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The Constitution bestows upon all accused persons the right to a trial by jury, the right to confront accusers, the right to remain silent, and the right to be presumed innocent. The law requires waiver of these rights to be done voluntarily, with the fullest possible knowledge of material consequences. Punishment is possibly the most material consequence of a guilty plea, yet criminal defendants who pleaded guilty are forced to relinquish their rights before punishment is determined. Our jurisprudence of due process prohibits this kind of practice, but it is routine in Federal court. For a guilty plea to comport with Constitutional principles, before relinquishing his rights, the accused must know what kind of information the sentencing court will consider when determining his punishment.

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INTRODUCTION

> *But I have always been taught that the federal courts, sitting in criminal matters, are a kind of sanctuary in the jungle.*
>
> —Edward Bennett Williams[1]

Imagine you are in the market for a new car, but dealerships will only reveal a car's sticker price after you buy it. Your research opportunities are very limited, and you have no recourse following the transaction. In such a scheme, the buyer is profoundly disadvantaged and almost guaranteed to overpay. Yet criminal defendants face this arrangement every day in federal court.

A criminal defendant enters a plea of guilty to charges against him. His punishment is determined by the Federal Sentencing Guidelines, a numerical grid where a certain "score" is equivalent to a period of months in prison.[2] An officer from the probation department, a branch of the judiciary, is tasked with calculating the guidelines score.[3] The calculations are enumerated in a document

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[1] MICHAEL TIGAR, PERSUASION: THE LITIGATOR'S ART 9 (1999) (emphasis added).

[2] U.S. SENT'G GUIDELINES MANUAL, ch. 5, pt. A sentencing tbl. (U.S. SENT'G COMM'N 2018).

[3] *See* FED. R. CRIM. P. 32(c)–(d)(1).

called the Pre-Sentence Report (the "PSR").[4] Written in secret, the PSR's guidelines score forms the basis for a court's sentence.[5] The report calculates "the defendant's history and characteristics,"[6] applicable enhancements under the Federal Sentencing Guidelines,[7] and an entire host of other information.[8] When the probation officer suggests a more severe punishment, the sentencing court almost always adopts the recommendations.[9] At that point, the central rationale of taking a plea deal, to avoid harsher punishment, becomes pointless.

Beyond general principles of fairness, the Constitution commands that a defendant be able to see the PSR before he decides to waive his rights.[10] A guilty plea must be made knowingly and intelligently.[11] A plea made without knowledge of the court-calculated guidelines score in the PSR is unknowing and therefore violates the accused's due process rights. As part of making an intelligent guilty plea with full knowledge of the consequences, a defendant should be allowed to see his own sticker price before doing so. Part I describes the original conception of the probation department report, how it changed under the federal sentencing guidelines regime, and the current procedural rights of offenders seeking to challenge its contents. Part II explores how the due process rights of the accused who enters a guilty plea have evolved, both before and after the Sentencing Reform Act. Finally, Part III concludes with a discussion of how the offender's due process rights are violated by suppression of the PSR and addresses counterarguments.

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[4] *Id.*

[5] *See id.;* FED. R. CRIM. P. 32(e)(1).

[6] FED. R. CRIM. P. 32(d)(2)(A).

[7] *See id.*; FED. R. CRIM. P. 32(d)(1); U.S. SENT'G GUIDELINES MANUAL, ch. 2, introductory cmt. (U.S. SENT'G COMM'N 2018).

[8] *See* FED. R. CRIM. P. 32(d)(2)(G).

[9] *See, e.g.*, United States v. Washington, 146 F.3d 219, 221 (4th Cir. 1998); United States v. Woods, 907 F.2d 1540, 1542 (5th Cir. 1990).

[10] *See infra* Part II.A.

[11] *See* Boykin v. Alabama, 395 U.S. 238, 242 (1969); FED. R. CRIM. P. 11(b)(2).

I. THE PSR: NOT WHAT IT USED TO BE

A. *The PSR Was Invented for Rehabilitative Purposes*

There was a time, before the era of the Federal Sentencing Guidelines,[12] when rehabilitation was an indispensable penological goal of the American criminal justice system.[13] A "punishment was intended to fit the offender and not merely the crime."[14] The prevailing belief was that no two crimes were the same.[15] Although two criminal acts may have fallen into identical legal categories, they were committed by different people with separate life histories and characteristics.[16] The justified presumption was that "by careful study of the lives and personalities of convicted offenders [they] could be less severely punished and restored sooner to complete freedom and useful citizenship."[17] It was therefore critical for the sentencing judge, when selecting an appropriate punishment, to possess "the fullest information possible concerning the defendant's life and characteristics."[18]

To make certain that judges intelligently exercised their broad discretion in the individualized sentencing regime, legislatures began encouraging specific investigative techniques.[19] The federal "manifestation" was Rule 32 of the Federal Rules of Criminal Procedure.[20] The rule provided "for consideration by federal judges of reports made by probation officers containing information about the convicted defendant, including such information 'as may be

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[12] The U.S. Sentencing Commission was established in 1984. *About the Commission*, U.S. SENT'G COMM'N, https://www.ussc.gov/ (last visited May 15, 2021).

[13] *See* Williams v. New York, 337 U.S. 241, 248 (1949) ("Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation have become important goals of criminal jurisprudence.").

[14] *Id.* at 247.

[15] *Id.*

[16] *Id.*

[17] *Id.* at 249.

[18] *Id.* at 247.

[19] *See id.* at 245 ("To aid a judge in exercising [broad] discretion . . . procedural policy encourages him to consider information about the convicted person's past life, health, habits, conduct, and mental and moral propensities.").

[20] *Id.* at 246.

helpful in imposing a sentence or in granting probation . . . .'"[21] Congress also enacted a law that gave sentencing judges power to receive unlimited information "concerning the background, character, and conduct" of a convicted offender.[22]

The PSR's function contemplated during the individualized sentencing era was to gather extensive biographical information to evaluate a person's likelihood of rehabilitation.[23] Probation officers, in making their reports, sought to aid offenders rather than increase punishments.[24] Indeed, a rehabilitation theory of criminal justice was the genesis of the United States Probation Department itself.[25] With the advent of the Federal Sentencing Guidelines, however, criminal law returned to the "old rigidly fixed punishments"[26] where rehabilitation played a minimal role. The PSR's complexion radically changed to the detriment of offenders it was originally intended to help.

B. *The PSR Was Weaponized by a "Real Conduct" Sentencing Philosophy*

The idea that two offenders who committed the same crime could receive different sentences began to frustrate lawmakers and proponents of uniformity, who saw the disparities as unfair.[27] There was also disenchantment with the idea that rehabilitation

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[21] *Id.* (citing Stephan v. United States, 133 F.2d 87, 100 (6th Cir. 1943) (quoting FED. R. CRIM. P. 32(c)(2) (1946)).

[22] *See* 18 U.S.C. § 3661.

[23] Ricardo J. Bascuas, *The American Inquisition: Sentencing After the Federal Sentencing Guidelines*, 45 WAKE FOREST L. REV. 1, 57 (2010).

[24] *Williams*, 337 U.S. at 249 ("Probation workers making reports of their investigations have not been trained to prosecute but to aid offenders.").

[25] *See* JOHN AUGUSTUS, A REPORT OF THE LABORS OF JOHN AUGUSTUS, FOR THE LAST TEN YEARS, IN AID OF THE UNFORTUNATE 23 (Boston, Wright & Hasty 1852) ("The object of the law is to reform criminals, and to prevent crime and not to punish maliciously, or from a spirit of revenge.").

[26] *See Williams*, 337 U.S. at 248.

[27] *See* Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291, 295–96 (1993) ("Evidence that similar offenders convicted of similar offenses received, at times, grossly disproportionate punishments struck a critical nerve among key legislators . . . .").

was a legitimate penological aim.[28] Marvin Frankel, former District Judge for the Southern District of New York, and an early proponent of sentencing reform, asserted that:

> The [rehabilitative] theory is flawed in the vagueness and overbreadth of its premise, the idea of 'sickness' calling for medical or quasimedical 'treatment.' . . . We sentence large numbers of people . . . who have coldly and deliberately appraised the risks and rewards, taken their stand against received morality, but then had the misfortune to be caught. Whatever else such defendants may need or otherwise deserve, they are not promising candidates for any sort of useful 'treatment' available in either our prisons or our hospitals.[29]

The frustration boiled over into the Sentencing Reform Act of 1984,[30] which created the United States Sentencing Commission tasked with drafting a set of Federal Sentencing Guidelines.[31] Made official in 1987, the Guidelines shunned rehabilitation as an appropriate penological goal, choosing instead to emphasize retribution and deterrence.[32]

Originally conceived as a rehabilitative instrument, the PSR was weaponized to satisfy "real conduct" sentencing, a vital com-

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[28] *See* Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 31 (1972).

