CASE COMMENT

DEFENDANT'S RIGHT TO DISCLOSURE OF PRESENTENCE INVESTIGATION REPORTS IN CAPITAL CASES


In Gardner v. Florida, the Supreme Court expanded the procedural protections which defendants convicted of capital crimes are entitled to at sentencing. Except in carefully circumscribed situations, the due process clause of the fourteenth amendment prohibits a state from imposing the death sentence on the basis of an undisclosed presentence investigation (PSI) report.

Petitioner was convicted in Florida of first degree murder, which is punishable by either life imprisonment or death. In accordance with Florida law, there was a separate sentencing hearing before a jury. The trial judge rejected the jury's advisory sentence of life imprisonment and, on the basis of portions of a court-ordered PSI report that was neither disclosed to the defendant nor included in the trial record, imposed the

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2. See notes 82 & 99 infra and accompanying text.
4. 430 U.S. at 351.
5. FLA. STAT. ANN. § 775.082 (West 1976).
7. 430 U.S. at 352. The jury, in accordance with FLA. STAT. ANN. § 921.141(5)-(6) (West Supp 1977), considered the aggravating and mitigating circumstances of the crime.
8. Use of a presentence investigation and report is usually within the trial judge's discretion, but is required when a minor or first offender is involved. FLA. R. CRIM. P. 3.710. Although defendant had an extensive police record, this was his first felony conviction and a presentence report was mandatory.
9. FLA. R. CRIM. P. 3.713 requires disclosure of factual material in a presentence report, but permits nondisclosure of evaluative and other material that the trial judge determines is proper to withhold. The rule attempts to effectuate the policies of full disclosure, while protecting confidential sources of information. FLA. R. CRIM. P. 3.713, Comm. Notes. The Florida death penalty statute does not include a mandatory disclosure provision, FLA. STAT. ANN. § 921.141 (West Supp. 1977), but is subject to FLA. R. CRIM. P. 3.713.
death penalty. The Supreme Court of Florida affirmed the conviction and sentence;\textsuperscript{10} the United States Supreme Court, however, vacated the sentence\textsuperscript{11} and \textit{held}: the imposition of the death sentence based on considerations neither disclosed to the defendant nor incorporated in the trial record violated the due process clause of the fourteenth amendment.\textsuperscript{12}

The due process clause of the fourteenth amendment provides that no “State [shall] deprive any person of life, liberty, or property, without due process of law.”\textsuperscript{13} It specifically ensures that the principles of “fundamental fairness”\textsuperscript{14} guaranteed at the federal level by the Bill of Rights\textsuperscript{15} are applied to state criminal proceedings.\textsuperscript{16} In addition, the clause\textsuperscript{17} entitles litigants to fair procedures—due process—whenever their rights may be adversely affected.\textsuperscript{18} What process is “due”\textsuperscript{19} is determined by balancing the effect of the proceeding on the defendant’s rights\textsuperscript{20} and the state’s interests.\textsuperscript{21}

\textsuperscript{11} By plurality. See note 75 infra.
\textsuperscript{12} 430 U.S. at 362.
\textsuperscript{13} U.S. CONST. amend. XIV, § 1.
\textsuperscript{15} U.S. CONST. amends. I-X.
\textsuperscript{17} See note 13 supra and accompanying text.
\textsuperscript{19} Morrissey v. Brewer, 408 U.S. 471, 484 (1971) (“[T]he process that is due” connotes a flexible due process standard.).
\textsuperscript{20} See Morrissey v. Brewer, 408 U.S. 471 (1971) (parolee’s liberty interest); \textit{In re} Gault, 387 U.S. 1 (1967) (juvenile’s liberty interest); Kent v. United States, 383 U.S. 541 (1966) (juvenile’s interest to be tried as such).
\textsuperscript{21} Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961) (“consideration of what procedures due process may require under any given set of

An accused person, having a recognized liberty interest in his life, has traditionally been accorded due process in pre-trial and trial procedures. Once convicted, however, the defendant stood at the mercy of the state, stripped of his rights, with only minimal due process protection. Because convicted defendants were considered slaves of the state, legislatures vested courts and corrections officials with virtually unbridled discretion. In response to modern penal theories, later courts also

[more text]

Id. at 795-96.


