

Meg Garvin, M.A., J.D., Executive Director

Sarah LeClair, J.D., Legal Publications Director

Staff Attorneys:

Terry L. Campos, J.D.

Rebecca S.T. Khalil, J.D.

Sarah LeClair, J.D.

Amy C. Liu, J.D.

Alison Wilkinson, J.D.

Paralegal: Jeff Hanson

## Victim Access to the Presentence Investigation Report in Federal Prosecutions

### I. Introduction

Until recently, crime victims in the federal criminal justice system lacked individual, enforceable rights. *See, e.g., United States v. McVeigh*, 106 F.3d 325 (10th Cir. 1997) (holding that victims of the Oklahoma City bombing lacked standing to contest a sequestration order preventing them from being present at trial). Historically, the federal criminal justice system “functioned on the assumption that crime victims should behave like good Victorian children—seen but not heard.” *Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1013 (9th Cir. 2006). In 2004, Congress passed the Crime Victims’ Rights Act (CVRA), 18 U.S.C. § 3771, which ushered in a new era in the federal criminal justice system; an era in which crime victims are “full participants in the criminal justice system.” *Kenna*, 435 F.3d at 1013.

The CVRA affords crime victims substantive rights. *See* 18 U.S.C. § 3771(a). These rights are explicitly enforceable by the crime victim in trial court and reviewable by writ of mandamus. *Id.* at §§ 3771(b), (d)(3). Among the substantive rights guaranteed by the CVRA are the rights to be reasonably heard at sentencing, to full and timely restitution, and “to be treated with fairness and respect for the victim’s dignity and privacy.” *Id.* at (a)(2), (4), (8). These rights are directly implicated at sentencing, and are specifically informed by material contained in a presentence report (PSR).

Although federal law does not prohibit the disclosure of PSRs to third parties, courts have been reluctant to grant third parties PSR access because of a defendant’s interest in confidentiality, unless the report is the only source for the information that the third party is seeking. Crime victims, however, have unique sentencing-related interests that distinguish them from other third parties based on rights guaranteed to them by the CVRA. As a result, crime victims are statutorily mandated sentencing participants, precluding them from the traditional approach regarding third party disclosure. Federal courts should presume that victims are entitled to all portions of the PSR that are relevant to a victim’s meaningful exercise of his or her statutory rights under the CVRA.

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## II. What is a PSR and Why is it Important?

A presentence investigation report is a document prepared by a federal probation officer designed to assist the court in determining an appropriate sentence after a criminal defendant has been convicted or has pleaded guilty. *See United States v. Cesaitis*, 506 F. Supp. 518 (D. Mich. 1981). Correctional authorities also rely on the PSR for inmate classification purposes and to make release planning decisions. *See Gregory W. Carman & Tamar Hartunian, Fairness at the Time of Sentencing: The Accuracy of the Presentence Report*, 78 St. Johns L. Rev. 1, 2 (2004). The PSR is a particularly important resource where a defendant has pleaded guilty because, in the absence of a trial, “the PSR serves as the main source of information about the defendant.” *Id.* at 1.

Probation officers compile information for the PSR through interviews with the defendant, defendant’s attorneys and/or family members, investigation officers, and the victims. Pursuant to Rule 32 of the Federal Rules of Criminal Procedure, the PSR must include, among other information:

- An assessment of “the defendant’s offense level and criminal history” under the United States Sentencing Guidelines, as well as the “resulting sentencing range and kinds of sentences available.” Fed. R. Crim. P. 32(d)(1);
- Defendant’s “prior criminal record,” “financial condition,” and “any circumstances affecting the defendant’s behavior that may be helpful in imposing sentence.” *Id.* at 32(d)(2)(A);
- Information regarding the “financial, social, psychological, and medical

impact” on victims of the defendant’s offense. *Id.* at 32(d)(2)(B); and

- “[A] report . . . contain[ing] sufficient information for the court to order restitution.” *Id.* at 32(c)(1)(B).

The PSR must exclude certain types of information, including:

- Any diagnoses [of defendant] that, if disclosed, might seriously disrupt a rehabilitation program;
- Any sources of information obtained upon a promise of confidentiality; and
- Any other information that, if

disclosed, might result in physical or other harm to the defendant or others. *Id.* at 32(d)(3).

Pursuant to Rule 32, a probation officer is required to disclose the PSR “to the defendant, the defendant’s attorney, and an attorney for the government at least 35 days before sentencing.” Fed. R. Crim. P. 32(e)(2). After receiving the report, the parties (government and defense) have 14 days to object to information contained in the report. *Id.* at 32(f)(1).

