

February 1967

## The Disclosure to Defense of Presentence Reports in West Virginia

Willard D. Lorensen  
*West Virginia University College of Law*

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Criminal Procedure Commons](#)

---

### Recommended Citation

Willard D. Lorensen, *The Disclosure to Defense of Presentence Reports in West Virginia*, 69 W. Va. L. Rev. (1967).

Available at: <https://researchrepository.wvu.edu/wvlr/vol69/iss2/4>

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact [ian.harmon@mail.wvu.edu](mailto:ian.harmon@mail.wvu.edu).

## The Disclosure to Defense of Presentence Reports in West Virginia

WILLARD D. LORENSEN\*

The ambivalent position struck with regard to the disclosure of the presentence report to a criminal defendant in the recent changes of the Federal Rules of Criminal Procedure dramatizes an interesting and intense division of viewpoints.<sup>1</sup> The problem involved is simply this: Should defendant be allowed to see and contend with a report made to the court when the court may rest significant sentencing decisions on the contents of the report? The typical presentence report ranges well beyond matters that normally would rise at trial.<sup>2</sup> It is not centrally concerned with the gravity of the defendant's offense nor the nature of his participation in it. It is concerned with his character, his history and environment, and his adjustment to them. The presentence report and its influence on the sentencing process epitomizes the fact that the humanitarian's plea—let the punishment fit the criminal and not merely the crime—has come to be an accepted postulate of penal policy.<sup>3</sup> There arises, in consequence, the problem of fitting this new sophistication in sentencing into the traditions of the adversary system of criminal law administration.<sup>4</sup> It is at this juncture that contending points of view divide.

The Federal Rules of Criminal Procedure of 1946 were silent on the matter of disclosing the contents of the presentence report, save that it was made clear that the report was not be "disclosed

---

\*Professor of Law, West Virginia University

<sup>1</sup> FED. R. CRIM. P. 32(c)(2), as amended (1966).

<sup>2</sup> The federal rule states the report "shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence. . . ." The West Virginia Code similarly provides: "Insofar as practicable this report shall include information concerning the offender's court and criminal record, occupation, family background, education, habits and associations, mental and physical condition, the names, relationship, ages and condition of those dependent upon him for support, and such other facts as may aid the court. . . ." W. VA. CODE, ch. 62, art. 12, § 7 (Michie 1966).

<sup>3</sup> See, Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. CRIM. L., C. & P.S. 226 (1959).

<sup>4</sup> Kadish, *The Advocate and the Experts Counsel in the Peno-Correctional Process*, 45 MINN. L. REV. 803 (1961).

to anyone unless the defendant has pleaded guilty or has been found guilty."<sup>5</sup> The 1962 preliminary report leading up to the recent changes in the federal practice proposed that a summary of the presentence report be made available to the defendant and his counsel.<sup>6</sup> This proposal was modified in 1964 to avoid the difficulties involved in the preparation of a summary and then provided that defendant and his counsel could read the report from which the court was specifically authorized to remove references to confidential sources.<sup>7</sup> In the amendments to the rules that were ultimately promulgated, all reference to an *obligation* to disclose the report to defense was omitted. It was merely noted that the trial judge "may" disclose the report. Having retreated to essentially the same position that the rule occupied prior to amendment, the Advisory Committee strove to salvage some trace of its innovation by noting that the amendment makes it clear that the report may be disclosed—which is hardly a revelation. It added the "hope" that judges would make increasing use of the discretionary power of disclosure.<sup>8</sup>

In the federal courts, under the old rule that was silent on the matter of disclosure, a sizeable minority of judges regularly disclosed the contents of the reports to defense counsel.<sup>9</sup> A similar practice apparently prevails in New York.<sup>10</sup> Some states have specifically provided for disclosure by statute. In Ohio<sup>11</sup> and Virginia,<sup>12</sup> for example, the probation officer must make his report in open court and may be examined on it.

The West Virginia Code is silent on the matter of disclosure and even leaves the preparation of a presentence report to the discretion of the trial judge.<sup>13</sup> Since the advent of the indeterminate sentence

---

<sup>5</sup> FED. R. CRIM. P. 32(c)(1).

<sup>6</sup> Committee on Rules of Practice and Procedure, Preliminary Draft of Proposed Amendments to the Rules of Criminal Procedure for United States District Courts (Dec. 1962).