[29] *Id.* (footnote omitted).

[30] Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984).

[31] *Id.* § 991 98 Stat. 1987, 2017 (codified as amended at 28 U.S.C. § 991); *id.* § 994 Stat. 1987, 2019 (codified as amended at 28 U.S.C. § 994).

[32] *See* 18 U.S.C. § 3553 (a)(2)(A)–(D) (2018); United States v. Wise, 976 F.2d 393, 399 (8th Cir. 1992) ("[T]he Sentencing Reform Act places rehabilitation of the defendant as the last of four goals to be accomplished through a sentence, the first three of which are punishment, deterrence, and incapacitation."); Sharon M. Bunzel, *The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows*, 104 YALE L.J. 933, 950–51 (1995); *United States Sentencing Commission Supplementary Report on the Initial Sentencing Guidelines and Policy Statements*, U.S. SENT'G COMM'N, https://www.ussc.gov/guidelines/guidelines-archive/1987-supplementary-report-initial-sentencing-guidelines-and-policy-statements (last visited May 15, 2021).

ponent of the Guidelines.[33] In a real conduct scheme, sentencing judges must consider "[c]onduct that is not formally charged or is not an element of the offense"[34] when determining an offender's punishment.[35] Congress ensured that, under the new regime, a PSR would continue to be generated for every convicted offender[36] even though most of the background information collected for rehabilitative purposes was irrelevant.[37] Instead, the PSR now served as an "authoritative recounting of the conduct underlying [criminal] charges of conviction, of any other charged or uncharged criminal conduct, and of the presumptive Guidelines calculation."[38]

Since relevant conduct only required establishment by a preponderance of the evidence,[39] information from the PSR was (and continues to be) routinely used to jack up an offender's sentence.[40]

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[33] *See* U.S. SENT'G GUIDELINES MANUAL, ch. 1, pt. A, subpart 1.4(a) (U.S. SENT'G COMM'N 2018) (explaining that initially, the Commission intended to create a "pure real offense system" that punished defendants for both charged and uncharged conduct); United States v. Booker, 543 U.S. 220, 250–51 (2005) ("Congress' basic statutory goal—a system that diminishes sentencing disparity—depends for its success upon judicial efforts to determine, and to base punishment upon, the *real conduct* that underlies the crime of the conviction.").

[34] U.S. SENT'G GUIDELINES MANUAL, § 1B1.3 cmt. background (U.S. SENT'G COMM'N 2018).

[35] *See Booker*, 543 U.S. at 250–52.

[36] *See* FED. R. CRIM. P. 32(c)(1)(A).

[37] *See* U.S. SENT'G GUIDELINES MANUAL § 5H1.2 (U.S. SENT'G COMM'N 2018) ("education and vocational skills are not ordinarily relevant"); *id.* § 5H1.4 ("drug or alcohol dependence, abuse, or addiction to gambling is not a reason for a downward departure"); *id.* § 5H1.5 ("employment record is not ordinarily relevant"); *id.* § 5H1.6 ("family ties and responsibilities are not ordinarily relevant"); *id.* § 5H1.10 ("race, sex, national origin, creed, religion, and socioeconomic status . . . are not relevant"); *id.* § 5H1.11 (civic work, charity work, other good deeds not ordinarily relevant); *id.* § 5H1.12 ("disadvantaged upbringing" and "lack of guidance" are not ordinarily relevant).

[38] Bascuas, *supra* note 23, at 57.

[39] United States v. Wright, 873 F.2d 437, 441 (1989).

[40] *See, e.g.*, Witte v. United States, 515 U.S. 389, 393–94 (1995) (sentencing court increased defendant's base offense level where PSI suggested that, in addition to attempted marijuana distribution outlined in indictment, defendant planned to import cocaine as part of same conspiracy); United States v. Cole, 569 F.3d 774, 775 (2009) ("The district court accepted the plea agreement but found that, based on information in the presentence report, that Cole should be held responsible for a greater quantity of drugs than the amount he had admitted

Courts were largely comfortable with the PSR's new function, clinging to the fantasy that probation officers were neutral judicial employees indifferent to the defendant's culpability.[41] The idea that the PSR was incorporated as part of a rehabilitative model was all but abandoned.[42]

Propagandists maintain that, because judges need all the information they can get when sentencing an offender, the PSR remains critical in a uniform sentencing scheme.[43] In fact, the Supreme Court contemplates the PSR (and its Guideline calculations) as the starting point of sentencing decisions.[44] Judges then must consider the nature of the offense, characteristics of the defendant (many of

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to in the agreement."); United States v. Osborne, 931 F.2d 1139, 1154–56, 1159 (7th Cir. 1991) (sentencing court denied acceptance of responsibility adjustment for both co-defendants based on PSI's recommendation and increasing a co-defendant's criminal history category where PSI asserted a prior conviction was pursuant to a state misdemeanor rather than a local ordinance violation); United States v. Woods, 907 F.2d 1540, 1542 (5th Cir. 1990) (district court, at suggestion of probation officer, disregarded plea agreement's stipulation in favor a much higher quantity of drugs); United States v. Larkin, 629 F.3d 177, 180–81 (3rd. Cir. 2010) (sentencing court used suggestions in the PSI to justify an upward departure and final sentence of 361 months where plea agreement contemplated a maximum of 151 months); United States v. Washington, 146 F.3d 219, 221 (4th Cir.1998) (district court relied on PSI's assertion that 20.3 grams of cocaine base were seized from defendant despite plea agreement stipulating that total relevant conduct would be limited to cocaine).

[41] *See* United States v. Johnson, 935 F.2d 47, 49–50 (4th Cir. 1991) ("[A] probation officer continues a neutral, information-gathering agent of the court, not an agent of the prosecution."); United States v. Belgard, 894 F.2d 1092, 1097 (9th Cir. 1990) ("While the details of the duties and role of a probation officer have changed under the Guidelines, the probation officer's essential function remains the same today as it was before November 1, 1987. The probation officer's duty is to compile information which then takes the form of a *neutral* written recommendation to the judge." (emphasis added)).

[42] *Belgard*, 894 F.2d at 1097 ("[T]he presentence report is not tied to the rehabilitative model . . . ."); *see also id*. at 1097 n.4 ("[D]iscipline (or punishment) can perform a character-changing rehabilitative function.").

[43] *See* U.S. SENT'G GUIDELINES MANUAL, § 1B1.4 (U.S. SENT'G COMM'N 2018); 18 U.S.C. § 3661.

[44] *E.g*., Rita v. United States, 551 U.S. 338, 351 (2007) ("The sentencing judge, as a matter of process, will normally begin by considering the presentence report and its interpretation of the Guidelines."); *see also* Gall v. United States, 552 U.S. 38, 49 (2007) ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.").

which are declared irrelevant by the Guidelines anyway),[45] the kinds of sentences available, and the need to avoid unwanted sentencing disparities.[46] Once a sentence is calculated, it is presumed reasonable if within the applicable guidelines range and will rarely be disturbed on appeal.[47]

The argument that the PSR serves a vital function in the Guidelines era is disingenuous. It is true that judges do need all the information they can get about an accused at sentencing, but not for "careful study of the lives and personalities of offenders" so they can be "restored sooner to complete freedom and useful citizenship."[48] If uniformity is the goal, then individualized information is superfluous.[49] There is another, more nefarious purpose of the Federal Sentencing Guidelines—where possible, impose the harshest and most punitive sentence the law will allow. It is to satisfy this goal that judges continue to "require" as much information as possible about the accused prior to sentencing.[50]

The PSR's contents make it an effective weapon for real conduct sentencing. A presentence investigation is conducted in every criminal case, and each investigation is codified into a report.[51]

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[45] *See* U.S. SENT'G GUIDELINES MANUAL § 5H1.2 (U.S. SENT'G COMM'N 2018) ("education and vocational skills are not ordinarily relevant"); *id.* § 5H1.4 ("drug or alcohol dependence, abuse, or addiction to gambling is not a reason for a downward departure"); *id.* § 5H1.5 ("employment record is not ordinarily relevant"); *id.* § 5H1.6 ("family ties and responsibilities are not ordinarily relevant"); *id.* § 5H1.10 ("race, sex, national origin, creed, religion, and socioeconomic status . . . are not relevant"); *id.* § 5H1.11 (civic work, charity work, other good deeds not ordinarily relevant); *id.* § 5H1.12 ("disadvantaged upbringing" and "lack of guidance" are not ordinarily relevant); *What Are Sentencing Guidelines?*, UNIV. MINN. (Mar. 21, 2018), https://sentencing.umn.edu/content/what-are-sentencing-guidelines.

