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United States v. Schlette: Dead Men Do Tell Tales

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UNITED STATES v. SCHLETTE: DEAD MEN DO TELL TALES

I. INTRODUCTION

In *United States v. Schlette*,[1] the Ninth Circuit held that disclosure of a criminal presentence report to third party petitioners was appropriate.[2] This is the first reported federal case in which disclosure to a third party was granted.[3] The court found that the government had not articulated a legitimate reason for maintaining confidentiality, in light of the petitioners' threshold showing of need.[4] With this showing, the petitioners had overcome the standard approved of in the Ninth Circuit in *Berry v. Department of Justice*.[5] In that case, the court stated that disclosure to third parties should not be ordered unless doing so is "necessary to serve the ends of justice."[6]

The issue of disclosure of criminal presentence reports has been debated at length over the last forty years.[7] The development in this area has been primarily within the context of disclosure to the subjects of the reports.[8] This article will examine the basis for which disclosure to a third party was allowed for the first time.

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1. 842 F.2d 1574 (9th Cir. 1988) (per Thompson, J; the other panel members were Noonan, J., and Anderson, J.).

2. *Id.* at 1584.

3. *Id.* at 1579. There has been one unreported case where a court ordered disclosure of a presentence report to a third party in the interest of justice. United States v. Charmer Indus., 711 F.2d 1164, 1173 (2d Cir. 1983) (citing United States v. Bernstein, CR 81 160 (E.D.N.Y. Jan. 12, 1982) (transcript of a hearing in which the court disclosed the report in the interest of justice)).

4. *Schlette*, 842 F.2d at 1584.

5. 733 F.2d 1343 (9th Cir. 1984).

6. *Id.* at 1352.

7. *Schlette*, 842 F.2d at 1578.

8. *Id.*

II. FACTS

In 1955, Malcolm R. Schlette was convicted of arson in Marin County, California.[9] The man who successfully prosecuted the case was Marin County District Attorney William O. Weissich.[10] Schlette never forgave Weissich and vowed to kill him.[11] After serving eleven years of a twenty-year sentence, Schlette was paroled, only to violate his parole on the day of his release.[12] He was returned to prison to serve the remaining nine years of his sentence, and was again released in 1975.[13] In 1983, he pleaded guilty to felonious possession of a firearm and was placed on probation.[14] In 1986, while still on probation, Schlette kept his thirty year old vow; he shot and killed Weissich.[15] Schlette then committed suicide.[16]

The Estate of Weissich and a local newspaper[17] each petitioned the district court to release Schlette's presentence report, postsentence report and psychiatric report.[18] The estate requested disclosure in order to determine whether the court's probation service knew of the danger to Weissich's life and was

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9. United States v. Schlette, 842 F.2d 1574, 1576 (9th Cir. 1988). *See* Marin Indep. J., Apr. 7, 1987, at A3, col. 1. Schlette was convicted of setting a fire at the Bleu Baie Tavern in Marshall, California. The establishment was operated by Schlette's estranged wife. He was given a 20 year sentence for a fire that caused six dollars damage. *Id.*

10. *Schlette*, 842 F.2d at 1576.

11. *Id. See* Marin Indep. J., Nov. 19, 1986, at A1, col. 5. Besides Weissich, there were others on Schlette's "hit list," a typed note left in his Santa Rosa apartment which targeted the persons who helped send him to prison. They were Charles Daniels, then a San Rafael insurance investigator; arson investigator Fred DuPuis; Sid Stinson, then a Marin County undersheriff; and private investigator Nick Giampali. *Id.*

12. Marin Indep. J., Nov. 19, 1986, at A2, col. 4.

13. *Id.* at A2, col. 5. After failing to report to his parole officer, Schlette apparently tried to buy weapons in San Francisco—a bazooka and a steel vest. After failing to do so, he went to Los Angeles to buy guns. He was apprehended soon afterwards in Santa Monica. *Id.*

14. *Schlette*, 842 F.2d at 1576. Schlette pleaded guilty to a weapons charge under 18 U.S.C. § 1202(a)(1) (*repealed* 1986).

15. *Schlette*, 842 F.2d at 1576.

16. *Id.* Schlette's van was stopped by the police three blocks away from where Weissich was killed. Marin Indep. J., Nov. 19, 1986 at A3, col. 1. Apparently, in fear of imminent capture, he took a number of cyanide pills. *Id.* Found on the body or in the van were a Ruger .223-caliber gun, a .45-caliber Colt pistol, ammunition, a survival knife, an electronic stun gun, a gas mask, and fake explosives. *See* Marin Indep. J., Nov. 20, 1986 at A1, col. 2.

17. *Schlette*, 842 F.2d at 1576. The newspaper was the Marin Independent Journal. *Id.*

18. *Id.*

negligent in not warning him.[19] The newspaper argued that disclosure would facilitate the public interest by informing the public about sentencing procedures.[20] The district court denied the requests, and both parties appealed.[21] The Ninth Circuit consolidated the appeals and dismissed them for lack of standing.[22] Both parties filed writs of mandamus to compel the district court to disclose the requested documents.[23]

III. BACKGROUND

A. The Presentence Report

After a criminal defendant has been found guilty, the district court's probation service files a presentence investigation report.[24] The primary purpose of the report is to facilitate the court's determination of an appropriate sentence.[25] After a thorough investigation of the defendant's background, a report is compiled which includes personal information and procedural

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19. *Id.*

20. *Id.* at 1582. Additionally, the newspaper asserted a request for the documents under the Freedom Of Information Act ("FOIA"), 5 U.S.C. § 552 (1982), as well as a first amendment right of access to the documents. *Schlette*, 842 F.2d at 1582. Finding that disclosure in the present case was warranted without reference to either the FOIA or the first amendment, the court declined to rule on those portions of the petitioners' arguments. *Id.*

21. *Schlette*, 842 F.2d at 1576. The Weissich family asked for the court records, saying that they needed evidence for possible claims against the psychiatrist who examined Schlette, the U.S. Probation Office or other federal authorities. *See* Marin Indep. J., Apr. 7, 1987, at A1, col. 2.

22. *Schlette*, 842 F.2d at 1576. Third parties who have been denied access to underlying proceedings in which they were not parties in district court have no standing to appeal. *Id.* (citing United States v. Brooklier, 685 F.2d 1162 (9th Cir. 1982) (decision by district court barring access by media and public to certain portions of a criminal proceeding reviewed on petition of writ of mandamus, but not on appeal, as petitioners were not parties to the proceedings)).

23. *Id.* Because presentence reports are court records, and disclosure of them to third parties is not expressly controlled by any statute, control of them rests within the discretion of the court. *Id.* at 1577.

