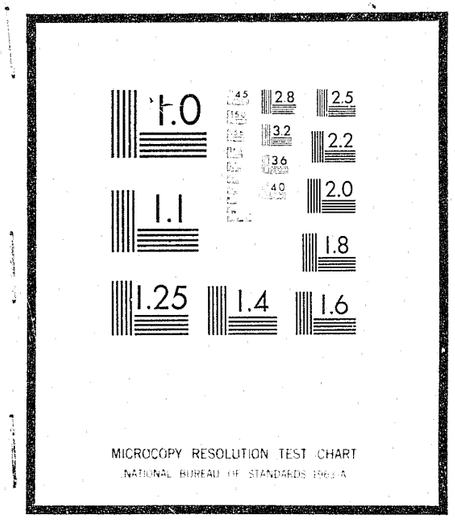

To Appear in FEDERAL PROBATION, June 1977

LOOKING AT THE LAW - APRIL 1, 1977

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SENTENCING THE WHITE-COLLAR CRIMINAL

Attention has recently been focused on the sentencing of "white-collar" criminals. Much of the discussion concerns the adequacy of sentences imposed in terms of their effectiveness in deterring similar criminal offenses and of their leniency when compared to sentences given "street-crime" offenders. To combat, for example, what the Department of Justice perceives as unwarranted leniency in sentencing anti-trust offenders, the Attorney General through the Antitrust Division recently issued a set of guidelines for Government attorneys to utilize in making sentencing recommendations in such cases. These guidelines prefer jail-time penalties over fines. The standard sentencing recommendation is to be calculated from a base of 18 months in prison for individual price-fixing defendants. The guidelines are printed in 45 Law Week 2419 (March 8, 1977)

Probation officers have likewise grappled with the challenge of more effective supervision of the frequently probationed white-collar criminal. [See 1976 Annual Report of the Director of the Administrative Office of the United States Courts, Table D.5, at II - 18-19.] The possibility of

of designing special conditions of probation which can more appropriately relate to the white-collar criminals than the traditional probation conditions promulgated with the thief or the bank robber, for instance, in mind has been suggested.

One proposed special condition of probation contemplates a requirement that the probationer submit, upon the request of his or her probation officer, to a reasonable audit of his financial, or business records, or both. Alternatively, a special condition of probation might require the probationer to submit, periodically, detailed reports with supporting documentation regarding his income and expenses, etc. This kind of condition is analogous to the frequently utilized condition of probation in drug cases that subjects the probationer and his belongings to reasonable searches by his probation officer. That kind of probationary condition has been expressly approved by the United States Court of Appeals for the Ninth Circuit in United States v. Consuelo-Gonzalez, 521 F.2d 259 (9th Cir. 1975).

As the following discussion reveals, I can find no constitutional pitfalls in the imposition of a condition providing for reasonable audits of, or reports regarding, a probationer's current financial matters, so long as it bears a nexus to the individual offender and his offense and to the protection of the public and the probationer's

rehabilitation. 1/

As a prefatory observation, the proposed condition of probation is essentially one of reporting - that is, it requires an accounting to be made by the probationer to his supervising officer. A standing condition of probation stipulates that the probationer "shall report to the probation officer as directed." See United States Probation System, Operations Manual, App. A-2.16 (Probation Form No. 7). This "reporting" function is critical in the probation setting. In Morrissey v. Brewer, 408 U.S. 471, 478 (1972) the Supreme Court wrote, with respect to the comparable parole system:

> The conditions of parole serve a dual purpose; they prohibit, either absolutely or conditionally, behavior that is deemed dangerous to the restoration of the individual into normal society. And through the requirement of reporting to the parole officer . . ., the officer is provided with information about the parolee and an opportunity to advise him. [Emphasis added.]

The requirement of reporting is central to the concept of probation. The extent to which a probationer can be assisted and the public safeguarded by the supervision process depends on the ability of the probation officer to know what is happening in the

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1/ The test for the validity of probationary conditions has been succinctly stated as follows:

> The granting of a sentence of probation in lieu of custody or fine in the first instance as well as the terms and conditions of the probation granted rests within the sound discretion of the sentencing district court; and such judicial discretion in probation matters is limited only by the requirement that the terms and conditions thereof bear "a reasonable relationship to the treatment of the accused and the protection of the public." Porth v. Templar, 453 F.2d 330, 333 (10th Cir. 1971). [Some citations omitted.]