25. See note 23 supra.

considered the best interests of the convicted defendant in determining punishment. 27

To aid in the fashioning of individualized sentences, many courts and legislatures authorize presentence investigations into the offender's background and the circumstances of the crime. 28 Because the offender had


As long as the sentence is within the range authorized by statute the convicted may not challenge it. See United States v. Weston, 448 F.2d 626, 631 (9th Cir. 1971), cert. denied, 404 U.S. 1061 (1972); Bowman v. United States, 350 F.2d 913, 917 (9th Cir. 1965), cert. denied, 383 U.S. 950 (1966); Jones v. United States, 327 F.2d 867 (D.C. Cir. 1963); Beckett v. United States, 84 F.2d 731, 732-33 (6th Cir. 1936); Gurera v. United States, 40 F.2d 338 (8th Cir. 1930). But see Woosley v. United States, 478 F.2d 139 (8th Cir. 1973); United States v. McKinney, 466 F.2d 1403 (6th Cir. 1972); United States v. Daniels, 446 F.2d 967 (6th Cir. 1971).


28. E.g., FED. R. CRIM. P. 32 (c) provides: "The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation." It is common practice in state criminal procedure to require or permit the use of presentence reports. See, e.g., CAL. PENAL CODE § 1203.10 (Deering 1970) (discretionary); IOWA CODE ANN. § 789A.3 (West Supp. 1977) (mandatory); MO. ANN. STAT. § 549.245 (Vernon Supp. 1977) (discretionary); FLA. R. CRIM. P. 3.710 (discretionary unless minor or first felony conviction in which case it is mandatory); 8A MOORE'S FEDERAL PRACTICE ¶ 32.03[1], at 32-28 to 32-32 (2d ed. 1977); 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE, § 522, at 389 (1969); Lehrich, The Use and Disclosure of Presentence Reports in the United States, 47 F.R.D. 225 (1969); Parsons, Aids in Sentencing, 35 F.R.D. 423 (1964); Note, Use of the Presentence Investigation in Missouri, 1964 WASH. U.L.Q. 396. See generally Note, Disclosure of Presentence Reports in Federal Court: Due Process and Judicial Discretion, 26 HASTINGS L.J. 1527 (1975); Note, Due Process in Sentencing: A Right to Rebut the Presentence Report?, 2 HASTINGS CONST. L.Q. 1065 (1975) [hereinafter cited as Note, Due Process in Sentencing].

no recognized property or liberty interest entitled to due process protection at sentencing, courts held that he could not object to the use of the PSI report and, consequently, he had no right to its disclosure. The sentencing court may, however, in its discretion, disclose the PSI report. Proponents of nondisclosure claim it serves the following state interests: maximizing the offender’s rehabilitation by not disclosing confidential and detrimental psychological information; protecting confidential sources of information; avoiding delay of criminal trials; and, preserving the sentencing court’s discretion.


The state’s interest in fair and efficient sentencing of offenders outweighed the defendant’s minimal procedural rights:

Under the practice of individualizing punishments, investigational techniques have been given an important role. Probation workers making reports of their investigations have not been trained to prosecute but to aid offenders. Their reports have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guesswork and inadequate information. To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cau-
In *Townsend v. Burke*, the Supreme Court considered whether an un counselled offender's due process right was denied by a court that sentenced him on the basis of "materially untrue" information. The Court held that the absence of representation by counsel at the sentencing hearing denied this offender due process of law. Read broadly, *Townsend* held that sentencing on the basis of misinformation was a denial of due process, and that an offender was entitled to the protection of counsel. The logical implication was that information on which the sentence is based, including the PSI report, must be disclosed so that the offender's counsel could rebut inaccurate information. Read more narrowly, the *Townsend* Court was shocked by the irresponsible behavior of the trial judge—-not only his reliance on misinformation, but his abuse of the uncounselled offender. This interpretation does not compel the

