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those who are bound by the rule but also the courts charged with its interpretation.[89] The value of the decision in the instant case lies in its demonstration of the need for federal regulation of short-form mergers.[90] The SEC has already proposed a new set of rules to govern "going private" transactions,[91] and perhaps this case will provide the impetus for their adoption.

CHARLES J. BARTLETT

CRIMINAL PROCEDURE: EXPANDING DISCLOSURE OF PRESENTENCE INVESTIGATION REPORTS

Gardner v. Florida, 97 S. Ct. 1197 (1977)

A Florida circuit court jury found defendant guilty of first degree murder.[1] In the separate sentencing hearing, the jury returned an advisory verdict of life imprisonment after determining that the mitigating circumstances outweighed the aggravating circumstances.[2] The trial judge, however, concluded that the aggravating circumstances were preponderant and sentenced defendant to death.[3] The judge partially based his conclusion on factual in-

89. Short-form mergers have been characterized as "a sort of private eminent domain proceeding" due to the ease with which minority shareholders can be eliminated. Vorenberg, *Exclusiveness of the Dissenting Stockholder's Appraisal Right*, 77 HARV. L. REV. 1189, 1191 (1964).

90. The step-by-step process of statutory analysis delineated in this decision will also be valuable for analysis of similar future cases. 97 S. Ct. at 1300-01.

91. SEC Securities Act Release No. 5567 (Feb. 6, 1975), FED. SEC. L. REP. (CCH) ¶80,104 (proposing rules 13e-3A and 13e-3B). The proposed rules would require that the terms of the transaction be fair and that a valid business purpose for the transaction exist.

1. After a day-long drinking spree, defendant killed his wife by striking her at least 100 times with a blunt instrument. Gardner v. State, 313 So. 2d 675, 676 (Fla. 1975).

2. FLA. STAT. §921.141 (1975) outlines the capital sentencing procedure approved by the Supreme Court in Proffitt v. Florida, 428 U.S. 242 (1976). In addition to the evidence presented during the actual trial, the jury's advisory verdict is based on new evidence presented at a postconviction hearing. Whether the death penalty is to be recommended is determined by the jury's evaluation of the legislatively specified aggravating and mitigating circumstances. *Id.* §921.141(5)-(6). The testimony in the instant case, if credited, was sufficient to support at least one mitigating circumstance: "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." *Id.* §921.141(6)(f); Gardner v. State, 313 So. 2d 675 (Fla. 1975) (consumption of large amounts of alcohol).

3. Gardner v. State, 313 So. 2d 675, 676 (Fla. 1975). The testimony, if credited, was sufficient to support a finding that one of the aggravating circumstances was present: that the felony "was especially heinous, atrocious, or cruel." FLA. STAT. §921.141(5)(h) (1975). *But see* State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973), which emphasized the role of the sentencing judge in softening jury findings of all capital crimes as heinous, rather than his role in imposing the death sentence over jury recommendations of life sentences.

formation contained in the presentence investigation report.[4] Defense counsel was not permitted to see the confidential portion of the presentence investigation.[5] Nor was the report included in the record on appeal to the Florida supreme court, which affirmed the sentence.[6] On certiorari the United States Supreme Court reversed, remanded, and HELD, petitioner was denied due process of law when the imposition of the death sentence was based, at least in part, on information contained in the presentence investigation report, which neither he nor his counsel had an opportunity to deny or explain.[7]

The use of the presentence investigation report (PSI) by judges in criminal sentencing proceedings has become generally accepted as part of the sentencing determination process.[8] Support for using the PSI stems mainly from the modern penal theory of individualized sentencing.[9] The constitutionality of sentencing based upon information elicited out of court was upheld by *Willliams v. New York*,[10] in which the Supreme Court rejected due process and confrontation clause[11] challenges to a sentence determination that relied

4. Gardner v. State, 313 So. 2d 675, 677 (Fla. 1975). Under the procedures set forth in FLA. STAT. §921.141 (1975), the trial judge is empowered to determine the actual sentence, and therefore may overturn the jury's advisory verdict. In addition to the evidence considered by the jury, the judge may order a presentence investigation report to be compiled by the Florida Probation and Parole Commission. FLA. R. CRIM. PROC. 3.710. The report contains information relating to the defendant's prior criminal record and social background, based on public records and private interviews. The probation officer's recommended sentence is also included. *See* Higgins, *Confidentiality of Presentence Reports*, 28 ALB. L. REV. 12, 36-37 (1964).