United States v. Nu-Triumph, Inc., 500 F.2d 594, 596 (9th Cir. 1974).

probationer's world. The Probation Act enjoins a probation officer to "keep informed concerning the conduct and condition of each probationer under his supervision." 18 U.S.C. § 3655 (1970). That submission to this limited kind of surveillance is an essential component of probation has been explicitly affirmed in two district court decisions. See United States v. Delago, 397 F. Supp. 708, 712 (S.D.N.Y. 1974); United States v. Manfredonia, 341 F. Supp. 790, 794-95 (S.D.N.Y.), aff'd per curiam, 459 F.2d 1392 (2d Cir.), cert. denied, 409 U.S. 851 (1972). Taken together, these authorities establish that a sentencing court and its probation officers have an obligation as well as the authority to require routine reporting by probationers.

With respect to the suggestion regarding auditing the financial records of white collar criminals, a constitutional analysis should be made. A probationary condition requiring the probationer to submit to reasonable audits of his books by his probation officer or to provide statements routinely as to his financial conditions may raise a question as to whether such conditions infringe on either of two constitutional guarantees belonging to the defendant.

A probationer is entitled to the protection of the Constitution; however, it is generally accepted that probationers are properly subject to limitations from which ordinary persons are free. See Note, 44 Fordham L. Rev. 617, 634-36 (1976); Note,

1976 Duke L. J. 71, 72-76 (1976). Consequently, federal courts have upheld restrictions on probationers that have limited the offender's freedom of association and travel or his right to privacy. See, e.g., Consuelo-Gonzalez, supra; Malone, supra; Berrigan v. Sigler, 499 F.2d 514 (D.C. Cir. 1974)(parole condition).

As I stated earlier, the legitimacy of a condition requiring a probationer to submit to searches in a reasonable manner and at a reasonable time by his probation officer has been established, at least with respect to drug offenders, in the 1975 decision of Consuelo-Gonzalez, supra. While a probationer has a Fourth Amendment right to be protected against unreasonable searches and seizures, searches by the probation officer under the above conditions, which would be unreasonable in the case of ordinary citizens, are permissible. The Consuelo-Gonzalez decision formulated the following test for determining the appropriateness of conditions that restrict otherwise inviolable constitutional rights:

> Thus, the crucial determination in testing probationary conditions is . . . whether the limitations are primarily designated to affect the rehabilitation of the probationer or insure the protection of the public.

Consuelo-Gonzalez, supra, 521 F.2d at 265 n.14.

I can see no reason why reasonable searches of the financial belongings of a probationer conducted in a reasonable manner by the probation officer would be any less valid under the Consuelo-Gonzalez test than drug searches. 2/ An embezzler's or a tax evader's business or financial records are as much the indicia of his crime as a drug offender's urinalysis or the presence of drug paraphernalia in his home. 3/ The probation officer possesses the same obligation to all offenders to report their activities for the purposes of rehabilitation and public safety. I must conclude that the Fourth Amendment rights of a probationer would not be violated by a condition of probation, reasonably tailored to individual circumstances, requiring the probationer to submit, at the request of his probation officer, to reasonably conducted audits or reviews of his financial records by the probation officer. 4/

2/ Other federal courts have adopted a similar criterion for testing probationary conditions that involve constitutional rights or privileges. See Nu-Triumph, Inc., supra, note 1, 500 F.2d at 596; Porth, supra, 453 F.2d at 333. The test is the same as that used in testing all probationary conditions, but the scrutiny of reasonableness is more exacting, in my view.

3/ Courts have recognized that restrictions which remove previous opportunities for the commission of crimes similar to the probationer's offense are proper. See Whaley v. United States, 324 F.2d 356 (9th Cir. 1963); cert. denied, 376 U.S. 911 (1964); Barnhill v. United States, 279 F.2d 105 (5th Cir.), cert. denied, 364 U.S. 824 (1960). See also United States v. Pastore, 537 F.2d 675, 679-83 (2d Cir. 1976).

4/ The fact that agents of an agency with greater expertise in studying financial records accompany the probation officer in the search would, in my view, create no substantial problem so long as the search was for probation purposes and was not a subterfuge for prosecutorial purposes. See United States v. Gordon, 540 F.2d 452, 453 (9th Cir. 1976); Consuelo-Gonzalez, supra, 521 F.2d at 267. On the other hand, there exists a grave danger of becoming a "stalking horse" for investigative agencies. The best approach may well be that we should better train probation officers to supervise white collar criminals.

