CHAPTER TWO

PRE-SENTENCE INVESTIGATION AND REPORT

I. IN GENERAL

A. PURPOSE

The purpose for review of a pre-sentence report ("PSR") is to ensure that the court has before it all the relevant information it needs about the defendant's background to exercise its discretionary authority in sentencing. Reffett v. State, 571 N.E.2d 1227, 1230 (Ind. 1991).

B. PSR SHOULD BE NEUTRAL

The PSR should be based on a theoretically neutral investigation of a defendant with an equally neutral evaluation. McMichael v. State, 471 N.E.2d 726, 732 (Ind. Ct. App. 1984); Shuttleworth v. State, 469 N.E.2d 1210, 1215 (Ind. Ct. App. 1984).

But see Hines v. State, 856 N.E.2d 1275 (Ind. Ct. App. 2006) (Ind. Code 35-38-1-9, concerning scope of pre-sentence investigation and report, does not limit report to neutral facts, but contemplates gathering of information concerning defendant's social history, family situation, and personal habits).

1. Probation officer must be neutral

O'Connor v. State, 590 N.E.2d 145 (Ind. Ct. App. 1992) (fact that probation officer who recommended that defendant receive maximum sentence was married to one of police officers who set roadblocks in defendant's path, alone, did not establish that probation officer was biased against defendant).

2. Defendant must be harmed by biased PSR

Lang v. State, 461 N.E.2d 1110 (Ind. 1984) (although PSR contained personal opinions, defendant was not entitled to relief where he suffered no actual prejudice because trial court did not accept probation officer's recommendation and sufficient reasons were given for sentence finally imposed).

Hall v. State, 405 N.E.2d 530 (Ind. 1980) (because defendant was given opportunity to present his version of incident, court could still use PSR where paragraph which contained bias against defendant was stricken).

C. CONSIDERATION OF MATTERS OUTSIDE OF PSR

1. Generally

In determining the appropriate sentence, the court may consider, and at times is required to consider, matters outside the PSR. If information comes to the trial court before sentencing which clearly indicates that other reasonable inquiries, in addition to the PSR, should be made in order to comply with the intent and purpose of the presentencing statutes, any failure to make further reasonable inquiries is an abuse of discretion.

The trial court may consider relevant information which was not admissible at trial. However, where a timely objection has been made, the trial court has authority to review questionable evidence *in camera*. State v. Barkdull, 708 N.E.2d 58 (Ind. Ct. App. 1999) (citing State ex rel. Crawford v. Superior Court of Lake County, 549 N.E.2d 374, 376 (Ind. 1990)).

Once a court has accepted a plea agreement it is bound by the terms of the agreement. Therefore, it cannot order production of information or documents for possible inclusion in the PSR after a plea agreement is accepted. The correct procedure for a court that may require further information from the PSR is to reject the guilty plea or to take the plea agreement under advisement. State v. Barkdull, 708 N.E.2d 58 (Ind. Ct. App. 1999).

> Bish v. State, 421 N.E.2d 608 (Ind. 1981) (because court announced prior to sentencing hearing that it would consider victim's physician's affidavit describing victim's physical and emotional state and defendant had opportunity to rebut affidavit, court properly considered affidavit although it was not included in PSR).

The trial court should look only to evidence properly placed in record when making sentencing determinations. Hulfachor v. State, 813 N.E.2d 1204 (Ind. Ct. App. 2004).

2. Indiana Risk Assessment System

Like many states, Indiana has embraced so-called evidence-based risk assessment tools. The term "evidence-based" refers to the use of empirical data to identify factors about offenders that correlate with risk of reoffending and programs that have been proven to reduce those risks. Evidence-based risk assessment instruments assess an offender in terms of these identified risk factors, focusing on both risk of reoffending and appropriate supervision and service referrals to reduce the risk.

In Malenchik v. State, 928 N.E.2d 564 (Ind. 2010), the Indiana Supreme Court addressed the proper use of evidence-based risk/needs assessment results. The trial judge in Malenchik had considered results of two assessments conducted by the county probation department – the Level of Service Inventory – Revised (LSI-R) and Substance Abuse Subtle Screening Inventory (SASSI). The Court wrote:

> It is clear that neither LSI-R not the SASSI are intended nor recommended to substitute for the judicial function of determining the length of sentence appropriate for each offender. But such evidence-based assessment instruments can be significant sources of valuable information for judicial consideration in deciding whether to suspend all or part of a sentence, how to design a probation program for the offender, whether to assign an offender to alternative treatment facilities or programs, and other such corollary sentencing matters.

Id., at 573.

> The Indiana Risk Assessment System (IRAS) has been used throughout Indiana since January 1, 2011. Developed by researchers at the University of Cincinnati, IRAS consists of six different assessment tools to be used at different stages, from pre-trial through re-entry. A similar system is in use for juveniles, the Indiana Youth Assessment

System (IYAS). According to a policy adopted by the Board of Directors of the Judicial Center, the Community Supervision Screener is to be completed with the pre-sentence investigation report, and the full Community Supervision Tool is to be completed with the pre-sentence investigation report if the offender scored high on the screener or if local policy requires completion of the full tool. See *Policy for Indiana Risk Assessment System.* https://www.in.gov/courts/iocs/justice-services/risk-assessment. Both the IRAS and IYAS are available on IPDC's website.

II. WHEN PRE-SENTENCE INVESTIGATION AND REPORT ARE REQUIRED

A. FELONY CASES - MANDATORY

Ind. Code 35-38-1-8 provides, in part:

(a) Except as provided in subsection (c), a defendant convicted of a felony may not be sentenced before a written pre-sentence report is prepared by a probation officer and considered by the sentencing court. Delay of sentence until a pre-sentence report is prepared does not constitute an indefinite postponement or suspension of sentence.

(c) A court may sentence a person convicted of a Level 6 felony without considering a written pre-sentence report prepared by a probation officer. However, if a defendant is committed to the department of correction or a community corrections program under Ind. Code 35-38-2.6, the probation officer shall prepare a report that meets the requirements of section 9 of this chapter to be sent with the offender to the department in lieu of the pre-sentence investigation report required by section 14 of this chapter.

1. Failure to prepare PSR

Failure to prepare a PSR is reversible error. Hinton v. State, 272 Ind. 297, 397 N.E.2d 282, 284 (1979); Ware v. State, 243 Ind. 639, 189 N.E.2d 704 (1963). However, the error may be harmless where the sentence entered by the court was mandated by statute and could not be suspended. Loman v. State, 265 Ind. 255, 354 N.E.2d 205, 210 (1976).

Wagner v. State, 474 N.E.2d 476 (Ind. 1985) (it was not reversible error for probation department of county other than county in which crime was committed to prepare PSR).

Mejia v. State, 702 N.E.2d 794 (Ind. Ct. App. 1998) (where court referred only to oral PSR having been given and there was no written PSR included in record, trial court committed reversible error by sentencing defendant for delivery of cocaine).