5. 97 S. Ct. 1197, 1201 (1977). FLA. R. CRIM. PROC. 3.713 requires disclosure to the parties of only factual, physical, and mental evaluation material. It leaves to the discretion of the judge whether to disclose to a defendant or his counsel any other evaluative information.

6. Gardner v. State, 313 So. 2d 675 (Fla. 1975). In his dissent from the per curiam opinion, Justice Ervin objected to the majority's failure to insist on disclosure of the confidential portion of the presentence investigation report to counsel on either side. He contended that nondisclosure introduced the element of discretion, which the same court had stated was barred by FLA. STAT. §921.141 (1975). *Id.* at 678.

7. 97 S. Ct. 1197 (1977). To insure the benefits to the defendant of full disclosure of the presentence investigation report and the opportunity to rebut its contents by defense counsel, the instant case was remanded to the Florida supreme court with directions to order further proceedings at the trial court level, in lieu of remanding to the Florida supreme court to review the record including the presentence investigation report. *Id.* at 1207.

8. Bach, *The Defendant's Right of Access to Presentence Reports*, 4 CRIM. L. BULL. 160 (1968); Lehrich, *The Use and Disclosure of Presentence Reports in the United States*, 47 F.R.D. 225, 227 (1969).

9. The penal theory that advocates individualized sentencing as the best way to protect society from criminal behavior led to implementation of the PSI in the first half of the twentieth century. R. SALEILLES, THE INDIVIDUALIZATION OF PUNISHMENT (R. Jastron trans. 1913); Brancale, *Diagnostic Techniques in Aid of Sentencing*, 23 LAW & CONTEMP. PROB. 442 (1958); Glueck, *Principles of a Rational Penal Code*, 41 HARV. L. REV. 453 (1928); Note, *Disclosure of Presentence Reports in Federal Court: Due Process and Judicial Discretion*, 26 HASTINGS L.J. 1527, 1528 (1975).

10. 337 U.S. 241 (1949).

11. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." U.S. CONST. amend. VI.

on information other than evidence admitted in the guilt determination process.[12]

Although it seems settled that the PSI may be used in sentencing procedures,[13] whether the information contained in the PSI can remain confidential has been the subject of controversy.[14] In part, the disagreement concerning the degree of disclosure required to be made to the defendant or his counsel can be attributed to the varying interpretations given *Williams*.[15] Lower courts have frequently relied on *Williams* to hold that due process does not require disclosure to the defendant of information contained in the PSI.[16] The Supreme Court, however, did not address that issue in *Williams*.[17] Thus, in using *Williams* to rule against disclosure, many courts have strayed from the question actually decided by the Court.

The central issue in the controversy concerning the confidentiality of the PSI has been whether the defendant has a due process right to inspect and comment upon the report.[18] Proponents of confidentiality have argued that disclosure of the PSI would detract from the effectiveness of the work of probation officers, resulting in the submission of incomplete reports to sentencing judges.[19] Advocates of disclosure have countered that maintaining confidentiality denies due process rights during a critical part of the pro-

12. 337 U.S. at 250. The trial judge, using information contained in the PSI, overturned the life sentence recommended by the jury and imposed the death penalty on a defendant convicted of first degree murder. *Id.* at 242.

13. See note 8 *supra.*

14. Higgins, *In Response to Roche*, 29 ALB. L. REV. 225, 227 (1965) (noting that the controversy has been sparked by recent attention to rights of convicted offenders during sentencing, which has been the motivating force behind proponents of disclosure). The controversy has been going on for at least twenty years. *Id.* at 228-29.