There is one other consitutional provision which should be examined in this context. Reporting requirements which entail divulging details about a probationer's finances, or business dealings, or both, might be perceived as violating an individual's Fifth Amendment privilege against self-incrimination. 5/

I noted above that there is nothing unusual or suspect about "reporting" requirements; nonetheless what the proposed condition contemplates is review of a person's own papers which may lead to the discovery of incriminating information. The Consuelo-Gonzalez test for probationary conditions suggests, nonetheless, that an otherwise impermissible intrusion on an individual's privacy rights can be justified where it is necessary to assist in such person's reintegration into a law-abiding world and to protect the public from further illegal conduct.

Two federal courts have rejected Fifth Amendment claims of probationers in the context of probation conditions. In United States v. Delago, supra, the court for the Southern District of New York held that the Fifth Amendment privilege against self incrimination is not available to a probationer with respect to his statements, including incriminating ones, made to his probation officer. The court ruled that such statements are admissible in a probation revocation case and further that there is, therefore, no need for probation officers to give probationers Miranda

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5/ See C. Imlay & C. Glasheen, "See What Condition Your Conditions Are In." 35 Fed. Prob. 3, 6-7 (June, 1971).

warnings 6/ when questioning probationers about their activities that may constitute probation violations. 397 F. Supp. at 712. The court explained its holding this way:

> This is so because the defendant expressly agrees to be subject to the supervision and surveillance appropriate to a probationer, to avoid the more onerous regimen of a prisoner.

Id. See also United States v. Johnson, 455 F.2d 932, 933 (5th Cir. 1972).

The Delago decision relied on an earlier opinion by the same court which concerned the validity of the monthly reporting requirement for a probationer, United States v. Manfredonia, supra, In Manfredonia the court noted that: "The reports about basic activities comprise an indispensable tool for effective probation supervision." 341 F. Supp. at 794. With respect to the claim of a Fifth Amendment privilege the court reasoned:

> Defendants are left at large rather than locked up on the understanding that they will be subjected to supervision and will cooperate in their supervision. As an alternative to an intolerable regime of surveillance approaching the quality of prison, probationers must be, and are, relied upon to supply accounts of their major activities, including their means of earning a living . . . . It is unlikely that Congress would continue to authorize, or that sentencing judges would remain as

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6/ Miranda v. Arizona, 384 U.S. 436 (1966). The "Miranda rights" include the right to remain silent and the right to know that personal statements may later be used to incriminate the speaker. Id. at 479.

> ready to employ, the alternative of probation if the reporting requirement were held unconstitutional.

341 F. Supp. at 794. The court recognized that conviction of a criminal offense withdraws only those constitutional rights expressly or implicitly necessary to the convicted offender's new status. For example, the rights of free speech and to pursue legal remedies survive. Id. On the other hand, the court continued:

> But the right of privacy must be, at least in some substantial degree, cut down for one who is, "in fact, as well as in theory," under the "custody and control" of the law. Jones v. Cunningham, 371 U.S. 236, 242 (1963). The requirement to report, to account, is centrally and necessarily implied in the probationer's status. It may not be avoided by the claim of a privilege which must be held unavailable because it is fundamentally inconsistent with the acquisition and maintenanance of the probationary status. [Footnote ommitted.]

341 F. Supp. at 795.

These cases, as well as their underlying premise that probation is a futile disposition without knowledge about the probationer (which must come in large part from the probationer himself), establish, in my view, the validity against claims of a Fifth Amendment privilege of a probationary condition requiring the probationer to submit his financial records or books to the probation officer either on a routine basis or upon the reasonably

made request of the officer. 7/

The price-fixer or the gambler whom the court deems worthy of probation cannot be rehabilitated if he continues to conspire to set prices or to derive gambling income. Nor can the public be protected from the embezzler or the tax evader unless the correctional officer can superintend those of his activities which facilitate criminal activity to the same degree, albeit in a different fashion, that a probation officer would monitor the activities of a bootlegger or the drinking of a mail thief who stole to support his alcoholism. The probationer when he enters on his probationary term reads the conditions imposed on his probation and expressly consents to abide by them. See Operations Manual, supra, App. A-2.16. The probationer understands that the probation conditions, so long as they are reasonably related to the purposes of probation, will require him to answer questions addressed to him by his probation officer and to produce pertinent documentation on request.