2. Failure to consider PSR

The right to have a PSR considered prior to sentencing is a privilege granted by the legislature; it is not a fundamental right. Woodcox v. State, 591 N.E.2d 1019, 1024 (Ind. 1992), *overruled on other grounds* by Richardson v. State, 717 N.E.2d 32 (Ind. 1999); Smith v. State, 432 N.E.2d 1363, 1373 (Ind. 1982).

Minnick v. State, 544 N.E.2d 471 (Ind. 1989) (trial court's failure to explicitly refer to PSR in sentencing statement was not error, where defendant did not specify that anything contained in report was overlooked or ignored by trial court or that he was prejudiced thereby).

Hall v. State, 273 Ind. 507, 405 N.E.2d 530, 537 (1980) (trial court's act of striking, at defendant's request, one paragraph from PSR concerning circumstances of crime was not violation of statute requiring consideration of PSR).

a. Plea agreements

If the contents of a plea agreement indicate that the prosecutor anticipates that the defendant intends to plead guilty to a felony charge, the court shall order the PSR required by Ind. Code § 35-38-1-8. Ind. Code 35-35-3-3(a).

Reffett v. State, 571 N.E.2d 1227 (Ind. 1991) (although law requires trial court to consider PSR prior to accepting plea agreement, court's failure to do so does not strip the court of its power to accept plea agreement).

b. Probation violations

Boyd v. State, 481 N.E.2d 1124 (Ind. Ct. App. 1985) (trial court is not required to consider new PSR when it orders revocation of defendant's probation and execution of original sentence).

c. Resentencing

Jackson v. State, 625 N.E.2d 1219 (Ind. 1993) (trial court did not err by failing to order second pre-sentence investigation when it resentenced defendant because trial court had benefit of PSR when it first sentenced defendant and that report was still available).

B. MISDEMEANOR CASES - NOT REQUIRED

A pre-sentence investigation and report are not required in misdemeanor cases. However, where a PSR is ordered and considered by the court, the defendant is entitled to full disclosure of the report under Ind. Code 35-38-1-12(a). Warren v. State, 417 N.E.2d 357, 359 (Ind. Ct. App. 1981) (applying repealed PSR statute with same content as 35-38-1-12).

III. CONTENTS AND SCOPE OF PRE-SENTENCE INVESTIGATION AND REPORT

A. STATUTORY REQUIREMENTS

Ind. Code § 35-38-1-9 provides, in part:

(b) The pre-sentence investigation consists of the gathering of information with respect to:

(1) the circumstances attending the commission of the offense;

(2) the convicted person's history of delinquency or criminality, social history, employment history, family situation, economic status, education, and personal habits;

(3) the impact of the crime upon the victim; and

(4) whether the convicted person is licensed or certified in a profession regulated by IC 25; licensed under IC 20-28-5; or employed, or previously employed, as a teacher in a school corporation, charter school, or nonpublic school.

(c) The pre-sentence investigation may include any matter that the probation officer conducting the investigation believes is relevant to the question of sentence, and must include:

(1) any matters the court directs to be included;

(2) any written statements submitted to the prosecuting attorney by a victim under IC 35-35-3; and

(3) any written statements submitted to the probation officer by a victim; and

(4) preparation of the victim impact statement required under section 8.5 of this chapter.

(d) If there are no written statements submitted to the probation officer, the probation officer shall certify to the court:

(1) that the probation officer has attempted to contact the victim; and

(2) that if the probation officer has contacted the victim, the probation officer has offered to accept the written statements of the victim or to reduce his oral statement to writing, concerning the sentence, including acceptance of the recommendation.

(e) A pre-sentence investigation report prepared by a probation officer must include the information and comply with any other requirements established in the rules adopted under IC 11-13-1-8 [which is the statute authorizing the board of directors of the judicial conference of Indiana to establish rules prescribing minimum standards concerning, among other areas, pre-sentence investigation reports].

(f) The probation officer shall consult with a community corrections program officer or employee (if there is a community corrections program in the county) regarding services and programs available to the defendant while preparing the presentence investigation report.

B. VICTIM IMPACT STATEMENT

The probation officer shall prepare for inclusion in the convicted person's PSR a victim impact statement or a certificate that the victim or the victim's representative could not be contacted or elected not to submit a statement to the probation officer concerning the crime. The victim impact statement consists of information about each victim and the consequences suffered by a victim or a victim's family as a result of the crime. Ind. Code § 35-38-1-8.5; see also Ind. Code § 35-38-1-9(d); Ind. Code § 35-40-5-6.

1. Purpose of victim impact statement

Ind. Code § 35-38-1-8.5 was not intended to create a right on the part of the defendant to have particular information included in his PSR. On the contrary, it was designed for the

benefit of the victims and gives no additional rights to defendants. Schwass v. State, 554 N.E.2d 1127, 1129 (Ind. 1990).

2. Lack of victim impact statement

A PSR which does not include a victim's statement or a probation officer's certificate that the victim was offered the opportunity to make a statement is not defective. Schwass v. State, 554 N.E.2d 1127, 1129 (Ind. 1990), overruling Beland v. State, 476 N.E.2d 843 (Ind. 1985); Isom v. State, 479 N.E.2d 61 (Ind. Ct. App. 1985); and Busam v. State, 445 N.E.2d 118 (Ind. Ct. App. 1985).

However, a victim or victim representative is not required to submit a statement or to cooperate in the preparation of the victim impact statement required under this section. Ind. Code § 35-38-1-8.5(e).

3. Contents of victim impact statement

a. Required contents

Pursuant to Ind. Code § 35-38-1-8.5(d), the victim impact statement must include the following information about each victim:

(1) A summary of the financial, emotional and physical effects of the crime on the victim and the victim's family.

(2) Personal information concerning the victim, excluding telephone numbers, place of employment and residential address.

(3) Any written statements submitted by a victim or victim representative to the probation officer.

(4) If the victim desires restitution, the basis and amount of a request for victim restitution.

Although rules of evidence do not apply to victim impact statements, "when a victim impact statement strays from the effect that the crime had upon the victim and others and begins delving into substantive, unsworn, and otherwise unsupported allegations of other misconduct or poor character on the part of the defendant, caution should be used in assessing the weight to be given to such allegations, especially where the defendant is not provided an opportunity to respond directly to them." Cloum v. State, 779 N.E.2d 84, 93 (Ind. Ct. App. 2002) (remanding on other grounds but ordering the trial court to "keep in mind our comments and observations" as to permissible content of the victim impact statement).

b. Statements limited to the actual victims and representatives of victims

Generally, only an actual victim or a victim's representative may make a victim's impact statement for inclusion in the PSR.

(1) Actual victims

A victim, for purposes of Ind. Code § 35-38-1-9, is a person who has suffered harm as a result of a crime. Ind. Code § 35-31.5-2-348(a).