24. Julian v. U.S. Dep't. of Justice, 806 F.2d 1411, 1414 (9th Cir. 1986), (copies of their presentence reports were disclosed to prisoners under the FOIA), *aff'd*, 108 S. Ct. 1606 (1988).

25. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, PUB. NO. 105, THE PRESENTENCE INVESTIGATION REPORT at 1 (1978) [hereinafter THE PRESENTENCE INVESTIGATION REPORT]. Additionally, the report serves other functions. It provides aid to the probation officer in supervising efforts during probation or parole; assists prison officials in classifying, planning rehabilitation programs for and releasing the subject; aids in the consideration of parole; and serves as a source of research information. *Id.*

details.[26] It describes the defendant's character and personality, discusses the defendant's relationships with others, discloses the factors underlying the defendant's specific offense and conduct in general, and evaluates his or her problems and needs.[27] The court is required to prepare a presentence report unless the defendant, with the court's permission, waives it.[28] The court may also dispense with the report's preparation if it finds sufficient information in the record to enable the court to determine an appropriate sentence.[29]

B. Disclosure To Defendants

Under Federal Rule of Criminal Procedure 32(c)(3)(A), the district court is required to release the presentence report to the defendant and his counsel within a reasonable time before sentencing.[30] The underlying rationale for such disclosure is to allow the defendant to introduce testimony or other evidence which may highlight any factual inaccuracies in the report or to clarify the information used in the sentencing decision.[31]

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26. *See* Fennel & Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 Harv. L. Rev. 1615, 1624-25 (1979) [hereinafter Fennel & Hall]. The report includes, *inter alia*, any prior criminal record of the defendant; an official version of the offense in question supplied by the United States Attorney; the defendant's version of the offense; information concerning loss or harm suffered by any victim of the crime; personal and family data such as marital status, education, military history, employment history, and financial status; information provided by interviews with family and friends, social services agencies, and employers; and clinical evaluations of the defendant's physical and mental health. *Id.*

27. *See* The Presentence Investigation Report, *supra* note 25, at 1.

28. Fed. R. Crim. P. 32(c)(1) provides:

> The probation service of the court shall make a presentence investigation and report to the court before imposition of sentence or the granting of probation unless, with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record.

29. *Id.*

30. Fed. R. Crim. P. 32(c)(3)(A). *See infra* note 36 for text of statute.

31. *See* Fed. R. Crim. P. 32 advisory committee's note. The original version of Rule 32(c) contained no language pertaining to disclosure. United States v. Schlette, 842 F.2d 1574, 1578 (9th Cir. 1988). Debate would continue for some time over whether mandatory disclosure to the defendant should be incorporated. *Id.* The 1966 revision of the rule left disclosure to the discretion of the court, a practice to which many of the courts were already adhering. *Id.* In 1974, Congress would further expand the defendant's access to the presentence report by amending the rule to require the district court

Courts had commonly asserted that confidentiality, including nondisclosure to the defendant, was necessary to protect the "sentencing court's ability to obtain data on a confidential basis from the accused and from sources other than the accused for use in the sentencing process."[32] The argument was made that, without confidentiality, courts would not receive the most complete information possible for determining an appropriate sentence.[33] It was felt that confidentiality would ensure against a chilling effect on sources of such information, thus protecting the quality of presentence reports.[34] However, this "free flow of information" rationale has been proven false by empirical analysis.[35]

Although full disclosure is mandated by Rule 32(c), there are three exceptions.[36] A presentence report will not be dis-

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to disclose the report upon request. *Id.* Subsequent empirical analysis revealed that defendants frequently failed to request disclosure, or requested disclosure only shortly before sentencing, thus allowing for only a hurried and, perhaps, cursory inspection of the report. *Id.* On the basis of the empirical data, FED. R. CRIM. P. 32(c) was revised in 1983 to require disclosure of the presentence report to defendants, even where a request was not forthcoming. *Schlette*, 842 F.2d at 1578.

32. *Schlette*, 842 F.2d at 1579 (citing United States v. Charmer Indus., Inc., 711 F.2d 1164, 1171) (injunction against the Arizona Attorney General's use of corporation's presentence report in a liquor license proceeding).

33. *Id.* at 1579.

34. *Id.* at 1580.

35. Fennell & Hall, *supra* note 26, at 1689 commented:

> In general, we found that disclosure has been acheived without the serious repercussions predicted by the opponents of the mandatory disclosure rule. The character of the sentencing proceeding has not changed, the sources of information have not diminished appreciably, and the effectiveness of the presentence report has not decreased. To the contrary . . . it has brought greater objectivity to the entire sentencing process.

36. FED. R. CRIM. P. 32(c)(3)(A). This section provides:

> At a reasonable time before imposing sentence the court shall permit the defendant and his counsel 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 opinions which if disclosed, might seriously disrupt a program of rehabilitation; or 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. The court shall afford the defendant and his counsel an opportunity to comment on the report and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it.

closed: 1) if it contains diagnostic opinions which could seriously disrupt a program of rehabilitation;[37] 2) if it contains information obtained under a promise of confidentiality;[38] and 3) if it contains information which might cause harm to the defendant or other person.[39] If any of the above exceptions arise, the court shall provide an oral or written summary of the factual information in the report to the defendant and his counsel.[40] The Parole Commission and Reorganization Act of 1976 ("Parole Act")[41] contains the same three exceptions to full disclosure to a prisoner within thirty days of a parole hearing.[42]

While Rule 32 ordinarily requires the presentence report to be disclosed to the defendant, copies of the report must be returned to the probation office immediately after sentencing, unless the court directs otherwise.[43] The efficacy of requiring a sen-

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37. *Id.*

38. *Id.*

39. *Id.*

40. FED. R. CRIM. P. 32(c)(3)(B) states:

> 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 and his counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

41. 18 U.S.C. §§ 4201-4218 (1976) (*repealed* 1987). The Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, ch. 2, 98 Stat. 1987 (codified as 18 U.S.C. §§ 3581-3586 (1986 Supp.)), has revised the federal system of sentencing that was in place at the time the Parole Act was adopted. It mandates that all sentences be for fixed terms and eliminates the possibility of parole before the term is completed. *Id.* The Parole Act will remain in effect for five years, in order that the Parole Commission continue to make parole decisions for individuals sentenced before November 1, 1987. *Id.*

42. 18 U.S.C. § 4208(c) (1976) (*repealed* 1987). The prisoner shall not be provided access to:

> (1) diagnostic opinions which, if made known to the eligible prisoner, could lead to a serious disruption of his institutional program;
> (2) any document which reveals sources of information obtained on a promise of confidentiality; or
> (3) any other information which, if disclosed, might result in harm, physical or otherwise, to any person.