[46] *See* 18 U.S.C. § 3553(a).

[47] *See* United States v. Booker, 543 U.S. 220, 261 (2005) (interpreting 18 U.S.C. § 3553(a) to imply an appellate review standard of reasonableness); *see also Rita*, 551 U.S. at 341 ("Several circuits have held . . . they will presume that a sentence imposed within a properly calculated United States Sentencing Guideline range is a reasonable sentence . . . . The most important question before us is whether the law permits [them] to use this presumption. We hold that it does.").

[48] *See* Williams v. New York, 337 U.S. 241, 249 (1949).

[49] *See* Bascuas, *supra* note 23, at 6–7.

[50] *See supra* note 36 and accompanying text.

[51] FED. R. CRIM. P. 32(c)(1).

The report must include a criminal history, the defendant's financial condition, any victim impact, any information relevant to the § 3553(a) factors, and statements of forfeiture or restitution.[52] It also includes a thorough description of all relevant conduct that determines the defendant's "offense level" under the guidelines.[53] Very often, probation officers simply rely on government allegations when setting out the offender's relevant conduct.[54]

Another aspect of the PSR useful to real conduct sentencing is an interview with the defendant. Although not required, probation officers usually interview the defendant as part of their presentence investigation.[55] The defendant is essentially mandated to furnish information for the probation officer and must submit to the interview.[56] If a defendant fails to furnish requested information, it can be held against them in the final report.[57] If the defendant furnishes incomplete or inaccurate information, they can receive a two-level enhancement to their eventual Guidelines sentence for obstructing justice.[58] Even if probation already has the information they seek, a

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[52] *See* FED. R. CRIM. P. 32(d)(2); 18 U.S.C. 3883(a).

[53] FED. R. CRIM. P. 32(d)(1)(B); *see* Gary M. Maveal, *Federal Presentence Reports: Multi-Tasking at Sentencing*, 26 SETON HALL L. REV. 544, 563 (1996) ("In particular, the [probation] officer must describe the 'relevant conduct,' which determines the base offense level and specific offense characteristics under the Guidelines.").

[54] *See* United States v. Cuellar-Flores, 891 F.2d 92, 93 (5th Cir. 1989) (finding that a probation officer's testimony was reliable because he obtained the information from a law enforcement officer and had no reason to "misrepresent the facts"); U.S. PROB. OFF. FOR THE W. DIST. OF N.C., THE PRESENTENCE INVESTIGATION REPORT: A GUIDE TO THE PRESENTENCE PROCESS 23 (2009) [hereinafter PRESENTENCE INVESTIGATION REPORT] ("[Defense counsel] is . . . encouraged to present his or her perspective on the offense conduct . . . . In most cases, failing to do so leaves the probation officer with little option but to present the case as presented by the government.").

[55] *See* FED. R. CRIM. P. 32(c)(2).

[56] *See, e.g.*, PRESENTENCE INVESTIGATION REPORT, *supra* note 54, at 5–6, 23; Bascuas, *supra* note 23, at 60 ("Courts require the interview even though no statute does . . . .").

[57] *See* PRESENTENCE INVESTIGATION REPORT, *supra* note 54, at 23.

[58] *See, e.g.*, United States v. Anderson, 68 F.3d 1050, 1055–56 (8th Cir. 1995) (holding that a "two-level enhancement for obstruction of justice" was warranted where defendant failed to provide complete financial records requested by the probation officer during presentence investigation); United States v. Ramunno, 133 F.3d 476, 481–82 (7th Cir. 1998) (upholding two-level enhance-

defendant can still be penalized for not providing it.[59] If the defendant does not outright mislead or lie to the probation department, the "totality of their conduct" can still be used to justify the enhancement.[60] The interview can also be used as a basis for denying an acceptance of responsibility reduction, even though the defendant has already done so by submitting a guilty plea.[61]

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ment for obstruction of justice where defendant attempted to conceal assets connected to uncharged conduct); United States v. Christman, 894 F.2d 339, 342 (9th Cir. 1990) (affirming a ruling where defendant received a two-level enhancement for obstruction of justice for mischaracterizing his criminal record to a probation officer); *see also* U.S. SENT'G GUIDELINES MANUAL § 3C1.1 cmt. n.4(H) (U.S. SENT'G COMM'N 2018) (listing failure to provide information requested by a probation officer as an example of obstructing or impeding justice).

[59] *See* United States v. Baker, 894 F.2d 1083, 1083–84 (9th Cir. 1990) (defendant received a two-point enhancement for obstruction of justice for misrepresenting his record notwithstanding the fact that probation had access to the defendant's FBI rap sheet while the defendant did not).

[60] *See* United States v. Gabel, 85 F.3d 1217, 1222 (7th Cir. 1996) (upholding the district court's conclusion that the "totality of Gabel's behavior" supported the conclusion that he willfully misstated information to Probation during preparation of the PSR); United States v. Thomas, 11 F.3d 1392, 1400 (7th Cir. 1993) (affirming an obstruction of justice enhancement where the record supported the district court's determination that the defendant had "provided false information to [a] probation officer" during the presence investigation); *see also Ramunno*, 133 F.3d at 482 ("[T]he district court's credibility determination finds support in the totality of Ramunno's conduct in this investigation . . . ."). *But see* U.S. SENT'G GUIDELINES MANUAL §3C1.1 cmt. n.5(C) (U.S. SENT'G COMM'N 2018) (declaring that "providing incomplete or misleading information, not amounting to a materials falsehood, in respect to a presentence report" does not typically warrant an upward adjustment).

[61] *See* United States v. Osborne, 931 F.2d 1139, 1155 (7th Cir. 1991) (denying a co-defendant's acceptance of responsibility reduction because, according to the PSR, despite the defendant pleading guilty, "he ha[d] not admitted involvement in cocaine trafficking."); *id*. at 1156 (denying a co-defendant's acceptance of responsibility reduction where, although he continued to cooperate with government investigators, he continued to "deny his knowing involvement in the cocaine conspiracy throughout the period of his interviews with the probation officer"); United States v. Thompson, 876 F.2d 1381, 1384–85 (8th Cir. 1989) (upholding a denial of a two point reduction for acceptance of responsibility because "when [the defendant] was questioned by the probation officer, he simply answered 'it's a long story, I don't want to talk about it.'"). *But see* Brady v. United States, 397 U.S. 742, 748 (1970) ("Central to the plea and the foundation for entering judgement against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment.").

The parameters of the PSR make it well suited to its new role under the Federal Sentencing Guidelines. Far from its originally rehabilitative function, the PSR now amounts to a charging document seeking to enhance sentences wherever conceivably possible.[62] Probation officers "officiously investigate and tabulate each defendant's transgressions so that he can more efficiently be made to pay for them."[63] Rather than gauging a defendant's prospects for rehabilitation, the PSR's new function under the Guidelines is to gauge an offender's prospects for punishment.[64]

C. *Current Rights of the Defendant*

At a time where "rehabilitative efforts and individualized justice are shunned[,] . . . [t]oday's probation officer has been forced to don new robes" by becoming an advocate for increasing punishment.[65] Yet the PSR is still regarded by courts as the same crucial, presumptively reliable document requiring no application of the usual procedural safeguards accorded to the accused.[66] It is not, nor has it ever been, subject to the "crucible of cross examination."[67] It is not limited by the rule against hearsay or the Federal Rules of Evidence.[68] Rule 32 was amended in conjunction with the

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[62] *See* Maveal, *supra* note 53, at 562–63.

[63] Bascuas*, supra* note 23, at 7.

[64] *See* Maveal, *supra* note 53, at 569 ("[T]he PSR routinely reads as if written by the defendant's adversary in ascribing criminal conduct to him."); Bunzel, *supra* note 32, at 959–60 (1995) (observing that, after the Sentencing Reform Act, PSR's devote far more space to guidelines calculations than personal characteristics of the offender).