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33. 334 U.S. 736 (1948).
34. Id. at 740-41. The erroneous information the sentencing judge relied on had been undisclosed to the defendant. The court did not inquire into how a defendant or his counsel might challenge erroneous information if it were undisclosed. See United States v. Tucker, 404 U.S. 443 (1972) (reliance on past invalid convictions); Kent v. United States, 383 U.S. 541 (1966) (errors in juvenile department report); United States v. Weston, 448 F.2d 626 (9th Cir. 1971) (unreliable conclusions in presentence report), cert. denied, 404 U.S. 1061 (1972). See also Collins v. Buchkoe, 493 F.2d 343 (6th Cir. 1974); United States v. Rollerson, 491 F.2d 1209, 1213 (5th Cir. 1974); United States v. Picard, 464 F.2d 215, 220 (1st Cir. 1972); United States v. Malcolm, 432 F.2d 809, 816 (2d Cir. 1970); Baker v. United States, 388 F.2d 931, 934 (4th Cir. 1968).
35. 334 U.S. at 740-41 ("counsel might not have changed the sentence, but he could have taken steps to see that the conviction and sentence were not predicated on misinformation or misreading of court records"). See Kent v. United States, 383 U.S. 541, 563 (1966) (duty of counsel to "denigrate" questionable information); United States v. Dockery, 447 F.2d 1178, 1193 (D.C. Cir.) (Wright, J., dissenting), cert. denied, 404 U.S. 950 (1971); Gray, *Post-Trial Discovery: Disclosure of the Presentence Investigation Report*, 4 U. TOL. L. REV. 1, 8-9 (1972); Note, *supra* note 26 at 263-71; 50 N.C.L. REV. 925, 928 (1972).
36. 334 U.S. at 740-41. See notes 34-35 *supra* and accompanying text.
38. 334 U.S. at 740-41.
disclosure of information on which a sentence is based to an offender or his counsel.39

In deciding Williams v. New York40 one year later, the Court read Townsend41 narrowly. A jury convicted Williams of first degree murder and recommended a life sentence.42 On the basis of a PSI report, however, the judge sentenced the defendant to death.43 At the sentencing hearing, the judge stated the information he relied on; neither the defendant nor his attorney attempted to refute it.44 Although Williams claimed that failure to allow rebuttal testimony and cross examination at the sentencing hearing denied him due process,45 the Supreme Court endorsed the modern sentencing theory that punishment should fit the offender, and the use of PSI reports to accomplish this goal.46

The Court in Williams, citing Townsend,47 recognized that the sentencing process was not immune from due process requirements,48 and


may, therefore, have only endorsed the use of PSI reports.\footnote{49} By affirming the trial judge's sentence despite his nondisclosure of the PSI report before the hearing and his failure to provide the defendant an opportunity to rebut,\footnote{50} however, the Court apparently sanctioned the discretionary use—including nondisclosure—of PSI reports.\footnote{51} Following Williams, many state and lower federal courts have held that failure to disclose a PSI report or to allow confrontation and cross examination of sources contained therein does not violate due process.\footnote{52}

Since the Williams decision in 1949, the Supreme Court has recognized that convicted offenders have a limited liberty interest which is entitled to due process protection in post-trial proceedings.\footnote{53} In Mempa

50. 337 U.S. at 252.
51. Id. at 250. But see id. at 252-53 (Murphy, J., dissenting).

In Williams, 337 U.S. at 246, the court justified the use of out-of-court information because of the sentencing judge's wide discretion in fashioning individualized sentences. For a criticism of this view, see K. Davis, supra note 26.