To promulgate such a condition as suggested here requires of course, an initial decision as to its appropriate application in individual circumstances. Secondly, before a probation

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7/ In fact recent Supreme Court decisions have indicated that the Fifth Amendment privilege against compelled self-incrimination is limited to truly personal, as opposed to commercial or corporate records, and is unavailable where the records are obtained pursuant to a Fourth Amendment search and independently authenticated as opposed to summoned from the individual himself. See Andresen v. Maryland, 96 S.Ct. 2737 (1976); United States v. Miller, 96 S.Ct. 1619 (1976); Fisher v. United States, 96 S.Ct. 1569 (1976); Bellis v. United States, 417 U.S. 85, 94 S.Ct. 2179 (1974).

officer exercises his authority to request review of his probationer's records he should have an articulable rationale for its necessity with respect to the purposes of probation. 8/

As for the particular wording of the condition, I might suggest the following as a model to be varied according to the circumstances:

> The probationer shall submit, upon the request of his probation officer, to a review of his financial records, including records as to his income, assets, liabilities, and expenses, 9/ to be conducted in a reasonable manner and at a reasonable place.

Or, the court might require:

> The probationer shall on a monthly basis provide to the probation officer a financial statement with supporting documentation as to his source of income, his expenses, etc.

Again, let me repeat the caveat that this type of condition should be drawn as narrowly as possible to permit adequate supervision but preserve as much as possible the probationer's privacy rights. If this caution is observed, and the probation office refrains from becoming an investigator for the IRS or DEA and remains faithful to his court duties, this type of probationary condition of disclosure may become an effective correctional tool.. Indeed, its use may deter some white collar criminal activity.

8/ See Latta v. Fitzharris, 521 F.2d 246, 250 (9th Cir.), cert. denied, 96 S.Ct. 200 (1975).

9/ It has not yet been firmly established whether a court can require a probationer to supply a copy of his income tax return to the court. See Imlay & Glasheen, supra, note 5, at 6; I.R.C. § 6103(a), (i) [Tax Reform Act of 1976, § 1202(a)(1)].

On a final note, I should add that all such statements made to the probation officer during the course of supervision are admissible in any revocation proceeding which may evolve. See Johnson, supra; Delago, supra. 10/ As to the admissibility of inculpatory information in future criminal prosecutions I am inclined to believe such would be improper. I believe, however, that the answer would depend on the circumstances. For example, if the probationer were in custody when asked by his probation officer about potentially incriminating matters, any inculpatory statements made without benefit of Miranda warnings clearly are not admissible. 11/ Furthermore, even if the Fifth Amendment privilege were unavailable, I would have reservations about the use of communications between a probationer and his probation officer to make a criminal case. 12/ Where representatives of an administrative agency, such as the IRS, accompany a probation officer to audit a probationer's records, the probation officer should exercise professional judgment in terminating the inquiry and the agents' participation when it appears that the agents are focusing on the probationer for further prosecutorial purposes.

10/ See Heath v. State, 310 So. 2d 38 (Fla. App. 1975)(violation of self-incrimination privilege to call probationer, over his objection, to testify at his own revocation proceeding).

11/ See United States v. Deaton, 468 F.2d 541, 544 (5th Cir. 1972); Arizona v. Magby, 19 Cr.L.Rptr. 2430 (1976); Kansas v. Lekas, 442 P.2d 11 (Kan. 1976); Ohio v. Gallagher, 313 N.E.2d 396 (Ohio 1976).

12/ Testimonial matters have a quality distinct from matters of physical or real evidence such as drug paraphernalia or blood tests which may, if seized properly by a probation officer, be used in a subsequent criminal prosecution. See Latta, supra, 521 F.2d at 252-53.

CHALLENGES TO STATEMENTS IN PRESENTENCE REPORTS

It is accepted doctrine that a sentencing judge has wide latitude in the amount and kinds of information, including hearsay, bearing on the background and behavior of the defendant which he or she may consider. Williams v. New York, 337 U.S. 241, 249-251 (1949); see 18 U.S.C. §3577; F.R. Crim. P. 32(c)(1). It is equally fundamental that the presentence information have constitutional validity, see United States v. Tucker, 404 U.S. 443 (1972), and that in all material aspects the information be accurate, see Townsend v. Burke, 334 U.S. 736 (1948).