[65] Bunzel, *supra* note 32, at 966.

[66] United States v. Espalin, 350 F.3d 488, 496 (6th Cir. 2003) (Lawson, J., concurring) ("[T]he recommendations that are most useful to the district judge . . . are tied to the facts of the case as set forth in the body of the PSR."); United States v. Tocco, 200 F.3d 401, 436 (6th Cir. 2000) ("The district court must ordinarily rely in considerable measure upon the presentence report . . . ."); *see* United States v. Belgard, 894 F.2d 1092, 1096–98 (9th Cir. 1990); Williams v. New York, 337 U.S. 241, 247 (1949); Stephen A. Fennell & William L. Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 HARV. L. REV. 1613, 1627–29, 1631 (1980).

[67] Crawford v. Washington, 541 U.S. 36, 61 (2004); *see* FED. R. CRIM. P. 32(c)(3)(A) advisory committee's notes to 1974 amendment.

[68] *See, e.g.*, United States v. Wise, 976 F.2d 393, 404 (8th Cir. 1992) (holding that a probation officer's hearsay testimony was still sufficiently reliable to

Guidelines so that defendants could not waive preparation of the report—an obvious change to maximize its effectiveness as a weapon of real conduct.[69] These protections are blind to the fact that a probation officer's role has been transformed from a neutral judicial employee into a "third adversary."[70] Courts have scrupulously followed the legislative command that "no limitation shall be placed"[71] on evidence received by a sentencing court when it comes to the PSR.[72]

Rule 32 does provide some limited procedural safeguards.[73] When a defendant is seeking to challenge the contents and factual determinations in the PSI, however, these safeguards are usually of little or no help.[74] The probation department is not obligated to further investigate, or revise the presentence report, or meet with the parties based on their objections.[75] A judge can even order probation to withhold the recommended guidelines sentence from the defendant's copy.[76] The burden is heavy when confronting a document that courts consider fundamentally reliable. Though it is within the discretion of the sentencing court to hold an evidentiary hearing on unresolved objections, they are not required.[77] In fact, the Guidelines contemplate that lengthy sentencing hearings will rarely occur.[78] The Guidelines do provide that "when a dispute

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support district court's sentencing conclusion because nothing in record indicated he had a reason to lie or distort facts); FED. R. EVID. 1101(d)(3) (stating that Federal Rules of Evidence do not apply at sentencing).

69 *See* Bunzel, *supra* note 32, at 960.

70 *Id.* at 962.

71 18 U.S.C. § 3661.

72 *See, e.g.*, Pepper v. United States, 562 U.S. 476, 488–89 (2011).

73 *See* FED. R. CRIM. P. 32(e)(1), (f)(1), (g).

74 *See* United States v. Deninno, 29 F.3d 572, 580 (10th Cir. 1994) (holding that defendant bears burden of "alleging factual inaccuracies of the presentence report").

75 FED. R. CRIM. P. 32(f)(3) ("After receiving objections, the probation officer *may* meet with the parties to discuss the objections. The probation officer *may* then further investigate and revise the presentence report as appropriate." (emphases added)).

76 FED. R. CRIM. P. 32(e)(3) ("By local order . . . the court may direct the probation office not to disclose to anyone other than the court the officer's recommendation on the sentence.").

77 FED. R. CRIM. P. 32(i)(2); Maveal, *supra* note 53, at 571–2.

78 U.S. SENT'G GUIDELINES MANUAL § 6A1.3 cmt. (U.S. SENT'G COMM'N 2018) ("[L]engthy sentencing hearings seldom should be necessary . . . .").

exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information."[79] This, however, is hardly useful in a proceeding that contains none of the usual protections afforded to the accused. "Written statements of counsel or affidavits of witnesses," the preferred method for solving factual disputes, may contain outright fallacies with multiple layers of hearsay.[80] If there is an evidentiary hearing, witnesses are not required to be sworn (and can testify to anything they fancy) because the Federal Rules of Evidence do not apply.[81]

Beyond the high legal bar, objecting to the PSR's contents is also logistically challenging. Following the Rule 32 calendar, a defense attorney has just fourteen days to "articulate challenges to each and every factual and legal error in the PSR" before their objections must be submitted.[82] Furthermore, even if the PSR is timely disclosed, there remains the troubling practice of ex-parte communications between the judge and the probation officer ahead of sentencing that may further disadvantage the defendant.[83] Defense counsel is permitted to attend the presentence interview upon request but is entitled only to "notice and a reasonable opportunity to attend."[84] This, of course, means that interviews will still regularly be conducted without the presence of counsel, which is gravely concerning in a world where "a single finding by the probation officer [during the presentence interview] can significantly affect the ultimate sentencing range."[85]

The purpose of the presentence investigation is to uncover as much incriminating information about the defendant as possible—"something neutral courts, by definition, do not do."[86] Yet none of

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[79] *Id.*

[80] *See id.*

[81] *See* FED. R. EVID. 1101(d)(3).

[82] Maveal, *supra* note 53, at 571; *see* FED. R. CRIM. P. 32(f).

[83] *See* United States v. Johnson, 935 F.2d 47, 50 (4th Cir. 1991) (holding that a defendant has no right to counsel during an ex parte presentence conference between a judge and the probation officer because it is "not a critical stage of the sentencing proceedings").

[84] FED. R. CRIM. P. 32(c)(2); *see* United States v. Herrera-Figueroa, 918 F.2d 1430, 1434 (9th Cir. 1991).

[85] *Herrera-Figueroa*, 918 F.2d at 1434.

[86] *See* Bascuas, *supra* note 23, at 66–67.

the protections normally available in an adversarial proceeding are afforded to the defendant when it comes to the PSR.[87] Rule 32 did not even require disclosure of the report until 1994.[88] Even though it can have devastating consequences for a defendant's sentence, but the PSR is given the same cavalier procedural treatment as issuing a search warrant or a grand jury proceeding.[89] The safeguards as they currently stand are plainly insufficient to protect the accused.

II. THE RIGHT VIOLATED: A KNOWING, INTELLIGENT PLEA

A. *Constitutional Requirements of a Guilty Plea*

The Constitution commands that for a plea of guilty to be valid, it must be made intelligently, with full knowledge of the consequences and free from coercion.[90] Rightfully so: "[a] defendant who enters [a guilty] plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to a trial by jury, and his right to confront his accusers."[91] A guilty plea "is more than a confession which admits the accused did various acts; it is itself a conviction; nothing remains but to give judgement and determine punishment."[92] Like any other waiver of a fundamental constitutional right, a guilty plea must be shown to be "an intentional relinquishment or abandonment of a known right or privilege" that overcomes every reasonable presumption against its validity.[93]

Plea bargaining has been around since well before the colonies declared their independence.[94] It was originally conceived as a method to combat harsh punishments in English Courts and incor-

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87 *See id.* at 72, 76.

88 *See* Maveal, *supra* note 53, at 564.

89 *See* FED. R. EVID. 1101(d).

90 *See* McCarthy v. United States, 394 U.S. 459, 466 (1969); Boykin v. Alabama, 395 U.S. 238, 242 (1969).

91 *McCarthy*, 394 U.S. at 466.

92 *Boykin*, 395 U.S. at 242.

93 *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

94 *See Plea Bargaining—Proposed Amendments to Federal Criminal Rule 11*, 56 MINN. L. REV 718, 718 (1972).

porated into the American system with similar rationale.[95] Considered "a necessary evil below the dignity of court," plea bargaining and guilty pleas have always been given substandard treatment in American criminal jurisprudence.[96] Federal courts did eventually warm to the idea.[97]

Courts were slow to adopt the idea, though, that there are constitutional protections afforded to the accused when making an official admission of guilt. Before the Federal Rules of Criminal Procedure were enacted in 1946,[98] guilty pleas were rarely disturbed on appeal. The prevailing wisdom was that an accused did not even have the right to appeal the proper entry of a guilty plea.[99] Courts reasoned that, although the common law permits a defendant to "withdraw his plea of guilty before a judgement," he cannot contest the validity of his plea after a judgement has been rendered.[100] Since a plea of guilty means no trial is held, there is nothing about the properly entered judgement that can be appealed.[101]

Such rationale begs the question: what is the manner of proper entry of a judgement against an accused who pleads guilty? In *Lowe v. State*,[102] the Maryland Court of Appeals reasoned that the word "properly" related not only to "mere form" of the entry of a judgement, but to the substance as well.[103] For a judgement on a guilty plea to be properly entered:

> [T]he plea must be entirely voluntary. It must not be induced by fear, or by misrepresentation, persua-

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95 *Id.*

96 *Id.*

97 *See* Dominick R. Vetri, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 870 n.21 (1964); Anderson v. North Carolina, 221 F. Supp. 930, 934 (W.D.N.C. 1963); Barber v. Gladden, 220 F. Supp. 308, 311–314 (D. Or. 1963); United States v. Cariola, 323 F.2d 180, 182, 187 (3rd Cir. 1963).