The right-privilege distinction, previously used to justify denials of post-trial due process, has been repudiated. The distinction was founded on the assumption that any proceeding considering a sentence less than the statutory maximum was a privilege and not a right entitled to procedural safeguards. E.g., Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (criminal). See also Graham v. Richardson, 403 U.S. 365, 374 (1971) (civil); Bell v. Burson, 402 U.S. 535, 539 (1971) (civil); Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (civil); Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969) (civil); Sherbert v. Verner, 374 U.S. 398, 404 (1963) (civil); United States v. Dockery, 447 F.2d 1178, 1190 & n.15 (D.C. Cir.) (Wright, J., dissenting) (criminal), cert. denied, 404 U.S. 450 (1971). See generally Van

v. Rhay,\textsuperscript{54} the Court held that defendant’s liberty interest warranted representation by counsel at sentencing.\textsuperscript{55} Following this decision, defendants have argued that their inability to challenge undisclosed errors in PSI reports renders meaningless this due process protection at sentencing by preventing detection of potential errors.\textsuperscript{56}


\textsuperscript{54} 389 U.S. 128 (1967).

\textsuperscript{55} \textit{Id.} at 134 (citing Townsend v. Burke, 334 U.S. 736, 740-41 (1948) ("appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected").


\textsuperscript{56} 50 N.C.L. REV. 925 (1972).

In a sector of the judicial process in which the stakes for society and the defendant are so high as they are at sentencing, and in which procedural safeguards are inadequate, there is a strong case for developing a body of substantive standards to ensure that sentences are not based on inaccurate assumptions of little probative value.


The convicted person has the burden of demonstrating error in the facts relied upon in sentencing, although he may not have access to the PSI report. \textit{See, e.g., Collins v. Buchkoe}, 493 F.2d 343 (6th Cir. 1974); United States v. Rollerson, 491 F.2d 1209 (5th Cir. 1974).

The tension between due process rights and sentencing discretion has stirred much debate over PSI report disclosure. For arguments against disclosure, see Barnett & Gronewold, \textit{Confidentiality of the Presentence Report}, 26 FED. PROBATION 26 (1962);
The Supreme Court’s reevaluation of capital punishment and capital sentencing procedures also implicates the nondisclosure of PSI reports. In *Furman v. Georgia*, *Gregg v. Georgia*, *Woodson v. North Carolina*, and *Proffitt v. Florida*, the Court recognized that capital punishment is unique and that it would conform to the eighth amendment’s proscription against cruel and unusual punishment only if the process by which it is imposed is and appears to be fair. The process mandated by


58. 408 U.S. 238 (1972).
63. U.S. CONST. amend. VIII provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

the eighth amendment requires a consideration of the character and record of the offender, and reliability in determining whether the death penalty is appropriate in the particular case. Nondisclosure of presentation reports appears to violate this requirement.


The use of the eighth amendment to mandate sentencing procedures is unusual. It is founded on the premise that without structured fact finding hearings addressed solely to the choice of life or death, capital punishment could not be imposed consistently. Lack of consistency in capital punishment was the basis for the concurrences of Justices Stewart and White in Furman v. Georgia, 408 U.S. 238, 309, 313 (1972) (Stewart and White, J.J., concurring). This unique use of the eighth amendment may mean that McGautha v. California, 402 U.S. 183 (1971), is overruled. McGautha held that the unfettered discretion of capital sentencing juries did not violate due process. See Comment, supra note 64, at 139 ("McGautha v. California, which upheld the discretionary system of sentencing offenders to death, has clearly been dealt a most fatal blow"); Note, Capital Sentencing—Effect of McGautha and Furman, supra note 64, at 626 (Furman requires the same procedures denied in McGautha but on eighth amendment grounds).

