer refused to allow defense counsel to attend the interview, Carranza faced the probation officer on his own. The officer asked him whether he had a criminal record. Unaware that the fine he paid for drunk driving constituted a prior conviction, Carranza an-

1. *Powell v. Alabama*, 287 U.S. 45, 69 (1932) (emphasis added).

2. *United States v. Herrera-Figueroa*, 918 F.2d 1430, 1434 (9th Cir. 1990).

3. The name is fictional but the facts are based on an actual case in the Southern District of California. Telephone Interview with Robert Swain, Attorney with the Federal Defender's Office, San Diego, Cal. (Jan. 30, 1992) [hereinafter Swain Interview].

4. See *infra* notes 104-08, 112-16 and accompanying text (discussing the role of the presentence report in the judge's sentencing calculation).

swered, "No." When the probation officer later discovered that Carranza had been convicted of driving under the influence, he promptly increased the federal sentencing offense level by two for obstruction of justice. As a consequence of his ignorance of the implications of his previous contact with the police, Juan Carranza received an additional six months in jail. Had his attorney been present, Carranza likely would have avoided the sentence increase.

This story is one among thousands. Every day defendants awaiting sentencing in the federal courts must interview with probation officers. The probation officers' reports prepared pursuant to these interviews often result in variations of months or years in the defendants' terms of imprisonment. In the past, when a stage of the criminal proceedings presented the defendant with as much potential for harm as the presentence interview now does, the Supreme Court held that the stage was "critical," giving the defendant a constitutional right to have an attorney present.⁵

The Sixth Amendment to the United States Constitution provides that an accused is entitled to the assistance of counsel for his defense.⁶ The Supreme Court has held that this right extends to proceedings outside the actual trial.⁷ In fact, it attaches to every stage of the criminal proceeding at which the rights of the accused may be damaged by lack of the advice and expertise of counsel.⁸ In *Mempa v. Rhay*,⁹ the Court held that sentencing was a critical stage in a criminal proceeding.¹⁰

5. See, e.g., *United States v. Wade*, 388 U.S. 218, 224-25 (1967) (holding that a post-indictment lineup was a critical stage of the prosecution at which the defendant was entitled to the aid of counsel).

6. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

7. See, e.g., *Wade*, 388 U.S. at 227-39 (extending the right to assistance of counsel to pretrial lineups).

8. See *Powell v. Alabama*, 287 U.S. 45, 69 (1932); see also *Wade*, 388 U.S. at 225-26 (listing Supreme Court cases upholding the right to counsel because the absence of counsel would unfairly disadvantage the accused's defense).

9. 389 U.S. 128 (1967).

10. *Id.* at 134; see also *Townsend v. Burke*, 334 U.S. 736, 741 (1948) (holding that the presence of counsel would have prevented the imposition of a sentence based on misinformation).

The federal sentencing guidelines¹¹ (Guidelines) have deprived judges of much of the broad discretion they previously enjoyed and no longer permit them to consider a wide array of circumstances in sentencing defendants.¹² Instead, the judge must sentence the defendant based on certain facts deemed important by the Sentencing Commission and set forth in the Guidelines.¹³ Therefore, the presentence investigation report that includes the vital information has become increasingly important.¹⁴ Judges, in fact, often rely unquestioningly on these reports and the sentencing recommendations included therein.¹⁵ An important source for the report is the probation officer's interview with the defendant. At the interview,

11. U.S. SENTENCING COMM'N, *FEDERAL SENTENCING GUIDELINES MANUAL* (1992) [hereinafter U.S.S.G.].

12. Julia L. Black, Note, *The Constitutionality of Federal Sentences Imposed Under the Sentencing Reform Act of 1984 After Mistretta v. United States*, 75 IOWA L. REV. 767, 772-73 (1990) (discussing the goals of the Guidelines and the resulting decrease in judges' discretion); Linda P. Campbell, *Court Requires Judges to Give Prior Notice of Harsh Sentences*, CHI. TRIB., June 14, 1991, at C3 (indicating that the Guidelines have been criticized by "lawyers and judges who contend that they leave courts with insufficient discretion to fit sentences to individual crimes").

At a recent conference of federal judges at the College of William and Mary, Marshall-Wythe School of Law, Professor Paul Marcus asked an assembly of approximately 90 judges if they favored the Guidelines; only one judge, a member of the Sentencing Commission, answered in the affirmative. Paul Marcus, Panel Discussion at the Conference for the Federal Judiciary in Honor of the Bicentennial of the Bill of Rights (Oct. 22, 1991). The judges dislike the Guidelines because the Guidelines restrict the discretion previously available to judges at sentencing. *Id.* Judge Abner Mikva, Chief Judge of the United States Court of Appeals for the District of Columbia Circuit, expressed his dissatisfaction with the Guidelines, stating that the Guidelines are inflexible and attempt to quantify unquantifiable factors: "The notion that you can quantify human behavior is ridiculous." Judge Abner J. Mikva, Remarks at the Conference for the Federal Judiciary in Honor of the Bill of Rights (Oct. 22, 1991).

13. See Project, *Twentieth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1989-90*, 79 GEO. L.J. 591, 1090-91 (1991) (listing specific factors to be considered, such as the defendant's role in the crime, his acceptance of responsibility, and whether he attempted to obstruct justice).

14. Keith A. Findley & Meredith Ross, Comment, *Access, Accuracy and Fairness: The Federal Presentence Investigation Report Under Julian and the Sentencing Guidelines*, 1989 WIS. L. REV. 837, 845 (1989).

15. *United States v. O'Meara*, 895 F.2d 1216, 1223 (8th Cir.) (Bright, J., dissenting), cert. denied, 111 S. Ct. 352 (1990); Telephone Interview with L. Felipe Restrepo, Attorney with the Public Defenders Association of Philadelphia, Federal Court Division (Dec. 11, 1991) [hereinafter Restrepo Interview].

the probation officer may elicit facts that are capable of substantially increasing or decreasing the defendant's sentence.¹⁶

Not all probation departments in the federal system exclude attorneys from these interviews.¹⁷ In fact, many defender's offices are on friendly terms with probation departments and have worked out terms whereby attorneys are permitted to attend.¹⁸ Such arrangements, however, are informal. Many offices do not permit attorneys to attend¹⁹ and those that do may not be willing to rearrange schedules and interview times to accommodate attorneys.²⁰ As a result, many defendants face the interview without the assistance of counsel.

Several circuits, ruling both before²¹ and after²² the enactment of the Guidelines,²³ have held that the presentence interview is not a "critical" stage. These decisions, however, do not adequately consider the nature of the presentence interview under the Guidelines.

16. For example, the defendant may admit to selling additional quantities of drugs, leading to an increased sentence under U.S.S.G. § 2D1.1(a)(3), or may receive a decreased sentence under § 3E1.1 by accepting responsibility for her conduct.

17. See *United States v. Saenz*, 915 F.2d 1046, 1049 (6th Cir. 1990) ("[I]t is the practice of the United States Probation Office for the Northern District of Ohio to allow counsel to attend the presentence interview."). No rule prohibits counsel from attending the presentence interview. *United States v. Rogers*, 921 F.2d 975, 980 (10th Cir.), *cert. denied*, 111 S. Ct. 113 (1990).

18. The probation office in the Eastern District of Pennsylvania is very accommodating in this regard. *Restrepo Interview*, *supra* note 15.

19. See *United States v. Herrera-Figueroa*, 918 F.2d 1430, 1432 n.2 (9th Cir. 1990) ("There does not appear to be a uniform practice in the Ninth Circuit with respect to whether defendants may be accompanied by counsel at the presentence interview. . . . [I]n the Southern District of California some probation officers permit defense attorneys to accompany their clients while others do not.").

20. In the Southern District of California, a hostile relationship exists between defense counsel and the probation office. *Swain Interview*, *supra* note 3. One attorney in that district stated that even after the decision in *Herrera-Figueroa*, 918 F.2d at 1433, which mandated that probation officers honor a federal defendant's request that his attorney accompany him at the presentence interview, the relationship between defense attorneys and the district's probation officers remains antagonistic. *Swain Interview*, *supra* note 3. Defense attorneys still must often fight to attend presentence interviews. *Id.*

21. See *Brown v. Butler*, 811 F.2d 938, 941 (5th Cir. 1987); *Baumann v. United States*, 692 F.2d 565, 578 (9th Cir. 1982).

22. See *United States v. Tisdale*, 952 F.2d 934, 939 (6th Cir. 1992); *United States v. Dingle*, No. 90-5083, 1991 U.S. App. LEXIS 26052, at *9-10 (4th Cir. Oct. 28, 1991); *United States v. Jackson*, 886 F.2d 838, 844-45 (7th Cir. 1989).

23. Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. 2, ch. 2, 98 Stat. 1837, 1987 (codified as amended at 18 U.S.C. §§ 3551-3673 (1988) and 28 U.S.C. §§ 991-998 (1988)).

The present federal sentencing structure creates a strong correlation between the presentence interview and the defendant's ultimate sentence. In light of the powerful influence of the presentence interview, that stage of a criminal proceeding must be considered a "critical" one at which counsel is required.²⁴ The Ninth Circuit has exercised its supervisory power to order that attorneys be permitted to attend presentence interviews.²⁵ Although it determined that the presentence interview is not a critical stage,²⁶ the Sixth Circuit has required probation officers to permit defense counsel to attend interviews.²⁷ These decisions represent an improvement but still leave unprotected a great number of defendants in the federal system. As long as counsel is not *required*

24. One defense attorney noted that, because the Guidelines are so complicated, the presentence interview has become a trap for the unwary and uncounseled client. Swain Interview, *supra* note 3.

In addition to Sixth Amendment claims that the presentence interview is a critical stage, several defendants have launched Fifth Amendment attacks on the interview process. See *United States v. Cortes*, 922 F.2d 123, 126-27 (2d Cir. 1990); *United States v. Rogers*, 921 F.2d 975, 977-78 (10th Cir.), *cert. denied*, 111 S. Ct. 113 (1990); *United States v. Woods*, 907 F.2d 1540, 1543 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 792 (1991); *Brown v. Butler*, 811 F.2d 938, 940-41 (5th Cir. 1987). Under this theory, defendants have argued that under *Miranda v. Arizona*, 384 U.S. 436 (1966), they have a constitutional right to be advised before initiation of the interview of their rights against self-incrimination and to an attorney. Courts have almost uniformly rejected this argument on the grounds that a "routine post-conviction presentence interview by a probation officer does not constitute the type of inherently coercive situation . . . for which the *Miranda* rule was designed." *Rogers*, 921 F.2d at 979; see also *Cortes*, 922 F.2d at 126-27 (dismissing the argument that *Miranda* warning is required); *Woods*, 907 F.2d at 1543 (dismissing the objection that the presentence interview violated the right against self-incrimination and the right to counsel).

25. *United States v. Herrera-Figueroa*, 918 F.2d 1430, 1437 (9th Cir. 1990).

26. *Tisdale*, 952 F.2d at 940 (adopting the reasoning of the Seventh Circuit in *Jackson*, 886 F.2d at 844-45, that the presentence interview is not a critical stage because the probation officer does not act on behalf of the prosecution). The Sixth Circuit had previously signalled that it would extend the defendant's Sixth Amendment right to the presentence interview as a critical stage. *United States v. Saenz*, 915 F.2d 1046, 1048 (6th Cir. 1990) ("[W]e would be inclined to reject the view of some courts that a defendant's right to counsel at his sentencing does not extend to the presentence interview because [it] is not a critical stage . . ."); cf. *United States v. Colon*, 905 F.2d 580, 588 (2d Cir. 1990) (listing factors that have increased the importance of the presentence interview and militate in favor of a determination that the interview is a critical stage).

27. *Tisdale*, 952 F.2d at 940. The court stated the rule as follows: "If a defendant requests the presence of counsel—or if an attorney indicates that his client is not to be interviewed without the attorney being there—the probation officer should honor the request." *Id.* This standard places the burden on defense counsel to be sure that they inform the probation office that defendants are not to be interviewed in the absence of their attorneys.

for defendants at the presentence interview,²⁸ courts cannot ensure that all defendants will receive fair and equal treatment at sentencing. Courts will be able to protect the rights of defendants at sentencing only by finding a Sixth Amendment right to an attorney at the interview.

This Note addresses whether the presentence interview is sufficiently significant to a defendant's rights to be considered a critical stage of the trial—critical enough to *require* that the defense attorney be present during the interview to advise his client and ensure fair proceedings. After tracing the Supreme Court's development of the constitutional right to counsel and discussing the refinement and expansion of that right, this Note analyzes pertinent Supreme Court cases to determine the elements necessary to qualify a stage in the criminal proceedings as "critical." Following a discussion of the nature of sentencing and the presentence interview prior to the Guidelines, and the impact of the Guidelines upon the importance of the presentence interview, this Note analyzes the presentence interview itself. Finally, it argues that the interview is a critical stage of the criminal prosecution at which counsel is required and addresses the constitutional effect of a defendant's failure to request his counsel's presence at the interview.