43. FED. R. CRIM. P. 32(c)(3)(E). This provision is ostensibly to insure that unauthorized persons do not gain access to the confidential report. *See* FED. R. CRIM. P. 32 advisory committee's note.; United States v. Charmer Indus., 711 F.2d 1164, 1172 (2d Cir. 1983). Conversely, 18 U.S.C. § 4208(b) (1976) (*repealed* 1987) contained no express requirement that the inmate return any or all copies of the report, only that he have "reasonable access to [the] report or other document to be used by the Commission in mak-

tenced defendant to return his copy of the report was recently tested in the Ninth Circuit in *Berry v. Dep't of Justice*.[44] Berry, a sentenced offender awaiting a parole hearing, brought a request under the Freedom of Information Act ("FOIA")[45] for disclosure of copies of his presentence report.[46] His request was directed at the United States Parole Commission.[47] The court held that the report was an agency record for purposes of the FOIA and thus allowed Berry access.[48] Applying a two-prong test, the

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ing its parole determination." United States Dep't of Justice v. Julian, 108 S. Ct. 1606, 1610 (1988).

44. 733 F.2d 1343 (9th Cir. 1984).

45. 5 U.S.C. § 552(a)(2) (1982) requires that each agency, in accordance with published rules, shall make available for public inspection and copying:

> (A) final opinions, including concurring and dissenting opinions, as well as orders, made in adjudication of cases;
> (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and
> (C) administrative staff manuals and instructions to staff that affect a member of the public;

5 U.S.C. § 552(a)(3) (1982) states the following:

> Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

The law was initiated by Congress and signed by President Johnson with several key concerns:

> [T]hat disclosure be the general rule, not the exception; that all individuals have equal rights of access; . . . that the burden be on the Government to justify the withholding of a document, not on the person requesting it; . . . that individuals improperly denied access to documents have right to seek injunctive relief in the courts; . . . that there be a change in Government policy and attitude.

U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT (1967) at 1.

46. *Berry*, 733 F.2d at 1345. Berry was given a copy of his presentence report thirty days prior to his parole hearing and given one hour to view it. *Id.* at n. 3.

47. The report is forwarded to the Bureau of Prisons and the Parole Commission and is relied upon in making correctional decisions affecting the prisoner. *Berry*, 733 F.2d at 1346, 18 U.S.C. § 4205(e) (1976) (*repealed* 1987). The Parole Commission is required to rely upon, *inter alia*, the presentence report in making parole determinations. 18 U.S.C. § 4207 (1976) (*repealed* 1987).

48. *Berry*, 733 F.2d at 1356. In doing so, the court put limitations on disclosure by qualifying FED. R. CRIM. P. 32(c)(3)(A) and Section 8 of The Parole Act, 18 U.S.C. § 4208(b), as withholding statutes within the contemplation of the FOIA scheme. *Berry*, 733 F.2d at 1354. 5 U.S.C. § 552(b)(3) provides that the FOIA does not apply to matters that are:

court found that because the report was 1) in the possession of an agency (the United States Parole Commission), and 2) was prepared substantially to be relied upon in agency decision making, it was an agency record.[49]

The issue of disclosure to the subject of the presentence report under the FOIA was also addressed by the Supreme Court in *United States Dep't of Justice v. Julian*.[50] In *Julian*, the two respondents, federal prisoners, again sought copies of their presentence reports from the United States Parole Commission, which denied the requests.[51] The Court held that the FOIA requires the presentence report to be disclosed to the subject of the report, except for portions which contain matters pertaining to confidential sources, diagnostic opinions, and possibly harmful information, in which case Rule 32 or the Parole Act control.[52] The government's contentions that presentence reports fall under certain exemptions[53] of the FOIA were rejected.[54] In

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> [S]pecifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

Thus, "the FOIA will probably entitle the defendant to copies of that which they were shown at sentencing and no more." *Berry*, 733 F.2d at 1354, n.17. On remand, the government could assert any alternative exemption under the FOIA which might apply. *Id.* at 1356.

49. *Berry*, 733 F.2d at 1349. The court noted that documents that are substantially prepared for use in agency decisionmaking are precisely those that the FOIA intended to disclose. *Id.* at 1350.

50. 108 S. Ct. 1606 (1988).

51. *Id.* at 1607. *See supra* note 47 and accompanying text.

52. *Julian*, 108 S. Ct. at 1611. The Court did not follow the Ninth Circuit ruling in *Berry* that FED. R. CRIM. P. 32(c)(3)(A) and 18 U.S.C. § 4208(c) are witholding statutes under FOIA contemplation, but came to the same conclusion that the exemption language contained in both statutes applied to the request. *Julian*, 108 S. Ct. at 1611.

53. The government argued that 5 U.S.C. § 552(b)(3) did apply. *Julian*, 108 S. Ct. at 1611. *See supra* note 48 for text.

The government also argued applicability of 5 U.S.C. § 552(b)(5), which provides an exemption for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." *Julian*, 108 S. Ct. at 1613. The Court stated that the test under exemption 5 was whether the documents would be routinely or normally disclosed upon a showing of relevance. *Id.* at 1613. However, the Court found "there is good reason to differentiate between a governmental claim of privilege for presentence reports when a third party is making the request and such a claim when the request is made by the subject of the report." *Id.* at 1614.

54. *Julian*, 108 S. Ct. at 1612.

doing so, the Supreme Court settled what had been a controversy between two circuits.[55]

C. Disclosure To Third Parties

Rule 32(c) is silent as to disclosure to third parties.[56] Federal courts have generally treated presentence reports as confidential documents and have used their discretion when entertaining requests for disclosure to third parties.[57] However, disclosure to third parties has been invariably denied.[58]

In *Hancock Brothers Inc. v. Jones*,[59] civil antitrust plaintiffs were denied access to government presentence memoranda.[60] The memoranda were prepared in connection with the sentencing of the defendants in earlier criminal antitrust proceedings.[61] The documents contained information obtained in proceedings before a grand jury.[62] Citing the policy of maintaining the secrecy of grand jury proceedings,[63] the district court held that disclosure of such information would be proper only if a compelling necessity had been shown with particularity.[64] Further, the district court held that this standard also applied to disclosure of presentence reports. The court felt that confidential information contained in such reports should not be revealed to third

55. The lower court decision, Julian v. U.S. Dep't of Justice, 806 F.2d 1411 (9th Cir. 1986), conflicted with Durns v. Bureau of Prisons, 804 F.2d 701, (D.C. Cir.) (prisoner's attempt to obtain a copy of his presentence report through the FOIA was denied under 5 U.S.C. § 552(b)(5) exemption), *reh'g denied*, 806 F.2d 1122 (D.C. Cir. 1986), *petition for cert. filed*, No. 86-6550.