Chief Justice Burger in Furman, 408 U.S. at 400, argued that the control of sentencing procedures was "essentially and exclusively a procedural due process question." He and Justice Rehnquist believed that the eighth amendment only applied to testing certain types of punishment. Id. at 398. See also Note, Capital Punishment: A Review of Recent Supreme Court Decisions, supra note 64, at 265-67; Note, Discretion and the Constitutionality of the New Death Penalty Statutes, supra note 64, at 1695 n.27, 1699-1712 (list of states repealing or amending their capital punishment statutes).

67. In addition, two other trends in penology militate in favor of PSI report disclosure: First, the move toward uniform mandatory prison terms for the same crime committed under similar circumstances dictates that all relevant facts concerning the crime and the offender be established accurately before the sentencing body. The goal of equal punishment for equal crimes, with exceptions permitted only in unusual circumstances,


68. \textit{See} notes 28-29 supra and accompanying text.


70. In federal court, disclosure is provided by \textit{FED. R. CRIM. P.} 32(c)(3)(A):
requiring disclosure, however, usually provide for exceptions to full disclosure with attendant procedures for partial or nondisclosure.\textsuperscript{71}

In \textit{Gardner v. Florida},\textsuperscript{72} the Supreme Court confronted the issue of whether, in the context of capital punishment, the Constitution compels the disclosure of PSI reports, and held that, except in extraordinary cases,\textsuperscript{73} the due process clause requires disclosure. States must make known to the defendant or his counsel the information on which the sentencing decision is based, and afford the defendant an opportunity to comment thereon.\textsuperscript{74}

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\item[(A)] Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons; and the court shall afford the defendant or his counsel an opportunity to comment thereon and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report.

Prior to the 1975 amendment of the rule, disclosure had been discretionary. When the discretionary rule was adopted in 1966, Justice Douglas argued:

\textit{While the formal rules of evidence do not apply to restrict the factors which the sentencing judge may consider, fairness would, in my opinion, require that the defendant be advised of the facts—perhaps very damaging to him—on which the judge intends to rely. The presentence report may be inaccurate, a flaw which may be of constitutional dimension. Cf. Townsend v. Burke, 334 U.S. 736.}


\item[(B)] If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant or his counsel an opportunity to comment thereon. The statement may be made to the parties in camera.


73. \textit{Id.} at 360-61.

74. \textit{Id.} at 362.
Justice Stevens, writing for a plurality,75 distinguished Williams v. New York76 on three grounds: In Williams, the material portions of the PSI report were communicated to the defendant in open court; in Gardner they were not and, accordingly, defense counsel did not have the opportunity to challenge the information.77 Secondly, society’s attitude toward capital punishment had changed so much since Williams that the Court was justified in reexamining capital punishment procedures in light of the eighth amendment’s proscription against cruel and unusual punishment.78 Finally, the extension of flexible due process requirements to sentencing proceedings rendered the procedural discretion sanctioned by Williams inapposite;79 defendants’ recently recognized liberty interest in post-trial proceedings requires more protection than Williams offers.80 The plurality then examined the state’s justifications for nondisclosure81 and concluded that they were outweighed in a capital case by the defendant’s paramount interest in procedural fairness in sentencing and by the unique status of the death penalty.82