Wallace v. State, 486 N.E.2d 445 (Ind. 1985), *cert. den'd*, 478 U.S. 1010, 106 S.Ct. 3311 (1986) (because statute in effect at the time only referred to immediate and actual victims of offense, there was no requirement that PSR include statement of murder victim's mother; murder victim's mother was not "victim" for purposes of making victim's statement in PSR).

Flinn v. State, 563 N.E.2d 536 (Ind. 1990) (statement from victim of dismissed counts was properly included in PSR for sentencing on remaining counts).

But see:

Lewis v. State, 759 N.E.2d 1077 (Ind. Ct. App. 2001), *trans. den'd* (victim's mother's testimony concerning offense for which defendant was acquitted was irrelevant to appropriate sentence for which he was convicted).

However, because the victim input requirement of the statute was not intended to expand the rights of the defendant, a defendant will have a difficult time challenging the inclusion of statements made by others than the actual victim. See Hughett v. State, 557 N.E.2d 1015, 1022 (Ind. 1990).

(2) Victim's representative

A victim representative is a person who is a spouse, parent, child, sibling, other relative of; or a person who has had a close personal relationship with the victim of a felony who is deceased, incapacitated or less than 18 years of age. Ind. Code § 35-38-1-2(a). Upon entering a conviction for a felony, the trial court shall designate a victim representative if the victim is deceased, incapacitated, or less than eighteen years old. Ind. Code § 35-38-1-2(e).

Jones v. State, 675 N.E.2d 1084, 1089 (Ind.1996) (the victim statement statute does not require that only one person speak on the victim's behalf, and multiple acquaintances may testify at the sentencing hearing. In this case, the deceased victim's mother, sister, and a friend testified, even though only one is the designated victim representative).

PRACTICE POINTER: Although statements of the victim or victim representative are to be included in a PSR, there are limits on how the judge can consider the statements. For instance, the judge can neither consider the recommendation of the victim as to the appropriate sentence nor enhance a sentence based on the impact on the victim or the victim's family unless the impact exceeds the normal impact experienced by victims in similar cases. See Hill v. State, 751 N.E.2d 273 (Ind. Ct. App. 2001); Bacher v. State, 686 N.E.2d 791 (Ind. 1997); Chapter 4, Subsection III, *Sentencing Decision, Aggravating Circumstances.* In a case involving the death penalty or life without parole, the victim representative makes a statement after the trial court has pronounced sentence, and victim impact evidence may not be considered in determining whether to impose the death penalty or life without parole. See Bivins v. State, 642 N.E.2d 928 (Ind. 1994); Veal v. State, 784 N.E.2d 490 (Ind. 2003).

C. DISCRETIONARY CONTENTS

The PSR may include any matter considered relevant by the probation officer to the question of sentence. Ind. Code 35-38-1-9(c). The probation officer has broad discretion to determine what maters will be included in the PSR and their relevance to a sentencing determination. Dillon v. State, 492 N.E.2d 661, 664 (Ind. 1986). The statute does not limit the PSR to neutral facts. Hines v. State, 856 N.E.2d 1275 (Ind. Ct. App. 2006). The following cases illustrate matters which were properly included in the PSR.

1. Arrest records and charges later dismissed or for which the defendant was acquitted. Misenheimer v. State, 268 Ind. 274, 374 N.E.2d 523 (Ind. 1978). However, a court may not consider an acquittal as an aggravating circumstance. Id.; Forrester v. State, 440 N.E.2d 475, 486 (Ind. 1982). See also United States v. Watts, 519 U.S. 148, 117 S.Ct. 633, 638 (1997) (As a matter of due process, trial court may not consider an acquittal as an aggravating circumstance unless the State proves by the preponderance of the evidence that the defendant committed the crime.).

2. Uncharged crimes and pending charges. Flinn v. State, 563 N.E.2d 536, 545 (Ind. 1990) (citing Jordan v. State, 512 N.E.2d 407 (Ind. 1987)).

3. Probation officer's observation that the defendant's answers and behaviors differed among first pre-sentence investigation, second pre-sentence investigation and other sources. Dillon v. State, 492 N.E.2d 661 (Ind. 1986).

4. Newspaper articles which contain a chronicle of the defendant's past criminal life, methods he used to accomplish burglaries and advice to local residents as to methods to protect their property. Laird v. State, 483 N.E.2d 68, 71-2 (Ind. 1985).

5. "Incident reports" of the defendant's behavior during previous periods of incarceration. Forrester v. State, 440 N.E.2d 475, 486 (Ind. 1982).

6. Clinical psychologist's observations and conclusions based on interview with defendant. Forrester v. State, 440 N.E.2d 475, 486 (Ind. 1982); Hines v. State, 856 N.E.2d 1275 (Ind. Ct. App. 2006) (psychosexual evaluation).

7. Defendant's confession. Smith v. State, 432 N.E.2d 1363, 1373 (Ind. 1982).

   Burch v. State, 450 N.E.2d 528, 530 (Ind. 1983) (defendant's non-Mirandized confession to probation officer was properly included in PSR; however, sentencing court should

refuse to consider defendant's statement in PSR where statement is demonstrated to be involuntary as induced by violence, threats, promises or other improper influence).

8. Adjudications of delinquency as a juvenile. Carlin v. State, 254 Ind. 332, 259 N.E.2d 870 (Ind. 1970); Jewell v. State, 261 Ind. 665, 309 N.E.2d 441, 443 (1974).

9. General reputation and academic record of the defendant. Hineman v. State, 155 Ind. App. 293, 292 N.E.2d 618, 623-24 (1973); Collins v. State, 422 N.E.2d 1250, 1253 (Ind. Ct. App. 1981).

10. Probation officer's opinions regarding the facts surrounding commission of the crime. Carlin v. State, 254 Ind. 332, 259 N.E.2d 870, 873-74 (1970).

    Flinn v. State, 563 N.E.2d 536 (Ind. 1990) (investigating officer's statement that defendant was not sick but rather knew his actions were wrong was proper).

11. Uncounseled misdemeanor convictions. Collins v. State, 422 N.E.2d 1250, 1253 (Ind. Ct. App. 1981). However, uncounseled felony convictions may not be considered by judge in sentencing and, thus, are irrelevant to PSR. See Subsection VI.B., *Constitutional Issues; Due Process*.

12. Privileged health records where defendant signed valid waiver form. Yates v. State, 429 N.E.2d 992 (Ind. Ct. App. 1982).

In order for a release of information from a federally-assisted program to be valid, the release form must meet federal requirements. See 42 C.F.R., Ch. 1, Pt. 2. These federal requirements apply to substance abuse treatment records and mental health records.

The court has no statutory authority to delete any item, included in the PSR at the probation officer's discretion, before the PSR is forwarded to the Department of Corrections. Smith v. State, 432 N.E.2d 1363, 1373 (Ind. 1982).

In addition, even if the discretionary contents were improperly included, the defendant will not receive a new sentencing hearing unless he can show prejudice from the inclusion.