56. *Schlette*, 842 F.2d at 1578.

57. *Id.* at 1579.

58. United States v. Charmer Indus., 711 F.2d 1164, 1173 (2nd Cir. 1983). "No reported case, and only one unreported case, has been called to our attention in which a court has ordered the disclosure of a presentence report to a third party." *Id.*

59. 293 F. Supp. 1229 (N.D. Cal. 1968).

60. *Hancock*, 293 F. Supp. at 1231.

61. *Id.*

62. *Id.*

63. *Id.* at 1231-32.

64. *Id.* at 1232. Those few courts which have discussed the threshold showing of need required by third party requests have done so setting a standard approaching that for disclosure of grand jury information. *Charmer*, 711 F.2d at 1174. *See*: United States v. Cyphers, 553 F.2d 1064, 1069 (7th Cir.), *cert. denied*, 434 U.S. 843 (1977) (defendant was not denied effective assistance of counsel by inability to obtain presentence report regarding government witness); United States v. Figurski, 545 F.2d 389, 391 (4th Cir. 1976) (no disclosure of report regarding witness); United States v. Krause, 78 F.R.D. 203, 204 (E.D. Wis. 1978) (no disclosure to defendant's judgment creditor).

parties unless it is required to meet the ends of justice.[65] In *Hancock*, the plaintiffs did not meet this threshold requirement.[66]

In *United States v. Walker*,[67] a defendant found guilty of passing a forged United States treasury check was denied access to a codefendant's presentence report.[68] The defendant contended that the report might contain statements by the codefendant inconsistent with his testimony at trial and therefore should be revealed.[69] The district court based its denial of access to the codefendant on an informal report to the court by the probation officer which stated that there was no exonerating evidence in the presentence report.[70]

Similarly, in *United States v. Figurski*,[71] the presentence report of a hostile witness in a criminal trial was withheld from the defendant.[72] The court found that, in general, when disclosure of the report is requested by the defendant in order to determine whether there is any impeachment material pertaining to the witness, the district court should examine the report *in camera*. The court should then disclose any part of the report which contains exculpatory material.[73] If the report contains material

65. *Hancock*, 293 F. Supp. at 1233.

66. *Id.* at 1233. The court found that the only reasons for disclosure articulated by the plaintiffs involved avoidance of expense and additional work. Compelling necessity was not met by a request in the name of mere convenience. *Id.* at 1232.

67. 491 F.2d 236 (9th Cir. 1974).

68. *Id.* at 237-38.

69. *Id.* at 238. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963), where the Court held that "[t]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *See also*: *Walker*, 491 F.2d at 238.

70. *Walker*, 491 F.2d at 238. Other courts have denied criminal defendants access to a codefendant's presentence report. *See, e.g.*: United States v. Martinello, 556 F.2d 1215 (5th Cir. 1977) (withholding of the codefendant's presentence report was proper as the report contained none of the information alleged by defense counsel) and United States v. Greathouse, 484 F.2d 805 (7th Cir. 1973) (evidence in the report that the codefendant was a pathological liar was not likely to change the verdict as the judge was already convinced of this).

71. 545 F.2d 389 (4th Cir. 1976).

72. *Figurski*, 545 F.2d at 389. *See also*: United States v. Anderson, 724 F.2d 596 (7th Cir. 1984) (defendant seeking the presentence report of a hostile witness, previously convicted for the same robbery) and United States v. Evans, 454 F.2d 813 (8th Cir. 1972) (defendant requesting the presentence report of government witness who previously pleaded guilty to the same post office burglary).

73. *Figurski*, 545 F.2d at 392.

that could be used to impeach the witness, then disclosure is only available when there is a reasonable likelihood of affecting the trier of fact.[74] Such likelihood depends upon the importance of the witness to the case, the extent to which the witness has already been impeached, and the significance of the material to the impeachment of the witness.[75]

The court, in *United States v. Charmer Industries*,[76] granted the defendant an injunction to prevent use by the Arizona Attorney General of a presentence report.[77] The report was to be used as additional evidence in a proceeding to revoke the defendant's liquor licenses in that state.[78] Citing *Hancock*,[79] the Second Circuit held that disclosure of the presentence report should only occur if it was necessary to meet the ends of justice.[80] The court was concerned that these reports frequently contain hearsay statements, information not relevant to the crime, and misinformation.[81] Although in the context of sentencing the trial court justifiably uses all information not disputed by the defendant, the court held that a presumption of accuracy should not be applied in an unrelated context.[82] In considering whether a third party has shown a compelling need for disclosure, the Second Circuit felt that the central element was the degree to which that party could not obtain the information from

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74. *Id.* at 391.

75. *Id.* at 391-92.

76. 711 F.2d 1164 (2d Cir. 1983).

77. *Id.* at 1167.

78. *Id.* at 1168.

79. 293 F. Supp. 1229 (N.D. Cal. 1969). *See supra* notes 59-66 and accompanying text.

80. *Charmer*, 711 F.2d at 1175. The court further felt that a compelling demonstration was needed in order to show that the ends of justice would be met by disclosure. *Id.*

81. *Id.* Although disclosure to the subject of the report is required, there is no opportunity for the defendant to confront the source of a disputed hearsay statement. *Id.* Even if the defendant successfully challenges the accuracy of the statement, it remains in the report, although the court should not rely upon it in its sentencing determination. *Id. See also*: United States v. Pugliese, 805 F.2d 1117 (2nd Cir. 1986) (When hearsay is admitted into evidence through the presentence report and defendant challenges its veracity, the government must introduce corroborating proof.). Additionally, defendants sometimes do not object to such statements, viewing them as inconsequential in the context of sentencing, or considering it a waste of time, given the conviction at hand. *Charmer*, 711 F.2d at 1175. Thus, although FED. R. CRIM. P. 32(c) provides safeguards which help point out misinformation in the report, it does not follow that misinformation is never contained in it. *Charmer*, 711 F.2d at 1175.