76. 337 U.S. 241 (1949).
77. 430 U.S. at 356.
78. Id. at 357-58. The plurality cites Justice Black’s broad language in Williams to license reevaluation of capital sentencing procedures “against evolving standards of procedural fairness in a civilized society.” Id. at 357 (citing Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972); McGautha v. California, 402 U.S. 183 (1971); Witherspoon v. Illinois, 391 U.S. 510 (1968)).
79. 430 U.S. at 358 (citing Mempa v. Rhay, 389 U.S. 128 (1967); Specht v. Patterson, 386 U.S. 605 (1967)).
80. 430 U.S. at 358, 360-61. The Court implicitly adopted the following balancing test:
   As applied to procedural rights at the sentencing hearing, due process analysis requires us to weigh three interests: (1) the defendant’s interest in the substantive outcome of the hearing, (2) his interest in the particular right to know and meet the evidence in the presentence report, and (3) the governmental interest in continued secrecy of the report.
81. See Brief for Respondent at 20-22, 29-34.
82. 430 U.S. at 358-61. The justifications proffered were protection of confidential sources, enhancement of rehabilitation, prevention of delay, and preservation of sentencing discretion. Id.
Justice White, concurring on eighth amendment grounds,\textsuperscript{83} argued that \textit{Gardner} violated the procedural requirements established in \textit{Woodson v. North Carolina}.\textsuperscript{84} To comply with the \textit{Woodson} requirement that the sentencing court consider the character of the offender and offense, a PSI report was necessary; to ensure reliability in the imposition of the death penalty, disclosure of all information was required.\textsuperscript{85} By confining his concurrence to the eighth amendment, Justice White would limit the disclosure of PSI reports to capital cases.\textsuperscript{86}

The Court's ordering of PSI report disclosure in capital cases \textit{sub silentio} overruled the broad reading of \textit{Williams v. New York}.\textsuperscript{87} Although \textit{Williams} remains authority for the use of presentence investigative information, \textit{Gardner} shatters the due process balance struck in \textit{Williams} favoring wide sentencing discretion.\textsuperscript{88}

The most significant aspect of the \textit{Gardner} opinion is the plurality's apparently conscious decision to analyze PSI report disclosure under the due process clause\textsuperscript{89} rather than the eighth amendment, as argued by

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  \item Justice Stevens, however, eschews uniform mandatory disclosure in capital cases by acknowledging the possibility of partial or nondisclosure in exceptional circumstances. But even in those cases, due process would require that the PSI report appear in the trial record to facilitate appellate review. \textit{Id.} at 360-61. See \textit{Proffitt v. Florida}, 428 U.S. 242, 258-59 (1976); State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973).
  \item 84. 428 U.S. 280 (1976).
  \item 85. 430 U.S. at 363-64.
  \item Justice Rehnquist dissented, stating that the eighth amendment is concerned with the character of a sentence and not with the process by which it is imposed. Capital punishment is not cruel and unusual under the eighth and fourteenth amendments, and they are not violated when the death sentence is imposed if the process has never before been found to violate due process. \textit{Id.}
  \item 87. 337 U.S. 241 (1949). \textit{See note 52 supra} and accompanying text.
  \item 89. 430 U.S. at 357-62.
\end{itemize}
Justice White. The choice indicates that the Court will end its unique use of the Eighth Amendment in capital punishment cases. Rather than graft the due process clause onto the Eighth Amendment and require that the procedures by which courts impose the death penalty be and appear to be fair, the Court will now look directly to the due process clause of the Fourteenth Amendment. Such reasoning may enable the Court later to extend the disclosure requirement of Gardner to noncapital defendants as society's notions about the liberty interest of a convicted defendant and fair procedures evolve. This extension is not required, however, because due process involves a balancing analysis, and the state's interest in nondisclosure may be greater than the defendant's need to know in a noncapital case. Indeed, although the state's rehabilitation argument