Forrester v. State, 440 N.E.2d 475, 486 (Ind. 1982) (inclusion of victim's statement to defendant that she was virgin may have been improper under rape shield law; however, defendant failed to show how inclusion of statement prejudiced him).

D. MENTAL / PHYSICAL EXAMINATION OF DEFENDANT

1. Statute

Pursuant to Ind. Code § 35-38-1-10, the court may order that the convicted person:

(1) undergo a thorough physical or mental examination in a designated facility as part of the pre-sentence investigation: and

(2) remain in the facility for examination for not more than ninety days.

Hines v. State, 856 N.E.2d 1275 (Ind. Ct. App. 2006) (trial court did not err in ordering defendant to undergo a psychosexual evaluation as part of pre-sentence investigation, or in relying upon such during sentencing).

2. Failure to order examination is reviewable only for abuse of discretion

The failure to order a physical or mental examination pursuant to this statute is reviewable only as an abuse of discretion. Woods v. State, 547 N.E.2d 772, 792 (Ind. 1989), *cert. den'd*, 501 U.S. 1255, 111 S.Ct. 2911 (1991); Alleyn v. State, 427 N.E.2d 1095, 1098 (Ind. 1981).

Schwass v. State, 554 N.E.2d 1127 (Ind. 1990) (trial court did not abuse its discretion in refusing to order a second psychiatric evaluation of defendant where court had benefit of physicians' reports rendered prior to trial, his own observation of defendant during trial, and PSR filed by probation officer).

Wray v. State, 547 N.E.2d 1062 (Ind. 1989) (no abuse of discretion to refuse to order exam prior to sentencing where probation officer testified that she saw no signs of mental disease or defect, severe mental illness, or other abnormalities).

King v. State, 531 N.E.2d 1154 (Ind. 1988) (no abuse of discretion to deny defendant's last minute motion for examination on date of sentencing).

E. HIV SCREENING

Pursuant to Ind. Code § 35-38-1-10.5, the court shall order that a person undergo a screening test for the human immunodeficiency virus ("HIV") and, pursuant to Ind. Code § 35-38-1-9.5, a probation officer shall obtain confidential information from the state department of health to determine whether a convicted person was an individual with HIV when the crime was committed if the person is:

(1) convicted of an offense relating to a criminal sexual act and the offense created an epidemiologically demonstrated risk of transmission of the human immunodeficiency virus (HIV); or

(2) convicted of an offense relating to controlled substances and the offense involved:
(A) the delivery by any person to another person; or
(B) the use person on another person:

of a contaminated sharp (as defined in IC16-41-16-2) or other paraphernalia that creates an epidemiologically demonstrated risk of transmission of HIB by involving percutaneous contact.

1. Probation officer's duty

If a confirmatory test confirms the presence of the HIV antibodies, the court shall report the results to the state department of health and require a probation officer to conduct a pre-sentence investigation to: (1) obtain medical records of the convicted person from the state department of health under Ind. Code § 16-41-8-1(a)(3); and (2) determine whether the convicted person had received risk counseling that included information on the behavior that facilitates the transmission of HIV. Ind. Code § 35-38-1-10.5(c).

The state department of health shall notify the victims if the test confirms the presence of HIV and provide counseling to all persons so notified. Ind. Code § 35-38-1-10.6.

2. Immunity

A person who, in good faith, makes a report required to be made under this section or testifies on matters arising from the report is immune from civil and criminal liability due to the offering of that report of testimony. Ind. Code § 35-38-1-10.5(d).

A mental health service provider (as defined in Ind. Code § 34-6-2-80) who discloses information that must be disclosed is immune from civil and criminal liability under Indiana statutes that protect patient privacy and confidentiality. Ind. Code § 35-38-1-10.5(f).

3. Privileged communication

The privileged communication between a husband and wife or between a health care provider and the health care provider's patient is not a ground for excluding information required under this section. Ind. Code § 35-38-1-10.5(e).

F. CONTENTS ORDERED BY COURT

The PSR must include matters that the court directs to be included. See Ind. Code § 35-38-1-9(c)(1). However, where the court's sentencing discretion has been restricted by a term in the plea agreement, the court must consider the pre-sentence report prior to accepting the plea agreement. After the court has accepted the plea agreement, it loses discretion over sentencing, and the pre-sentence report becomes useless. Reffett v. State, 571 N.E.2d 1227, 1230 (Ind. 1991).

State v. Barkdull, 708 N.E.2d 58 (Ind. Ct. App. 1999) (prior to accepting plea agreement, trial court could have requested inclusion of police reports into PSR despite fact that they were inadmissible in trial; however, when trial court accepted agreement, it lost authority to request police reports because it lost authority to change sentence).

Harris v. State, 159 N.E.3d 988 (Ind. Ct. App. 2020) (trial court acted within its discretion when it accepted a guilty plea but explained it would not be accepted until review of defendant's PSI report; distinguishing Reffett (above), Court found no abuse of discretion in trial court's rejection of plea agreement after reviewing PSI and determining the agreement was unacceptable).

G. PRE-SENTENCE MEMORANDUM PREPARED ON BEHALF OF THE DEFENDANT

At any time before sentencing, the defendant may file with the court a written memorandum setting forth any information he/she considers pertinent to sentencing. The convicted person may attach written statements of others in support of facts alleged in the memorandum. Ind. Code § 35-38-1-11; see also ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4-8.1 (3rd Ed.).

Laird v. State, 483 N.E.2d 68 (Ind. 1985) (although there is no statutory basis authorizing State to prepare pre-sentence memorandum on its behalf, trial court did not err in permitting it to file one).

Yates v. State, 429 N.E.2d 992 (Ind. Ct. App. 1982) (PSR must contain only accurate information, and thus, defendant must be given opportunity to refute information in report).

IV. DISCLOSURE OF THE PRE-SENTENCE REPORT

Before imposing sentence, the court shall advise the defendant or counsel and the prosecuting attorney of the contents and conclusions of the pre-sentence investigation or provide them with a copy of the PSR. Ind. Code § 35-38-1-12(a).

A. SCOPE OF DISCLOSURE

The defendant is entitled to disclosure of the entire contents of the PSR. Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197 (1977); Stanley v. State, 273 Ind. 13, 401 N.E.2d 689, 693-94 (1980).

Warren v. State, 417 N.E.2d 357 (Ind. Ct. App. 1981) (court improperly refused to disclose to defendant last page of PSR, although it contained only recommendation of probation department).

B. TIMELINESS OF DISCLOSURE

The court shall furnish the defendant with the factual contents of the PSR or a copy of the PSR sufficiently in advance of sentencing so that the defendant will be afforded a fair opportunity to contest the material included. Ind. Code § 35-38-1-12(b).

1. Sufficient time prior to sentencing for review and preparation

When the defendant claims insufficient time for preparation, the defendant must show how he was harmed by the untimely receipt of the PSR. Coppock v. State, 480 N.E.2d 941 (Ind. 1985). The issue is not as much length of time that the defendant had to review the PSR, but rather, the defendant's ability to controvert the report. May v. State, 578 N.E.2d 716, 725 (Ind. Ct. App. 1991).