82. *Charmer*, 711 F.2d at 1176.

other sources.[83]

The court, in *Berry v. Dep't of Justice*,[84] in granting the defendant disclosure of his presentence report, commented on the possibility of third party access under the FOIA scheme.[85] The Ninth Circuit looked to the language of FOIA exemption (6),[86] which states that exempt from disclosure are "personnel and medical files and similar files the disclosure of which would constitute a cleary unwarranted invasion of privacy."[87] Looking to case law,[88] the court found "little difficulty" in concluding that presentence reports constitute "similar files" under the FOIA.[89] Thus, third parties seeking disclosure would be denied if such disclosure constituted "a clearly unwarranted invasion of privacy."[90]

The *Berry* court also commented that third party access is not completely barred in those circuits where the reports are not agency records subject to FOIA disclosure.[91] "If disclosure of a report is necessary to serve the ends of justice, courts will order disclosure." "Thus, whether or not presentence reports are agency records, occasional disclosure to third parties is both inevitable and desirable."[92]

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83. *Id.* at 1177. In this instance, the court found that nearly all the relevant information in the report was also contained in the government's plea memorandum. *Id.* The Arizona Attorney General also made no showing that he could not gain just as much information as contained in the report from interviewing the investigating law enforcement officials. *Id.* at 1178

84. 733 F.2d 1343 (9th Cir. 1984).

85. *Id.* at 1352-53.

86. 5 U.S.C. § 552(b)(6) (1982).

87. *Id.*

88. The phrase "similar files" has been given an expansive interpretation. *Berry*, 733 F.2d at 1353. *See* United States Dep't of State v. Washington Post Co., 456 U.S. 595 (1982) (information as to whether Iranian nationals held valid passports); Harbolt v. Dep't of State, 616 F.2d 772 (5th Cir. 1980) (names and addresses of citizens imprisoned in foreign countries for narcotics violations), *cert. denied*, 449 U.S. 856 (1980); Milizia v. Dep't of Justice, 519 F. Supp. 338 (S.D.N.Y. 1981) (criminal "rap sheet") and Metropolitan Life Insur. Co. v. Usery, 426 F. Supp. 150 (D.D.C. 1976) (job evaluations).

89. *Berry*, 733 F.2d at 1353.

90. *Id.* However, the court declined to define the term "clearly unwarranted." *Id.*

91. *Id.* at 1352.

92. *Id.*

D. Common Law Right Of Access

In *Nixon v. Warner Communications, Inc.*,[93] the materials in contention were the "Watergate Tapes," introduced into evidence in the trial of several of the ex-President's former advisers in connection with the Watergate investigation.[94] The Supreme Court affirmed a general common law right to inspect and copy public records and documents, including judicial records and documents.[95] The necessity for access pursuant to the common law right has been found, for example, where the party has manifested a "desire to keep a watchful eye on the workings of public agencies . . . and in a newspaper publisher's intention to publish information concerning the operation of government . . . ."[96] However, the right to inspect and copy judicial records is not absolute.[97] Every court has control over its own court files.[98]

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93. 435 U.S. 589 (1978).

94. *Id* at 589.

95. *Nixon*, 435 U.S. at 598-99. The common law right to access judicial records and documents has been applied in a number of different situations. *See, e.g.*: Seattle Times v. U.S. Dist. Ct., 845 F.2d 1513 (9th Cir. 1988) (pretrial detention documents); Littlejohn v. BIC Corp., 851 F.2d 673 (3d Cir. 1988) (confidential documents in a products liability suit); FTC v. Standard Fin. Management Corp., 830 F.2d 404 (1st Cir. 1987) (sworn personal financial statement); United States v. Raffoul, 826 F.2d 218 (3d Cir. 1987) (court transcripts); United States v. Smith, 787 F.2d 111 (3d Cir. 1986) (transcript of sidebar conference) and Columbia Broadcasting System v. U.S. Dist. Ct., 765 F.2d 823 (9th Cir. 1985) (documents pertaining to a motion for reduction in sentence). *See also*: Nicholas v. Gamso, 35 N.Y.2d 712, 315 N.E.2d 770 (1974) (parts of court file relating to sustained charges against a judge in a disciplinary proceeding); People v. Sharman, 17 Cal. App. 3d 550, 95 Cal. Rptr. 134 (1971) (defendant's criminal record and all public official records filed in the cause) and New York Post v. Leibowitz, 2 N.Y.2d 677, 143 N.E.2d 256 (1957) (transcript of trial judge's charge to jury).

96. *Nixon*, 435 U.S. at 597-98.

97. *Id.* at 598.

98. *Id.* at 599. Where access may become a vehicle for an improper purpose, the court may deny the common law right. *Id.* Such was the case where the court records contained "the painful and sometimes disgusting details of a divorce case," which might be "used to gratify private spite or promote public scandal." *Id.* (quoting In re Caswell, 18 R.I. 835, 836, 29 A. 259, 260 (1893) (transcript of proceedings in a divorce suit)). Similarly, courts have denied access to their files where such would become sources of "libelous statements for press consumption," *Id.* (citing Park v. Detroit Free Press Co., 72 Mich. 560, 568, 40 N.W. 731, 734-35 (1888) (pleadings and other documents in a libel suit back for new trial)), or "business information which might harm a litigant's competitive standing." *Id.* (citing Flexmir, Inc. v. Herman, 40 A.2d 799, 800 (N.J. Ch. 1945)) (injunction to restrain defendants from using or divulging trade secrets). *See also*: News-Press Publishing Co. v. State (345 So. 2d 865 (Fla. Dist. Ct. App. 1977) (denial of inspection of depositions in a criminal case where disclosure of such would endanger a person's life) and Estate of Hearst, 67 Cal. App. 3d 777, Cal. Rptr. 821 (1977) (portions of probate records of a member of a well known and wealthy family temporarily sealed because

While approving of this general rule, the Court in *Nixon* declined to delineate the exact parameters of the common law right, stating that access is a decision best left to the sound discretion of the trial court "in light of the relevant facts and circumstances of the particular case."[99]

United States v. Edwards[100] involved a request seeking permission to copy all audio and video tapes introduced into evidence for broadcast to the public during the pendency of the trial.[101] The Seventh Circuit addressed the question left unanswered by *Nixon*,[102] namely the strength of the presumption favoring public access.[103] The court, adopting the majority approach,[104] held that there is a strong presumption in favor of a common law right to inspect and copy judicial records which may only be denied on the basis of "articulable facts known to the court, not on the basis of unsupported hypothesis or conjecture."[105] The district court was faced with the task of balancing the defendant's right to a fair trial[106] against the common law

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family members and trust proprieties were subject to a series of terrorist attacks).

99. *Nixon*, 435 U.S. at 603. The Court found it unnecessary to analyze the balancing factors in order to reach a decision, for it found that "[a]n additional, unique element" was dispositive of the case. *Id.* In the Presidential Recordings and Materials Preservation Act, 44 U.S.C. 2107 (1982), Congress had already created an administrative procedure for processing and releasing to the public all of petitioner's presidential material, including the tape recordings at issue. *Nixon*, 435 U.S. at 603.

100. 672 F.2d 1289 (7th Cir. 1982).