15. For a good discussion of the various interpretations, see Note, *supra* note 9, at 1534.

16. *See, e.g.*, Baker v. United States, 388 F.2d 931 (4th Cir. 1968) (court denied any obligation to disclose entire PSI report to defendant whose sentence for armed robbery was based on a confidential PSI report); United States v. Fischer, 381 F.2d 509 (2d Cir. 1967) (court denied defendant's confrontation clause challenge based on undisclosed PSI information to sentencing for interstate transportation of forged checks), *cert. denied*, 390 U.S. 973 (1968); Waddell v. State, 24 Wis. 2d 364, 129 N.W.2d 201 (1964) (trial court judge disclosed contents of PSI to defendant before sentencing him for obtaining property by false representations calculated to defraud; Supreme Court of Wisconsin noted that *Williams* specifically held that denial of PSI disclosure to defendant does not violate due process under the fourteenth amendment).

17. Higgins, *supra* note 4, at 20. Note, *Recent Developments in the Confidentiality of Pre-sentence Reports*, 40 ALB. L. REV. 619, 627 (1976) [hereinafter cited as *Recent Developments*]; Note, *supra* note 9, at 1535.

18. *See Recent Developments, supra* note 17, at 619.

19. Roche, *The Position for Confidentiality of the Presentence Investigation Report*, 29 ALB. L. REV. 206, 212, 219 (1965); *Recent Developments, supra* note 17, at 620, 622. Arguments in favor of keeping the information in the PSI confidential have included the protection of the defendant, the protection of those who have given intimate and personal information in confidence, the delay resulting from the challenge to the contents of the report by defense counsel, the possibility of drying up essential sources of information that must be assured anonymity, and destruction of the therapeutic usefulness of the PSI report. For denials of PSI disclosure based on confidentiality, see also United States v. Durham, 181 F. Supp. 503 (D.C. Cir.), *cert. denied*, 364 U.S. 854 (1960); Morgan v. State, 142 So. 2d 308 (Fla. 1962).

ceedings.[20] Such arguments are based chiefly on the right of the convicted defendant to be sentenced on the basis of accurate information.[21] Cases in which the defendant's sentence was based on inaccurate material contained in the PSI demonstrate the potential harm in nondisclosure.[22]

Numerous state and federal statutes and judicial decisions[23] have attempted to balance the competing interests of affording due process to defendants and maintaining confidentiality of PSI reports. For example, rule 3.713 of the Florida Rules of Criminal Procedure mandates the disclosure of only factual, physical, and mental evaluation, leaving the disclosure of confidential material to judicial discretion.[24] The committee note to rule 3.713 explains that the rule represents a compromise between full disclosure and confidentiality.

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20. *See* State v. Kunz, 55 N.J. 128, 259 A.2d 895 (1969); Opinion of Mr. Justice Douglas, 39 F.R.D. 276 (1966) (dissenting from promulgation of Federal Rule of Criminal Procedure 32(c)(2)); *Recent Developments, supra* note 17, at 623; Note, *Due Process in Sentencing: A Right to Rebut the Presentence Report*, 2 HASTINGS CONST. L.Q. 1065, 1066 (1975). Proponents of disclosure also stress the need for fundamental fairness during sentencing, which dictates that the defendant be advised of the informational basis of the sentence imposed on him.

21. Townsend v. Burke, 334 U.S. 736, 740-41 (1948) (held that due process had been violated when defendant was sentenced on the basis of false assumptions concerning his criminal record).

For a discussion of the possibility of unintentional mistake in the PSI that may cause irreparable harm to the defendant, see Gardner v. State, 313 So. 2d 675, 678 (Fla. 1975) (Ervin, J., dissenting); Opinion of Mr. Justice Douglas, 39 F.R.D. 276 (1966); Higgins, *supra* note 4, at 26; Note, *supra* note 20, at 1070-71.

Another right that is claimed to be violated by nondisclosure of the PSI is the right to confrontation, stemming from the lack of any opportunity by the defendant to challenge or rebut information in the PSI. *See* Bach, *supra* note 8, at 166-67; Lehrich, *supra* note 8, at 251-52.