THE RIGHT TO COUNSEL

Development of the Right

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."²⁹ In *Powell v. Alabama*,³⁰ the Supreme Court held that defendants accused of rape had been deprived of a fair trial because

during perhaps the most critical period of the proceedings against [them], that is to say, from the time of their arraignment until the beginning of their trial, . . . the defendants did not have the aid of counsel in any real sense, although they were as

28. *Herrera-Figueroa*, 918 F.2d at 1437.

29. U.S. CONST. amend. VI.

30. 287 U.S. 45 (1932).

much entitled to [counsel] during that period as at the trial itself.³¹

In addition, the Court held that the state court failed to accord the defendants the right to counsel "in any substantial sense"³² because counsel did not have time to prepare the case before the trial took place.³³

Given the circumstances—poor, illiterate defendants and an openly hostile public—the Court held that the state had an obligation to provide counsel.³⁴ The Court went on to state that the right to counsel in capital cases is of such a fundamental character that it should be embraced within the Due Process Clause of the Fourteenth Amendment.³⁵ *Powell* was the genesis of the Supreme Court's development of the Sixth Amendment right to counsel.

Not until *Gideon v. Wainwright*,³⁶ however, did the Court hold that the Fourteenth Amendment incorporated the Sixth Amendment right to counsel and, accordingly, required the states to make appointed counsel available to indigent defendants in all criminal prosecutions.³⁷ Since *Gideon*, the Court has recognized that the Sixth Amendment applies in all criminal prosecutions that may result in imprisonment.³⁸ The right to counsel, however, does not attach until the initiation of formal adversarial judicial proceedings.³⁹ Once attached, the right to counsel is guaranteed through

31. *Id.* at 57.

32. *Id.* at 58.

33. *Id.* at 59 ("[A] defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense.").

34. *Id.* at 71 (stating that the failure to provide the defendants with counsel under such circumstances was a denial of due process).

35. *Id.*

36. 372 U.S. 335 (1963).

37. *Id.* at 344 (recognizing that any person summoned into court who cannot afford a lawyer cannot be assured a fair trial unless he is provided the assistance of counsel).

38. See *Scott v. Illinois*, 440 U.S. 367, 373 (1979) (adopting "actual imprisonment as the line defining the constitutional right to the appointment of counsel"); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (stating that no person may be imprisoned as the result of any criminal prosecution, including misdemeanor prosecutions, in which he was denied representation by counsel at trial).

39. In *Kirby v. Illinois*, 406 U.S. 682, 690 (1972), the Court ruled that a lineup held after arrest, but before the initiation of any adversarial criminal proceeding, is not a stage of the prosecution, and therefore, the right to counsel does not attach.

sentencing.⁴⁰ Due process requires that counsel be available at all "critical stages" of the proceedings.⁴¹

In *United States v. Wade*,⁴² the Court articulated the standard for determining whether a particular stage is "critical."⁴³ The Court held that it was necessary to "analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice."⁴⁴ *Wade* involved a pretrial lineup, and the Court's analysis focused on the prejudice the defendant may encounter when confronted by the forces of the State in pretrial proceedings: "It is central . . . that in addition to counsel's presence at trial, the accused is guaranteed that he *need not stand alone against the State at any stage of the prosecution, formal or informal*, . . . where counsel's absence might derogate from the accused's right to a fair trial."⁴⁵

The Supreme Court has extended the right to counsel to a number of other pretrial and posttrial proceedings, holding that critical stages of the prosecution now include arraignment,⁴⁶ preliminary hearing,⁴⁷ postindictment interrogation,⁴⁸ and other pretrial confrontations.⁴⁹ In *Estelle v. Smith*,⁵⁰ furthermore, the Court held that a pretrial psychiatric examination of the defendant conducted in a capital murder trial was a "critical stage" of the criminal proceedings when the examining doctor later testified against the defendant at the penalty phase of the trial.⁵¹ Finally, the Court held

40. *Mempa v. Rhay*, 389 U.S. 128, 134, 137 (1967); see also *Golden v. Newsome*, 755 F.2d 1478, 1482 (11th Cir. 1985) (stating that the right to be represented by counsel is fully applicable at a sentencing hearing).

41. *United States v. Wade*, 388 U.S. 218, 224 (1967).

42. *Id.* at 218.

43. *Id.* at 227.

44. *Id.*

45. *Id.* at 226 (emphasis added) (footnote omitted).

46. *Hamilton v. Alabama*, 368 U.S. 52, 53 (1961) (stating that a crucial defense would be lost irretrievably if not asserted at the arraignment).

47. *Coleman v. Alabama*, 399 U.S. 1, 10 (1970) (plurality opinion).

48. *Brewer v. Williams*, 430 U.S. 387, 401 (1977).

49. *United States v. Henry*, 447 U.S. 264 (1980) (holding that federal agents' deliberate elicitation of incriminating statements from the defendant, in the absence of his attorney, deprived the defendant of his Sixth Amendment right to counsel).

50. 451 U.S. 454 (1981).

51. *Id.* at 470.

in *Mempa v. Rhay*⁵² that sentencing was a critical stage of the trial at which the defendant was entitled to the presence and assistance of an attorney.⁵³

Elements of a Critical Stage

The Supreme Court has identified a number of elements that must exist in order for a criminal proceeding to be deemed "critical." First, a critical stage must occur after the initiation of adversarial proceedings.⁵⁴ Second, the defendant must confront either the prosecution or the procedural system.⁵⁵ Finally, the confrontation must involve the possibility that the accused's right to a fair trial,⁵⁶ or other proceeding,⁵⁷ will be harmed if he is forced to proceed without counsel.⁵⁸ In other words, the presence of counsel must be necessary to guard against the potential prejudice of the proceeding. This final element is composed of two separate factors: first, there must be a possibility that the proceeding will prejudice the defendant substantially, or deprive him of certain rights; second, the presence of counsel must help avoid the prejudice.⁵⁹

The lay person is often incapable of interacting on an equal footing with veterans of the legal system, be it the judge, the prosecu-

52. 389 U.S. 128 (1967).

53. *Id.* at 134 (discussing the critical nature of sentencing in a criminal case).

54. *Kirby v. Illinois*, 406 U.S. 682, 688 (1972).

55. *Id.* at 689 (holding that only after the initiation of judicial criminal proceedings do the adverse positions of government and defendant solidify); *see also* *United States v. Wade*, 388 U.S. 218, 226 (1967) ("[T]he accused is guaranteed that he need not stand alone against the State at any stage of the prosecution . . .").

56. *Wade*, 388 U.S. at 226 (stating that counsel's presence is mandated whenever absence of counsel might derogate from an accused's right to a fair trial).

57. The Sixth Amendment right to counsel also applies at critical stages in the sentencing phase of criminal proceedings. *United States v. Jackson*, 886 F.2d 838, 843 (7th Cir. 1989) (citing *Mempa*, 389 U.S. at 134). A similar analysis applies to both pretrial proceedings and presentence proceedings. Just as a pretrial proceeding is critical if it affects the accused's right to a fair trial, presentence proceedings are critical if they affect the defendant's right to a fair sentencing hearing. *See Gardner v. Florida*, 430 U.S. 349, 358 (1977) ("[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. . . . The defendant has a legitimate interest in the character of the procedure which leads to the imposition of [a] sentence . . .").

58. *Wade*, 388 U.S. at 226-27.

59. *Id.* at 227 (finding it necessary to "analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice").

tor, the police, or the probation investigator.⁶⁰ The criminal defendant is frequently unable to assert his rights because he is unaware of what those rights are. He may be equally unaware of the legal consequences of his words and actions in the presence of state actors.⁶¹

The defense attorney serves to educate his client about his rights and to advise him of the consequences of his words and actions.⁶² Only the assistance of counsel protects the defendant from possible overreaching on the part of government authorities and from the defendant's own sheer ignorance of the legal rules.⁶³ In order to guarantee this protection, defense counsel must be present at any confrontation at which the defendant may be seriously prejudiced in his dealings with the state.

60. *Powell v. Alabama*, 287 U.S. 45, 69 (1932) ("Even the intelligent and educated layman has small and sometimes no skill in the science of law If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.").

61. For example, admissions made during the presentence interview may result in a higher Guideline range, provide a basis for upward departure, or undermine the possibility of a downward departure. 1 PRACTICE UNDER THE NEW FEDERAL SENTENCING GUIDELINES 191 (Phyllis S. Bamberger & David J. Gottlieb eds., 2d ed. 1992 Supp.) [hereinafter PRACTICE UNDER THE GUIDELINES].

62. Counsel can also help the client communicate with the probation officer and develop a "rapport with the investigator that may increase the investigator's sympathy for the client." Richard H. Kuh, *Trial Techniques: Defense Counsel's Role in Sentencing*, 14 CRIM. L. BULL. 433, 435 (1978). Additionally, the presentence interview offers the defendant the first opportunity to challenge the prosecution's version of the facts. William W. Wilkins, Jr., *Observations on Judge Heaney's Study*, 4 FED. SENTENCING REP. 145, 150 (1991). In order to make the opportunity meaningful, the defendant's attorney must be present. See generally *Powell*, 287 U.S. at 69 (explaining the helpful role of the "guiding hand of counsel" at every stage of the proceeding).

63. The complexity of the Guidelines makes the preparation of the presentence report more difficult; accordingly, it takes much longer to complete. Julian A. Cook, *The Changing Role of the Probation Officer in the Federal Court*, 4 FED. SENTENCING REP. 112, 115 (1991). As one commentary noted, "[P]robation officers have become the federal criminal justice system's 'guidelines experts.'" Albert W. Alschuler & Stephen J. Schulhofer, *Judicial Impressions of the Sentencing Guidelines*, 2 FED. SENTENCING REP. 94, 96 (1989). One can hardly expect the defendant to comprehend the application of the Guidelines and their potential for prejudice to the defendant.

THE FEDERAL SENTENCING STRUCTURE

The "Old" Indeterminate System

Until November 1, 1987, federal judges possessed broad discretion to sentence offenders based upon a wide array of facts.⁶⁴ Under this system, the sentencing court determined a maximum sentence and the Parole Commission then determined the actual length of the time served within this maximum term.⁶⁵ As long as the judge did not exceed the statutory maximum, the defendant could not appeal the sentence.⁶⁶ The discretion of federal judges in sentencing was "almost infinite."⁶⁷ The judge was permitted to consider all relevant facts in the defendant's personal history, as well as any other facts brought out in the presentence investigation report.⁶⁸ The court's sentencing determination was highly individualized and depended on the defendant's background, the nature of the offense, and the likelihood of rehabilitation.⁶⁹

The presentence investigation report under the indeterminate sentencing system was "primarily an aid to the judge's exercise of discretion."⁷⁰ The report included both the prosecution's and the defendant's versions of the crime for which the defendant was convicted, a description of other offenses with which the defendant

64. Findley & Ross, *supra* note 14, at 840 (noting that the court's sentencing determination was highly individualized).

65. *Id.* The defendant was usually eligible for parole after serving one-third of his sentence. See S. REP. NO. 225, 98th Cong., 1st Sess. 40 (1984) [hereinafter S. REP. NO. 225], reprinted in 1984 U.S.C.A.N. 3182, 3223.

66. Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83, 89 (1988).

67. Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1941 (1988).

68. *Baumann v. United States*, 692 F.2d 565, 578 (9th Cir. 1982); see also Ogletree, *supra* note 67, at 1941-42 ("In *Williams v. New York*, [t]he Court affirmed the prevailing view that the past life or particular habits of the individual offender are relevant to the sentencing decision and rejected the idea that every criminal offense in a specific legal category requires an identical punishment.").

69. Findley & Ross, *supra* note 14, at 840. "The thinking behind the old rule, as an American Bar Assn. report said in 1980, was that 'sentencing is a human process.'" Alan Abrahamson, *Irving Heard Flurry of Sentence Appeals as He Left Bench*, L.A. TIMES, Jan. 7, 1991, at B1. Judge J. Lawrence Irving, a federal district court judge in the Southern District of California, resigned in September, 1990 because he believed he "could no longer impose the rules in good conscience, particularly in cases involving youthful, first-time drug offenders who were being sentenced to lengthy terms without the possibility of parole." *Id.*

70. Weigel, *supra* note 66, at 89.

had been charged or convicted, and accounts of the harm suffered by victims.⁷¹ It also contained a psychological profile of the defendant and personal information about the defendant's family, health, marital status, work history, and education.⁷² This information enabled the judge to impose a sentence tailored to the individual offender.⁷³ Although the information contained in the presentence investigation report generally was extremely helpful to the judge in imposing a sentence, he was not required to rely on it: "[The] judge was not required to impose the maximum sentence or even the recommended sentence [included in the report]."⁷⁴ In fact, with the defendant's consent, the judge could impose a sentence without a presentence report.⁷⁵

Given this flexibility, the presentence interview under the old sentencing regime arguably was not a critical stage of the criminal prosecution.⁷⁶ The defendant certainly could have benefitted from the presence of counsel, but was less likely to suffer prejudice due to statements made in the interview. The probation officer recorded the defendant's version of the crime, inquired into previous criminal conduct, and otherwise elicited personal information likely to be helpful to the sentencing judge. Nothing required the officer to make any subjective judgments about the defendant or

71. Findley & Ross, *supra* note 14, at 841.

72. *Id.*

73. See *Williams v. New York*, 337 U.S. 241, 247 (1949) (stating that a judge's possession of full information concerning a defendant's life and characteristics is highly relevant, if not essential, to imposition of an appropriate sentence).