Following this comment period, “the probation officer must submit to the court and to the parties the presentence report and addendum containing any unresolved objections, the grounds for those objections, and the probation officer’s comments on them.” *Id.* at 32(g).

### Practice Pointer

A victims’ attorney should request access to the PSR when he or she files an entry of appearance in a federal criminal proceeding to establish the victims’ right to access early enough in the proceeding to contest the accuracy of information in the PSR in the comment period established by Rule 32 of the Federal Rules of Criminal Procedure.

## III. Crime Victim Access to the PSR

Rule 32 is silent regarding disclosure to third parties, including victims. Despite this lack of prohibition on disclosure, courts have treated PSRs as confidential and not subject to third party disclosure absent a showing that disclosure

is necessary “in the interest of justice.”<sup>1</sup> See, e.g., *United States v. McKnight*, 771 F.2d 388, 390 (8th Cir. 1985). To determine whether a third party has made an adequate showing of necessity, courts consider whether the information sought is available from other sources. See *United States v. Charmer Indus., Inc.*, 711 F.2d 1164, 1177 (2d Cir. 1983) (“A central element in the showing required of a third person seeking disclosure is the degree to which the information in the presentence report cannot be obtained from other sources.”).

As noted above, crime victims are different from other third parties to a criminal proceeding in the federal system because they have specific statutory rights implicated at the time of sentencing. Specifically, those rights are: the right “to be reasonably heard at sentencing,” 18 U.S.C. § 3771(a)(4); the right “to be treated with fairness,” *id.* at (a)(8); and “[t]he right to full and timely restitution as provided in law.” *Id.* at (a)(6). These sentencing-related rights make victims participants in the sentencing process with a unique need for certain information contained in the PSR that is not shared by third parties who are peripheral to the criminal case. Consequently, victims should not be subject to the presumption of PSR confidentiality applied to other third parties.

#### A. The right to be heard at sentencing.

Crime victims have a statutory right “to be reasonably heard at sentencing.” 18 U.S.C. § 3771(a)(4). It is well-accepted that a victim’s right to be reasonably heard at sentencing includes the right to make a sentencing recommendation in noncapital cases.<sup>2</sup> See Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 Cornell L. Rev. 282, 289 n.51 (2003) (“Every state ruling on the constitutionality of victim recommendations in noncapital cases has held that trial court judges can hear all three types of [victim] impact evidence, including sentencing recommendations that are in the public interest.”).

Certain information contained in the PSR is essential if a victim is going to give an informed and meaningful sentencing recommendation. See Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims’ Rights Act*, 2005 BYU L. Rev. 886, 893 (2005). Without such information, a crime victim is unable to provide an independent perspective to the sentencing court. For instance, lack of access to the PSR prevents a victim from effectively disputing the PSR writer’s calculation of the guidelines sentence or factual findings that influence the mitigation and aggravation of a sentence.

#### B. The right to be treated with fairness.

A crime victim’s right to meaningfully participate in the sentencing process is further supported by his or her right “to be treated with fairness.” 18 U.S.C. § 3771(a)(8). The CVRA’s legislative history instructs that “fairness includes the notion of due process.” 150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl). A fundamental aspect of due process is the opportunity to be heard in a “meaningful manner.” See *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Denying a crime victim access to the PSR results in the crime victim being the only sentencing participant with a right to comment on an appropriate sentence but who lacks the critical sentencing information contained in the PSR. “The right to be treated with fairness” requires that a crime victim receive the same sentencing information, in the same manner, as other participants in the sentencing process.

#### C. The right to restitution.

In federal criminal proceedings a victim has “[t]he right to full and timely restitution as provided in law.” 18 U.S.C. § 3771(a)(6). The Mandatory Victim Restitution Act (MVRA), 18 U.S.C. § 3663A, provides mandatory restitution to crime victims suffering physical injury

or pecuniary loss arising from a defendant's criminal conduct that results in conviction of an offense within Title 18 of the United States Code. *Id.* at (a)(1), (c)(1)(A)-(B). Sentencing courts rely on the PSR to determine the amount of the restitution order. *See* Fed. R. Crim. P. 32(c)(1)(B); Cassell, *supra*, at 896 ("As a practical matter, many of the calculations supporting a restitution award will rest on information in the presentence report."). Crime victims cannot effectuate their right to "full and timely restitution" unless they are able to independently analyze the PSR writer's findings and dispute any erroneous calculations.