98 *See* FED. R. CRIM. P. at VII.

99 *See* City of Edina v. Beck, 47 Mo. App. 234, 236 (1891) ("[T]he conclusion follows that the appeal was properly dismissed, unless we can hold that a party may appeal from a judgement properly entered against him upon his plea of guilty, which is in effect a judgement by confession. This we cannot hold.").

100 *Id.*

101 *Id.*

102 Lowe v. State, 111 Md. 1 (1909).

103 *Id.* at 14.

> sion, or holding out false hopes, nor made through ignorance or inadvertence. The Court should be satisfied as to the voluntary character of the plea before giving judgement and passing sentence, and in some States such an investigation is required by Statute. In some States the statute requires the court to admonish the defendant as to the consequences of his guilty plea . . . . Before proceeding to make such a plea the foundation of a judgement however, the Court should, and frequently by statute must, see that it is made by a person of competent intelligence, freely and voluntarily, and with a full understanding of its nature and effect, and of the facts on which it is founded.[104]

Using this rationale, the court held that it was error "to receive the plea of guilty without being satisfied that the accused fully understood its nature and effect" and reversed.[105] Several years later, in *Nicely v. Butcher*, the West Virginia Supreme Court overturned a petitioner's guilty plea on identical grounds.[106] Eventually, the idea that a court had the duty to ascertain whether a guilty plea was knowingly and intelligently made found its way into the federal domain.[107]

Upon enactment of the Federal Rules of Criminal Procedure, the proper way to enter judgement against the accused who plead guilty became more formalized.[108] Rule 11 essentially codified what was already an existing practice in many courtrooms across the country.[109] As enacted in 1946, it simply declared that "[t]he court . . . shall not accept a plea [of guilty] without first determin-

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[104] *Id* at 14–15. (emphasis omitted) (first quoting 12 Cyc. 353; and then quoting 19 Cyc. 437).

[105] *Id.* at 20.

[106] *See* Nicely v. Butcher, 94 S.E. 147, 148 (W. Va. 1917).

[107] *See* Fogus v. United States, 34 F.2d 97, 98–99 (4th Cir. 1929) (holding that petitioner's guilty pleas were valid because the record indicated they were received by the trial judge in compliance with the rule stated in *Nicely*).

[108] *See* FED. R. CRIM. P. 11.

[109] *See id.* at advisory committee's note to 1944 adoption.

ing that the plea is made voluntarily with understanding of the nature of the charge."[110]

Courts spent decades unpacking the requirements the new rule and its impact on the correct procedure of entering a judgement on a guilty plea against the accused.[111] To comply with Rule 11, for example, the Sixth Circuit held that "the District Court need not follow any particular ritual" and that "[a] brief discussion with the defendant regarding the nature of the charges may normally be the simplest and most direct method of ascertaining the state of his knowledge."[112] On the other hand, the Second Circuit declared that "[a] mere routine inquiry—the asking of several standard questions—will not suffice to discharge the duty of the trial court. It is the duty of a federal judge before accepting a plea of guilty to thoroughly investigate the circumstances under which it is made."[113] The Seventh Circuit in *United States v. Davis* held that a court still must discharge the duty imposed by Rule 11, even if the accused "is represented by counsel of his choice."[114]

In 1966, Rule 11 was amended[115] to further clarify the trial judge's responsibilities when entering a judgement against a defendant who submits a guilty plea.[116] The new language required a sentencing court "to address the defendant personally in the course of determining that the plea is made voluntarily and with understanding of the nature of the charge."[117] The new rule also required the judge to make an independent finding that the plea had a factual basis.[118] Despite the amended rule, though, courts were still split on how strictly Rule 11 must be followed.[119] Two cases announced

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110 *See* FED. R. CRIM. P. 11 (1946).

111 *See infra* notes 112–114.

112 Julian v. United States, 236 F.2d 155, 158 (6th Cir. 1956).

113 United States v. Lester, 247 F.2d 496, 499–500 (2nd Cir. 1957).

114 United States v. Davis, 212 F.2d 264, 267 (7th Cir. 1954).

115 Elaine Brand, *Revised Federal Rule 11: Tighter Guidelines for Pleas in Criminal Cases*, 44 FORDHAM L. REV. 1010, 1010, 1016 (1976).

116 *See* FED. R. CRIM. P. 11. advisory committee's note to 1966 amendment.

117 *See id*.

118 *Id.*

119 *Compare* Heiden v. United States, 353 F.2d 53, 55 (9th Cir. 1965) (holding that appellant's guilty plea be set aside where the district court did not fully comply with Rule 11 procedures), *with* Kennedy v. United States, 397 F.2d 16, 17 (6th Cir. 1968) ("*Heiden* has been rejected in at least three Circuits . . . . We are not inclined to follow it.").

in the Supreme Court's 1969 term were critical for shaping the rule's clarity and protections.[120]

In *McCarthy v. United States*,[121] the court announced that a defendant whose plea is accepted without strict adherence to Rule 11 is invalid.[122] The court further stated that "prejudice inheres in a failure to comply with Rule 11."[123] In doing so, though, the court did not reach any of the constitutional arguments advanced for reversal.[124] Rather, they based the decision solely upon Rule 11's construction made pursuant to their supervisory power over the lower federal courts.[125] Though not reaching their decision on constitutional grounds, the Supreme Court did note that Rule 11 "is designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary."[126] They remarked that, since an accused waives important constitutional rights when pleading guilty, those waivers must be "an intentional relinquishment" of those rights.[127] Therefore, "if a defendant's plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void."[128]

In *Boykin v. Alabama*,[129] the Supreme Court reached similar conclusions but rested their decision on constitutional grounds.[130] The court found that, based on a silent record, an effective waiver of the petitioner's constitutional rights was not made, and therefore, his plea was obtained in violation of due process.[131] The accused waives important constitutional rights when he enters a guilty plea.[132] Determining whether those waivers were obtained in compliance with due process requires "the utmost solicitude of

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120 *See* McCarthy v. United States, 394 U.S. 459, 741–42 (1969); Boykin v. Alabama, 395 U.S. 238, 242–43 (1969).

121 *McCarthy*, 394 U.S. at 459.

122 *Id.* at 471–72.

123 *Id.* at 471.

124 *See id.* at 464.

125 *Id.*

126 *Id.* at 465.

127 *Id.* at 466 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

128 *Id.*

129 Boykin v. Alabama, 395 U.S. 238 (1969).

130 *Id.* at 243.

131 *See id.* at 243.

132 *Id.*

which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence."[133] In doing so, the judge evaluating a defendant's plea "leaves a record adequate for any review that later may be sought."[134] The court, extending their reasoning from *Carnley v. Cochran*, held that it was constitutionally required to show on the record an accused who pled guilty made an effective waiver of their constitutional rights.[135] A guilty plea that was not made intelligently or with knowledge of the consequences, therefore, violated both Rule 11 and the due process clause.[136]

Mostly on the impetus of *Boykin*, Rule 11 was further amended by Congress in 1974.[137] Now the trial judge was required, on the record, to make specific inquiries of the defendant.[138] The judge had to apprise the defendant of the important constitutional rights they were relinquishing, namely: the right to a trial by jury, the right to confront and cross-examine adverse witnesses, the right to be represented by counsel, and the right to prepare his own de-

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[133] *See id.* at 243–44.

[134] *See id* at 244.

[135] *See id.* at 242 ("We held: 'Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer.'" (quoting Carnley v. Cochran, 369 U.S. 506, 516 (1962)).

[136] *See id.* at 242–43, 43 n.5 (citing McCarthy v. United States, 394 U.S. 459, 471–72 (1969)).