74. *Baumann v. United States*, 692 F.2d 565, 578 (9th Cir. 1982).

75. Weigel, *supra* note 66, at 89 (noting that in cases involving minor offenses judges often imposed sentences without any presentence report).

76. Prior to the Guidelines, defendants argued unsuccessfully that the presentence interview was a critical stage because the characterizations of the probation officer could prejudice the defendant severely. See *Brown v. Butler*, 811 F.2d 938 (5th Cir. 1987); *Baumann*, 692 F.2d at 578. In *Baumann*, the defendant alleged that "the probation officer recommended an aggravated sentence . . . because of the lack of remorse which he gathered from Baumann's responses during the interview." *Id.* In *Brown*, during the presentence interview the defendant told the probation officer that he had supported himself by travelling across the country passing bad checks. *Brown*, 811 F.2d at 940-41.

the offense.⁷⁷ The officer merely put the facts in the report and let the judge draw the appropriate inferences.⁷⁸

The United States Sentencing Guidelines

Because under the old sentencing system judges could choose which facts to rely on in sentencing the defendant and base their decision on a wide variety of different facts, the specific facts elicited in the presentence interview were less important than they are presently. Under the Guidelines system, the circumstances surrounding the sentencing decision have changed drastically.⁷⁹

The federal sentencing laws prior to November 1, 1987 were based on a "rehabilitation model,"⁸⁰ and the defendant was eligible for parole after serving one-third of his sentence.⁸¹ The Parole Commission was responsible for setting a release date when it determined that the prisoner was sufficiently rehabilitated.⁸² The Sentencing Reform Act of 1984 and the resultant Guidelines abandoned the rehabilitative approach.

Reasons for the Change

Several studies cited by Congress concluded that the rehabilitative approach to sentencing was not workable.⁸³ The Senate report

77. Susan K. Grunin & Jud Watkins, *The Investigative Role of the United States Probation Officer Under Sentencing Guidelines*, FED. PROBATION, Dec. 1987, at 43, 46.

78. *Id.*; see also Charlie E. Varnon, *The Role of the Probation Officer in the Guideline System*, 4 FED. SENTENCING REP. 63, 64 (1991) (noting that the probation officer no longer serves merely as a conduit for the prosecution's version and the defendant's statement to the court).

79. Findley & Ross, *supra* note 14, at 841-42; see *infra* notes 89-93 and accompanying text (discussing the changes made by the Sentencing Reform Act of 1984).

80. S. REP. NO. 225, *supra* note 65, at 38, reprinted in 1984 U.S.C.C.A.N. 3182, 3220-21.

81. *Id.* at 40, reprinted in 1984 U.S.C.C.A.N. at 3223. Prior to the enactment of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. 2, ch. 2, 98 Stat. 1837, 1987 (codified as amended at 18 U.S.C. §§ 3551-3673 (1988) and 28 U.S.C. §§ 991-998 (1988)), federal law contained no general sentencing provisions; the law simply specified the maximum term of imprisonment and the maximum fine for each federal offense. See, e.g., Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified as amended at 18 U.S.C. §§ 1-2711 (1988)).

82. S. REP. NO. 225, *supra* note 65, at 38, reprinted in 1984 U.S.C.C.A.N. at 3221 (tying prison release dates to the completion of certain vocational, educational, and counseling programs within the prisons).

83. *Id.* at 40 & n.16, reprinted in 1984 U.S.C.C.A.N. at 3223 & n.16.

on the Sentencing Reform Act stated: "We know too little about human behavior to be able to rehabilitate individuals on a routine basis or even to determine accurately whether or when a particular prisoner has been rehabilitated."⁸⁴ Under the sentencing laws then in effect, however, judges were free to impose sentences based upon their own notions of the goals of sentencing.⁸⁵

The broad discretion afforded judges in sentencing and the lack of any direction concerning the purposes of sentencing resulted in two evils. First, different judges imposed widely disparate sentences on similarly situated defendants.⁸⁶ Second, the efforts of the Parole Commission to alleviate the disparity in sentences contributed to another defect in the sentencing laws: no one could predict with certainty how much time a particular offender would serve if sentenced to prison.⁸⁷ According to the Senate Report, the "system encourage[d] judges to sentence with the parole guidelines in mind, and it encourage[d] the Parole Commission to release pris-

84. *Id.* at 40, reprinted in 1984 U.S.C.C.A.N. at 3223; see also Mikva, *supra* note 12 (stating that asking the parole board to determine what a felon would do in the future was unrealistic).

85. See S. REP. No. 225, *supra* note 65, at 41, reprinted in 1984 U.S.C.C.A.N. at 3224 (describing discrepancies in judges' sentences). The legislative history includes a chart of sentencing patterns in the Second Circuit that reveals sentences for bank robbery ranging from a high of 18 years imprisonment and a \$5,000 fine to a low of five years imprisonment. *Id.* at 42-43, reprinted in 1984 U.S.C.C.A.N. at 3225-26.

86. *Id.* at 41, reprinted in 1984 U.S.C.C.A.N. at 3224; see also Black, *supra* note 12, at 769. Studies have indicated the existence of some correlation between the race of the defendant and the length of the sentence imposed. See D. Brian King, *Sentence Enhancement Based on Unconstitutional Prior Convictions*, 64 N.Y.U. L. REV. 1373, 1377 n.32 (1989) (citing Lawrence P. Tiffany et al., *A Statistical Analysis of Sentencing in Federal Courts: Defendants Convicted After Trial, 1967-1968*, 4 J. LEGAL STUD. 369, 387-88 (1975) (finding the mean sentence imposed upon black defendants with no criminal history to be 50% greater than the mean sentence imposed on white defendants with no prior criminal record)). "Troubling assumptions concerning race, ethnicity, economic status, and gender were often at the heart of these disparities." Bruce M. Selya & Matthew Kipp, *An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines*, 67 NOTRE DAME L. REV. 1, 4 (1991). The Guidelines, by requiring judges to consider only facts that are relevant under the Guidelines, and by requiring judges to state their reasons for departures from the Guidelines, should help to relieve disparities based on race or other minority status. See *id.* at 5 (stating that Congress strove to eliminate discriminatory sentencing disparities by adopting the Guidelines structure).

87. S. REP. No. 225, *supra* note 65, at 49, reprinted in 1984 U.S.C.C.A.N. at 3232.

oners with its own purposes—not those of the sentencing judge—in mind.”⁸⁸

In response to these problems, Congress passed the Sentencing Reform Act of 1984.⁸⁹ The basic objective of the Act was “to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system.”⁹⁰ To achieve this end, Congress sought certainty, uniformity, and proportionality in sentencing.⁹¹ The Act created the United States Sentencing Commission and authorized it to “establish sentencing policies and practices for the Federal criminal justice system”⁹² to meet these objectives. The Commission’s Guidelines took effect on November 1, 1987.⁹³

The New System

The Guidelines established a determinate system of sentencing in which the defendant’s offense level and criminal history category correspond to a sentence length on a sentencing table.⁹⁴ The offense level is calculated by determining the Guideline section applicable to the statute of conviction and determining the base offense level within that section, as well as applying any appropriate specific offense characteristics.⁹⁵ The Guidelines then provide for adjustments related to: the harm to the victim;⁹⁶ the defendant’s

88. *Id.*

89. The legislative history of the Sentencing Reform Act demonstrates that sentencing reform was designed to address disparity and uncertainty in federal sentencing. *Id.* at 41-49, reprinted in U.S.C.A.N. at 3224-3232.

90. U.S.S.G. ch. 1, pt. A3, at 4.

91. *Id.* at 4-5. Congress sought to achieve this goal through a system that imposes appropriately different sentences for criminal conduct of differing severity. *Id.*

92. 28 U.S.C. § 991 (1988).

93. In *United States v. Mistretta*, 488 U.S. 361 (1989), the Supreme Court upheld the constitutionality of the Sentencing Reform Act of 1984, and the Guidelines promulgated thereunder, against the claim that the Act violated the doctrine of separation of powers.

94. See U.S.S.G. § 1B1.1.

95. *Id.*

96. *Id.* §§ 3A1.1-3 (considering the vulnerability of the victim, whether the victim was a present or former law enforcement or corrections officer, and whether the victim was restrained).

role in the offense;⁹⁷ the degree of obstruction of justice by the defendant;⁹⁸ whether the defendant was convicted on multiple counts;⁹⁹ and whether the defendant has accepted personal responsibility for the offense.¹⁰⁰ Next, the judge must determine the defendant's criminal history category.¹⁰¹ Using these two figures, the judge determines the applicable sentence range by referring to the sentencing table.¹⁰² The judge may not depart from this range without stating the reasons in open court.¹⁰³

THE FUNDAMENTAL IMPORTANCE OF THE PRESENTENCE INVESTIGATION REPORT UNDER THE GUIDELINES

The Guidelines now provide that "[a] probation officer *shall* conduct a presentence investigation and report to the court before the imposition of sentence."¹⁰⁴ Congress deleted provisions of Rule 32(c) of the Federal Rules of Criminal Procedure that permitted

97. *Id.* §§ 3B1.1-3 (regarding the determination whether the defendant was an organizer, leader, manager, or supervisor, or merely a minor participant in the crime, and whether defendant abused a position of public or private trust).

98. *Id.* § 3C1.1 (providing for an upward adjustment if the defendant willfully impeded or obstructed the administration of justice during the investigation or prosecution of the offense).

99. *Id.* § 1B1.1(d) (providing that various counts be grouped).

100. *Id.* § 1B1.1(e); *see* Project, *supra* note 13, at 1090-91.

101. U.S.S.G. § 1B1.1(f).

102. *Id.* § 1B1.1(g). The sentencing table's horizontal axis consists of 43 offense levels and its vertical axis contains six criminal history categories. A defendant's sentence range appears at the point in the chart where his offense level and criminal history category intersect. Thus, a defendant with an offense level of 21 and a criminal history category II would be sentenced to 41-51 months in prison. *See id.* ch. 5, pt. A.

103. 18 U.S.C. § 3553(c) (1988). The sentencing judge may depart upwards when the defendant's conduct resulted in a death, physical injury, extreme psychological injury, abduction or unlawful restraint, or property damage, or if the defendant used or possessed a weapon, disrupted a governmental function, engaged in unusually cruel conduct, or committed the offense to conceal the commission of another offense. U.S.S.G. §§ 5K2.1-.9. Downward departures are possible when the defendant substantially aided the authorities, *id.* § 5K2.1, when the victim provoked the offensive behavior, when the defendant committed the offense under duress to avoid a more serious harm, or suffered from diminished mental capacity. *Id.* § 5K2.10-.13. Finally, the court may depart downward when the defendant voluntarily discloses the offense to authorities and accepts responsibility for the offense in instances where the offense likely would not otherwise have been discovered. *Id.* § 5K2.16.

104. *Id.* § 6A1.1 (emphasis added). If the court finds that information in the record is sufficient for a meaningful exercise of sentencing authority, the court may waive preparation of the report. *Id.*

the defendant to waive the presentence report.¹⁰⁵ Thus, the report is now mandatory unless the judge explains, on the record, why sufficient information for sentencing is already available.¹⁰⁶ Due to its mandatory nature,¹⁰⁷ the presentence report takes on added significance for the defendant.

The nature and contents of the presentence report have also changed dramatically under the Guidelines. Congress designed the report to provide the facts necessary for the application of the Guidelines.¹⁰⁸ Thus,

[t]he most important facts in the report, those which have the greatest impact upon the number of months to be served, consist of facts in three sections of the report: the Offense Conduct, the Criminal History, and [the] Offender Characteristics. The report must set out these verified facts in a concise manner and in such a way that judges may rely upon them as findings at the sentencing hearing.¹⁰⁹

Information that constituted a large part of the old report, including personal data and background information such as education, employment, and health,¹¹⁰ is now relegated to one section of the new report.¹¹¹ The result is that this information now plays a relatively minor role in the sentencing decision.

105. *Id.* § 6A1.1 cmt.

106. *Id.* § 6A1.1. As a practical matter, waiver of the report by the judge is unlikely to occur. Because 90% of criminal defendants plead guilty, the record rarely will contain sufficient information. *See, e.g.,* *United States v. Easterling*, 921 F.2d 1073, 1078-79 (10th Cir. 1990) (involving a probation officer who provided a presentence report describing the offense conduct as stipulated in the plea agreement; the court indicated it was not convinced that the report adequately reflected relevant conduct), *cert. denied*, 111 S. Ct. 2066 (1991).

107. U.S.S.G. § 6A1.1 (stating that the defendant may not waive preparation of the presentence report).

108. Grunin & Watkins, *supra* note 77, at 44 (outlining the information that is to be included in the presentence report). Specified facts now have a reasonably predictable impact on the sentence. Wilkins, *supra* note 62, at 148.