*D. Full versus partial disclosure of the PSR to crime victims.*

A victim's attorney can request the entire PSR, arguing that the CVRA grants victims the same rights of access as the defendant and the attorney for the government. To date, however, no federal court has granted such access, and some courts and commentators have rejected the argument that crime victims are entitled to full disclosure.<sup>3</sup> *See In re Kenna*, 453 F.3d 1136, 1137 (9th Cir. 2006) (denying victim access to entire presentence report but noting that victim "refused the district court's offer to consider disclosure of specific portions of the PSR"); Mathew B. Riley, Note, *Victim Participation in the Criminal Justice System: In Re Kenna and Victim Access to Presentence Reports*, 2007 Utah L. Rev. 235, 249-50 (2007) (outlining rationales against full disclosure of PSR to crime victims). *Cf. In re Brock*, No. 08-1086, 2008 WL 268923 (4th Cir. Jan. 31, 2008) (finding that district court did not abuse its discretion in denying the victim access to portions of the PSR because he could meaningfully exercise his right to be reasonably heard without such access); *United States v. Citgo Petroleum Corp.*, No. C-06-564, 2007 WL 2274393, at \*2 (S.D. Tex. Aug. 8, 2007) (holding that the government's duty to provide victims with notice regarding a case under the CVRA does not mandate PSR disclosure). Even if victims cannot gain access to the entire PSR,

they may be able to obtain critical information by requesting partial disclosure of the report under a modified "ends of justice" test.<sup>4</sup>

As mentioned above, the traditional test for disclosure of PSR to third parties requires that the requesting third party show that such disclosure is "necessary to serve the ends of justice" and a "central element" of that showing is "the degree to which the information in the presentence report cannot be obtained from other sources." *Charmer*, 711 F.2d at 1177. When evaluating the third party's request, courts will "balance the desirability for confidentiality [of the PSR] against the need of the moving party for disclosure." *Id.* at 1173. A defendant's interest in maintaining confidentiality does not presumptively bar a third party who has demonstrated the requisite need from gaining access to a PSR. *See United States v. Schlette*, 842 F.2d 1574, 1583 (9th Cir. 1988) (stating that "confidentiality is not some talismanic utterance that can justify a refusal to disclose the contents of a presentence report when a sufficient showing supporting disclosure has been made").

Instead of the traditional "ends of justice" test, which places the burden on the third party requesting a PSR to justify its disclosure, victims should not be required to make any affirmative showing of need for portions of the PSR that are relevant to a victim's meaningful exercise of his or her statutory rights. *See Riley, supra*, at 248 n.85 (opining that "the rights guaranteed by the CVRA [should create] a strong presumption that someone who is a participant in the process will get access, unless someone can show good reason otherwise") (internal quotations omitted). Under this test, the defendant bears the burden of overcoming the presumption of victim access by demonstrating that disclosure of a specific portion of the PSR would improperly intrude upon the defendant's rights.

This modified "ends of justice" test should also require that victims receive all relevant portions of the PSR at the same time that it is disclosed



to the government and the defense under Rule 32: “at least 35 days before sentencing.” Fed. R. Crim. P. 32(e)(2).<sup>5</sup> Because the feedback sentencing process. For this reason, a victim’s right “to be reasonably heard at sentencing,” 18 U.S.C. § 3771(a)(4), must extend to this comment period.

#### IV. Conclusion

The PSR is an important component of the federal sentencing process. Courts rely heavily on the information contained in the PSR when determining a defendant’s prison sentence and restitution obligation. Crime victims have unique sentencing-related interests that distinguish them from other third parties who may wish to access a defendant’s PSR. The importance of these interests—including the exercise of the victims’ statutory rights to be heard at sentencing and to restitution—support an argument for a modified “ends of justice” test to be applied by courts in determining access to information in the PSR that is critical to the meaningful exercise of the victims’ rights.

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<sup>1</sup> In fact, until relatively recently, this practice of confidentiality included non-disclosure even to the defendant. See Gary M. Maveal, *Federal Presentence Reports: Multi-Tasking at Sentencing*, 26 Seton Hall L. Rev. 554, 563 (1996) (explaining that, prior to 1966, courts retained discretion over whether to allow defendants access to the PSR).