A recent development in sentencing law has explored allegations that presentence reports, which are now divulged as a general rule to the defendant and/or his counsel, contain misleading information, inflammatory labelling, and pejorative descriptions of the defendant, his or her family, or his or her associates, which are not justified. The cases mentioned below illustrate the pitfalls in using unverified information in a presentence report and suggest how certain situations may properly be handled.

In 1971 the United States Court of Appeals for the Ninth Circuit ruled that a sentencing court may not rely upon disputed information contained in a presentence report unless it is amplified by information such as to be persuasive of the validity of the suspect information. United States v. Weston, 448 F.2d 626 (9th Cir., 1971), cert. denied, 404 U.S. 1061

(1972). The defendant had objected to the allegations in her presentence report that she was involved in large-scale heroin trafficking. The sentencing court placed the burden on the defense to disprove the allegation for which no corroboration existed. The Ninth Circuit vacated the sentence on the ground that the court should have sought support for the allegation from those making it. This same theory was recently reapplied in a Ninth Circuit decision of September, 1976. In Farrow v. United States, ___F.2d___ (9th Cir., 1976), the challenged presentence report's evaluative summary referred to the defendant as the leader of a large narcotics operation, the veracity of which the defense counsel denied. Although there was some substantiation for this conclusion on the part of the probation officer preparing the report, the Ninth Circuit stated that once disputed, the truth of the statement must be explored or the statement ignored. I quote from the Farrow decision:

> Once a prisoner casts doubt on the validity of facts material to fixing sentence, it becomes incumbent on the district court either explicitly to disregard the potentially false information or, if the court wishes to rely on it, to adopt some procedure to reconcile the factual dispute (with the burden of proof on the government). [Citations omitted.]

Taken together Weston and Farrow establish that certain labels, generalizations, or allegations of broad criminal conduct in a presentence report cannot be relied on by the sentencing court absent verification, where the defendant objects to their accuracy. If there is insufficient corroboration in the face of the defendant's denial, the court should disavow consideration of the suspect material. If there is adequate substantiation, the court should so find. It is clear, however, that a defendant's knowing failure to contest the accuracy of the contents of the presentence report at the time of sentencing will waive any subsequent objection.

Other circuits have approached challenges to presentence reports similarly. In United States v. Bass, 535 F.2d 110 (D.C. Cir., 1976) a defendant challenged but did not deny the truth of certain hearsay allegations of extensive criminal involvement made by the prosecutor in a sentencing memorandum. Although the report was not prepared by the probation office, the test here established would be applicable to presentence reports. Failure to deny the veracity of an objectionable statement, said the D.C. Circuit, permits the sentencing court to consider the relevant information, inasmuch as silence

suggests the credibility of the statement. Where, however, the defendant charges that the information is false, the party responsible for the disputed statement must submit verification. If the court then finds factual support or some indicia of reliability for the allegations it may consider the data. Otherwise, it should disclaim reliance on the disputed information.

Case law suggests that adequate indicia of reliability may be found in the defendant's silence when he has the opportunity to dispute allegations in the presentence information coming before the court. See Bass, supra; United States v. Cardi, 519 F.2d 309, 314 (7th Cir., 1975); Weston, supra. Corroboration may also be found if the disputed material is quoted from sworn testimony presented before a Congressional committee, for example, see United States v. Strauss, 443 F.2d 986, 990-91 (1st Cir., 1971). Substantiation of allegations of criminal conduct may be found if the information comes from the sworn testimony of trial witnesses subject to cross-examination. See United States v. Cruz, 523 F.2d 473 (9th Cir., 1975), cert. denied, 423 U.S. 1060 (1976).

Extrapolating from these cases leads to the principle that sensitive or potentially material allegations made in a presentence report ought to be substantiated as best as

possible, the source for such allegations identified, and the underlying facts identified. While it may be that a defendant will admit or acquiesce in the allegations, there is the chance that he or she will not. If the defendant objects to the allegations' veracity, the probation officer should be prepared to provide substantiation for the challenged allegations. See United States v. Needles, 472 F.2d 652, 658-59 (2nd Cir., 1973); United States ex rel. Brown v. Rundle, 417 F.2d 282 (3rd Cir., 1969). Otherwise the sentencing court should disclaim reliance on such allegations at the time of sentencing. Farrow, supra; Bass, supra.