109. Grunin & Watkins, *supra* note 77, at 44.

110. *See United States v. Belgard*, 694 F. Supp. 1488 app. B (D. Or. 1988) (displaying the format of this information as contained in the old presentence report form).

111. DIVISION OF PROBATION, ADMIN. OFFICE OF THE U.S. COURTS, PRESENTENCE INVESTIGATIVE REPORTS UNDER THE SENTENCING REFORM ACT OF 1984 (1987), *reprinted in* FEDERAL JUDICIAL CTR., IN-COURT EDUCATIONAL PROGRAM ON GUIDELINE SENTENCING ORIENTATION tab H, at 37-40 (1987) [hereinafter *REPORTS UNDER SENTENCING REFORM ACT*]; *see also Belgard*, 694 F. Supp. 1488 app. C (displaying the format of the presentence report after the Guidelines).

The probation officer must gather all the facts relating to the offense and the offender, weigh the evidence in support of divergent accounts, and arrive at a single version of the facts.¹¹² This subjective weighing was not required in the old presentence report, which included both the prosecution's and the defendant's versions of the offense.¹¹³ Using his interpretation of the facts, the probation officer then determines the offense level and criminal history category and calculates the sentencing range applicable to the offense.¹¹⁴ The judge relies on these conclusions in determining the sentence. Although technically not required to rely on the probation officer's recommendation,¹¹⁵ the fact is that "due to the difficulty of mastering this complicated and ever-evolving guideline system, . . . the district courts have come increasingly to rely on the recommendations of the probation officer who prepares the presentence report."¹¹⁶

Because the probation officer must collect and weigh all the facts that go into the sentencing formula and then subjectively determine the set of facts that will be used by the judge in determining

112. See Grunin & Watkins, *supra* note 77, at 44; see also Varnon, *supra* note 78, at 63 ("Judgments . . . must be made by the probation officer to arrive at the statement of 'the classification of the offense and of the defendant under the categories established by the Sentencing Commission,' as required by Rule 32."). Although the probation officer is instructed to remain impartial, REPORTS UNDER SENTENCING REFORM ACT, *supra* note 111, at 4, his perceptions of the defendant are likely to affect, consciously or unconsciously, the version of the facts he prepares.

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

114. REPORTS UNDER SENTENCING REFORM ACT, *supra* note 111, at 19-35, 53-54; Belgard, 694 F. Supp. at 1510.

115. WAYNE BARR ET AL., FEDERAL SENTENCING GUIDELINES HANDBOOK § 6.07 (1990).

116. United States v. O'Meara, 895 F.2d 1216, 1223 (8th Cir.) (Bright, J., concurring in part and dissenting in part), cert. denied, 111 S. Ct. 352 (1990); see John L. Carroll, *The Defense Lawyer's Role in the Sentencing Process: You've Got to Accentuate the Positive and Eliminate the Negative*, 37 MERCER L. REV. 981, 988 (1986) ("In the federal sentencing system, the trial judge usually sentences on the basis of the [presentence] report and usually follows the probation officer's recommendation."); Cook, *supra* note 63, at 113 ("The view of the probation officer may, and probably will, have some influence upon the judge who must decide whether to include or exclude two points in the guidelines calculation."); Stephen A. Fennell & William N. Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 HARV. L. REV. 1613, 1668 (1980) ("The concurrence between the probation officer's recommendation and the actual sentence imposed in most cases underscores the federal courts' heavy reliance on the probation officer's expertise."). One defense attorney stated that judges rely on the probation officer's recommendation "nearly 100%" of the time. Restrepo Interview, *supra* note 15.

the sentence, the officer's assessment of the defendant in the interview is crucial. This is particularly true when the defendant has entered into a plea bargain and there has been no trial to develop the facts of the case.¹¹⁷ Under the Guidelines, the presentence report may also be used to assess the adequacy of the plea: "A judge is required to reject a plea agreement involving a dismissal of charges or a promise not to pursue other potential charges if the remaining charge does not adequately reflect the seriousness[sic] of the actual offense behavior."¹¹⁸ The judge has limited discretion to consider facts other than those presented in the report, as the facts in the report are keyed to the sections of the Guidelines he *must* apply in arriving at a sentence.¹¹⁹ Furthermore, departures from the Guidelines are likely to be based on information in the presentence report.¹²⁰ As one commentary noted, "[A]s important as the [presentence investigation report] was to sentencing under the old system, it is even more critical under the guidelines."¹²¹

Although judges are not required to rely on the probation officer's report, in fact it is often the final word in vital sentencing determinations. As one judge noted in his dissent in *United States v. O'Meara*,¹²² "[I]t is a sad but true fact of life under the Guidelines that many of the crucial judgment calls in sentencing are now made, not by the court, but by probation officers to whose technical knowledge overworked district judges understandably, but all too often, uncritically defer."¹²³

117. See Fennell & Hall, *supra* note 116, at 1627 ("[T]he report often substitutes for the trial itself as a mechanism through which facts are found in a criminal case, . . . provid[ing] the sentencing judge with his only knowledge of the offense and the defendant . . ."); Findley & Ross, *supra* note 14, at 843 ("Especially in guilty plea cases, in which there has usually been no development of facts at trial, the [presentence investigation report] is the court's primary tool for making a sentencing determination under the guidelines.").

118. Ellen H. Steury, *Prosecutorial and Judicial Discretion*, in THE U.S. SENTENCING GUIDELINES 93, 107 (Dean J. Champion ed., 1989) [hereinafter SENTENCING GUIDELINES] (citing U.S.S.G. § 6B1.2(a)).

119. See *id.* at 96-102; Findley & Ross, *supra* note 14, at 842; Weigel, *supra* note 66, at 89.

120. BARR ET AL., *supra* note 115, § 6.07, at 68.

121. Findley & Ross, *supra* note 14, at 845.

122. 895 F.2d 1216 (8th Cir.), *cert. denied*, 111 S. Ct. 352 (1990).

123. *Id.* at 1223 (Bright, J., concurring in part and dissenting in part); see also Alschuler & Schulhofer, *supra* note 63, at 96 ("[P]robation officers have become the federal criminal justice system's 'guidelines experts.' "). This opinion is confirmed by the statements of defense attorneys in several federal districts. Telephone Interview with Steve Hubachek, At-

In *Mempa v. Rhay*,¹²⁴ the Supreme Court addressed whether the right to counsel applied to the determination of facts for sentencing in a scenario in which the sentencing authority was not necessarily bound by the facts:

We were informed . . . that the Board [of Prison Terms and Paroles] places considerable weight on these recommendations [made by the judge and prosecutor], *although it is in no way bound by them*. Obviously to the extent such recommendations are influential in determining the resulting sentence, the necessity for the aid of counsel in *marshaling the facts*, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence is apparent.¹²⁵

Because the recommendations made by the judge and prosecutor in *Mempa* and those made by probation officers under the Guidelines system are analogous, the Court's decision stands for the proposition that defendants are entitled to the presence of counsel at the presentence interview, a major step in "marshaling the facts."¹²⁶ An attorney may help the defendant present his case to the probation officer, as well as provide to the probation officer information that might otherwise go unnoticed.¹²⁷ *Mempa* provides the groundwork for the determination that the presentence interview, because it results in the report relied upon for sentencing, demands the protection of the Sixth Amendment's right to counsel.

torney with the Federal Defender's Office in San Diego, Cal. (Feb. 7, 1992) [hereinafter Hubachek Interview]; Swain Interview, *supra* note 3. In the Eastern District of Pennsylvania, probation officers do not put their sentence recommendations in presentence reports. Restrepo Interview, *supra* note 15. Instead, they convey their recommendations to the judge in ex parte conferences. *Id.*

124. 389 U.S. 128 (1967).

125. *Id.* at 135 (emphasis added).

126. *Id.*; see also 3 AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE § 18-6.3 cmt., at 443 (Supp. 1982) ("[T]here are a number of useful functions counsel can perform at this juncture: information can be marshaled, extenuating circumstances detailed, and the defendant's views better articulated.").

127. Probation officers are likely to have substantial case loads and little time for other than routine investigation. Counsel can be helpful in supplying data that probation officers might otherwise fail to notice. Kuh, *supra* note 62, at 434.

The Critical Role of the Presentence Interview in Sentencing Proceedings

The increased importance of the presentence investigation report in the judge's sentencing decision results, of course, in the critical nature of the presentence interview. A defendant's demeanor and conduct before the probation officer is often a vital factor in the sentencing recommendation.¹²⁸ A judge's decision to reduce a defendant's offense level for accepting responsibility¹²⁹ or to increase it for willfully obstructing or impeding the administration of justice¹³⁰ will be influenced in large part by the presentence interview.¹³¹ Recognizing the vital role of the presentence interview, the federal courts have addressed the need for counsel during this stage.

United States v. Herrera-Figueroa

United States v. Herrera-Figueroa,¹³² in which the Ninth Circuit held that attorneys must be allowed to attend presentence interviews, described the potential harm that a defendant may incur by her actions at a presentence interview. The defendant in *Herrera-Figueroa* was convicted of possession of marijuana with intent to distribute.¹³³ A probation officer contacted the defendant to conduct a presentence interview.¹³⁴ At the suggestion of the public defender, Herrera-Figueroa, who did not speak English, requested that his attorney be permitted to attend the interview.¹³⁵ The probation officer refused to interview him in the presence of counsel and the defendant then declined to be interviewed.¹³⁶ In his presentence report, the probation officer stated that he was un-

128. BARR ET AL., *supra* note 115, § 6.07, at 68.

129. U.S.S.G. § 3E1.1.

130. *Id.* § 3C1.1 (imposing a two-level upward adjustment if the defendant impeded or attempted to impede the investigation, prosecution, or sentencing).

131. *E.g.*, *United States v. Barreto*, 871 F.2d 511 (5th Cir. 1989) (stating that a drug dealer's coyness and lack of candor in dealing with his probation officer was a factor in disallowing a reduction of two in the offense level based upon acceptance of responsibility for the crime).

132. 918 F.2d 1430 (9th Cir. 1990).

133. *Id.* at 1431-32.

134. *Id.* at 1432.

135. *Id.*

136. *Id.*

able to determine whether Herrera-Figueroa had accepted responsibility for the offense because he had not interviewed the defendant;¹³⁷ the probation officer therefore refused to give Herrera-Figueroa the reduction for acceptance of responsibility.¹³⁸ In lieu of an interview, Herrera-Figueroa submitted a letter to the court describing his personal and family background, admitting to the crime, and expressing remorse, but the district judge, relying solely on the report, refused the reduction.¹³⁹

On appeal, the Ninth Circuit declined to decide the case on constitutional grounds, noting that the Sentencing Guidelines reduce the trial judge's sentencing discretion and require the judge to sentence largely on the basis of facts contained in the report.¹⁴⁰ Instead, the court used its supervisory powers to order that probation officers allow counsel to be present at presentence interviews: "Whether or not the presentence interview constitutes a 'critical stage' in the criminal proceeding for purposes of the sixth amendment, there is no question that it is an important step in the proceedings in terms of the consequences to the defendant."¹⁴¹ The court held that a defendant's conduct at the interview could have a significant effect on the sentence recommendation in the report, and that the district court relies heavily on the report's contents in determining a sentence: "The presentence interview plays a crucial role in determining the probation officer's recommended sentence."¹⁴² These statements seem to support the conclusion that the presentence interview is a critical stage at which the Constitution entitles a defendant to the assistance of counsel.

The Ninth Circuit's reluctance to confront the Sixth Amendment issue, in light of its conclusions on the critical nature of the

137. *Id.*

138. *Id.*

139. *Id.* at 1432-33 (determining that Herrera-Figueroa refused to be interviewed at his own risk, the court refused to upset the finding of the probation officer even though the government had no objection to the reduction).

140. *Id.* at 1433-34 (" '[G]uided by considerations of justice' . . . and in the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress.") (quoting *United States v. Hasting*, 461 U.S. 499, 505 (1983) (citation omitted)).

141. *Id.* at 1434.

142. *Id.* (finding that a single determination by the probation officer "can significantly affect the ultimate sentencing range").

interview, is regrettable. Forcing probation officers to permit counsel to attend is an inadequate substitute for a constitutional requirement that the defendant's attorney be present. By placing the burden on the defendant, the Ninth Circuit's solution to the problem leaves too many defendants potentially unprotected.

Possibilities for Prejudice

The methods by which a defendant potentially could prejudice himself during the presentence interview include: obstructing justice;¹⁴³ misrepresenting his record;¹⁴⁴ and revealing prior criminal conduct for which he was never convicted.¹⁴⁵ In conducting the interview, a probation officer is entitled to seek information relevant to these categories, which may then provide the basis for a significant increase in the defendant's sentence.¹⁴⁶ The judge, lacking the time to investigate such details, relies heavily on the contents of the report.¹⁴⁷ As the court in *Herrera-Figueroa* concluded, "Given

143. See U.S.S.G. § 3C1.1 cmt. 3(h) (stating that "providing materially false information to a probation officer in respect to . . . presentenc[ing]" can result in a two-point increase in the offense level for obstructing justice).