101. *Id.* at 1290.

102. *Nixon*, 435 U.S. 597 (1978). *See supra* notes 93-99 and accompanying text.

103. *Edwards*, 672 F.2d at 1293-94.

104. *Id. See also*: In re Application of Nat'l Broadcasting Co. (United States v. Criden), 648 F.2d 814 (3d Cir. 1981) (where pretrial suppression, due process, and entrapment hearings disclosed, there was a "strong presumption that material introduced into evidence at trial should be made reasonably accessible . . . "); In re Application of Nat'l Broadcasting Co. (United States v. Jenrette), 653 F.2d 609 (D.C. Cir. 1981) (access to copies of audio and video tapes introduced into evidence "may be denied only if . . . justice so requires") and In re Application of Nat'l Broadcasting Co. (United States v. Myers) (only compelling circumstances should prevent contemporaneous access to evidence introduced at a criminal trial). *But cf.*: Belo Broadcasting Corp. v. Clark, 654 F. 2d 423 (5th Cir. 1981) (public right of access viewed as subordinate to the defendant's competing right to a fair trial).

105. *Edwards*, 672 F.2d at 1294.

106. *Id.* at 1291. The trial court considered three factors in deciding against access. *Id.* First, because the trial was as yet unresolved, access might be seen as placing a judicial stamp upon evidence which might later be overcome through testimony. *Id.* Therefore, the pendency of the trial was given considerable weight. *Id.* Second, the defendant had yet to be tried on other counts which had been severed from this proceeding. *Id.* Although stating that proper voir dire should solve the problem, the court nevertheless offered some concern over impaneling an impartial jury in a later trial. *Id.* Finally, a

right of access.[107] Although ruling that the trial court did not abuse its discretion in denying access, the Seventh Circuit found that concerns over impaneling an impartial jury in any future trial of the defendant were speculative and not a proper factor to be considered.[108]

In another recent decision, *Valley Broadcasting Co. v. United States Dist. Court*,[109] the Ninth Circuit adopted the strong presumption in favor of public access to judicial records and documents.[110] This case also involved a request to copy audio tapes introduced into evidence for broadcast during the pendency of the trial.[111] Citing *Edwards*,[112] the court held that the factors asserted by the district court against access were inadequate to overcome the strong presumption favoring the common law right to inspect or copy judicial records.[113]

The common law right to access presentence reports was commented on, in dictum, by the Ninth Circuit in *Columbia Broadcasting System v. United States District Court*.[114] The defendant in the underlying case pleaded guilty to drug and tax evasion charges.[115] As part of the plea bargain, the defendant agreed to testify, if called, at the celebrated John DeLorean trial.[116] Subsequently, he filed a motion to reduce his sen-

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recent resolution of the Judicial Conference of the United States which reaffirmed the ban against broadcasting trials was found relevant in weighing against access. *Id.*

107. *Id.*

108. *Id.* at 1296.

109. 798 F.2d 1289 (9th Cir. 1986).

110. *Id.* at 1294.

111. *Id.* at 1290.

112. *Edwards*, 672 F.2d 1289. *See supra* notes 103-108 and accompanying text.

113. *Valley Broadcasting*, 798 F.2d at 1289. The district court asserted that providing the media with tapes as they were introduced into evidence was an administrative inconvenience and further that the danger of loss or erasure of the original tapes should militate against access. *Id.* at 1294. Additionally, the court articulated concerns about jury misconduct and, as in *Edwards*, 672 F.2d at 1289, the possibility of complications in impaneling an unbiased jury in upcoming trials. *Valley Broadcasting*, 798 F.2d at 1289. The Ninth Circuit held that the logistics of supplying the media with tapes on a day-by-day basis were not insurmountable, provided that certain cooperative steps were taken by the broadcasters. *Id.* at 1295-96. The other arguments against release of the tapes were deemed conjecture, save for one reference to the defendant in an as yet untried connected case. *Id.* at 1296.

114. 765 F.2d 823 (9th Cir. 1985).

115. *Id.* at 824.

116. United States v. DeLorean, 561 F.Supp. 797 (C.D. Cal. 1983).

tence.[117] The motion, along with the government's response, were filed under seal.[118] Finding insufficient specificity in the interests asserted by the government, the court ordered the documents disclosed.[119] However, the court commented:

> "Our opinion is not to be read to disapprove the practice of keeping presentence reports confidential . . . . We do not reach that issue, for this case is distinguishable. The issue here concerns a proceeding under Rule 35, and nothing in the Rule's language, history, or judicial interpretation suggests that documents filed in support of motions for reduction of sentence should be treated in the same manner as presentence reports. In the absence of explicit legislative intent to the contrary, the general presumption of openness will prevail."[120]

IV. THE COURT'S ANALYSIS

In *United States v. Schlette*,[121] each petitioner offered separate and distinct arguments with which to demonstrate its particular need for release of the presentence report.[122] Accordingly, the Ninth Circuit separately analyzed each party's need for disclosure.[123] The court stated that a third party need only make a threshold showing that disclosure would serve the ends of justice.[124] Whether such a need exists would be a matter within the discretion of the trial judge.[125] Once this is demonstrated, the decision of whether disclosure is warranted would require the court to balance the need for disclosure against the reasons for confidentiality.[126] The court emphasized that "if the reasons for maintaining confidentiality do not apply at all in a given case, or apply only to an insignificant degree, the party seeking disclosure should not be required to demonstrate a large compelling

117. *CBS*, 765 F.2d at 824.
118. *Id.*
119. *Id.* at 825.
120. *Id.* at 826.
121. 842 F.2d 1574 (9th Cir. 1988).
122. *Id.* at 1576.
123. *Id.* at 1581-84.
124. *Id.* at 1581
125. *Id.*
126. *Id.*

need."[127]

A. THE NEWSPAPER'S ARGUMENT

The court determined that the newspaper's interest in obtaining Schlette's presentence report was not founded on an improper purpose, such as exploiting the tragic details of Schlette's life or the sensationalism of the Weissich murder.[128] In fact, the court reasoned that, by publishing the desired information, a legitimate public interest in the inner workings of the criminal justice system would be served.[129] The particulars of the case only served to strengthen the public interest.[130]

The court elaborated further, stating that public awareness of the mechanisms of the criminal justice system serves the ends of justice by giving the public sufficient information with which to join in a dialogue about the courts and the treatment of defendants.[131] "If the system has flaws, it is all the better that these flaws be exposed and subjected to public comment."[132]

Regarding the government's position favoring competing interests, the court stated that privacy concerns may still militate against disclosure in a given case.[133] When it considered *Berry*, the Ninth Circuit observed that, under FOIA exemption (6), disclosure of the defendant's "previous criminal record, early life and developmental history, school and employment record, mental and physical condition, religion, habits, attitudes, associates and other pertinent factors" cannot be revealed to third parties seeking disclosure under FOIA if such disclosure would constitute "a clearly unwarranted invasion of privacy."[134] How-

127. *Id.* (quoting United States Indus. v. U.S. Dist. Court, 345 F.2d 18, 21 (9th Cir.) (memorandum pertaining to imposition of sentences and fines in an antitrust suit held proper object of federal discovery proceeding), *cert. denied*, 382 U.S. 814 (1965)).