22. *E.g.*, United States v. Tucker, 404 U.S. 443 (1972) (defendant sentenced on the basis of convictions that had been unconstitutionally obtained, but this fact did not appear in the PSI); Townsend v. Burke, 334 U.S. 736 (1948) (defendant sentenced on the basis of misinformation in the PSI as to charges that had been dismissed or upon which defendant had not been found guilty); State v. Killian, 91 Ariz. 140, 370 P.2d 287 (1962) (information in the PSI connected defendant with a rape that he had never been accused of committing); State v. Pohlable, 61 N.J. Super. 242, 160 A.2d 647 (1960) (eight years after his conviction, when he was first able to examine the PSI, defendant discovered serious errors in the number and nature of prior convictions listed in the report).

23. For a discussion of various jurisdictions that require, either by statute or judicial decision, disclosure to the defendant of the contents of the PSI, see Bach, *supra* note 8. Many states have not required disclosure of the PSI. *See, e.g.*, McCormack v. State, 332 So. 2d 117 (Fla. 1976); State v. Robinson, 209 N.W.2d 374 (S.D. 1973); State v. Doremus, 29 Utah 2d 373, 510 P.2d 529 (1973); Waddell v. State, 24 Wis. 2d 364, 129 N.W.2d 201 (1964). FED. R. CRIM. PROC. 32(c)(3) allows the defendant "to read the report of the presentence investigation exclusive of any recommendation as to sentence," but leaves to the discretion of the judge disclosure "to the extent that in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons." For a discussion of rule 32, see United States v. Maslanka, 501 F.2d 208 (5th Cir. 1974); United States v. Arenas-Granada, 487 F.2d 858 (5th Cir. 1973); Baker v. United States, 388 F.2d 931 (4th Cir. 1968).

24. FLA. R. CRIM. PROC. 3.713.

Despite the lack of agreement whether the contents of PSI reports should be disclosed, a trend toward increased access for the defendant and his counsel has emerged.[25] This movement coincides with the general recognition of the critical nature of the sentencing stage in all criminal proceedings, during which defendants must be afforded due process protections.[26] Due process includes the right to counsel during sentencing because defense counsel plays a key role in assuring that the sentence is based on accurate information.[27] The right to confront all adverse witnesses,[28] viewed as intimately related to this role of counsel, guarantees the convicted defendant that his sentence is based on truthful information.[29]

The instant Court rejected the state's reliance on *Williams* in its discussion of the constitutionality of nondisclosure of the PSI.[30] The plurality[31] dis-

25. Gray, *Post Trial Discovery: Disclosure of the Presentence Investigation Report*, 4 U. TOLEDO L. REV. 1, 20-22 (1972); Lehrich, *supra* note 8, at 245; Schaffer, *The Defendant's Right of Access to Presentence Reports*, 3 CRIM. L. BULL. 674, 681 (1967). The trend toward increased disclosure is identified mainly in modern proposals that encourage disclosure of the PSI to the defendant or his counsel. *See* PRESIDENT'S COMMISSION OF LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 144-45 (1967); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 20 (1967); AMERICAN BAR ASSOCIATION, PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, SENTENCING ALTERNATIVES AND PROCEDURES 200-28 (approved draft 1968); Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Advisory Committee Note, Proposed Amendments to Criminal Rules, 48 F.R.D. 553, 616-18 (1970).

26. An impetus toward increased disclosure is identified in Supreme Court decisions that have greatly expanded the rights of the accused during the determination of guilt or innocence as well as during the sentencing process. *See* United States v. Maroney, 355 F.2d 302 (3d Cir. 1966). For examples of the extension of due process rights to convicted defendants, see Mempa v. Rhay, 389 U.S. 128 (1967) (convicted defendant entitled to the right to counsel during sentencing); Specht v. Patterson, 386 U.S. 605 (1967) (prohibited sentencing defendant on one charge based on an earlier unlitigated charge); Kent v. United States, 383 U.S. 541 (1966) (convicted defendant generally may not be subjected to "critically important" determinations without meaningful opportunity to be heard and meaningful representation by counsel); Townsend v. Burke, 334 U.S. 736 (1948) (convicted defendant given the right to be sentenced on the basis of accurate information).

27. In Townsend v. Burke, 334 U.S. 736, 740 (1948), the Supreme Court indicated that defense counsel would be under a duty during sentencing proceedings to prevent the trial court from proceeding on false assumptions in its determination of a sentence. A logical extension of *Townsend* has been projected to result in mandatory disclosure of the PSI to defendant and his counsel to enable the defense counsel to fulfill the active role described for him by the Supreme Court. *See* Verdugo v. United States, 402 F.2d 599, 613 (9th Cir. 1968) (Browning, J., concurring); Higgins, *supra* note 4, at 20.