<sup>7</sup> Committee on Rules of Practice and Procedure, Second Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the United States Districts Courts (March 1964).

<sup>8</sup> FED. R. CRIM. P. 32, as amended (1966). Advisory Committee's Note.

<sup>9</sup> See, Higgins, *Confidentiality of Presentence Reports*, 28 ALBANY L. REV. 12 (1964); Sharp, *Objectives of the Presentence NCE Report*, in PILOT INSTITUTE ON SENTENCING, 26 F.R.D. 231, 326 (1959).

<sup>10</sup> See Higgins, *supra* note 9.

<sup>11</sup> OHIO REV. CODE § 2947.06 (Anderson 1953).

<sup>12</sup> VA. CODE ANN. § 53-278. 1 (Michie 1957).

<sup>13</sup> W. VA. CODE § 62-12-7 (Michie 1966).

*PRESENTENCE REPORTS IN WEST VIRGINIA* 161

law in 1939, the sentencing choices of the judge in West Virginia have admittedly have been quite narrow—probation or a general sentence to the penal system are the only alternatives in most situations.<sup>14</sup> Nonetheless the choice between probation and the penitentiary is a significant one which merits careful consideration and a presentence report may play an important role in that choice.

To gain some insight into the use of presentence reports in West Virginia a mail questionnaire was directed to judges in this state who are authorized to grant probation. The questionnaire was aimed at determining the frequency of the use of the report and the practice in regard to disclosing its contents to defense counsel. The response to the questionnaire was surprisingly complete and this in itself is significant. Of the thirty judges questioned twenty-nine responded. While the simplicity of the questionnaire avoided the discouraging, time consuming nuisance aspects that no doubt reduces such responses in some situations, the level of the response was probably due as much to the intensity of interest judges manifest in the problem of sentencing. The judges on a whole seemed quite anxious to share information about sentencing practices. A substantial number volunteered elaborating statements underlining a healthy eagerness to develop a better understanding of the practices in the state.

The responses indicate that the presentence report is used as a basis for most sentencing decisions in West Virginia. The question was so phrased as to limit the response about the frequency of use to those situations where probation was in fact an available choice. Eighteen of those responding indicated that the report was used in "all" cases and another eight indicated it was used in "most" cases. Only one response indicated that the presentence report was used in only a "few" cases. Volunteered comments indicated some interesting varieties of practice in regard to the use of these reports. One judge noted for example that in his sparsely populated rural circuit his personal knowledge of some defendants made the preparation of a formal report unnecessary in some cases. Another judge indicated a unique kind of neutral position to the report. In this circuit the judge reported he felt obligated to direct the preparation of such a report whenever a motion was made for

---

<sup>14</sup> W. VA. CODE § 61-11-16 (Michie 1966). See generally Brown, *West Virginia Indeterminate Sentence and Parole Laws*, 59 W. VA. L. REV. 143 (1957).

probation by the defendant or his counsel. Absent such motion, the report would normally not be prepared. This position obviously makes the actual representation by counsel terribly important. An unrepresented defendant could easily suffer a considerable disadvantage by being unaware of his right to seek affirmative and informed consideration of probation. In other circuits, however, judges indicated that the preparation of the report was automatic. One judge expressed the opinion that sentencing could not be done in a judicial manner without the availability of such a report. Another suggested that the court needed all the information possible to assist in the sentencing process and the presentence report was simply a source of information. One judge indicated that the report was routinely prepared in all cases even though it was obvious the offender was ineligible for probation and the only sentencing choice available to the court was imprisonment. The report in this situation is forwarded to the prison officials for their use and for the subsequent use of the Board of Probation and Parole.<sup>15</sup>

A much greater variety of response was produced by the question as to whether the contents of the presentence report were disclosed to defense counsel. Eleven judges indicated that the report was always disclosed to defense counsel: three indicated it was disclosed in most cases; nine indicated it was disclosed only rarely; and five indicated that it was never disclosed to defense counsel. One judge found he could not respond on the "always" to "never" scale since no defense counsel in his circuit had ever requested an opportunity to see such a report. With this one abstention, the gross numbers divide evenly, fourteen judges usually disclosing the content of the report, while fourteen judges usually do not. Six of the eleven who indicated that the contents were always disclosed volunteered comments in regard to their practice. A higher proportion, nine of fourteen, who regularly withhold the report volunteered statements in regard to their practice. The judges who do not disclose the content of the report to the defense counsel seem to feel a bit more obligated to offer some explanation. Typically, the explanation advanced for the practice of confidentiality is that "sources of information would be dried up" if the contents were

---

<sup>15</sup> The basic statute providing for the presentence report, note 13 *supra*, concludes as follows: "A copy of all reports shall be filed with the board of probation and parole." The provision apparently has never been followed regularly.