128. *Id.* at 1582.

129. *Id.*

130. *Id.* at 1582-83. The court pointed to the facts of the case, stating "[t]he public is legitimately interested when a former public prosecutor is murdered by a felon whose conviction he obtained. This public interest is particularly strong when the felon who has vowed to kill his prosecutor shoots the prosecutor dead while out on probation for a firearm offense." *Id.*

131. *Id.* at 1583.

132. *Id.*

133. *Id.* at 1581.

134. *Id.* at 1580-81 (quoting Berry v. Dep't. of Justice, 733 F.2d 1343, 1353 (9th Cir.

ever, the court found that, analogous to suits for defamation, privacy interests are personal to the individual and do not survive that person's death.[135] Thus, this ground for nondisclosure was unavailable.[136]

The government additionally argued for nondisclosure in order to prevent a chilling effect on future sources of information regarding presentence reports.[137] This line of reasoning assumes that sources of information important to the quality of presentence reports will dry up if confidentiality is not preserved.[138] The "free flow of information" rationale was deemed insufficient in light of the empirical evidence to the contrary[139] and when balanced with the newspaper's common law right of access.[140] Accordingly, the newspaper was entitled to disclosure of the presentence report, subject to any appropriate deletions by the district court.[141]

B. The Estate's Argument

The heart of the estate's argument for release of the presentence report was that it was required in order to determine whether the probation service was negligent in its failure to warn Weissich of any danger posed to him by Schlette.[142] In response, the government asserted that this was nothing more than a request for disclosure to facilitate a civil lawsuit, and therefore was not a sufficient showing of need to breach the confidentiality of the presentence report.[143] While generally in

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1984)). Because disclosure was warranted without reference to the FOIA, the issue of whether presentence reports in the hands of the court probation service should be subject to FOIA disclosure was not considered. *Id.* at 1581 n.2.

135. *Id.* at 1581. *See, e.g.*: Wehling v. Columbia Broadcasting Sys. 721 F.2d 506, 509 (5th Cir. 1983) ("In Texas, a suit for defamation is personal to the one about whom the statements are made."); Stein-Sapir v. Birdsell, 673 F.2d 165, 167 (6th Cir. 1982) (under Ohio law, "actions for libel or slander abate with the death of either party") and Gruschus v. Curtis Publishing Co., 342 F.2d 775, 776 (10th Cir. 1965) (defamation action did not survive the death of the defamed party).

136. *Schlette*, 842 F.2d at 1581.

137. *Id.* at 1580.

138. *Id.*

139. *See supra* note 35 and accompanying text.

140. *Schlette*, 842 F.2d at 1584.

141. *Id.*

142. *Id.*

143. *Id.*

agreement with the government's position, the court was concerned that the information sought could not be obtained from another source.[144] The court noted that, while the estate might depose the probation officers and the psychiatrist as the government suggested, such discovery would not produce the report itself, which was relevant to the estate's contemplated suit.[145] As with the newspaper's request, the court found that the government had not articulated a valid reason to offset the estate's threshold showing of need for disclosure.[146]

V. CRITIQUE

In *United States v. Schlette*,[147] the Ninth Circuit purported to use well established criteria and existing law in its determination of whether to disclose a presentence report to a third party. Yet, contrary to every previously reported opinion,[148] the court granted the requests of these third parties for disclosure.[149] In light of changing attitudes in the legislature (towards expanded disclosure to the defendant and diversified use of the report) and judicial decisions in *Berry* and *Julian* to allow for post-sentence disclosure to the defendant under FOIA, the Ninth Circuit's decision in *Schlette* seems to reflect the growing liberalization of disclosure of the presentence report.[150] In stating that a third party need only make a threshold showing that disclosure would serve the ends of justice, the court changed the initial burden of proof standard required of the third party requester.

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144. *Id. See supra* note 83 and accompanying text.

145. *Schlette*, 842 F.2d at 1584. The court reasoned that if the probation service knew of the threats Schlette had made against Weissich previously and did not include this information in the report, this was important. *Id.* If the probation service did include this information in the report, and the court decided in favor of probation for Schlette, this too was relevant. *Id.* Whatever information was contained in the presentence report, it was the report itself that was relevant to the estate's contemplated action. *Id.*

146. *Id.*

147. 842 F.2d 1574 (9th Cir. 1988).

148. *See supra* note 3 and accompanying text.

149. *Schlette*, 842 F.2d at 1584.

150. "These statutory concessions served as indicators that, by the early 1980s, the control that the federal courts had always assumed over presentence reports was less than absolute and could be challenged by statutorily mandated diversifications of the functions of court documents." Shockley, THE FEDERAL PRESENTENCE INVESTIGATION REPORT: POSTSENTENCE DISCLOSURE UNDER THE FREEDOM OF INFORMATION ACT, 90 ADMIN. L. REV. 79 (1987).

In doing so, the court apparently rejected the standard favored by other circuits, that of requiring the third party to show a compelling need.[151]

Well aware of the dicta contained in *CBS*,[152] the court took the opportunity to make clear the fact that the *Schlette* opinion did not conflict with *CBS*.[153] Although agreeing that presentence reports are confidential, the court stated that " 'confidentiality' is not some talismanic utterance" to invoke when refusing to disclose a presentence report when a sufficient showing for disclosure is made.[154] However, the court in *CBS* also hinted that, because of legislative intent, Federal Rule of Criminal Procedure 32 may place more confidentiality on presentence reports than what was afforded the documents at issue there.[155] In view of their decision in *Schlette*, as well as *Berry* and *Julian*, this statement seems both hollow and at odds with the trend in the Ninth Circuit.

The court identified several arguments against disclosure of presentence reports advanced in previous decisions.[156] First, the argument that disclosure would dry up sources of confidential information was rejected as not supported by empirical data.[157] Similar arguments that courts would not receive sufficient information upon which to fashion an appropriate sentence and that the quality of presentence reports would decline were discounted.[158] Thus, the only remaining concern left before the

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151. *See supra* note 64 and accompanying text. However, the court found that:

> We need not decide whether the Second Circuit's burden of proof is in conflict with our standard in third-party disclosure cases . . . . Even under the arguably higher "compelling need" standard set by *Charmer*, . . . a sufficient threshold showing has been made in the present case to warrant disclosure, absent a legitimate reason for maintaining confidentiality.