28. *See* Pointer v. Texas, 380 U.S. 400 (1965), in which the sixth amendment right to confrontation was applied to the states through the fourteenth amendment.

29. For a discussion of the importance of affording the sixth amendment right to confrontation to defendant during sentencing to enable defense counsel to fulfill the role outlined for him in *Townsend*, see Bach, *supra* note 8, at 167; Lehrich, *supra* note 8, at 251; Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821, 828 (1968).

30. 97 S. Ct. at 1203-04.

31. Justice Stevens announced the Court's judgment and delivered an opinion in which Justices Stewart and Powell joined. Chief Justice Burger concurred in the judgment. Justices White and Blackmun filed opinions concurring in the judgment. Justice Brennan

tinguished *Williams* from the instant case by contrasting the disclosure of information contained in the PSI in *Williams* with the nondisclosure of the confidential portion of the PSI in the case under review.[32] The Court concluded that defense counsel in the instant case was not afforded the same opportunity as counsel in *Williams* to challenge the accuracy of the PSI report.[33]

The instant Court further distinguished *Williams* by noting that the Court had since reexamined the capital sentencing procedures in light of "evolving standards of procedural fairness."[34] Examining the constitutional developments since *Williams* that have assured procedural due process in the imposition of the death penalty,[35] the Court noted the unique nature of the death sentence as compared to all other types of punishment.[36] The Court also discussed the progress that has been made in guaranteeing procedural due process in all criminal sentencing proceedings.[37] Recognizing the critical nature of posttrial stages, the Court emphasized the "legitimate interest" of the convicted defendant in sentencing procedures.[38]

After reaffirming the applicability of procedural due process to sentencing in criminal proceedings, the Court proceeded to refute each argument that the state advanced in favor of maintaining the confidentiality of the PSI in the instant capital sentencing proceeding.[39] The state argued that, in gathering the needed information about the defendant, it must promise that the information will remain confidential in order to keep sources of information

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filed a separate opinion, and Justices Marshall and Rehnquist filed dissenting opinions. 97 S. Ct. 1197.

32. *Id.* at 1204.

33. The Court noted that in *Williams*, "the material facts concerning the defendant's background which were contained in the presentence report were described in detail by the trial judge in open court. . . . In contrast, in the case before us, the trial judge did not state on the record the substance of any information in the confidential portion of the presentence report that he might have considered material." *Id.*

34. *Id.* The instant Court referred to Justice Black's opinion in *Williams*, which recognized the need to reexamine capital sentencing procedures after a passage of time. The instant Court thus recognized its duty to reexamine these procedures in light of changing views of the procedures used to impose the death penalty.

35. In Gregg v. Georgia, 428 U.S. 153 (1976), and Proffitt v. Florida, 428 U.S. 242 (1976), the Supreme Court declared that imposition of the death penalty did not violate the eighth amendment if certain approved procedures were strictly followed. Requiring such procedures was deemed necessary to insure that imposition of the death sentence was "based on reason rather than caprice or emotion." 97 S. Ct. at 1205.

36. In Furman v. Georgia, 408 U.S. 238 (1972), and Gregg v. Georgia, 428 U.S. 153 (1976), the Supreme Court recognized the unique quality of the death penalty. *But see* McGautha v. California, 402 U.S. 183, 217 (1971), in which the Court stated that defendant had no constitutional right to a bifurcated trial in a capital case, "[n]or does the fact that capital, as opposed to any other, sentencing is in issue seem to us to distinguish this case."

37. See note 26 *supra* and accompanying text.

38. "The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." 97 S. Ct. at 1205.