Gilbert v. State, 982 N.E.2d 1087 (Ind. Ct. App. 2013) (where defendant was brought from Kentucky, where he was serving a sentence for an offense committed there, to Indiana only 48 hours before sentencing, submitted to pre-sentence interview on the first day, and received the PSR and was sentenced on the second day, his due process rights were violated because he was not afforded a fair opportunity to controvert the material included. Reversed and remanded for resentencing).

In the following cases, the courts held that the defendants were not prejudiced by the time at which they were given the PSR:

Echeverria v. State, 146 N.E.3d 943 (Ind. Ct. App. 2020) (although defendant provided with PSR one day before sentencing hearing, defendant was effectively given another 19 days to review PSR when the court rescheduled the hearing so no error occurred).

Goudy v. State, 689 N.E.2d 686 (Ind. 1997) (trial court did not err in refusing to grant continuance when defendant received PSR one day before sentencing hearing because defendant did not allege that report contained any factual error or inaccuracies that he needed additional time to rebut). See also Lang v. State, 461 N.E.2d 1110 (Ind. 1984).

Wagner v. State, 474 N.E.2d 476 (Ind. 1985) (giving defendant PSR on Thursday when sentencing set for following Monday allowed proper and adequate time for defendant to prepare).

Eubank v. State, 456 N.E.2d 1012 (Ind. 1983) (proper to give defendant PSR one day before hearing when defendant's request for continuance did not mention what findings, if any, he wished to controvert, he presented no evidence and he showed no harm).

May v. State, 578 N.E.2d 716 (Ind. Ct. App. 1991) (although defendant was given PSR ten minutes before sentencing, defendant made six page statement addressing PSR at sentencing hearing).

2. Remedy - continuance

The usual remedy for the untimely disclosure of the PSR is a continuance of the sentencing hearing.

Coppock v. State, 480 N.E.2d 941 (Ind.1985) (defendant was not harmed by receiving PSR only one day prior to sentencing because defendant refused to move for continuance although trial court stated it would grant continuance).

Eubank v. State, 456 N.E.2d 1012 (Ind. 1983) (when defendant moves for continuance based on late delivery of PSR to defense counsel, defendant must show that he would be harmed by denial of continuance; defendant should point to findings in PSR that he wishes to controvert and what evidence he wants to present if given additional time).

C. CONFIDENTIALITY OF PRE-SENTENCE REPORT

1. Disclosure to defendant

Although the facts and conclusions in the PSR must be provided to the defendant or counsel, it is not necessary to disclose the source of confidential information within the report. Ind. Code § 35-38-1-12(b).

2. Disclosure to others

According to Ind. Code 35-38-1-13, the PSR or memoranda and any report of a physical or mental examination submitted to the court in connection with sentencing shall be kept confidential from any person or public or private agency except:

a. the convicted person and her counsel; prosecuting attorney; the probation department; the community corrections program in which the offender is placed under IC35-38-2.6; and the Indiana criminal justice institute established under IC 5-2-6;

b. upon specific authorization of the court and the defendant; or

c. upon statutory authorization.

3. Disclosure to victim

Pursuant to IC 35-40-5-6, notwithstanding IC 35-38-1-13, a victim has the right to read pre-sentence reports relating to the crime committed against the victim, except those parts of the reports containing the following: (1) the source of confidential information; (2) information about another victim; (3) other information determined confidential or privileged by the judge in a proceeding. The information given to the victim must afford the victim a fair opportunity to respond to the material included in the pre-sentence report.

4. Disclosure to jury

Disclosure of the PSR to the jury constitutes error, but whether it is fundamental error is a fact-sensitive issue.

a. Habitual offender proceedings

Kindred v. State, 521 N.E.2d 320 (Ind. 1988) (admission of exhibit containing PSR during habitual offender phase of defendant's trial was not fundamental error, where jury was presented with overwhelming proof supporting habitual offender determination). See also Northern v. State, 489 N.E.2d 520, 522 (Ind. 1986); Pointer v. State, 499 N.E.2d 1087 (Ind. 1986).

Owens v. State, 427 N.E.2d 880 (Ind. 1981) (court did not err by refusing defendant's request that jury be allowed to see PSR during habitual offender phase of trial).

b. Bifurcated proceeding where jury determines sentence

Robinson v. State, 180 Ind.App. 555, 389 N.E.2d 371 (1979) (where jury was to prescribe sentence under former law, it was fundamental error to allow jury to consider PSR).

c. Use at trial

Hardin v. State, 260 Ind. 501, 296 N.E.2d 784 (1973) (it is violative of defendant's rights to due process and confrontation to use information from PSR to bolster in-court testimony on question of guilt).

Jarrett v. State, 580 N.E.2d 245 (Ind. Ct. App. 1991) (where PSR was not introduced into evidence but was merely used by officer to refresh his memory about relevant facts known by him when report was prepared and prior convictions in PSR were admissible anyway in trial, use of PSR was not reversible error).

5. Inclusion in defendant's brief

When challenging the sentence on appeal, a copy of the PDR must be included in the Appendix. Perry v. State, 845 N.E.2d 1093, 1094, n.2 (Ind. Ct. App. 2006) ("Although pursuant to Indiana Appellate Rule 49(B) this has not caused waiver of Perry's sentencing claims, the pre-sentence report is a vital document that should be included in the appendix in any appeal that raises sentencing issues.").

However, the PSR is a confidential document that requires special treatment on appeal. Inclusion of a PSR printed on white paper in defendant's appendix was inconsistent with T.R. 5(G), App. R. 9 and Admin R. 9(H)(1)(n)(viii). Hamed v. State, 852 N.E.2d 619, 621 (Ind. Ct. App. 2006). The PSR is specially treated in filing electronic appendices. See *IPDC Appellate Practice Manual* (2012), Chapter 4.

V. CHALLENGING THE PRE-SENTENCE REPORT

Although a defendant has the right to challenge the report filed by the assigned probation officer and to state to the court his version of the situation during sentencing for the conviction, a defendant is not entitled to replace the probation officer's report with his own language. Thomas v. State, 553 N.E.2d 825, 828 (Ind. 1990).

A. BURDEN OF CHALLENGING INACCURATE REPORT

1. Defendant's initial burden to challenge inaccuracies to establish due process violation

Due process requires that a PSR contains factually true information. Townsend v. Burke, 334 U.S. 736, 68 S.Ct. 1252 (1948); Lang v. State, 461 N.E.2d 1110, 1114 (Ind. 1984).

Statements in a PSR are presumed true unless challenged by the defendant. The initial burden of production rests with the defendant in disputing the information contained in the PSR. Whether the defendant is required to produce evidence or merely deny the information depends upon whether the information consists of supported or naked allegations. Gardner v. State, 270 Ind. 627, 388 N.E.2d 513, 517-18 (1979); Shuttleworth v. State, 469 N.E.2d 1210, 1215 (Ind. Ct. App. 1984).