SPEEDY REVOCATION HEARINGS

UNITED STATES V. COMPANION

____ F.2d ____ (2d Cir. 1976)(#76-1257)

Under 18 U.S.C. §3653 arrested probationers are entitled to be brought to the court having jurisdiction for revocation purposes "as speedily as possible after arrest." No specific meaning has been given the phrase "as speedily as possible." In this case, an arrested probationer was not returned to the district of jurisdiction for a court appearance until 89 days had elapsed. The Second Circuit ruled, in response to his statutory claim of denial of a speedy hearing, that the court must weigh four factors in assessing whether §3653 had been violated: length of delay, reason for delay, probationer's assertion of his right, and prejudice to the probationer from the delay. These four factors are the ones enunciated by the Supreme Court in Barker v. Wingo, 407 U.S. 514, 530 (1972), in determining whether a defendant's Sixth Amendment right to a speedy trial has been denied. Application of this constitutional test to the statutory provision of 18 U.S.C. §3653 results in a case-by-case determination. For example, in Companion although the delay was excessive and the reasons for the delay were primarily bureaucratic inefficiencies of the Marshals Service, the probationer did not assert his right to a speedy hearing until the delay had ended and he claimed no prejudice from the delay. Therefore the court concluded that §3653 had not been violated.

In Companion, the probationer also claimed that under Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973), and Morrissey v. Brewer, 408 U.S. 471, 485-87 (1972), he had a due process right to a preliminary hearing at or reasonably near the place of the alleged violation or arrest to determine probable cause on the alleged violations. The Companion court stated that it was undisputed that the arrested probationer has a right to a preliminary hearing which was denied him here; however, the court found that he had no right to release since the final revocation hearing given him was proper. The probationer should have sought such a hearing at the time it was denied.

The Companion court did not decide whether the preliminary hearing should have been held at the place of arrest in Arizona or the district of jurisdiction, Vermont. It is, however, essential that a probationer arrested in a different district be brought before the magistrate in the district of arrest for an identity hearing and be given copies of the probation order, the warrant and warrant application which will be sufficient probable cause for removal. Once he is returned to the district he is entitled to both a preliminary and final revocation hearing.

AVAILABILITY OF PRESENTENCE REPORTS TO CO-DEFENDANTS

UNITED STATES v. FIGURSKI

545 F.2d 389 (4th Cir., 1976)(#75-1136)

A defendant in a criminal case requested inspection of the presentence study done by the Bureau of Prisons under former 18 U.S.C. §4208(b) on an unindicted coconspirator, who had a previous conviction and who was testifying for the Government at the defendant's trial, for purposes of assisting in cross-examination. The district court refused the request which the Fourth Circuit affirms; however, the court did not rule out disclosure in certain situations.

According to the Fourth Circuit, Rule 32(c)(3) of the Federal Rules of Criminal Procedure is silent as to disclosure to parties other than to the defendant who is the subject of the report, or his counsel, and to the prosecuting United States attorney. Accordingly, the court adopts the rule enunciated in an earlier case that "information contained in a presentence report should not be disclosed to third parties unless lifting confidentiality is required to meet the ends of justice." See Hancock Bros., Inc. v. Jones, 293 F. Supp. 1229, 1233 (N.D. Calif., 1968).

In assessing what is required by "the ends of justice" the court suggests that inasmuch as no defendant should be convicted on less than the full truth, where the credibility of a Government witness is at stake there may be certain circumstances where the confidentiality of a presentence report should be breached and the report made available to defense counsel. The question the court should decide is one of materiality - is the desired information reasonably likely to affect the trier of fact? Is the information exculpatory? Or is it relevant to impeach a secondary witness? To make this determination, the Fourth Circuit states:

> It follows that, when requested to exhibit such a report, the district court should examine it in camera and disclose only those portions, if less than all, of the report which meet the test we prescribe. If exhibition is denied, the denial should be an informed one based upon the district court's conclusion that the information contained therein fails to meet the prescribed test.

This procedure appears to fairly accommodate the concerns of confidentiality and fairness to the defendant.

Other cases involving requests for presentence reports by co-defendants involve the issue of making Government evidence available to the defendant. In Brady v. Maryland, 373 U.S. 83, 87 (1963), the Supreme Court held that:

> The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or innocence, irrespective of the good faith or bad faith of the prosecution.