144. A defendant may be penalized for misrepresenting his record even though the probation officer has access to the defendant's FBI rap sheet and the defendant does not. *Herrera-Figueroa*, 918 F.2d at 1435.

145. The sentencing court may consider allegedly criminal conduct of which the defendant has not been convicted. See U.S.S.G. § 1B1.3 cmt. 2. Section 1B1.3(a) provides that conduct relevant to determining the applicable guideline range includes, among other things:

- (1) all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation of that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;
- (2) . . . all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction;
- (3) all harm that resulted from the acts or omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts or omissions;

Id. § 1B1.3(a). When the defendant relates his version of the offense to the probation officer, he is in danger of recounting facts that fall under § 1B1.3(a) and may be taken into account in increasing the applicable Guidelines sentence. According to defense counsel, this is the most dangerous section of the Guidelines to uncounseled defendants. Restrepo Interview, *supra* note 15.

146. *Herrera-Figueroa*, 918 F.2d at 1435.

147. See Findley & Ross, *supra* note 14, at 845 (stating that Rule 32 of the Federal Rules of Criminal Procedure "gives the [presentence report] a central role in the initial computa-

the importance of the presentence interview to the defendant, there is no justification for excluding defense counsel."¹⁴⁸ The numerous possibilities available for a criminal defendant to prejudice himself during a presentence interview militate that it be considered a critical stage of the trial.

THE PRESENTENCE INTERVIEW AS A CRITICAL STAGE

In *United States v. Jackson*,¹⁴⁹ the leading presentence interview case decided after the adoption of the Guidelines,¹⁵⁰ the Seventh Circuit held that the Constitution did not mandate the right to counsel at presentence interviews.¹⁵¹ The court determined that the Sixth Amendment right to counsel applied only at stages of the prosecution, which the court interpreted to include only those stages in which the defendant confronts the prosecutor or an agent of the prosecutor.¹⁵²

The Seventh Circuit cited *United States v. Morrison*¹⁵³ and *Gerstein v. Pugh*¹⁵⁴ to support its conclusion.¹⁵⁵ However, the decisions of the Supreme Court in those cases are inapposite. *Morrison* addressed the scope of the remedy available for a violation of the

tion of guideline sentences. Likewise, the sentencing guidelines state that the [report] is the initial tool for resolving factual disputes critical to guideline application prior to sentencing").

148. *Herrera-Figueroa*, 918 F.2d at 1435.

149. 886 F.2d 838 (7th Cir. 1989).

150. Before the adoption of the Guidelines, several courts held that the presentence interview was not a critical stage of the proceedings. See *Brown v. Butler*, 811 F.2d 938 (5th Cir. 1987); *Baumann v. United States*, 692 F.2d 565 (9th Cir. 1982).

151. *Jackson*, 886 F.2d at 841-45. Other cases have dealt with the issue in dicta or with little discussion of the factors behind the decision to deny the right to counsel. See *United States v. Johnson*, 935 F.2d 47, 50 (4th Cir.) (holding that the right to counsel does not attach at an ex parte presentence conference and finding the adversary rationale "persuasive in the case of a presentence interview"), cert. denied, 112 S. Ct. 609 (1991); *United States v. Woods*, 907 F.2d 1540, 1543 (5th Cir. 1990) (adopting, with no discussion of the impact of the Guidelines, the holding in *Brown* that the presentence interview is not a critical stage at which the defendant has a right to counsel), cert. denied, 111 S. Ct. 792 (1991).

152. *Jackson*, 886 F.2d at 843 ("Under the sixth amendment, the focus of the constitutional protection of right to counsel relates to the adversary character of criminal proceedings and the particular process involved.") (emphasis added).

153. 449 U.S. 361 (1981).

154. 420 U.S. 103 (1975).

155. *Jackson*, 886 F.2d at 843-44.

right to counsel.¹⁵⁶ Noting that the defendant was not prejudiced by the absence of her attorney, the Court held that dismissal of the charge was an inappropriate remedy, even if the violation may have been deliberate.¹⁵⁷

In *Gerstein*, the Court considered the criminal defendant's right to counsel at a preliminary probable cause hearing prior to placement in pretrial detention.¹⁵⁸ The Court held that appointed counsel is not required at the preliminary probable cause determination because the proceeding is limited in function and *nonadversarial*.¹⁵⁹ Importantly, the Court emphasized that the hearing would not impair the accused's defense on the merits at trial.¹⁶⁰ *Gerstein* is consistent with other Supreme Court decisions¹⁶¹ that emphasize the lack of prejudice in determining whether the right to counsel applies.

In contrast to a probable cause hearing, a presentence interview is replete with possibilities for prejudice to the defendant in the sentencing phase of the trial. Therefore, neither of the cases relied upon in *Jackson* suffices to establish the proposition that a "critical" stage must involve the prosecution or agents of the prosecution. Moreover, a survey of the Supreme Court's Sixth Amendment jurisprudence reveals that the Court is far less concerned with the adversarial nature of the proceeding than with the potential prejudice to the defendant inherent in the proceeding.¹⁶² A close reading of the Court's Sixth Amendment decisions supports the theory that the particular proceeding need not involve an adversary in order to be "critical."¹⁶³

After concluding that the proceeding must be adversarial, the Seventh Circuit held that the probation officer is not an adversary but rather a neutral fact gatherer and an "extension of the

156. *Morrison*, 449 U.S. at 365 (noting that absent prejudice to the defendant, or a threat thereof, the court has no basis for imposing a remedy).

157. *Id.* at 365-66.

158. *Gerstein*, 420 U.S. at 119.

159. *Id.* at 122 (emphasis added).

160. *Id.* at 122-23 (noting that the sole purpose of such a hearing is to determine probable cause for purposes of pretrial detention).

161. See *infra* note 200 and accompanying text.

162. See discussion *infra* text accompanying notes 187-206.

163. See *infra* notes 197-206 and accompanying text.

court"¹⁶⁴ and that a defendant therefore has no constitutional right to have counsel present at the presentence interview.¹⁶⁵ The court drew this conclusion directly from *Baumann v. United States*¹⁶⁶ and *Brown v. Butler*,¹⁶⁷ both pre-Guidelines decisions. The court stated that the reasoning of these pre-Guidelines cases was still applicable, although it provided no support for this conclusion and no analysis of the changes that had occurred under the Guidelines.¹⁶⁸

In *Baumann*, the Ninth Circuit held that the presentence interview was not a critical stage, reasoning that the judge had wide discretion in determining the sentence and could consider all relevant facts in the defendant's personal history.¹⁶⁹ This discretion rendered the lack of counsel "constitutionally insignificant."¹⁷⁰ This is no longer the case since the enactment of the Guidelines,¹⁷¹ under which the judge must select from the Guideline range—generally as determined by the probation officer—and has limited authority to consider factors other than those set forth in the presentence report.¹⁷²

Additionally, the court's findings that the federal probation officer is not an agent of the government, that he does not have an

164. *United States v. Jackson*, 886 F.2d 838, 844 (7th Cir. 1989).

165. *Id.* at 843-44.

166. 692 F.2d 565 (9th Cir. 1982).

167. 811 F.2d 938 (5th Cir. 1987).

168. *Jackson*, 886 F.2d at 844.

169. *Baumann*, 692 F.2d at 578. The court in *Baumann* rejected the criminal defendant's claim that *Estelle v. Smith*, 451 U.S. 454 (1981) (holding that a psychiatrist's pretrial examination of the defendant was a critical stage because the psychiatrist testified at the penalty phase of trial), mandated that the presentence interview be considered a critical stage. *Baumann*, 692 F.2d at 577-78.

170. *Id.* at 578.

171. See *supra* notes 117-19 and accompanying text for a discussion of the restriction of the judge's sentencing discretion. The Ninth Circuit has since held that defense counsel should be permitted to attend presentence interviews and noted the differences that the advent of the Guidelines had wrought. *United States v. Herrera-Figueroa*, 918 F.2d 1430, 1433-34 (9th Cir. 1990).

172. See U.S.S.G. § 5A1.1; see also *Baumann*, 692 F.2d at 583 (Pregerson, J., dissenting) ("As a practical matter, the presentence interview with the probation officer is an important and critical stage of the proceedings."). But see *United States v. Johnson*, 935 F.2d 47, 50 (4th Cir.) (stating that the judge still has discretion and responsibility for imposition of the sentence and that the Guidelines do not shift responsibility to the probation officer), *cert. denied*, 112 S. Ct. 609 (1991).

adversarial role, and that he is a neutral information gatherer for the sentencing judge, were not based in fact. Failing to explain why the probation officer is not adversarial, the court merely asserted that he is not.¹⁷³ Due to the adversarial nature of the presentence interview and the probation officer's role in it, we should not so blithely accept this proposition.¹⁷⁴

Other circuits addressing the issue have, by and large, adopted the reasoning of *Jackson* with little or no analysis of their own. For example, in *United States v. Rogers*,¹⁷⁵ the Tenth Circuit explained that a routine presentence interview is not a critical stage of the proceedings requiring the right to counsel.¹⁷⁶ The court provided no analysis of the Sixth Amendment issue, although it did discuss the nature of the interview in considering a Fifth Amendment challenge.¹⁷⁷

In holding that the Fifth Amendment did not require that the probation officer administer a *Miranda* warning at the postconviction presentence interview,¹⁷⁸ the court noted that "the presentence report process is familiar and predictable, and defendants, having just gone through a trial, are represented by counsel in most cases,"¹⁷⁹ and that "[c]ounsel will either know or can easily learn the date of the interview, and there is no rule which excludes counsel's presence at the interview."¹⁸⁰ In at least one district, however, probation officers did not allow defense attorneys to attend presentence interviews until they were ordered by the courts

173. *United States v. Jackson*, 886 F.2d 838, 844 (7th Cir. 1989).

174. See *infra* notes 221-32 and accompanying text; see also Restrepo Interview, *supra* note 15 (stating that at least for defense lawyers, it is absolutely untrue that probation officers are independent, neutral fact gatherers).

175. 921 F.2d 975 (10th Cir.), *cert. denied*, 111 S. Ct. 113 (1990).

176. *Id.* at 979 n.7.

177. *Id.* at 979-80. The court stated that the presentence interview is not prosecutorial or punitive, but is essentially neutral in those respects: "The probation officer acts as an agent of the court for the purpose of gathering and classifying information and informing the court in the exercise of its sentencing responsibility." *Id.* at 979. The court then cited *United States v. Belgard*, 694 F. Supp. 1488, 1495-97 (D. Or. 1988), for the proposition that the role of the probation officer had not changed significantly after the enactment of the Guidelines. *Rogers*, 921 F.2d at 980.

178. *Rogers*, 921 F.2d at 980.

179. *Id.*

180. *Id.* at 982.

to do so,¹⁸¹ and defense attorneys note that they cannot always easily learn when the interview will take place.¹⁸²

Likewise, the degree of defendants' familiarity with the presentence interview is questionable. Given the complexity of the Guidelines, most defendants are unlikely to find the interview process routine or familiar.¹⁸³ Defendants may not know which facts are important nor will they understand the impact their demeanor may have on probation officers' recommendations.

Finally, the courts in *United States v. Tisdale*¹⁸⁴ and *United States v. Dingle*,¹⁸⁵ two recent cases holding that the presentence interview is not a critical stage, merely adopted the *Jackson* argument wholesale without independent analysis.¹⁸⁶

The Problems of an "Adversarial Nature" Requirement

The Supreme Court has outlined the essential standard for determining when the right to counsel attaches: as long as the de-

181. In the Southern District of California, defense attorneys were forced to fight for the right to accompany their clients to the presentence interview. Swain Interview, *supra* note 3. Until the Ninth Circuit's ruling in *Herrera-Figueroa*, two-thirds of the district's probation officers would not allow defense counsel to attend. *Id.*

182. For example, one probation officer went to the home of a defendant out on bail, and conducted the interview there; defense counsel was not warned and had no way of discovering that such an arrangement would occur. Hubachek Interview, *supra* note 123.

183. Most defendants are unaware of the potential consequences of the interview. See *United States v. Saenz*, 915 F.2d 1046, 1049 n.2 (6th Cir. 1990) ("Given the significance of a defendant's presentence encounter with the probation officer, we are unable to agree with the Tenth Circuit that 'the presentence report process is familiar and predictable' and requires no special constitutional safeguards.") (quoting *Rogers*, 921 F.2d at 980).

184. 952 F.2d 934 (6th Cir. 1992).