> Dillard v. State, 827 N.E.2d 570 (Ind. Ct. App. 2005) (knowing failure to object to report waives issue of report's accuracy for review); see also Stokes v. State, 828 N.E.2d 937 (Ind. Ct. App. 2005).

2. Failure to challenge is not admission to accuracy for Sixth Amendment purposes

Using a defendant's failure to object to a PSR to establish an admission to the accuracy of the report implicates the defendant's Fifth Amendment right against self-incrimination. Ryle v. State, 842 N.E.2d 320, 324 n.5 (Ind. 2005); Edrington v. State, 909 N.E.2d 1093 (Ind. Ct. App. 2009).

> Thomas v. State, 840 N.E.2d 893, 903 (Ind. Ct. App. 2006), *trans. denied* (although when asked, defendant suggested several corrections to information in the PSI, his failure to challenge the assertion that he was in a position of trust with regard to the child victim did not constitute an admission that he was in such a position. Where jury did not find, and defendant did not admit that he was in a position of trust, trial court's reliance on assertion in the PSI violated defendant's Sixth Amendment right to trial by jury.)

However, where a probation officer relies on "judicial reports" to base a criminal history and/or a defendant's status as a probationer, the unchallenged probation status or criminal history can be used to enhance the defendant's sentence without violating the Sixth Amendment right to a jury trial and proof beyond a reasonable doubt. Ryle, supra, 842 N.E.2d at 324.

Carmona v. State, 827 N.E.2d 588 (Ind. Ct. App. 2005) (where a defendant vigorously contests his criminal history and that history is highly relevant to his sentence, State has burden to produce some affirmative evidence, e.g., docket sheets, certified copies of convictions, affidavits from appropriate officials, etc., to support a criminal history alleged in a PSI and urged as basis for sentence enhancement).

PRACTICE POINTER: If information included in the PSR is inaccurate, request that the information be deleted from the report. The judge simply not relying on the inaccurate information insufficiently protects the defendant because, pursuant to Ind. Code 35-38-1-14(1), the court must send the PSR of a defendant who is sentenced to a term of imprisonment to the Department of Corrections ("DOC"). Thus, the PSR may later affect that defendant's placement and overall treatment at the DOC. However, be aware that a defendant does not have a statutory right to deletion of information from the PSR. Hiner v. State, 470 N.E.2d 363, 374 (Ind. Ct. App. 1984).

B. INADEQUATE REPORT

When a defendant is given an opportunity to present evidence or to make any statements prior to the judge's pronouncing sentence, it is incumbent upon the defendant to demonstrate how he is prejudiced by the omissions from a PSR. Fact that a PSR does not contain all the elements mandated by the legislature does not, alone, require reversal. Woodcox v. State, 591 N.E.2d 1019, 1024 (Ind. 1992), *overruled on other grounds by* Richardson v. State, 717 N.E.2d 32 (Ind. 1999).

Shuttleworth v. State, 469 N.E.2d 1210 (Ind. Ct. App. 1984) (where defendant failed to bring to court's attention that the PSR did not include two letters which reflected on defendant's positive aspects, defendant was not entitled to remand for new sentencing).

C. LACK OF CONSIDERATION OF REPORT

The PSR is only provided as a source of information for the trial court, and the court shall undertake its own independent evaluation to determine aggravating and mitigating factors. However, the trial court may be required to show some reference indicating that the PSR was considered, and completely ignoring the PSR may support reversal of a sentence. Kinkead v. State, 791 N.E.2d 243 (Ind. Ct. App. 2003) (citing Timberlake v. State, 690 N.E.2d 243, 266 (Ind. 1997), *cert den'd* 525 U.S. 1073, 119 S.Ct. 808 (1999)).

D. MUST PROVE PREJUDICE

Even if PSR is found to be inaccurate or incomplete, the defendant must demonstrate that he was prejudiced by the inaccurate information or the lack of information. If the PSR is improperly prepared, the defendant suffers no prejudice when the trial judge (1) does not adopt the probation officer's sentencing recommendations and (2) provides sufficient reasons for the sentence which is imposed. Broome v. State, 687 N.E.2d 590, 603 (Ind. Ct. App. 1997), *overruled on other grounds by* Voss v. State, 856 N.E.2d 1211 (Ind. 2006).

Morrell v. State, 121 N.E.3d 577 (Ind. Ct. App. 2019) (trial court's consideration of juvenile contacts with justice system not reduced to adjudication was error, but defendant could not show prejudice when appellate court was confident same sentence would be imposed on remand), *op. on reh'g*.

Emerson v. State, 724 N.E.2d 605 (Ind. 2000) (where trial court did not rely on fact that defendant refused to talk with probation officer in a pre-sentence interview, defendant was not prejudiced by probation officer's PSR claiming defendant was uncooperative).

Malone v. State, 660 N.E.2d 619 (Ind. Ct. App. 1996) (defendant was not improperly sentenced on basis of inaccurate PSR because review of trial court's statements during sentencing hearing revealed that judge did not accord much weight to allegedly inaccurate felony citations, and enhanced sentence did not rest solely on challenged conviction, but defendant had numerous criminal convictions to support imposition of enhanced sentence).

E. APPEAL

Where error alleged on appeal includes the contention that material was erroneously included in the PSR, the record must contain a copy of the report. Meadows v. State, 428 N.E.2d 1232, 1237 (Ind. 1981).

Trial counsel has an obligation to review the accuracy and reliability of the PSR. Failure to do so has been successfully raised as grounds for a claim of ineffective assistance of counsel, as it falls below prevailing professional norms and may prejudice the defendant in determination of sentencing or restitution. Shane v. State, 769 N.E.2d 1195, 1201 (Ind. Ct. App. 2002).

Dillard v. State, 827 N.E.2d 570 (Ind. Ct. App. 2005) (knowing failure to object to PSI report waives issue of report's accuracy for review). See also Stokes v. State, 828 N.E.2d 937 (Ind. Ct. App. 2005).

If relevant to an issue on appeal, all versions of the PSR viewed by the trial court must be included in the appellant's appendix. In Settles v. State, 791 N.E.2d 812 (Ind. Ct. App. 2003), the trial court received an initial PSR and a subsequent update, but only the latter was included in Appellant's Appendix. Because of this omission, the appellate court refused to reconsider the weight given to the defendant's prior criminal history.

However, the PSR is a confidential document that requires special treatment on appeal. Inclusion of a PSR printed on white paper in defendant's appendix was inconsistent with T.R. 5(G), App. R. and Admin R. 9(H)(1)(n)(viii). Hamed v. State, 852 N.E.2d 619, 621 (Ind. Ct. App. 2006). The PSR is specially treated in filing electronic appendices. See *IPDC Appellate Practice Manual* (2012), Chapter 4.