In several cases federal defendants have sought to obtain, pursuant to Brady, supra, the presentence reports of their co-defendants either to use as impeachment material or to explore for exculpatory material. In United States v. Walker, 491 F.2d 236, 238 (9th Cir.), cert. denied, 416 U.S. 990 (1974), the court, while informally asking the probation officer to reveal any exonerating material in his records, quashed the subpoena duces tecum of the probation officer to examine his records for impeachment purposes and held Brady inapplicable. "A probation officer is not subject to the control of the prosecutor; nor are his reports to the court public records." Similarly, in United States v. Evans, 454 F.2d 813 (8th Cir.), cert. denied, 406 U.S. 969 (1972), the court rejected the defendant's pretrial discovery motion for the presentence report of a co-defendant for use to impeach him as a Government witness. Noting that the report was provided solely for the court's use and that the co-defendant had not consented to its disclosure, the court held Brady inapplicable. Without deciding what relevance the lack of consent had to the question of third-party access, the court stated:

> Appellants do not cite and we are not aware of any authority to the effect than an accused in a criminal case is entitled as of right to obtain an official presentence report concerning another person on the basis that the other person may be a witness against the accused in the trial of the accused. Such a clained right is contrary to public interest as it would adversely affect the sentencing court's ability to have presented to it on a confidential basis data from sources independent of the subject as well as from the subject for use in the sentencing process and not otherwise to be publicized. Id. at 820.

Again, in United States v. Greathouse, 484 F.2d 805, 807 (7th Cir. 1973), Brady was deemed inapposite and a defendant's request for his co-defendant's presentence report denied. See Also United States v. Caniff & Benigno, 521 F.2d 565 (2d Cir., Aug. 13, 1975). See also United States v. Dingle, 546 F.2d 1378 (10th Cir. 1976) (holding that presentence reports are not producible under the Jencks Act, 18 U.S.C. § 3500, or under the Brady rule).

SOME SENTENCING DIFFICULTIES

A sentence predicated on the court's belief that the defendant lied to the court in "fabricating a defense" to the criminal charge is improper, according to the case of United States v. Grayson, ___F.2d___ (3d Cir., Jan. 7, 1977) [20 Cr.L.Rptr. 2394]. In Grayson the court relied on an earlier decision of the same circuit in which the court stated the principle that the sentencing judge may not add a penalty because he believes that the defendant lied. Poteet v. Fauver, 517 F.2d 393 (3d Cir. 1975). The sentencing judge in Grayson stated that he was considering, in sentencing the defendant, his belief that the trial defense was a complete fabrication wholly lacking in merit. In the opinion of the appellate court, such action constituted an augmentation of the sentence upon the judge's belief that the accused lied. To permit such an increase is to condone possible infringements of the Fifth Amendment privilege against self-incrimination and the right to due process. A strongly written dissent, however, argued that the sentencing court may properly consider its evaluation of the defendant's mendacity, or veracity, without violating a rule that prohibits a sentence to be increased because of the defendant's refusal to confess after his guilt had been adjudicated, which was the situation in Poteet.

The Fifth Circuit recently vacated a sentence that had been increased on retrial. In United States v. McDuffie,

542 F.2d 236 (5th Cir., Nov. 10, 1976)[20 Cr.L.Rptr. 2223], the court of appeals was dismayed, not at the fact that the second sentence was harsher, but at the process by which it was derived. The trial court relied on an undisclosed interview, purportedly given by the defendant to an FBI agent, in imposing the new sentence. Although the Fifth Circuit sympathized with the trial court's desire to seal the interview document, the court ruled that enhancement of a sentence upon retrial is permissible only upon an affirmative showing of the factual basis for the increase. See North Carolina v. Pearce, 395 U.S. 711(1969). The factual showing required is not merely to the appellate court if the sentence is challenged. Rather the information ought to be disclosed to the defendant and his counsel. This disclosure will serve to allay the defendant's fear that the augmented sentence is not a result of any retaliatory motive by the court and to permit exploration of the information's reliability.

When a defendant succeeds in having his sentence vacated because the sentencing court considered a prior conviction that was invalid (see Tucker v. United States, 404 U.S. 443 (1972), the question remains as to whether his new sentence may be harsher than the initial one. According to the Eighth Circuit, the answer is no. In United States v. Durbin, ___ F.2d___ (8th Cir., Oct. 6, 1976), the court ruled that the Double Jeopardy clause does forbid increase of the sentence where, as in the case at bar, neither the conviction itself had

been attacked nor was the original sentence wholly illegal. The court nevertheless affirmed that a sentencing court may consider relevant events subsequent to the original sentencing in reimposing sentencing even though the new sentence may not exceed the original one.

END