185. No. 90-5083, 1991 U.S. App. LEXIS 26052 (4th Cir. Oct. 28, 1991).

186. See *Tisdale*, 952 F.2d at 939-40; *Dingle*, 1991 U.S. App. LEXIS 26052, at *9-10. The Fourth Circuit had previously decided that an *ex parte* presentence conference was not a critical stage. *United States v. Johnson*, 935 F.2d 47, 50 (4th Cir.), *cert. denied*, 112 S. Ct. 609 (1991). In *Johnson*, the court relied on *Moran v. Burbine*, 475 U.S. 412 (1986), and *Kirby v. Illinois*, 406 U.S. 682 (1972), for the proposition that constitutional protections need not be invoked in the absence of adversarial proceedings. *Johnson*, 935 F.2d at 50. *Moran* and *Kirby*, however, do not support that proposition. Those cases held that the right to counsel does not attach until after the initiation of adversarial proceedings. *Moran*, 475 U.S. at 430; *Kirby*, 406 U.S. at 689-90. The presentence interview clearly falls after such initiation. In *Johnson*, the court attempted to extrapolate from the holdings of *Moran* and *Kirby* the conclusion that counsel is unnecessary unless the proceeding in question is adversarial. *Johnson*, 935 F.2d at 50. A close reading of *Moran* and *Kirby* reveals that such an extension is not warranted.

fendant's contact with the State presents a real probability that he will lose rights or be severely prejudiced.¹⁸⁷ The presentence interview is analogous to stages in the criminal proceedings—a pretrial lineup, for example—that the Court has found to be critical stages at which an attorney must be present.¹⁸⁸ Both proceedings entail the potential for prejudice to the defense.

In *United States v. Ash*,¹⁸⁹ the Court noted that the “extension of the right to counsel to events before trial has resulted from changing patterns of criminal procedure and investigation that have tended to generate pretrial events that might appropriately be considered to be parts of the trial itself.”¹⁹⁰ In much the same way, the presentence interview, as part of a changing pattern of criminal procedure, might be considered part of the sentencing procedure itself.¹⁹¹ The Court went on to state, “At these newly emerging and significant events, the accused was confronted, just as at trial, by the *procedural system*, or by his expert adversary, or by both.”¹⁹² The Court's use of the word “or” stresses that a defendant confronting *either* the procedural system *or* an adversary is entitled to the assistance of counsel. Under the Guidelines, the presentence interview with a probation officer fits squarely within the procedural system that the defendant is forced to confront.¹⁹³ After all, the defendant cannot be sentenced properly unless he

187. See *infra* notes 206-20 and accompanying text.

188. *United States v. Wade*, 388 U.S. 218, 223-24 (1967).

189. 413 U.S. 300 (1973).

190. *Id.* at 310.

191. See *United States v. Saenz*, 915 F.2d 1046 (6th Cir. 1990). The Sixth Circuit noted that courts holding that the presentence interview is not a critical stage “treat the presentence interview as divisible from the sentencing phase, . . . even though nothing in the sentencing guidelines supports such a bifurcation.” *Id.* at 1048. The court concluded that “the presentence interview is an integral part of the sentencing phase of a criminal proceeding.” *Id.* at 1048 n.2.

In *State ex rel Russell v. Jones*, 647 P.2d 904, 906 (Or. 1982), a state case addressing the role of the presentence interview, the court stated:

[T]he investigator informally performs for the judge a function, in part, which would otherwise be performed by the judge as part of the formal sentencing hearing. Functionally, the investigation is a part of the sentencing procedure.

A defendant is entitled to the assistance of counsel to the same degree when the judge seeks sentencing information from him in open court and when the judge does so indirectly through the out-of-court agency of a probation officer.

192. *Ash*, 413 U.S. at 310 (emphasis added).

193. Similarly, the Court noted that a

complies with this procedure.¹⁹⁴ The rationale of *Jackson* and its progeny directly contradicts this interpretation of the Sixth Amendment right to counsel.

Consistently applying a historical interpretation of the guarantee, the Court "has expanded the constitutional right to counsel only when new contexts appear presenting the same dangers that gave birth initially to the right itself."¹⁹⁵ Those dangers are that the defendant may be substantially prejudiced by proceeding without counsel and that counsel may be unable later to remedy the harm done.¹⁹⁶ The presentence interview presents the requisite dangers—possible unfairness to the defendant and the improbability of a future remedy.

As the Ninth Circuit noted in *Herrera-Figueroa*, if a proceeding must involve an adversarial confrontation in order to invoke the right to counsel, the defendant would not be entitled to counsel at the sentencing proceeding because the sentencing judge is "presumed to be completely impartial"¹⁹⁷ and therefore is not the defendant's adversary. However, the Supreme Court has held that "a

review of the history and expansion of the Sixth Amendment guarantee of counsel demonstrates that the test utilized by the Court has called for examination of the event in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary.

Id. at 313 (emphasis added). A defendant facing a presentence interview needs the aid of counsel in coping with the legal problems inherent in the sentencing phase of the trial. See *supra* notes 94-103 and accompanying text.

194. The Guidelines, in effect, make the presentence report mandatory by not allowing a defendant to waive its preparation. See U.S.S.G. § 6A1.1. The Sixth Circuit stated, "Although the presentence interview is one of several means for gathering information about the defendant and his offense, the range of information that Fed.R.Crim.P. 32(c)(2) requires a presentence report to contain necessitates that [the] probation officer interview the defendant." *Saenz*, 915 F.2d at 1049 n.2.

195. *Ash*, 413 U.S. at 311.

196. See, e.g., *Hamilton v. Alabama*, 368 U.S. 52, 53 (1961) (holding that arraignment is a critical stage because the defendant may lose the opportunity to assert certain defenses if they are not raised at the arraignment). In *Stovall v. Denno*, 388 U.S. 293 (1967), the Court stated:

We have outlined in *Wade* the dangers and unfairness inherent in confrontations for identification. The possibility of unfairness at that point is great The presence of counsel will significantly promote fairness at the confrontation and a full hearing at trial on the issue of identification. We have, therefore, concluded that the confrontation is a "critical stage."

Id. at 298 (emphasis added).

197. *United States v. Herrera-Figueroa*, 918 F.2d 1430, 1436 n.8 (9th Cir. 1990).

defendant's *constitutional* right to be represented by counsel at sentencing is based upon 'the critical nature of sentencing in a criminal case.'¹⁹⁸ As the Court in *Mempa* stated, the right to counsel attaches at every stage in which "substantial rights" of the accused may be affected.¹⁹⁹

The determinative factor for finding that a stage in the criminal proceedings is "critical" is whether the events during that stage may substantially prejudice the defendant and whether the defense attorney may avert such prejudice.²⁰⁰ Contrary to the holdings of several circuits, the adversarial nature of the proceeding is not a prerequisite to finding a particular stage critical.

In holding that a proceeding must be adversarial in order to be a critical stage, some courts have cited cases that stress that the right to counsel does not apply until after the initiation of adversary proceedings.²⁰¹ *Kirby v. Illinois*²⁰² established the commencement of adversary proceedings as the point at which the right to counsel attaches. According to the Court, the initiation of such proceedings

is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and *immersed in the intricacies of substantive and procedural criminal law*.²⁰³

198. *Id.* (quoting *Mempa v. Rhay*, 389 U.S. 128, 134 (1967)); *see also* *Gardner v. Florida*, 430 U.S. 349, 358 (1977) ("[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. . . . The sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel.").

199. *Mempa*, 389 U.S. at 134.

200. *See* *Coleman v. Alabama*, 399 U.S. 1, 9 (1970). The Court in *Coleman* held that a preliminary hearing is a critical stage and set forth the relevant inquiry: "The determination whether the hearing is a 'critical stage' requiring the provision of counsel depends . . . upon an analysis 'whether potential substantial prejudice to defendant's rights inheres in the . . . confrontation and the ability of counsel to help avoid that prejudice.'" *Id.* (quoting *United States v. Wade*, 388 U.S. 218, 227 (1967)).

201. *See, e.g.,* *United States v. Johnson*, 935 F.2d 47, 50 (4th Cir.), *cert. denied*, 112 S. Ct. 609 (1991).

202. 406 U.S. 682 (1972).

203. *Id.* at 689 (emphasis added).

Kirby is often cited as the source of the principle that adversary forces in the guise of the prosecution must be present in order for a stage to be critical.²⁰⁴ However, the Court merely held that the start of adversarial proceedings, and not any time earlier, is the point at which the right to counsel attaches.²⁰⁵ Every succeeding stage—including the presentence interview—is part of the “intricacies of criminal law.”

Appellate courts confronting a defendant's Sixth Amendment right to counsel at the presentence interview have misinterpreted *Kirby*. By focusing on whether the proceeding was adversarial in nature, the courts have ignored Supreme Court precedent. The primary criteria of the Court in determining whether a stage is critical is the proceeding's inherent potential for substantially prejudicing a defendant's rights, and the ability of counsel to avert such prejudice.²⁰⁶

Analyzed under this standard, the presentence interview clearly is such a critical stage. As the court outlined in *Herrera-Figueroa*, numerous possibilities for prejudice to the defendant inhere to such a proceeding:

To the legally unsophisticated defendant, the presentence interview—like any interaction with the court—may be an intimidating and confusing procedure. . . .

Defendants who are not lawyers are not likely to understand the consequences of their conduct at the presentence interview if they are not accompanied by counsel. . . .

. . . Casual, ill-considered or inaccurate answers offered without a full understanding of the potential consequences may re-

204. *E.g.*, *Johnson*, 935 F.2d at 50 (citing *Kirby* for the proposition that a critical stage is adversarial in nature).

205. *Kirby*, 406 U.S. at 689.

206. *Coleman v. Alabama*, 399 U.S. 1, 9 (1970). *But see* *Moran v. Burbine*, 475 U.S. 412, 432 (1986) (“For an interrogation, no more or less than for any other ‘critical’ pretrial event, the possibility that the encounter may have important consequences at trial, standing alone, is insufficient to trigger the Sixth Amendment right to counsel.”); *United States v. Gouveia*, 467 U.S. 180, 190 (1984) (“[T]he right to counsel exists to protect the accused during trial-type confrontations with the prosecutor.”). However, both *Moran* and *Gouveia* dealt with events that occurred before the initiation of adversarial proceedings. Additionally, the quote from *Moran* must be read in context: the initiation of adversarial proceedings *in addition to* the possibility of negative consequences at trial creates a right to counsel at pretrial interrogations. The presentence interview meets both of these criteria.

sult in a substantial increase in the recommended period of incarceration.²⁰⁷

The role of counsel at the presentence interview can be critical. As one attorney commented before the advent of the Guidelines, "Many [defendants] are members of ethnic minorities, frequently lacking in communicative skills and more frequently with problems of comprehending anything terribly complicated. To send such defendants in, without counsel at their side, for interviews that will figure critically in the presentence investigator's report, is itself almost criminal."²⁰⁸ Under the Guidelines, the probation officer's conclusions in the presentence report are accorded greater weight by the court than they were previously.²⁰⁹ If, under the old sentencing system, allowing a defendant to be interviewed without counsel was "almost criminal," doing so under the rigid Guidelines system is even more ill advised.²¹⁰

Finally, the defense attorney cannot repair the harm resulting from the interview. Although *United States v. Wade*²¹¹ concerned a pretrial confrontation with prosecutorial forces rather than a posttrial presentence interview, the case is instructive regarding irremedial prejudice. In *Wade*, the Court was confronted with a pretrial lineup that arguably had tainted the witness' identification of the defendant at trial.²¹² The Court's analysis focused on the possibility that this taint had deprived the defendant of his right to a fair trial: "We [must] scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial"²¹³ Because the defendant was unable "effectively to reconstruct at trial any unfairness that occurred at the lineup,"²¹⁴ the defendant may have been deprived of his "only opportunity meaningfully to

207. *United States v. Herrera-Figueroa*, 918 F.2d 1430, 1435-36 (9th Cir. 1990).

208. Kuh, *supra* note 62, at 435.

209. See *supra* text accompanying notes 94-103.

210. One attorney considered it malpractice for a lawyer not to attend the interview with his client. Swain Interview, *supra* note 3.

211. 388 U.S. 218 (1967).

212. *Id.* at 227-32.

213. *Id.* at 227.

214. *Id.* at 232.

attack the credibility of the witness' courtroom identification."²¹⁵ Therefore, the presence of counsel was necessary to "avert prejudice and assure a meaningful confrontation at trial."²¹⁶

Similarly, the presentence interview, if held in the absence of counsel, is fraught with possibilities for prejudice to the defendant. The answers to the probation officer's questions, along with the words, actions, and demeanor of the defendant, may significantly affect the ultimate sentence.²¹⁷ The results of this interview may derogate from the accused's right to a fair sentencing proceeding.²¹⁸ The defense attorney is unlikely to be able to reconstruct the events of the interview to ferret out any unfairness that may have taken place. Nor will counsel be able to repair the harm done by the defendant's self-incriminating statements. Although counsel may challenge the facts and conclusions contained in the report,²¹⁹ a successful challenge to the probation officer's subjective conclusions on the defendant's demeanor or acceptance of responsibility is unlikely.²²⁰ The presence of the attorney at the interview is necessary to avert possible prejudice to his client.

The Probation Officer's Adversarial Role

As outlined above, courts holding that the presentence interview is not a critical stage of the trial stress that application of the Sixth Amendment right to counsel requires a proceeding of an ad-

215. *Id.*

216. *Id.* at 236.

217. *United States v. Herrera-Figueroa*, 918 F.2d 1430, 1434-35 (9th Cir. 1990). An adjustment of two points under the Guidelines may result in a significantly different sentence. The difference can range from a reduction of zero to two months for a defendant with a criminal history category of I and an offense level of three, to a reduction from life to 34 years for a defendant with a criminal history category of VI and an offense level of 38. U.S.S.G. ch. 5, pt. A, Sentencing Table.