VI. CONSTITUTIONAL ISSUES REGARDING CONTENTS OF PRE-SENTENCE REPORT

A. RIGHT OF CONFRONTATION (U.S. Const. amend. VI; Ind. Const. art. 1, § 13)

1. Hearsay

Because the rules of evidence do not apply to sentencing proceedings that are conducted by a judge sitting without a jury, a judge may use a PSR to discern a defendant's criminal history although a PSR is hearsay. Shepard v. United States, 544 U.S. 13, 125 S.Ct. 1254 (2005); Stokes v. State, 828 N.E.2d 937 (Ind. Ct. App. 2005).

Hearsay evidence in a PSR does not violate the defendant's constitutional rights of confrontation and cross-examination or impinge upon due process of law. Williams v. New

York, 337 U.S. 241, 69 S.Ct. 1079 (1949). The trial court may examine the statutory definition, charging document, written plea agreement, transcript of the plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.

Stokes v. State, 828 N.E.2d 937 (Ind. Ct. App. 2005) (Shepard v. United States, 544 U.S. 13, 125 S.Ct. 1254 (2005), does not preclude use of criminal history information delineated in a PSR by a sentencing court to enhance a sentence; underlying concern in Shepard was judicial fact-finding of circumstances surrounding a conviction). See also Ryle v. State, 842 N.E.2d 320 (Ind. 2005)

Robeson v. State, 834 N.E.2d 723 (Ind. Ct. App. 2005) (Ind. T.R. 44 does not require that PSR be authenticated before it may be used in sentencing; here, defendant's objection to PSR was based entirely on authentication of PSR, not on its accuracy).

One Indiana Court has held that the prohibition against testimonial hearsay of an unavailable witness does not apply in sentencing hearings. Davis v. State, 892 N.E.2d 156 (Ind. Ct. App. 2008). However, reliance on hearsay which lacks indicia of reliability may result in reliance on improper or inaccurate information in making the sentencing determination and require remand for a new sentencing. Thomas v. State, 562 N.E.2d 43, 48 (Ind. Ct. App. 1990).

Hulfachor v. State, 813 N.E.2d 1204 (Ind. Ct. App. 2004) (trial court should look only to evidence properly placed in record when making sentencing determinations; looking outside record for evidence in a sentencing hearing deprives defendant of opportunity to review information and refute its accuracy and creates risk that sentencing will be based on inaccurate or irrelevant information; here, trial court improperly relied on information from CHINS file from another court, but defendant waived issue by not objecting).

United States v. Russell, 156 F.3d 687 (6th Cir. 1998) (police investigation report, which stated that defendant possessed more marijuana plants than number stated in search warrant, was unreliable and improperly used to sentence defendant to mandatory sixty months).

United States v. Harris, 558 F.2d 366 (7th Cir. 1977) (where PSR included hearsay on hearsay allegations and judge did not disclose factors relied upon in imposing maximum sentence, sentence was vacated and remanded for resentencing after affording defendant opportunity to contest accuracy of serious hearsay allegations).

United States v. Weston, 448 F.2d 626 (9th Cir. 1971) (statements of narcotics agents in PSR containing unverified statements of unknown informant that defendant was one of biggest heroin dealers in area, had insufficient indicia of reliability to be proper basis for sentencing).

2. Cross examination

The PSR must contain only accurate information, and thus, the defendant must be given the opportunity to refute the information in the report. Yates v. State, 429 N.E.2d 992, 994 (Ind. Ct. App. 1982).

Dillard v. State, 827 N.E.2d 570 (Ind. Ct. App. 2005) (State's duty to "prove" factual assertions in PSR is not triggered until defendant, given the opportunity, disputes the accuracy of those facts).

Ryle v. State, 842 N.E.2d 320 324 n.5 (Ind. 2005) (defendant's failure to object is not an admission to the accuracy of the PSR).

However, where a report is being considered only on the issue of commitment and the question of guilt or innocence has already been determined, the court's consideration of a portion of the report in which the investigating officer receives her understanding of the facts without being subjected to cross examination does not prejudice a defendant. Carlin v. State, 254 Ind. 332, 259 N.E.2d 870, 874 (1970).

B. DUE PROCESS (U.S. Const. amend. XVI; Ind. Const. art. I, § 12)

Due process requires that sentences be based upon accurate and reliable information. A sentence based on materially untrue assumptions violates due process. Gardner v. State, 270 Ind. 627, 388 N.E.2d 513, 520 (1979). Where a defendant vigorously contests his criminal history, and that criminal history is highly relevant to his sentence, it is incumbent upon the State to produce some affirmative evidence, e.g., docket sheets, certified copies of judgment of convictions, affidavits from appropriate officials, etc., to support a criminal history alleged in a PSR and urged as the basis for sentence enhancement.

Carmona v. State, 827 N.E.2d 588 (Ind. Ct. App. 2005) (court remanded for resentencing based on unreliability of defendant's criminal history).

But see Green v. State, 850 N.E.2d 977 (Ind. Ct. App. 2006) (where defendant challenged a specific, identifiable case and was in possession of the information showing the error, he was required to do more than just allege the PSR was erroneous).

1. Previous charges resulting in acquittals

A sentencing court's consideration of a defendant's previous charge which resulted in an acquittal does not violate a defendant's federal right to due process if the State proves by the preponderance of the evidence that the defendant committed those crimes. United States v. Watts, 519 U.S. 148, 117 S.Ct. 633, 638 (1997).

However, where the court assumes, without considering any evidence, that the defendant committed the crime or was convicted of the crime, the defendant's due process right to be sentenced based on materially true assumptions is violated.

Townsend v. Burke, 334 U.S. 736, 68 S.Ct. 1252 (1948) (case was remanded for resentencing when it appeared on record that trial judge mistakenly believed defendant had three previous convictions, when in fact some of the charges had been dismissed and defendant had been acquitted on others).

Fugate v. State, 516 N.E.2d 75 (Ind. Ct. App. 1987) (trial court's express reliance on PSR which contained statement of damage to victim in crime for which defendant was acquitted denied defendant's right to be sentenced on basis of materially true assumptions in violation of due process).

PRACTICE POINTER: It is unresolved whether the court considering a defendant's prior charge for which she was acquitted violates the Indiana Constitution, specifically Article I, Section 12, affording due course of law, and Article I, Section 14, prohibiting double jeopardy.

2. Previous uncounseled convictions

a. Felony convictions

Previous convictions of the defendant which were obtained in violation of defendant's Sixth Amendment right to counsel may not be considered in sentencing. United States v. Tucker, 404 U.S. 443, 92 S.Ct. 589 (1972); Burgett v. Texas, 389 U.S. 109, 88 S.Ct. 258 (1967).

b. Juvenile adjudications

Because it is a violation of due process to sentence a defendant on basis of "misinformation of constitutional magnitude" such as convictions where a defendant was unrepresented in violation of the Sixth Amendment, a trial court may not consider in PSR juvenile delinquent adjudication in which a defendant was uncounseled. Angleton v. State, 686 N.E.2d 803, 814, n.7 (Ind. 1997) (citing Rizzo v. United States, 821 F.2d 1271 (7th Cir. 1987)).

c. Misdemeanor convictions

Because uncounseled misdemeanor convictions are valid if no imprisonment is imposed, they may be considered to enhance punishment for a later conviction. Nichols v. United States, 511 U.S. 738, 114 S.Ct. 1921, 1928 (1994), *overruling* Baldasar v. Illinois, 466 U.S. 222, 100 S.Ct. 1585 (1980).