*PRESENTENCE REPORTS IN WEST VIRGINIA* 163

not held in confidence. All explanations volunteered for the practice of confidentiality tended to rely on the "drying up" concern and evinced a desire to protect the probation officer and his information gathering practices.

The most interesting feature of the divided practice in West Virginia arises from the distinct urban-rural split between those circuits which disclose the report and those which do not. Courts in more urban areas make the report available to defense counsel. Courts in predominately rural areas tend to hold the report confidential. Courts in Wheeling, Parkersburg, Huntington and Charleston routinely disclose the contents of the report. This consistent pattern might indicate a difference in the kinds of information gathered for the reports in rural areas as opposed to urban communities. It may well be that persons in rural areas feel more closely related on a personal basis to the defendant than in the urban areas and thus feel more intensely a threat of embarrassment if their subjective judgments are openly disclosed to the defendant.<sup>16</sup> The division might also be explained as a manifestation of a general pattern of more informal operation of courts in rural areas which consequently places greater trust on persons and less trust on modes of procedure as a primary means of assuring fair and accurate disposition in such matters.

Arguments in regard to disclosure as opposed to confidentiality of presentence reports have been well spelled out in the debate over the proposed change in federal practice. Principal arguments raised against the disclosure focus on loss of information and harm to the defendant.<sup>17</sup> There is of course the fear that sources of information would "dry up" and the efficacy of the report would be materially hampered. The short answer to this argument is that in many courts the presentence reports are used effectively though they are regularly and systematically disclosed to defense. The courts which make a regular practice of disclosure seem not to be hampered in any significant degree by a loss of significant information. A slightly different objection is voiced on the grounds that persons furnishing information should be protected from embarrassment or harassment. At the harassment end of this scale we are

---

<sup>16</sup> WELLER, *YESTERDAY'S PEOPLE* *passim*. 1965).

<sup>17</sup> See, e.g., PAISONS, *The Presentence Investigation Must be Preserved as a Confidential Document*, 28 FED. PROB. March 1964, p 3.

simply restating the "drying up" complaint in that a person who fears harassment no doubt simply refuses to give any information at all. One judge in West Virginia reported that some barn burning reprisals had occurred in his circuit because derogatory information given to a parole officer had eventually found its way back to the felon concerned. It should be recognized of course that this problem is quite different than the one of mere embarrassment at the other end of the scale. Another West Virginia judge volunteered the opinion that the disclosure of confidential character assessments would tend to embarrass those who cooperated with the officer preparing the report. This embarrassment of course is a matter of much less gravity than the problem of actual reprisal which is no doubt quite rare. A further objection arises from the view that there are certain kinds of information that it would be harmful for the defendant to see. A cold and objective evaluation by a wife or a loved one might strip a defendant of needed emotional support at a time when it is desperately needed.<sup>18</sup> A final objection that has been raised is that the disclosure of the reports might unduly prolong the sentencing process and encourage the raising of many collateral issues of clarifying or rectifying hearsay statements and the like.<sup>19</sup> Judges who follow the practice of disclosure seem not to find this a serious problem however and some have indicated that disclosure helps to narrow the issues under consideration at the time of sentencing and thus serves to make hearings concerning this matter more effective and efficient.

The argument in favor of disclosure is simple and obvious. If the defendant is to be dealt with upon the basis of such a report, fair play would seem to dictate that he ought to have an opportunity to contest the accuracy of the basic factual data contained in the report and to challenge the validity of adverse conclusions contained in it.<sup>20</sup> Basic errors of fact are bound to occur from time to time and the best process for identifying and correcting these situations is disclosure and a hearing of some form which would allow the defendant and his counsel to challenge matters which may be misrepresented. This basic fairness argument failed to rule the day in a due process challenge to use of such reports

---

<sup>18</sup> *Ibid.*

<sup>19</sup> See Higgins, *supra* note 9.