218. *See supra* text accompanying notes 117-31.

219. Both the government and defense counsel review the complete report and may offer objections to facts or Guidelines applications they allege to be erroneous. *BARR ET AL.*, *supra* note 115, § 6.07, at 68. Matters that cannot be agreed upon are set forth in an addendum to the report. *Id.*

220. *See Lynne Goodstein & John H. Kramer, Case Processing and the Federal Sentencing Guidelines*, in *SENTENCING GUIDELINES*, *supra* note 118, at 11, 126 (noting that judges view the facts set forth in the presentence report as immutable and rely on the probation officer's interpretation of a case).

versarial nature.²²¹ Therefore, whether the presentence interview is a critical stage of criminal proceedings depends upon the probation officer's role in the sentence determination.²²² Because some courts have expressed the belief that the "probation officer acts as an agent of the court,"²²³ and that a defendant's statements therefore are not made to representatives of the prosecution,²²⁴ the pretrial interview has not been held a critical stage of the criminal proceedings. This analysis, however, rests upon the faulty assumption that probation officers do not operate as adversaries.

Regardless of whether the probation officer is, in theory, a neutral fact gatherer, most defense attorneys and defendants perceive

221. *United States v. Jackson*, 886 F.2d 838, 843 (7th Cir. 1989). At the state level, courts have held that allowing a defense attorney to attend presentence interviews will interfere with the probation officer's ability to conduct the interview effectively. *See, e.g., People v. Burton*, 205 N.W.2d 873, 875 (Mich. Ct. App. 1973) ("[T]he presence of counsel could inhibit defendants from answering questions, which in turn could work to their detriment . . ."); *State v. Knapp*, 330 N.W.2d 242, 244-45 (Wis. Ct. App. 1983) ("Having counsel present at the interview might seriously impede the ability of the trial court to obtain and consider all facts that might aid in forming an intelligent sentencing decision."). The Supreme Court considered this argument in the context of pretrial lineups in *United States v. Wade*, 388 U.S. 218 (1967). The Court said, "[T]o refuse to recognize the right to counsel for fear that counsel will obstruct the course of justice is contrary to the basic assumption upon which this Court has operated in Sixth Amendment cases. We rejected similar logic in *Miranda v. Arizona* concerning presence of counsel during custodial interrogation . . ." *Id.* at 237-38. Similar reasoning applies in the case of presentence interviews. The attorney wishes to help his client to receive the shortest possible sentence. He has no incentive to obstruct the proceedings; doing so would actually harm his client's interests. *See United States v. Rodriguez-Razo*, 962 F.2d 1418, 1423 (9th Cir. 1992) (noting that the presence of the defendant's attorney would have resulted in full disclosure of prior convictions to the probation officer); *Herrera-Figueroa*, 918 F.2d at 1436 (arguing that the effect of lawyer participation will be greater candor on the part of the defendant, not obfuscation).

Instead of inhibiting the defendant from answering, the attorney may be able to help his client communicate with the probation officer. According to one attorney who specialized in postconviction remedies, "[T]here are many reasons which favor counsel's presence [at presentence interviews]. For example, counsel may assist in clarifying the legal status of the case, its facts, offense behavior, and overall circumstances." Benson B. Weintraub, *The Role of Defense Counsel at Sentencing*, FED. PROBATION, Mar. 1987, at 25, 25. In addition, the American Bar Association has commented that "it has been observed that the presence of counsel can establish a better rapport and thus increase the flow of information." *Id.* (citing 3 AMERICAN BAR ASS'N, *supra* note 126, § 18-6.3 cmt., at 443).

222. *Jackson*, 886 F.2d at 844.

223. *E.g., United States v. Rogers*, 921 F.2d 975, 979 (10th Cir.), *cert. denied*, 111 S. Ct. 113 (1990).

224. *Jackson*, 886 F.2d at 842 n.4.

the probation officer as an arm of the prosecution.²²⁵ After all, the probation officer is responsible for: uncovering the defendant's criminal history; determining whether the defendant truly has accepted responsibility for the crime²²⁶ and whether the crime involved more drugs than the amount for which the defendant was

225. Swain Interview, *supra* note 3. In fact, one attorney noted that he would rather have his client talk to the prosecutor than to a probation officer because "at least prosecutors are charged with certain ethical duties." Hubachek Interview, *supra* note 123. One commentator described the changes in defendants' perceptions of the probation officer's role after the enactment of the Guidelines:

Historically, the probation officer was viewed by many defendants as a friend, a confidante, and someone who had the proverbial "ear" of the sentencing judge. That relationship, in many ways, has been severely impaired by the responsibilities placed upon the probation officer under the Act. Today, because of their perceived role as an adversary in the sentencing process, probation officers are viewed by some defendants when they appear in the probation office for the requisite presentence interview, as working on behalf of the attorney for the government.

Cook, *supra* note 63, at 113; see also Alschuler & Schulhofer, *supra* note 63, at 96 (noting that the Guidelines have transformed the role of probation officers in the sentencing process, making them more like lawyers); cf. *Jones v. Cardwell*, 588 F.2d 279, 282 (9th Cir. 1978) (discussing the objectives of the probation officer and the officer's relation to the prosecution), *cert. denied*, 440 U.S. 965 (1979).

226. Many defendants believe that to receive the point reduction for acceptance of responsibility, they must confess to crimes for which they were never convicted or to which they did not plead guilty, and which may be unrelated to the crime for which they are being sentenced. See *Jones*, 588 F.2d at 281 (involving a defendant who, while being interviewed by a probation officer for the presentence report, confessed to many other rapes and burglaries of which he had not been found guilty, and as a result received a 99-year sentence for rape). The circuits are split as to the scope of criminal conduct a defendant must accept before being awarded a reduction. Compare *United States v. Piper*, 918 F.2d 839, 841 (9th Cir. 1990) (holding that for a defendant to merit a reduction for acceptance of responsibility, he "must show contrition for the crime of which he was convicted, but he need not accept blame for all crimes of which he may be accused") and *United States v. Perez-Franco*, 873 F.2d 455, 459 (1st Cir. 1989) (concluding that acceptance of personal responsibility for "criminal conduct" means the criminal conduct to which the defendant pleads guilty and not all of his criminal conduct) with *United States v. Mourning*, 914 F.2d 699, 705 (5th Cir. 1990) (holding that a criminal defendant must accept responsibility for all of his relevant criminal conduct before he is entitled to a reduction for acceptance of responsibility) and *United States v. Gordon*, 895 F.2d 932, 936 (4th Cir.) (holding that for the reduction under the Guidelines to apply, the defendant must first accept responsibility for all his criminal conduct), *cert. denied*, 111 S. Ct. 131 (1990). By hinting that doing so will be advantageous to the defendant, probation officers may encourage defendants to reveal everything. Hubachek Interview, *supra* note 123. The result may be an increase in offense level related to relevant conduct. See U.S.S.G. § 1B1.3. By assisting his client in providing the necessary information, a defense attorney can prevent the inclusion of unnecessary damaging information. Restrepo Interview, *supra* note 15.

convicted; and ascertaining the defendant's role in the crime.²²⁷ Not surprisingly, this type of questioning leads the defendant to believe that the probation officer's efforts are designed to recommend the highest possible sentence.

This is not to suggest that, in general, probation officers are less than scrupulous in maintaining objectivity. It is important, however, that they attempt to remain unbiased.²²⁸ In practice, unfortunately, abuses sometimes do occur. For example, commentators have noted that "the insular relationship of the probation officer and the sentencing judge may . . . provide[] an opportunity for the probation officer to abuse his control of information."²²⁹ In addition to attempting to withhold or deliberately reveal facts in the report, the probation officer may adopt a pro-State slant. For example, "the probation officer may rely excessively on the prosecutor's files for information."²³⁰ In fact, instructions from the Administrative Office of the United States Courts on how to prepare a presentence report state that "[m]ost of the essential offense data may be found in the U.S. attorney's file."²³¹ Because the probation officer has a close working relationship with the prosecutor, the probation officer is more familiar with the prosecution's point of view. Although incidents of probation officer misconduct may be

227. The presentence investigation reports under the Guidelines make clear the probation officer's responsibility to present the relevant conduct of the defendant, including aggravating factors such as the purity or additional amounts of drugs involved in the offense. *United States v. Belgard*, 694 F. Supp. 1488, 1509 (D. Or. 1988).

228. Grunin & Watkins, *supra* note 77, at 47 (noting that the probation officer's "single most important objective [is] . . . [t]o remain independent and unbiased in the adversarial process and to provide the court with thoroughly verified information").

229. Fennell & Hall, *supra* note 116, at 1669. One probation officer "included in the recommendation section a statement that 'the defendant bragged in prison that he would be out on the street in a few days.' [The probation officer] admitted that the statement, while true, had been included specifically to provoke the judge into incarcerating the individual." *Id.* at 1670 n.227.

230. Peter B. Pope, *How Unreliable Factfinding Can Undermine Sentencing Guidelines*, 95 YALE L.J. 1258, 1277 (1986); see also Goodstein & Kramer, *supra* note 220, at 125 (describing how "in one district, there are already indications that probation officers who are reluctant to exercise much discretion in interpreting information are turning to prosecutors to aid them in making relevant guidelines determinations"). These files contain facts which, though collected by an adversarial party, may never have been proved in adversarial proceedings. Pope, *supra*, at 1277.

231. REPORTS UNDER SENTENCING REFORM ACT, *supra* note 111, at 1509.

isolated, a real danger remains that the probation officer may be less than impartial.

One cannot overstate the danger to the defendant when one sees the harsh consequences that may result from even minimal probation officer bias, in light of the Guidelines' unforgiving sentencing structure. For example, seventy-five percent of the adjustments provided in the Guidelines are upward departures.²³² Thus, most of the information elicited from the defendant by the probation officer is adverse to the defendant's interests. Without defense counsel present to advise the defendant when to invoke his privilege against self-incrimination, the defendant may talk himself into a longer prison term. Because the probation officer is more of an adversary than a neutral fact gatherer, the presentence interview resembles an adversarial confrontation. Therefore, even under a Sixth Amendment standard that requires an adversarial proceeding to invoke the right to counsel, the interview should be considered a critical stage of the prosecution at which the defendant is entitled to the assistance of counsel.

The Probation Officer's Role in Plea Bargaining

The contents of the presentence report may also affect the court's willingness to accept a plea bargain. The following example illustrates the problem: Rodney Johnson²³³ was charged with jewelry theft. His attorney struck a deal with the prosecutor whereby Johnson agreed to plead guilty to the offense, which carried a sentence of zero to six months. Under this bargain, Johnson based his plea on the sentence the charge carried. His attorney wanted a probationary period; the prosecutor wanted six months. Both sides were prepared to argue to the judge. At that point, Johnson went in for his presentence interview without his attorney. By the time the presentence report was issued, the adjustments made by the probation officer had increased the recommended sentence to three years. At the sentencing hearing, the judge looked at the report

232. Of the twelve specific grounds for adjustment of offense level enumerated in the Guidelines, nine result in increases in the offense level and three mandate a decrease in offense level. See U.S.S.G. ch. 3.

233. The name of the criminal defendant has been changed but the story is based upon an actual case in the Southern District of California. Swain Interview, *supra* note 3.

and asked defense counsel, "What are you complaining about? The defendant is getting a break at six months," and sentenced Johnson to six months in jail.²³⁴

By stipulating certain facts, the prosecution and defense can fix the sentencing range for a given charge. For example, if they agree that the defendant will be charged with possession of five grams of cocaine, that no firearm was found on the defendant, and that the defendant has one prior conviction for possession, they can reach a certain sentencing range.²³⁵ However, when the probation officer conducts an investigation, he may discover additional facts that will result in a different calculation of the sentence.²³⁶ Thus, the probation officer can essentially vitiate any attempt by the defense attorney to achieve a meaningful plea bargain.²³⁷ As one commentator has noted, one

concern regarding plea agreements arises out of potential disparities between the relevant facts disclosed at the time of agreement with those developed by the presentence report and related procedures. . . . The facts upon which the plea was entered may therefore turn out to be significantly different from those developed for the sentencing hearing. As a result, defendants may make decisions on guilty pleas based upon inadequate information and face far stiffer sentences than anticipated.²³⁸

Because seven out of ten defendants plead guilty,²³⁹ the potential for prejudice to the defendant is clear.

234. *Id.*

235. See Cook, *supra* note 63, at 113 (noting that the attorneys for the government and defense may, in some instances, reach a settlement and purposely overlook material facts).

236. *Id.* ("On some occasions, the probation officer, whose responsibility is to uncover relevant facts, may adversely affect the acceptance of the proposed sentence range by (1) introducing newly discovered facts . . . or (2) calculating the criminal history category and the offense level so as to recommend a higher sentencing guideline.").

237. Note, however, that "[d]isrupting plea agreements is not a function probation officers have solicited or unilaterally assumed." Varnon, *supra* note 78, at 63.