Brown v. State, 683 N.E.2d 600 (Ind. Ct. App. 1997) (defendant has burden to prove, by preponderance of evidence, that there was actual lack of representation without knowing waiver of counsel in earlier proceeding).

PRACTICE POINTER: Counsel may argue that the court cannot rely on a misdemeanor conviction regardless of whether imprisonment was imposed because, unlike the U.S. Constitution, the Indiana Constitution guarantees the right to counsel for all persons charged with a misdemeanor, regardless of whether the charge ultimately results in imprisonment. Ind.Const., art. 1, § 13; Brunson v. State, 182 Ind.App. 146, 394 N.E.2d 229 (1979).

3. Reversal required only if judge relied on inaccurate information

A trial court's sentencing of a defendant will not be reversed if the court did not rely on the inaccurate PSR. Malone v. State, 660 N.E.2d 619, 633 (Ind. Ct. App. 1996).

C. SELF-INCRIMINATION (U.S. Const. amend. X; Ind. Const. art. I, § 14)

Although a probation officer is not required to Mirandize the defendant prior to a pre-sentence investigation interview, a statement made by the defendant during pre-sentence interview should be excluded on Fifth Amendment grounds where it is shown to be involuntary, as induced by

violence, threats, promises, or other improper influence. Burch v. State, 450 N.E.2d 528, 530 (Ind. 1983).

Limp v. State, 457 N.E.2d 189, 191-92 (Ind. 1983) (distinguishing Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866 (1981), where purpos of pre-sentence interview was clear and defendant knew or should have known that information obtained might be relied upon to make sentencing determination, defendant's admissions during pre-sentence interview of sexual misconduct were volunteered, and thus, did not implicate his right against self-incrimination).

Gardner v. State, 270 Ind. 627, 388 N.E.2d 513 (1979) (where there was no showing of force or coercion during interview with probation officer and defendant was also being advised by counsel, statements made by defendant to probation officer and included in PSR did not violate defendant's constitutional right against self-incrimination).

Brown v. State, 659 N.E.2d 671 (Ind. Ct. App. 1995) (where defendant made statements to pre-sentence investigator that he would kill again and had no remorse, was aware of purpose of PSR, was fully advised of rights at initial hearing, and was presented with a copy of PSR and voiced no opposition to its contents, trial court was justified in relying on defendant's statements to enhance his sentence).

Hines v. State, 856 N.E.2d 1275 (Ind. Ct. App. 2006) (statement was properly considered where there was no force or coercion used during psychosexual evaluation, other than persistent questioning by interviewing psychologist regarding defendant's sexually deviant behavior; Darden, J., dissenting, is "deeply troubled by the fact that the trial court had ordered Hines to undergo a psychosexual evaluation and then expressly used the information gained from it when imposing a sentence").

Ryle v. State, 842 N.E.2d 320 (Ind. 2005) (using a defendant's failure to object to a pre-sentence report to establish an admission to the accuracy of the report implicates the right against self-incrimination); see also Edrington v. State, 909 N.E.2d 1093 (Ind. Ct. App. 2009).

PRACTICE POINTER: It is unclear whether the probation officer may include into the PSR unmirandized statements made to those other than the probation officer for purposes other than gathering information for sentencing. Gardner, infra, did not say that a defendant must be informed that he has a right to remain silent during the pre-sentence investigation. According to Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866 (1981), such statements are excluded in the penalty phase of a capital case, and according to Foster v. State, 484 N.E.2d 965, 966 (Ind. 1985), such statements are excluded in habitual offender determinations.

D. RIGHT TO COUNSEL (U.S. Const. amend. VI; Ind. Const. art. I, § 13)

Because a pre-sentence interview with a probation officer is not a critical stage of the proceedings, a defendant need not have assistance of counsel at that interview. Lang v. State, 461 N.E.2d 1110, 1115 (Ind. 1984); Burch v. State, 450 N.E.2d 528, 530 (Ind. 1983).

United States v. Jackson, 886 F.2d 838 (7th Cir. 1989) (Sixth Amendment right to counsel does not extend to defendant's pre-sentence interview with federal probation officer).

However, in a death penalty case counsel should fight for the right to attend the interview. The 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, at Guideline 10.12(A) (2), provide that "counsel should consider whether the client should speak with the person preparing the report; if the determination is made to do so, counsel should discuss the interview in advance with the client **and attend it."**

E. RIGHT TO JURY TRIAL AND PROOF BEYOND A REASONABLE DOUBT

A defendant has the Sixth Amendment right to have any fact, other than prior crimes or those facts to which the defendant admits, used to increase his or her sentence beyond the "statutory maximum" to be tried to a jury and found beyond a reasonable doubt. Blakely v. Washington, 124 S.Ct. 2531 (2004). Under Indiana's sentencing scheme prior to April 25, 2005, the "statutory maximum" was the presumptive sentence set out for each class of offense. Smylie v. State, 823 N.E.2d 679 (Ind. 2005).

Within weeks after Smylie was decided, the Indiana General Assembly amended Ind.Code. § 35-50-2-3 to replace fixed presumptive sentences with "advisory sentences," and gave sentencing courts the right to impose any sentence authorized by statute and permissible under the state constitution, regardless of the presence or absence of aggravating or mitigating circumstances. See Anglemyer v. State, 868 N.E.2d 482 (Ind. 2007). In 2014, the General Assembly amended Ind. Code § 35-50-2-1.3 to define advisory sentences as "a guideline that the court may voluntarily consider when imposing a sentence," and amended Ind. Code § 35-38-1-1.3 to provide that the sentencing court need not issue a statement of reasons for imposing an advisory sentence.

A defendant's failure to object to a PSR does not constitute an admission to the accuracy of the facts within the report. Ryle v. State, 842 N.E.2d 320, 324 n.5 (Ind. 2005). Thus, the State is not relieved of its burden to prove an essential element beyond a reasonable doubt just because it is unchallenged in the PSR. However, facts relating to criminal history and based on "judicial records" in the PSR do not have to be proven beyond a reasonable doubt to a jury if not objected to in the PSR. Id.

> Thomas v. State, 840 N.E.2d 893 (Ind. Ct. App. 2006) (defendant's failure to challenge his marriage to the complaining witness's mother did not constitute an admission that he was in a position of trust with complaining witness).

For a detailed discussion of the sentencing court's decision, see Chapter 4, *Sentencing Decision.*