[137] FED. R. CRIM. P. 11, advisory committee note to 1974 Amendment. The advisory committee note to the 1974 Amendment to Federal Rule of Criminal Procedure 11 reads as follows:

> Subdivision (c) prescribes the advice which the court must give to the defendant as a prerequisite to the acceptance of a plea of guilty. The former rule required that the court determine that the plea was made with "understanding of the nature of the charge and the consequences of the plea." The amendment requires more specifically what must be explained to the defendant and also codifies, in the rule, the requirements of *Boykin v. Alabama*, which held that a defendant must be appraised of the fact that he relinquished certain constitutional rights before pleading guilty.

Id. (citation omitted).

[138] *See* FED. R. CRIM. P. 11(b)(1).

fense.[139] The judge also was now required to ensure the defendant understood the "mandatory minimum penalty provided by law, if any, and the maximum penalty provided by law."[140] There was no requirement, though, that the defendant be informed of additional consequences that might flow from the guilty plea, such as that a jury might find him guilty of only a lesser included offense.[141] With Rule 11's new specific requirements, the judge would have to "develop a more complete record to support his determination in a subsequent post-conviction attack."[142]

As it currently stands, Rule 11 looks much the same as it did after the revisions in 1974, with several minor exceptions.[143] After the enactment of the Federal Sentencing Guidelines, Congress amended the rule to require the judge to alert the defendant that the judge is required to consider applicable guidelines.[144] The amendment did not require the court to identify which guidelines were important or which grounds for departure might prove significant.[145] This, of course, was because a judicial inquisitor had yet to compile the information that would ultimately determine the offender's punishment.[146] Even Congress recognized that "it will be impracticable, if not impossible, to know which guidelines will be relevant prior to the formulation of the presentence report . . . ."[147] After the guidelines were made "advisory" by *United States v. Booker*,[148] Congress further amended Rule 11's guidelines notice

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139 *See* FED. R. CRIM. P. 11(b)(1)(A)–(F).

140 FED. R. CRIM. P. 11 advisory committee's note to 1974 amendment; *see id.* at Rule 11(b)(1)(G)–(I). The old requirement that the judge ascertain the defendant understand the nature of the charge was retained. *Id.* at Rule 11 advisory committee's note to 1974 amendment.

141 *Id.* at Rule 11 advisory committee's note to 1974 amendment.

142 *Id*.

143 *See id.*; FED. R. CRIM. P. 11.

144 *See* FED. R. CRIM. P. 11(b)(1)(M); Rule 11 advisory committee's note to 1989 amendment.

145 *Id.* at Rule 11 advisory committee's note to 1989 amendment.

146 *See id.* at Rule 32(c)(1)(A) ("The probation officer must conduct a *presentence* investigation and submit a report to the court *before it imposes a sentence* . . . ." (emphasis added)).

147 *Id.* at Rule 11 advisory committee's note to 1989 amendment.

148 *See* United States v. Booker, 543 U.S. 220, 246 (2005).

requirement, but with little substantive change.[149] Although the judge could technically consider other statutory concerns, *Booker* still mandated consideration of the guideline range, and the defendant would be told as much.[150]

B. *Guilty Pleas in the Age of the Federal Sentencing Guidelines*

The Guidelines offer an enticing prospect for the accused. If they pleaded guilty, thereby obviating the need for a trial, offenders will receive an across-the-board two-level reduction in their base offense level.[151] If the offense is serious and the trial will be onerous (a challenge that any good prosecutor should welcome), a defendant can get a further one-point reduction by "timely notifying authorities of his intention to plead guilty."[152] In this way, the Guidelines, with a "backdrop" of harsh draconian prison sentences, achieve their secondary goal of efficiency by making trial a costly endeavor for the accused.[153] Worse still, whatever benefit an offender contemplated in a reduction, his base offense is usually abrogated by enhancements from the PSR.

The Guidelines threaten harsher punishments for exercising one's right to trial in several ways. Firstly, an offender's base level exposure increases by a substantial amount if they decide not to plead out their case.[154] For example, if an accused has a base level of twenty-six and a criminal history category of three, their Guideline range is seventy-eight to ninety-seven months in prison.[155] With a reduction under § 3E1.1,[156] the base offense level drops to twenty-four and their Guideline range becomes sixty-three to sev-

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[149] *See* FED. R. CRIM. P. 11 advisory committee's note to 2007 amendment; *id.* at Rule 11(b)(1)(M).

[150] *See id.* at Rule 11 advisory committee's note to 1989 amendment; *id.* at Rule 11 advisory committee's note to 2007 amendment.

[151] *See* U.S. SENT'G GUIDELINES MANUAL § 3E1.1(a) (U.S. SENT'G COMM'N 2018).

[152] *See id.* § 3E1.1(b).

[153] *See* Bascuas, *supra* note 23, at 42–45.

[154] *See* U.S. SENT'G GUIDELINES MANUAL § 5A (Sentencing Table) (U.S. SENT'G COMM'N 2018).

[155] *Id.*

[156] *See* U.S. SENT'G GUIDELINES MANUAL § 3E1.1(a) (U.S. SENT'G COMM'N 2018).

enty-eight months.[157] Assuming the high end of each range, an offender's exposure is about twenty percent larger if they exercise their trial right.[158] This means that if the offender believed that the government had an eighty percent chance of convicting him, he is better off pleading guilty.[159]

This contrast is even larger at lower levels, which is completely antithetical to the goals of efficiency promulgated by the Guidelines. If a system is seeking efficiency, then the most cumbersome obstacles to efficiency (i.e., complicated trials of complicated cases) ought to be scrapped first. The larger contrast at lower-level offenses, however, means that offenders whose trials would be far more manageable are much better off waiving their rights. If an offender's base level is ten, for example, and they are in a criminal history category of one, their Guideline range is six to twelve months.[160] By earning a reduction under § 3E1.1,[161] their base level becomes eight, with a Guideline range of zero to six months.[162] The offender, in other words, has a fifty percent larger exposure to punishment if he was to exercise his trial right.[163] This means that, if the offender believed the government had only a fifty-one percent chance of finding him guilty, he would plea.[164]

A second way the Guidelines punish offenders for exercising their trial right is by threatening a two-level obstruction of justice enhancement for offenders who opt to testify in their own defense, particularly if they contradict the government's case.[165] This means that our same offender, who is at a base level of twenty-six and criminal history category of three (seventy-eight to ninety-seven months), actually faces a guideline range of ninety-seven to 121 months if convicted with an obstruction enhancement.[166] This makes a potential guilty plea for sixty-three to seventy-eight

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157 *Id.*
158 *See id.*
159 *See id.*
160 *Id.*
161 *See* U.S. SENT'G GUIDELINES MANUAL § 3E1.1(a) (U.S. SENT'G COMM'N 2018).
162 *Id.*
163 *See id.*
164 *See id.*
165 *See id.* at § 3C1.1.
166 *See id.* § 5A (Sentencing Table).

months seem far more attractive than putting "the government to its burden of proof at trial."[167] Even simple persistence in a plea of not guilty can drastically increase a defendant's exposure level.[168]

Thirdly, the Guidelines incentivize witnesses to corroborate the government's allegations against an accused in exchange for cooperation agreements reducing their own punishments.[169] The government essentially controls the agreement and can withhold its benefits for any reason.[170] As a result, defendants who proceed to trial face witnesses who must testify to the government's satisfaction in order to reap the rewards of a potential cooperation deal.[171] Since this is the only substantial way to reduce one's sentence under the Guidelines (other than pleading guilty), defendants are eager to satisfy the government's wishes.[172] This significantly increases the likelihood that they will offer perjured testimony or whatever else the prosecutor asks for.[173] There is evidence to suggest this does not happen infrequently.[174]

It is not surprising that such a high price for going to trial induces astronomically high numbers of guilty pleas. Approximately three percent of federal defendants put "the government to its burden" from 2012 to 2016.[175] This means that ninety-seven percent

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[167] *Id.* § 3E1.1 cmt. n.2.

[168] *See, e.g.*, Ronn Blitzer, *Lori Loughlin and Mossimo Giannuli Hit with Money Laundering Charge in New Indictment*, L. & CRIME (Apr. 9, 2019, 2:09 PM), https://lawandcrime.com/high-profile/lori-loughlin-and-husband-mossimo-giannulli-hit-with-money-laundering-charge-in-new-indictment/.

[169] *See* U.S. SENT'G GUIDELINES MANUAL § 5K1.1 (U.S. SENT'G COMM'N 2018).

[170] *See id.* § 5K1.1 cmt. n.3.

[171] *See id.* § 5K1.1.