39. *Id.* at 1205-07.

from drying up.[40] According to the state, disclosing the information to the defendant would also disrupt the rehabilitation process and restrict the trial judge's ability to exercise discretion in sentencing.[41] The Court nonetheless determined that the state's interest in maintaining confidentiality was outweighed by the importance of using accurate and reliable information in the imposition of the death sentence.[42] The Court stressed the utility of an effective rebuttal by defense counsel to uncover the truth.[43] The need to restrict the degree of discretion available to sentencing judges also influenced the decision requiring PSI disclosure; otherwise, the procedure would run afoul of the dictates of *Furman v. Georgia*[44] and *Proffitt v. Florida*.[45]

Justice White concurred in the judgment but did not join in the opinion. Objecting to the plurality's reliance on the due process clause of the fourteenth amendment, Justice White believed that the holding should have been limited to a requirement of disclosure only in death penalty cases in which the eighth amendment is applied.[46] In his dissent, Justice Marshall agreed that the use of the confidential PSI report violated due process, but he would have reversed and remanded for sentencing to a term of years.[47] Justice Brennan, while agreeing that the due process clause was violated when the contents of the PSI were not disclosed to a defendant facing the death sentence,[48] adhered to his view that the imposition of the death penalty in all circumstances violates the eighth and fourteenth amendments.[49]

The instant case may impact areas of criminal law other than capital cases. Justice White's objection to the plurality's reliance on the due process clause rather than the eighth amendment indicated that the heretofore confidential nature of the PSI may be subject to attack in all felony cases.[50] Failing to limit its consideration to earlier death penalty cases, the Court relied on the due process clause to invalidate a procedure used in capital sentencing. That

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40. *Id.* at 1205.

41. *Id.* at 1206.

42. The Court found the state's arguments weak in the face of the tragic consequences that could result from use of undisclosed, erroneous information contained in the PSI. *Id.*

43. "Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases." *Id.*

44. 408 U.S. 238 (1972).

45. 428 U.S. 242 (1976).

46. 97 S. Ct. at 1207-08 (White, J., concurring).

47. *Id.* at 1208-11 (Marshall, J., dissenting). Justice Marshall believed that the opinion should have focused upon the Florida courts' blatant disregard of the procedures approved in *Proffitt*.

48. *Id.* at 1208.

49. *Id.* Justice Blackmun and Chief Justice Burger concurred in the judgment but did not address the due process issue presented in the plurality opinion. Justice Rehnquist, in his dissent, objected to the examination of the process by which the death sentence is imposed. *Id.* at 1211 (Rehnquist, J., dissenting).

50. "I thus see no reason to address in this case the possible application to sentencing proceedings — in death or other cases — of the Due Process Clause, other than as a vehicle by which the strictures of the Eighth Amendment are triggered in this case." *Id.* at 1208 (White, J., concurring).

foundation may allow the extension of the Court's decision to cases other than those in which the death penalty is imposed.

The Court reinforced its reliance on the due process clause by discussing at length the constitutional developments that have guaranteed convicted defendants procedural due process rights during sentencing.[51] The Court's emphasis on the evolving nature of due process rights in sentencing fits the instant case into the broader context of sentencing in all felony cases. The recognition of this due process requirement by the Court, regardless of the nature of the felony, further indicates the possible expansion of the instant decision to noncapital cases.

The separate opinions of Justices Marshall and Brennan also support a future extension of PSI disclosure to defendants in noncapital cases.[52] Although they disagreed about the constitutionality of the death sentence under the eighth and fourteenth amendments, both Justices agreed that sentencing based on a confidential PSI report violated the due process clause of the fourteenth amendment.[53] These opinions, together with the plurality opinion, suggest that a majority of the Court believes that the due process clause is applicable to noncapital sentencing procedures.

The plurality's rejection of the arguments advanced in favor of PSI confidentiality[54] lends further credence to an assumption that the instant Court may be willing to extend its due process analysis to noncapital cases in which sentencing was based on confidential information. In deciding that the due process requirement of sentencing based on accurate information outweighed the need for confidentiality,[55] the instant Court adopted the major arguments advanced by proponents of mandatory disclosure of PSI reports.[56] The plurality's emphasis on the need for reliable sentencing data seems to indicate that the justifications for nondisclosure will prove equally weak in future noncapital cases.