Schlette, 842 F.2d at 1579, n.1.

152. *CBS*, 765 F.2d 823.

153. *Schlette*, 842 F.2d at 1583.

154. *Id.*

155. *CBS*, 765 F.2d at 826. *See supra* note 31 and accompanying text.

156. *Schlette*, 842 F.2d at 1577-81.

157. *Id.* at 1581. *Compare*: United States v. McKnight, 771 F.2d 388, 390 (8th Cir. 1985) (disclosure denied in order to ensure the free flow of information) and United States v. Charmer Indus., Inc., 711 F.2d 1164, 1171 (2nd Cir. 1983) (disclosure may adversely affect the court's ability to obtain data on a confidential basis for use in the sentencing process).

158. *Schlette*, 842 F.2d at 1581. *See*: Comment, *Proposed Changes in Presentence*

court was the issue of privacy.[159] Following the general rationale applied in defamation suits, the court found that Schlette's death foreclosed any argument that disclosure would be a clearly unwarranted invasion of privacy.[160]

In light of the court's finding that the government failed to show a legitimate reason for confidentiality, the court did not require the petitioners to demonstrate a large compelling need for disclosure.[161] With that, the court remanded the case to the district court to redact information from the report, pursuant to a Rule 32(c)(3)(A) type determination of what information should remain confidential, and permit the petitioners to read the documents and make notes.[162] If Mr. Schlette had been alive, the disclosure of a redacted version of the presentence report still might have fallen short of a clearly unwarranted invasion of privacy, for under the *Schlette* rationale, all sensitive information would have been expurgated prior to disclosure.

With the rejection by the Ninth Circuit of all the arguments presented by the government, it remains to be seen whether the government could ever show a legitimate reason for keeping the presentence report confidential. Thus, the possibility of future disclosures of the report to third parties remains viable. Along with such a possibility comes inevitable questions.

The court seemed to give only light regard to the warning contained in *Charmer* that the presumption of accuracy in the presentence report is not necessarily warranted in an unrelated context.[163] The primary purpose of the report is to assist in determining an appropriate sentence for the convicted criminal defendant.[164] Defendants may have numerous motives in not disputing statements contained in the presentence report.[165]

Investigation Report Procedures, 66 J. CRIM. L & CRIMINOLOGY 56, 58 (1975) (examination of arguments for and against mandatory disclosure to the defendant and defense counsel before sentencing).

159. *Schlette*, 842 F.2d at 1581.

160. *Id.* at 1581 (quoting Berry v. Dep't of Justice, 733 F.2d 1343, 1353 (9th Cir. 1984)).

161. *Id.* The court maintained that even though not required, a sufficient threshold showing of need was presented, absent a legitimate reason for confidentiality. *Id.*

162. *Id.* at 1585.

163. *Charmer*, 711 F.2d at 1176.

164. *See supra* note 26 and accompanying text.

165. *See supra* note 81 and accompanying text.

Although courts may properly rely on the information contained in the report to reach a sentencing decision,[166] perhaps the same may not be true of newspapers, civil litigants or others seeking disclosure in dissimilar contexts. Courts in the future may be faced with determining whether restrictions on the use of presentence reports by third parties may be properly imposed.

Finally, the Ninth Circuit may have purposely reached its decision in *Schlette* without relying on the FOIA,[167] in anticipation of the Supreme Court's ruling in *Julian*.[168] Although the majority in *Julian* felt that FOIA exemption (5) would preclude third party disclosure,[169] Justice Scalia's dissenting opinion[170] may have voiced concerns held by those on the Ninth Circuit as well. Justice Scalia contended that it was inaccurate for the Court to say "the reasoning of the cases denying disclosure to third party requesters would have little applicability to a request by a defendant to examine his own report . . . . "[171] Justice Scalia stressed the interpretation that, under the FOIA, there is no such person as a "third party requester," since all FOIA requesters have equivalent status and equivalent rights to the public documents that the FOIA identifies.[172] Thus, the individuating characteristics of the requester should not be considered.[173]

The Court in *Julian* took great pains to decide the case narrowly. However, the possibility existed that it would extrapolate the interpretation that all requesters were of equal status, and allow for disclosure under the FOIA not only to the defendants, but to "any person" requesting the document. Had this been the case, it would seem fairly absurd that a third party, having been denied access under the common law, could then turn around and gain disclosure of the presentence report under the FOIA.

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166. *Charmer*, 711 F.2d at 1176.

167. *See supra* note 45 and accompanying text.

168. 108 S. Ct. 1606 (1988). The *Julian* case was decided in May of 1988, two months after the Ninth Circuit's decision in *Schlette*.

169. *See supra* note 53 and accompanying text.

170. *Julian*, 108 S. Ct. at 1614-19.

171. *Id.* at 1618.

172. *Id.* at 1618. *See supra* note 45 and accompanying text.

173. *Julian*, 108 S. Ct. at 1617.

VI. CONCLUSION

United States v. Schlette[174] sets a new precedent, in light of the fact that no prior recorded federal decision has allowed a third party access to a presentence report.[175] Here, disclosure of the report was allowed to two third parties under a new standard of proof. A threshold showing of need, in the absence of a legitimate reason for maintaining confidentiality, will suffice in gaining disclosure.

The portions of the opinion regarding the newspaper's common law right to access judicial records would appear to strengthen what is already a "strong presumption of access."[176] However, the facts of the case would seem to indicate that the newspaper's showing need not have been overpowering, for the government did not demonstrate a legitimate reason for denying disclosure.

As stated in *Hancock*,[177] the reasons for disclosing the presentence report to defendants is quite different from the need for disclosure to plaintiffs in a civil action.[178] However, in approving disclosure to a third party seeking evidence upon which to base a negligence suit, the Ninth Circuit almost guarantees that *Schlette* will be cited in future requests. In entertaining those requests, the courts will most assuredly have to analyze new arguments presented by the government for maintaining confidentiality, lest disclosure be automatic. This decision may someday aid in disclosing the presentence report of someone who, unlike Mr. Schlette, is not deceased.

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174. 842 F.2d 1574 (9th Cir. 1988).
175. *See supra* note 3 and accompanying text.
176. *See supra* note 95 and accompanying text.
177. *Hancock Bros., Inc. v. Jones*, 293 F. Supp. 1229, 1233 (N.D. Cal. 1968).
178. *Id.* at 1233.
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