[172] *Federal Sentencing Reductions*, BURNHAM & GOROKHOV, https://www.burnhamgorokhov.com/criminal-defense-resources/federal-sentencing/federal-sentencing-reductions (last visited May 15, 2021).

[173] *See* Yvette A. Beeman, *Accomplice Testimony Used Under Contingent Plea Agreements*, 72 CORNELL L. REV. 800, 800, 808–09 (1987).

[174] *See, e.g.*, United States v. Ochoa-Vasquez, 428 F.3d 1015, 1022–23 (11th Cir. 2005) (describing a DEA scheme that allowed drug kingpins to surrender to the United States government in exchange for phony cooperation deals); United States v. Manske, 186 F.3d 770, 772 (7th Cir. 1999) (reversing Manske's conviction where the district court prevented him from cross-examining government witnesses on "past acts of witness intimidation").

[175] *See* U.S. SENT'G GUIDELINES MANUAL § 3E1.1 cmt. n.2 (U.S. SENT'G COMM'N 2018); U.S. SENT'G COMM'N, 2016 SOURCEBOOOK OF FEDERAL

of defendants waived their constitutional right to a trial by jury, to confront their accuser, and to cross examine witnesses.[176] In 1998, by contrast, eighty-two percent of defendants pleaded guilty in federal court.[177] Since 1945, the rate has been as low as seventy-seven percent (in 1981), with a steady upward trend beginning in the early nineties.[178] If the plea rate dropped back to what it was in the early 1980s, the number of federal criminal trials would drastically increase.[179] The twenty-first century, so far, has been the century of waiving your right to trial.[180]

An argument might be advanced that defendants *should* be incentivized to plead guilty. Nothing is preventing them from going to trial, and it is their choice to surrender their rights. They are simply engaging in a cost-benefit analysis that comes out far more often against trial than for it. This rationale is exactly what the Supreme Court renounced in *United States v. Jackson*.[181] Congress may not pursue goals (here, uniformity and efficiency in criminal punishment) "by means that needlessly chill the exercise of basic constitutional rights."[182] "The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive."[183] Criminal

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SENTENCING STATISTICS, Fig.C [hereinafter FIGURE C 2016], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2016/FigureC.pdf; U.S. SENT'G COMM'N, 2017 SOURCEBOOOK OF FEDERAL SENTENCING STATISTICS, Fig.C, [hereinafter FIGURE C 2017], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/FigureC.pdf.

176 *Supra* note 175, FIGURE C 2016; *supra* note 175, FIGURE C 2017.

177 John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RES. CTR. (June 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/.

178 *See* Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 91 fig.1 (2005).

179 *Id.* at 91.

180 Shari Seifman Diamond & Jessica M. Salerno, *Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges*, 81 LA. L. REV. 119, 126 (2020).

181 United States v. Jackson, 390 U.S. 570, 581–83 (1968) (invalidating a federal kidnapping statute that allowed death as a punishment for offenders found guilty by a trial, but not for offenders who pleaded guilty).

182 *Id.* at 582 (citation omitted).

183 *Id.* at 582.

penalties may not be imposed "in a manner that needlessly penalizes the assertion of a constitutional right."[184] It need not be an inherently coercive penalty—the constitutional evil lies even when the statute "needlessly encourages" guilty pleas.[185]

III. MAKING PRE-PLEA DISCLOSURE MANDATORY

The full presentence investigation, and the report that summarizes it, should begin as soon as the defendant is indicted. A plea made without knowledge of the offense level computation in the PSR is unknowing and therefore violates due process. A guilty plea is "more than an admission of past conduct; it is the defendant's consent that judgement of conviction may be entered without a trial."[186] A trial by jury is but one of the many constitutional rights one surrenders when pleading guilty.[187] "Waivers of constitutional rights . . . must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."[188] *It is impossible* for a defendant to know the relevant circumstances and likely consequences of his guilty plea without seeing the contents of his presentence report. In order to comply with the high commands of due process, a defendant must see his presentence report before he decides to enter a guilty plea. Once it is finished, the defendant should be given leave to fully review the PSR. At that point his plea will, at the very least, be made with full understanding of the potential consequences, as the Constitution requires.[189]

It is not that the PSR is *always* so drastically different from what the defendant expects to receive, or that the judge *always* adopts what the PSR says. Both, though, happen with enough frequency to merit the institutional change argued here. The concern is at hand every time a defendant pleads guilty in federal court, which happens ninety-seven percent of the time.[190] It is far beyond

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184 *Id.* at 583.
185 *Id.*
186 Brady v. United States, 397 U.S. 742, 748 (1970).
187 *See* Boykin v. Alabama, 395 U.S. 238, 243 (1969).
188 *See Brady*, 397 U.S. at 748.
189 *See, e.g.*, McCarthy v. United States, 394 U.S. 459, 466 (1969).
190 *See* FIGURE C 2016, *supra* note 175; FIGURE C 2017, *supra* note 175.

the scope of this Note to compute how often, and by how much, a PSR's recommendation differs from a sentencing recommendation between the prosecutor and the defense. Several anecdotes are instructive on just how unknowing and unintelligent a guilty plea can be without the information from the presentence report.[191]

Consider Angela Larkin, who pled guilty to one count of producing a sexually explicit image of a minor in violation of 18 U.S.C. § 2251(a).[192] Her agreement with the prosecutor contemplated a sentencing guideline range between 121 and 151 months, possibly lower pursuant to a cooperation agreement.[193] This was based on the government's calculation that Larkin's "criminal history fell in Category I."[194] The PSR, on the other hand, calculated Larkin's criminal history fell into category two.[195] Furthermore, the PSR identified the fact that there was a second possible victim of Larkin's crime.[196] It also calculated a "possible enhancement for the use of a computer in the commission of the offense."[197] The PSR contemplated a sentencing range of 168–210 months, an increase of approximately thirty-nine percent from what Larkin thought she was getting.[198] As it turns out, Larkin was sentenced to 360 months in prison, based largely on the PSR's identification of other victims in the scheme.[199] If Larkin knew that her "sticker price" was thirty-nine percent higher than what the prosecutor was offering, and that her exposure could be even larger based on new facts in the PSR, she may well have decided to "put the government to its burden."[200] At the very least, it cannot be said she

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191 *See* United States v. Larkin, 629 F.3d 177, 180–83 (3rd Cir. 2019); United States v. Osborne, 931 F.2d 1139, 1142, 1164–66 (7th Cir. 1991); United States v. Washington, 146 F.3d 219, 220–23 (4th Cir. 1998).

192 *Larkin*, 629 F.3d at 180.

193 *Id.*

194 *Id.* at 180 n.4.

195 *Id.*

196 *Id.* at 180.

197 *Id.*; *see* U.S. SENT'G GUIDELINES MANUAL § 2G2.1(b)(3) (U.S. SENT'G COMM'N 2018).

198 *See Larkin*, 629 F.3d at 180.

199 *See id.* at 181.

200 *See* U.S. SENT'G GUIDELINES MANUAL § 3E1.1 cmt. n.2 (U.S. SENT'G COMM'N 2018).

waived her constitutional rights with full knowledge of the consequences.

Or, consider the case of William Osborne, who pleaded guilty to "one count of conspiracy to possess cocaine with intent to distribute under 21 U.S.C. §§ 841(a)(1), 846 and 18 U.S.C. § 2."[201] Osborne's plea agreement with the government placed him in a criminal history category of one.[202] At sentencing, however, the PSR calculated him at a criminal category history of three.[203] The PSR uncovered two "operation of a motor vehicle while intoxicated" convictions not previously disclosed to the defendant.[204] The court used the information from the PSR to sentence, even though the judge found there was no proof that "these matters were handled under state statutes."[205] On appeal, the Seventh Circuit affirmed, holding that the original plea agreement was "based upon an understanding of [Osborne's] criminal record that did not include all of his convictions."[206] Both the government and Osborne were operating under the assumption he had no DUIs on his record.[207] In fact, the government had Osborne's record months before the sentencing hearing.[208] If the PSR had been disclosed prior to Osborne's guilty plea, then *both* parties would have received valuable information that likely would have affected their bargain. Osborne would undoubtedly have made a more effective waiver of his constitutional rights.