The instant Court's recognition of the crucial nature of sentencing in all criminal proceedings[57] leads to the conclusion that disclosure of the PSI report may be required in any criminal case in which the defendant is threatened with restraints on his liberty.[58] The Supreme Court's acknowledgment of the significant role of counsel during sentencing, together with earlier decisions stressing the importance of effective counsel during sentencing,[59] suggests that the defendant may not be afforded meaningful representation by counsel unless the PSI is disclosed to him.[60]

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51. See note 26 *supra* and accompanying text.
52. See text accompanying notes 47-49 *supra*.
53. See text accompanying notes 47 & 48 *supra*.
54. See text accompanying notes 39 & 40 *supra*.
55. See text accompanying note 42 *supra*.
56. See notes 20 & 21 *supra* and accompanying text.
57. 97 S. Ct. at 1205.
58. *See* United States v. Maroney, 355 F.2d 302, 310 n.10 (3d Cir. 1966); Opinion of Mr. Justice Douglas, 39 F.R.D. 276 (1966); *Recent Developments, supra* note 17.
59. See notes 26 & 27 *supra*.
60. *See* Verdugo v. United States, 402 F.2d 599, 613, 614 n.3 (9th Cir. 1968) (separate opinion of Browning, C.J.) (quoting PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND

Finally, the Court's emphasis on the defendant's ability to rebut the contents of the PSI,[61] coupled with the constitutional right of confrontation,[62] may influence future extension of the instant decision. The Court's apparent willingness to extend the right of confrontation to sentencing proceedings[63] indicates that the right to disclosure of the PSI may become a constitutional necessity.[64] The defendant and his counsel would otherwise face the confusing position of having been afforded the right to confront the sources of the information in the PSI without knowing the contents of the report.[65]

The issue of disclosure of the PSI to the defendant and his counsel has been in a state of controversy for over twenty years.[66] In its first decision addressing PSI disclosure, the Court has taken a positive step toward resolution of the conflict in favor of due process rights of the convicted defendant.[67]

The instant Court has extended a right to disclosure under the due process clause of the fourteenth amendment to the most crucial of all sentencing proceedings, one during which the convicted defendant is faced with the possible imposition of the death penalty. By relying on the due process clause rather than the eighth amendment, the plurality has left the door open for future consideration of the issue of disclosure in criminal cases involving less severe sentences.[68]

RISA LIEBERWITZ

ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 20 (1967): "A serious obstacle to the full participation by defense counsel in the sentencing process is that in many jurisdictions he does not have access to the presentence report."); United States v. Maroney, 355 F.2d 302, 310 n.10 (3d Cir. 1966); State v. Kunz, 55 N.J. 128, 259 A.2d 895, 900 (1969); Bach, *supra* note 8, at 166; Note, *supra* note 9, at 1538.

61. 97 S. Ct. at 1206.

62. *See* Lehrich, *supra* note 8, at 251-52. See note 28 *supra*.

63. Specht v. Patterson, 386 U.S. 605 (1967), and Kent v. United States, 383 U.S. 541 (1966), have been identified as indicative of the Supreme Court's willingness to reexamine sentencing in light of due process standards to afford defendants an opportunity to rebut sentencing information. Bach, *supra* note 8, at 167; Note, *supra* note 29, at 828.

64. *See* Bach, *supra* note 8, at 167; Lehrich, *supra* note 8, at 252; Note, *supra* note 29, at 836.

65. *See* Bach, *supra* note 8, at 167; Lehrich, *supra* note 8, at 252.

66. *See* Higgins, *supra* note 14, at 228-29.

67. The Supreme Court recently reaffirmed the holding of the instant case in its summary disposition of Songer v. Florida, 97 S. Ct. 1594 (1977), in which the judgment was vacated and the case remanded to the Florida supreme court for further consideration in light of the instant decision. In *Songer*, the trial judge used the PSI to sustain a jury recommendation of death for premeditated murder. Songer v. State, 322 So. 2d 481, 483 (Fla. 1975).

As a result of the instant decision, the Florida supreme court also agreed to review the cases of 18 death row inmates to determine whether their sentences should be reversed because the trial judges determined sentences using confidential information contained in the PSI.

68. The instant decision, together with recent proposals urging mandatory disclosure during all criminal proceedings, may further the trend toward increased disclosure that has been identified in the past. See note 25 *supra*.