<sup>2</sup> The majority of courts that have considered the issue have determined that sentencing recommendations in capital cases—whether the victim requests leniency or the most severe sentence—are prohibited by Supreme Court jurisprudence. See, e.g., *Hain v. Gibson*, 287 F.3d 1224, 1238-39 (10th Cir. 2002); *Parker v. Bowersox*, 188 F.3d 923, 931 (8th Cir. 1999), *cert. denied*, 529 U.S. 1038 (2000) (dictum); *Woods v. Johnson*, 75 F.3d 1017, 1037-38 (5th Cir. 1996) (dictum); *Ex parte*

*McWilliams*, 640 So. 2d 1015, 1017 (Ala. 1993). For cases concluding that victims have a right to offer sentencing recommendations in capital cases, see *Murphy v. State*, 47 P.3d 876, 885 (Okla. Crim. App. 2002), *cert. denied*, 538 U.S. 985 (2003); *Turrentine v. State*, 965 P.2d 955, 980 (Okla. Crim. App. 1997), *cert. denied*, 525 U.S. 1057 (1998); *Ledbetter v. State*, 933 P.2d 880, 890-91 (Okla. Crim. App. 1997); *Conover v. State*, 933 P.2d 904, 920 (Okla. Crim. App. 1997). The federal right to be heard found in the CVRA has yet to be interpreted on this issue, although the legislative history makes clear that Congress intended this right to include the right to give a sentencing recommendation. See 150 Cong. Rec. S2468 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) (“When a victim invokes this right [to be heard] during plea and sentencing proceedings, it is intended that he or she be allowed to provide all three types of victim impact—the character of the victim, the impact of the crime on the victim, the victims’ family and the community, and sentencing recommendations.”); see also *id.* (statement of Sen. Feinstein) (“The victim of crime, or their counsel, should be able to provide any information, as well as their opinion, directly to the court concerning the release, plea, or sentencing of the accused.”). For a more thorough discussion and analysis of this topic, including arguments as to why victim sentencing recommendations in capital cases are appropriate and consistent with Supreme Court precedent, see *Why Sentencing Recommendations in Victim Allocution are Permissible and Desirable*, NCVLI Newsletter of Crime Victim Law, 13th Ed. (Nat’l Crime Victim Law Inst., Portland, Or.), May 2011.

<sup>3</sup> Although this analysis focuses on access to presentence reports in federal prosecutions, practitioners should be aware that some states explicitly afford crime victims an independent right to review presentence reports in state prosecutions. See, e.g., Ariz. Const. art. 2, § 2.1(A)(7) (giving a victim the right to review the presentence report when it is available to the defendant); Ariz. Rev. Stat. Ann. § 13-4425 (a victim’s right to review the presentence report “except those parts excised by the court or made confidential by law”); Idaho Const. art 1, § 22(9) (giving the victim the right to “read presentence

reports relating to the crime”), Idaho Code § 19-5306(1) (h) (a victim has the right to review the presentence report); Ind. Stat. Ann. 35-40-5-6(b) (giving a victim right to read and “respond to” material contained in the presentence report); Or. Rev. Stat. Ann. § 137.077 (presentence report may be made available to a victim). *See also* Colo. Rev. Stat. § 24-72-304(5) (affording the prosecutor the discretion to allow the victim or the victim’s family to see the presentence report). In states that do not afford an explicit right, the analysis to seek access to the PSR should proceed similarly to that outlined in this paper.

<sup>4</sup> Additionally, a lawyer representing a child-victim in the role of guardian ad litem may have another argument for victim access to the PSR through 18 U.S.C. § 3509(h)(2), which provides that upon appointment, a guardian ad litem “may have access to all reports, evaluations and records, except attorney’s work product, necessary to effectively advocate for the child.” *See United States v. [redacted]*, No. [redacted] (S.D. Tex. Dec. 3, 2010) (order granting partial disclosure of defendant’s presentence report on the ground that disclosure was necessary to protect the interests of the child-victims and allow the guardian ad litem to advocate for restitution on the child-victims’ behalf).

<sup>5</sup> Legislation was introduced in the Senate to codify the “ends of justice” test, which would have amended Rule 32 to require disclosure to victims, along with the defense and government, “unless the court, after receiving an objection from the defendant, the attorney for the government, or another victim, finds that disclosure of a portion of the report would be an unwarranted invasion of personal privacy and not in the interest of justice.” S. 1749, 110th Cong. § 19 (2007). This legislation was part of the Crime Victims’ Rights Rules Act of 2007, which was referred to the Committee on the Judiciary, but did not reach a vote.

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