Finally, consider Alex Davis.[209] He pleaded guilty to one drug-related conspiracy count in violation of 21 U.S.C. § 846.[210] Davis' agreement with the government stipulated that his total relevant conduct "would be at least 100 but less than 200 grams of cocaine."[211] The PSR, on the other hand, asserted that Davis' relevant conduct included 20.3 grams of cocaine base and 82.7 grams of

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201 United States v. Osborne, 931 F.2d 1139, 1142 (7th Cir. 1991).
202 *Id.* at 1162.
203 *Id.* at 1164
204 *Id*.
205 *Id.* at 1165.
206 *Id.* at 1166.
207 *Id.* at 1165–66.
208 *Id.* at 1166.
209 United States v. Washington, 146 F.3d 219, 220 (4th Cir. 1998).
210 *Id.*
211 *Id.* at 221.

cocaine hydrochloride.[212] The probation officer came to this conclusion when he noticed the original lab report "appeared to describe a substance that included cocaine base."[213] The probation officer then took it upon himself to order an amended lab report to attach to the PSR and argue for an increase in Davis' sentence.[214] The judge credited the PSR's findings and sentenced Davis to seventy months.[215] On appeal, the Fourth Circuit affirmed, reasoning that "if the government's information was inaccurate, it should have been corrected."[216] In other words, the government faced no consequences for doing a poor job investigating the case. Had Davis been permitted to see his "sticker price" before making a plea deal, the result likely would have been quite different.

One might argue that it is impossible to do the presentence investigation without running afoul of the defendant's Fifth Amendment rights.[217] This is simply not true. The defendant has *never* been obligated to participate in the presentence investigation. Furthermore, the Fifth Amendment already applies to the probation officer's interview of the defendant, at least to the extent that any admission could be used to increase punishment.[218] This is essentially the only point of the presentence interview anyway, since the defendant has already admitted they are guilty and reductions are rarely, if ever, available.

A parallel argument might be that it is far more difficult for the probation officer to gather relevant, reliable information before the defendant enters a guilty plea. This also is simply not true. The

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212 *Id.*

213 *Id.*

214 *Id.*

215 *Id.*

216 *Id.* at 223.

217 *See* U.S. CONST. amend. V.

218 *See* U.S. SENT'G GUIDELINES MANUAL § 3C1.1 cmt. n.2 (U.S. SENT'G COMM'N 2018). The *Sentencing Guidelines Manual* reads, in pertinent part, as follows:

> This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), *refusal to admit guilt or provide information to a probation officer*, or refusal to enter a plea of guilty is not a basis for application of this provision.

Id. (emphasis added).

litany of personal information (which depends on the cooperation of the defendant and his/her associates) is not "ordinarily relevant" to sentencing under the Guidelines.[219] Therefore, it matters not whether the information is "reliable" since the vast majority of judges will not even use it at sentencing anyway. Because most of the facts that probation would need to find for a downward variance are not usually relevant, it follows that their investigation is done primarily to find reliable facts that will lead to an upward variance.[220] It appears that, in this regard, probation is doing fine without the defendant's help. Just ask Angela Larkin, William Osborne, and Alex Davis.[221]

A resource argument also fails. Probation, the argument might go, cannot devote officers to every case as soon as it is indicted. Resources will be wasted if a presentence investigation is completed only to have the defendant exercise his trial right. This is not a legitimate concern. In fiscal year 2018, for example, there were 79,704 federal defendants.[222] A PSR was generated in every one of those cases except for the 320 that ended in an acquittal.[223] Since resources are already being devoted to presentence investigations

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[219] *See* U.S. SENT'G GUIDELINES MANUAL § 5H1.2 (U.S. SENT'G COMM'N 2018) ("education and vocational skills are not ordinarily relevant"); *id.* § 5H1.4 ("drug or alcohol dependence, abuse, or addiction to gambling is not a reason for a downward departure"); *id.* § 5H1.5 ("employment record is not ordinarily relevant"); *id.* § 5H1.6 ("family ties and responsibilities are not ordinarily relevant"); *id.* § 5H1.10 ("race, sex, national origin, creed, religion, and socioeconomic status . . . are not relevant"); *id.* § 5H1.11 (civic work, charity work, other good deeds not ordinarily relevant); *id.* § 5H1.12 ("disadvantaged upbringing" and "lack of guidance" are not ordinarily relevant).

[220] *See* U.S. SENT'G GUIDELINES MANUAL § 5H1.2 (U.S. SENT'G COMM'N 2018) ("education and vocational skills are not ordinarily relevant"); *id.* § 5H1.4 ("drug or alcohol dependence, abuse, or addiction to gambling is not a reason for a downward departure"); *id.* § 5H1.5 ("employment record is not ordinarily relevant"); *id.* § 5H1.6 ("family ties and responsibilities are not ordinarily relevant"); *id.* § 5H1.10 ("race, sex, national origin, creed, religion, and socioeconomic status . . . are not relevant"); *id.* § 5H1.11 (civic work, charity work, other good deeds not ordinarily relevant); *id.* § 5H1.12 ("disadvantaged upbringing" and "lack of guidance" are not ordinarily relevant).

[221] *See* United States v. Larkin, 629 F.3d 177, 180–83 (3rd Cir. 2019); United States v. Osborne, 931 F.2d 1139, 1142, 1164–66 (7th Cir. 1991); United States v. Washington, 146 F.3d 219, 220–23 (4th Cir. 1998).

[222] *See* Gramlich, *supra* note 177.

[223] *Id.*

in virtually every case, it should not matter whether the effort occurs before or after a defendant's guilty plea. The proposal in this Note only moves the time frame up. Furthermore, disclosure of the PSR pre-plea would eliminate untold hundreds, or thousands, of sentencing appeals, based on disappointed expectations from a "surprise" enhancement.

A more fundamental argument against pre-plea disclosure is that the defendant already knows his relevant conduct. The defendant should be the least surprised of anyone when they read the PSR because they knew what they did. Therefore, nothing would change by disclosing the PSR pre-plea since the defendant knows the enhancements are probably coming anyway. This ignores the reality that the Guidelines are extremely complicated and not easily applied to every single case.[224] Some enhancement can be frustratingly vague, despite the fact the Guidelines are not open to vagueness challenges.[225] Furthermore, there may be facts underlying the PSR's calculations of certain enhancements that the defendant vigorously disputes. Rather than contest those facts at a sentencing hearing where he has virtually no rights, he may decide to contest those facts at a trial. This is a judgement every accused person is constitutionally entitled to make.

CONCLUSION

Originally conceived as an instrument of rehabilitation, the PSR has become anything but. Its sole purpose is to enhance an offender's punishment wherever possible, embodying the worst

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[224] *See* Bascuas, *supra* note 23, at 70–71. As Professor Bascuas explains,

> Many Guidelines provisions can be challenging for even trained lawyers and judges to apply. Even determining the base offense level presents intricate mixed questions of law and fact. In a conspiracy case, for example, the base offense level depends on what was reasonably foreseeable to each defendant. In a fraud or theft case, the amount of loss attributable to the defendant is often sharply contested. Drug cases turn on the amount of drugs each defendant is responsible for distributing. Questions over the applicability of adjustments to the base offense level introduce legal and factual complications.

Id.

[225] *See* Beckles v. United States, 137 S. Ct. 886, 894 (2017).

tendencies in the American criminal justice system. The document is created in secret and never exposed to the light until it is far too late. The defendant has no ability to meaningfully dispute the document's contents. His waiver of constitutional rights, which must be done knowingly and intelligently, is completely ineffective without this information. Elementary notions of fairness and due process command that the accused be able to see the PSR before he decides his own fate.

The land of the free incarcerates more people than anywhere in the world, including authoritarian regimes such as Russia and China.[226] The trend will only continue without drastic institutional change, largely unattainable in the current climate of legislative gridlock. "The Guidelines are here to stay," but the simple change argued in this Note would empower at least some defendants to exercise their trial right.[227] This should be welcomed by defense attorneys, prosecutors, judges, and probation officers because it will only increase the fairness of the criminal justice system. The apparatus does not simply exist to dispense with guilty people. "An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.'"[228] Anyone who supports more justice should favor pre-plea disclosure of the PSR.

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[226] *See Incarceration Rates by Country 2021,* WORLD POPULATION REV., https://worldpopulationreview.com/country-rankings/incarceration-rates-by-country (last visited May 15, 2021).

[227] *Conference on the Federal Sentencing Guidelines: Summary of Proceedings*, 101 YALE L.J. 2053, 2058 (1992).

[228] Brady v. Maryland, 373 U.S. 83, 87 (1963).