90. Id. at 362-63 (White, J., concurring).
91. See note 66 supra. The Eighth Amendment historically has been used to examine the character of punishments in the abstract and not to structure sentencing procedures. Courts have applied it to invalidate entire statutes as well as punishments for specific crimes. See, e.g., Trop v. Dulles, 356 U.S. 86 (1958); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947); Weems v. United States, 217 U.S. 349 (1910). By using a due process analysis in Gardner, the Court avoided confronting a statutory scheme that reduced reliability in imposing the death penalty by permitting nondisclosure of part of the sentencing record. Fla. Stat. Ann. 921.141 (West Supp. 1977) had been held constitutional under the Eighth Amendment in Proffitt v. Florida, 428 U.S. 242 (1976). Florida will have to amend Fla. R. Crim. P. 3.713, or enact a separate mandatory disclosure rule applicable to capital cases because its general disclosure provision, applicable to both capital and noncapital cases, permits partial nondisclosure. See note 9 supra.
92. Notions of procedural fairness established in capital cases have often been extended to noncapital cases. For instance, the right to counsel was established in capital cases, and then extended to all cases. See Mempa v. Rhay, 389 U.S. 128 (1967) (right to counsel at time of sentencing); Gideon v. Wainwright, 372 U.S. 335 (1963) (indigent's right to counsel at trial); Hamilton v. Alabama, 368 U.S. 52 (1961) (right to counsel at arraignment); Moore v. Michigan, 355 U.S. 155 (1957) (right to counsel at time of pleading); Betts v. Brady, 316 U.S. 455 (1942) (sixth amendment right to counsel held inapplicable to states), overruled, Gideon v. Wainwright, 372 U.S. 335 (1962); Powell v. Alabama, 287 U.S. 45 (1932) (counsel required in capital cases because of the defendant's great interest in protecting his rights at trial). See generally Cohen, supra note 26, at 2; 41 Fordham L. Rev. 671, 676 & n.53 (1973).

93. It seems no other class of defendants could demonstrate as high an interest as that of capital defendants.

is not meritorious in capital cases because death eliminates any possibility of rehabilitation, in other cases the state's interest in rehabilitation might justify nondisclosure.\textsuperscript{95} Thus, by emphasizing the unique interests of a defendant facing a death sentence, the court insulated its holding from extension to noncapital cases.\textsuperscript{96} Although an eighth amendment analysis would have explicitly confined the holding to capital cases, the due process decision in \textit{Gardner} does so implicitly.

To comply with \textit{Gardner}, state capital punishment statutes must require PSI report disclosure except in narrowly defined circumstances.\textsuperscript{97} When nondisclosure is justified, the full PSI report must nevertheless appear in the trial record.\textsuperscript{98} Federal practice under Rule 32 of the Federal Rules of Criminal Procedure remains unchanged because \textit{Gardner} is inapplicable to federal capital cases.\textsuperscript{99} If \textit{Gardner} is extended to noncapital cases, however, the exceptions to disclosure in Rule 32 will have to be amended to conform with disclosure exceptions permitted by the Court.\textsuperscript{100}

The Court's holding in \textit{Gardner} is inadequate in two respects. First, although it requires disclosure of presentence reports, it does not require the use of PSI reports in all capital cases. Employing an eighth amendment analysis, the Court could have held that PSI reports were indispensable to ensure the procedural fairness required in capital cases.\textsuperscript{101} Sec-

\textsuperscript{95} See note 82 supra.


The concern that sentencing hearings might evolve into full evidentiary hearings seems unwarranted because of the structure already present in capital sentencing and the ease with which \textit{Gardner} can be distinguished from noncapital cases.

\textsuperscript{97} See notes 82 supra & 99 infra. See also Note, \textit{Discretion and the Constitutionality of the New Death Penalty Statutes}, supra note 66, at 1691.

\textsuperscript{98} See note 71 supra and accompanying text.

\textsuperscript{99} The sole federal death penalty statute, which pertains to aircraft piracy where another person is killed, has sentencing provisions requiring full disclosure. 49 U.S.C. §§ 1472(i)(1)(B), 1473(c)(2)-(7) (Supp. V 1975). This statute provides for nondisclosure in cases involving national security and the immediate safety of a confidential source. These exceptions might justify nondisclosure in other capital cases.

\textsuperscript{100} 430 U.S. at 358-61.

\textsuperscript{101} See notes 64-66 supra and accompanying text.
ondly, it is anomalous to insure the accuracy of sentencing records only in capital cases. In lieu of alternative means to achieve uniform accuracy of sentencing records, PSI reports should be disclosed whenever they are used. Although the Supreme Court has left open the possibility of mandatory PSI report disclosure in all cases, *Gardner* carefully limits the requirement to capital cases.