<sup>20</sup> Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1291-92 (1952).

## PRESENTENCE REPORTS IN WEST VIRGINIA 165

in a landmark case of *Williams v. New York*.<sup>21</sup> However, the experience of our day teaches that constitutional decisions are transient and the pervasive force of constitutional due process should not be lightly disregarded. In a recent decision, *United States v. Kent*,<sup>22</sup> the Supreme Court held that a hearing had to be afforded on demand in a "dispositional" decision by a juvenile judge in the District of Columbia on the matter of whether the defendant was to be proceeded against in juvenile or criminal court.<sup>23</sup> The Court acted in that decision as a court of last resort for the District of Columbia and disavowed any pretense of announcing a constitutional doctrine. However, the not-so-subtle hint was there that the case commended itself to the Supreme Court's attention because a denial of review might give rise to fundamental constitutional issues. Interestingly in that case, a "social service report", developed by juvenile authorities and employed by a judge in making his dispositional decision transferring the defendant to the criminal court, was to be made available to the defense counsel according to the Supreme Court's mandate. Some form of hearing or opportunity to rebut matters in confidential reports which significantly affect important dispositional decisions may emerge as a constitutional necessity in the not too distant future.<sup>24</sup>

West Virginia practice at the present time seems to reflect the general disparity of views typical of the nationwide situation. If we attribute any significance to the fact that the greater volume of criminal cases probably occur in those courts which regularly make it a practice to disclose the contents of these reports, then West Virginia practice seems to favor the disclosure principle. There is nothing inherent in the issue that demands an all-or-nothing-at-all rule in regard to disclosure.<sup>25</sup> The unsuccessful preliminary drafts proposed as amendments to the federal criminal rules suggested two ways of meeting some of the objections to

---

<sup>21</sup> 337 U.S. 241 (1949); see Note, *Due Process and Legislative Standards of Sentencing*, 101 U. PA. L. REV. 257 (1952).

<sup>22</sup> 86 Sup. Ct. 1045 (1966).

<sup>23</sup> D. C. CODE § 11-1553 (Supp. V. 1966). Compare W. VA. CODE § 49-5-14 (3) (Michie 1966) which grants the juvenile court discretion to take cases involving juveniles between 16 and 18 years of age or to remand them to criminal courts for trial. The West Virginia provision makes no reference to any procedure to be employed by the court in making such a decision.

<sup>24</sup> See, e.g., *Sas v. Maryland*, 334 F.2d 506 (4th Cir. 1964); *United States ex rel. Gerchman v. Maroney*, 355 F.2d 302 (3rd Cir. 1966).

<sup>25</sup> Thomsen, *Confidentiality of the Presentence Reports A Middle Position*, 28 FED. PROB., March 1964, p. 8.

total disclosure, *viz.* by summarizing or by specifically authorizing the withholding of confidential sources. The Model Penal Code suggests another alternative that seeks to accommodate both the interest of a fair hearing and a reasonable opportunity to rebut on the one hand with the protections afforded the reporting system by some measure of confidentiality on the other.<sup>26</sup> West Virginia disclosure practices range from total disclosure and open court hearing to very informal in chambers proceedings. The absence of rigid doctrine allows an unrestricted choice of procedural techniques. If there is a trend in the legal policy in this area, it appears to be pressing for greater disclosure and opportunity to rebut in dispositional proceedings. It is hoped that the trial judges of the state will use the flexibility and discretion that is at their command to afford maximum opportunities for defendants to be alerted to the basis on which sentencing decisions are made and to afford them an opportunity for a fair and informed hearing.

---

<sup>26</sup> MODEL PENAL CODE § 7.07(5) (P.O.D. 1962): "Before imposing sentence, the Court shall advise the defendant or his counsel of the factual contents and the conclusions of any pre-sentence investigation or psychiatric examination and afford fair opportunity, if the defendant so requests, to controvert them. The sources of confidential information need not, however, be disclosed." In contrast, the Model Sentencing Act sponsored by the National Council on Crime and Delinquency adopts the same position as the recent amendments to the Federal Rules of Criminal Procedure—specific authority to the trial judge to disclose or not in his discretion. Model Sentencing Act § 4, in 9 CRIME AND DELINQUENCY 339-69 (1963).