238. Weigel, *supra* note 66, at 94.

239. The Department of Justice reports that of 54,643 defendants in federal courts in 1989, 38,681 entered a plea of guilty or nolo contendere. U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS - 1990, at 500-01. Of those convicted and sentenced from October 1989 to September 1990, 87.7% pled guilty and 12.3% were convicted after trial. *Id.* at 510.

To a certain extent, this is a function of the continued coexistence of plea bargaining and the Guidelines. Because the Guidelines require the sentencing judge to assure when charges are dismissed that the remaining charges adequately reflect the seriousness of the actual offense behavior,²⁴⁰ the judge, upon reviewing the presentence investigation report, may impose a much stiffer sentence²⁴¹ than that which the parties had agreed upon. Although nothing, aside from abolishing plea bargaining,²⁴² will resolve the problem completely, permitting a defendant's attorney to attend the presentence interview would enable him to exert some influence over the defendant's revealing additional facts. That influence may well enable him to save a plea bargain for his client.

Waiver

The failure of courts to reach the Sixth Amendment question in cases in which the defendant asserted that he was denied the right to counsel at the presentence interview raises the additional problem of the impact of a waiver. In these cases, the attorneys were not precluded from attending the interviews, but the defendants failed to request the presence of counsel.²⁴³ The courts have held that a defendant waives the right to counsel by failing to object to the attorney's absence.²⁴⁴ Before finding that a defendant has waived a right, however, a court must first determine what sort of right he has waived. If the presentence interview is a critical stage, then holding that a defendant's failure to object to counsel's ab-

240. U.S.S.G. § 6B1.2(a).

241. The sentence would be based upon additional facts included in the presentence report. See Varnon, *supra* note 78, at 64 ("[I]t is not contemplated that the lawyers will, by agreement, be permitted to eliminate relevant information.") (quoting REPORTS UNDER SENTENCING REFORM ACT, *supra* note 111, at 4-5).

242. *Id.* at 65 (noting that probation officers observe that Guidelines sentencing may not be compatible with the charge-bargaining provisions of Rule 11(e)(1)(A) of the Federal Rules of Criminal Procedure and suggesting that eliminating charge dismissals would promote fairness and honesty in sentencing).

243. See *United States v. Cotton*, No. 90-5223, 1991 U.S. App. LEXIS 22294, at *5 (4th Cir. Sept. 24, 1991) (*per curiam*); *United States v. Cortes*, 922 F.2d 123, 128 (2d Cir. 1990); *United States v. Saenz*, 915 F.2d 1046, 1049 (6th Cir. 1990); *United States v. Colon*, 905 F.2d 580, 588 (2d Cir. 1990); *United States v. Dickson*, 712 F.2d 952, 954 (5th Cir. 1983).

244. *Cotton*, 1991 U.S. App. LEXIS 22294, at *5 ("In such a situation, even if a Sixth Amendment right to counsel existed, it was waived.").

sence effects a waiver of the right to counsel is inconsistent with the Supreme Court's waiver jurisprudence.²⁴⁵

As one commentator has noted, "[W]hether the sixth amendment was violated more properly turns on whether the defendant intentionally waived counsel at the interview. That counsel was not precluded from attending is an insufficient basis to find a valid waiver."²⁴⁶ In *Brewer v. Williams*,²⁴⁷ the Court stated that its previous decisions had established the doctrine that "it [is] incumbent upon the State to prove 'an intentional relinquishment or abandonment of a known right or privilege.' . . . We have said that the right to counsel does not depend upon a request by the defendant and that courts indulge in every reasonable presumption against waiver."²⁴⁸ Under this standard, a defendant whose attorney does not appear at the presentence interview and who fails to request an attorney has not intentionally waived his right to counsel. No Supreme Court case has held that mere silence on the part of the defendant is sufficient to waive the right to counsel.²⁴⁹ In fact, the Court has held that "we presume that the defendant requests the lawyer's services at every critical stage of the prosecution."²⁵⁰ Courts must not avoid the question of whether a presentence interview is a critical stage by claiming that the defendant has waived his right to counsel.

In light of the potential prejudice inherent in the presentence interview and the unconstitutionality of denying the defendant's right to counsel, the important question becomes what burden to place on the State. Currently, courts place the burden on the defendant or her attorney to request counsel's presence.²⁵¹ Because

245. See *infra* notes 246-50 and accompanying text.

246. PRACTICE UNDER THE GUIDELINES, *supra* note 61, at 192 n.50 (relying on *Brewer v. Williams*, 430 U.S. 387, 403-05 (1977)).

247. 430 U.S. 387.

248. *Id.* at 404 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)) (citations omitted).

249. However, the Court has held that the State, by administering *Miranda* warnings, made an accused—who waived his Sixth Amendment rights during postindictment questioning—sufficiently aware of his right to have counsel present at the questioning. *Patterson v. Illinois*, 487 U.S. 285, 293 (1988).

250. *Michigan v. Jackson*, 475 U.S. 625, 633 (1986).

251. See, e.g., *United States v. Cotton*, 1991 U.S. App. LEXIS 2294, at *5 (4th Cir. Sept. 24, 1991) (per curiam) (finding that the defendant failed to request his attorney's presence). The Ninth Circuit also placed the burden on the attorney and the defendant to insure coun-

the presentence interview is a critical stage, however, the burden should rest with the court and the probation officer to make certain that defendants are not interviewed in the absence of counsel. Such a requirement should not prove unduly onerous. The probation department should be required to contact the defendant's attorney and arrange an interview when all parties can attend. If a defendant appears for an interview without counsel, the probation officer should refuse to interview the defendant unless the officer ascertains that the defendant *knowingly* waives the right to the assistance of counsel at the interview.²⁵² Should the probation officer fail to do so, the results of the interview would be constitutionally tainted. Unless the government can prove that the absence of counsel constituted harmless error,²⁵³ a court should order the probation department to conduct another interview, preferably with a different officer.²⁵⁴

POLICY ARGUMENTS FOR EXTENDING THE RIGHT TO COUNSEL TO PRESENTENCE INTERVIEWS

One of the primary goals that sentencing legislation should meet is to assure that sentences are fair both to the offender and to society.²⁵⁵ The offender, the federal personnel charged with implementing the sentence, and the general public should be certain

sel's right to attend. *United States v. Herrera-Figueroa*, 918 F.2d 1430 (9th Cir. 1990); see *supra* text accompanying note 28.

252. This procedure complies with the Supreme Court's requirements for waiver of a constitutional right. See *Brewer*, 430 U.S. at 404.

253. The Supreme Court recently clarified the harmless error standard for misapplications of the Guidelines. The Court held that the burden is on the party defending the sentence to prove that the record indicates "that the error did not affect the district court's selection of the sentence imposed." *Williams v. United States*, 112 S. Ct. 1112, 1121 (1992).

254. If the same probation officer conducts the interview, he likely will be influenced by his perceptions of the defendant at the first interview. Additionally, he may consciously or subconsciously refuse to revise his previous recommendations. In one case, when the same probation officer conducted a second interview of the defendant with counsel present, she began by announcing that she would not revise her original recommendation regarding a two-level increase for obstruction of justice "despite anything [the defendant] or his attorney might say." *United States v. Rodriguez-Razo*, 962 F.2d 1418, 1421-22 (9th Cir. 1992). The Ninth Circuit remanded the case for another interview with a different probation officer. *Id.* at 1425.

255. S. REP. NO. 225, *supra* note 65, at 39, reprinted in 1984 U.S.C.C.A.N. 3182, 3222 (stating that fairness should be reflected "both in the individual case and in the pattern of sentences in all [f]ederal criminal cases").

that the sentence is justified under the Guidelines structure.²⁵⁶ In order to meet these goals, sentencing must rely upon accurate facts. The Guidelines mandate disclosure of the facts that a sentencing judge relies upon and explain exactly how the given facts affect the sentence.²⁵⁷ This aspect of the Guidelines allows lawyers to know precisely which facts are important. Sentencing under the Guidelines will be only as fair as the facts are accurate.²⁵⁸ In this crucial area of the sentencing process—ensuring fair and accurate fact gathering by the probation officer—the defense attorney should play a vital role.

The presence of counsel at every stage in which the defendant's rights may be compromised is an important part of ensuring the accuracy of the facts used in sentencing. Due to the unquestionable importance of the presentence report, which "if unchallenged, establishes the range of sentencing binding upon the trial court,"²⁵⁹ attorneys should have the right to guard against inaccuracy. Because of the critical importance of the presentence report, we must require that the facts contained therein be accurate enough to withstand any challenge.²⁶⁰ Consistency²⁶¹ and fairness in sentencing, the original purposes of the adoption of the Guidelines, are enhanced by permitting defense attorneys to participate in the presentence interviews.

256. *Id.*

257. Goodstein & Kramer, *supra* note 220, at 124 ("[T]he number of months one must spend in prison is inextricably tied to specific elements of the offense and the defendant's criminal history."); Pope, *supra*, note 230, at 1282.

258. Findley & Ross, *supra* note 14, at 844; Pope, *supra* note 230, at 1282 ("No matter . . . how excellent the 'substantive' legal rules . . . and the social policies they embody, specific decisions will go astray, absent competent fact-finding.") (quoting *In re Fried*, 161 F.2d 453, 464 (2d Cir.), *cert. granted*, 331 U.S. 804, and *cert. denied*, 331 U.S. 858, and *cert. dismissed*, 332 U.S. 807 (1947)).

259. Weigel, *supra* note 66, at 95.

260. See Varmon, *supra* note 78, at 64 ("Given the close scrutiny so many issues receive from the courts of appeals, probation officers must strive to insure that court adoption of their recommendations does not result in reversal on appeal.").

261. Consistency in sentencing means that defendants with the same criminal history, personal role in the crime, and acceptance of responsibility will receive the same sentence provided these facts are equally included in the presentence report.

RECOMMENDATIONS FOR DEFENSE PRACTICE

In the absence of a ruling that the Sixth Amendment mandates the right to counsel at the presentence interview, it is incumbent upon defense attorneys to develop a good working relationship with probation officers. "The most obvious impediment to a successful and productive relationship between probation officers and defense attorneys relates to how each professional perceives the other. . . . It is critical, for the benefit of the criminal justice system, for defense attorneys and probation officers to share a common ground."²⁶²

Additionally, defense counsel must consult with the defendant prior to the interview. Counsel must impress upon the defendant the importance of the interview and stress the consequences of various actions and omissions. In short, the defense attorney must make certain the defendant knows what the relevant facts in his case are and what the probation officer will be looking for. The more prepared the defendant is, the less likely the interview will result in prejudice. Moreover, because the determinations of acceptance of responsibility, obstruction of justice, and other Guidelines adjustments will be based on the interview, the attorney should arrange to be present with his client at the presentence interview.²⁶³

In addition, the defense attorney must read the presentence report and be alert for any facts with which he disagrees. Opportunities are available to object to the contents of the report and defense counsel should take advantage of these if necessary.²⁶⁴ Ensuring that the facts presented in the report are accurate will help ensure that the defendant receives the fairest possible sentence.

CONCLUSION

Because the information in the presentence report is directly correlative to the sentence received under the Guidelines, the na-

262. Weintraub, *supra* note 221, at 29.

263. See Kuh, *supra* note 62, at 434-35.

264. Carroll, *supra* note 116, at 989 (noting that the defense lawyer can have a significant impact on the presentence investigation process and its subsequent effect on the client by making timely attacks on erroneous information in the report).

ture of the presentence interview from which the information is derived has changed significantly since the enactment of the Guidelines. A close examination of the Supreme Court's critical-stage analysis reveals that the Court's main concern in determining whether a stage is critical is its inherent potential for prejudice, intentional or not, which the presence of counsel can avert.²⁶⁵ Even if the Court imposes the additional requirement that a critical stage be adversarial in nature, the reality of the probation officer's role as an adversary supports a finding that the presentence interview qualifies as a critical stage.

Even after a criminal defendant has been convicted or pled guilty, the Constitution demands continued fair treatment by the criminal justice system. Therefore, the Supreme Court has determined that the defendant is entitled to the assistance of counsel at every critical stage in the proceedings, including sentencing. In the federal sentencing structure, the presentence interview is a critical stage at which the defendant is entitled to the assistance of counsel.²⁶⁶

Upon extending the right to counsel to the presentence interview, the Constitution demands either the presence of counsel at the interview or an effective waiver of the right by the defendant. Mere failure to request the presence of counsel should not suffice. Practically, the constitutional guarantee would not be difficult to implement, nor would it place an undue burden on the probation department or the courts. The Constitution and the fairness concerns that prompted Congress to enact the Guidelines demand uniform provision of the right to counsel at presentence interviews in the federal criminal justice system.

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265. *United States v. Wade*, 388 U.S. 218, 236-37 (1967).

266. An attorney in the Federal Defender's Office in San Diego stated that "it's insane to think [the presentence interview] is not a critical stage." Swain Interview, *supra* note 3. When asked why the circuit courts have refused to recognize the interview as a critical stage, he speculated that the federal appellate courts are so far removed from the trenches that they cannot understand the impact of the interview. *Id.*