

THE ALTERNATE DEFENSE PRE-SENTENCE INVESTIGATION REPORT: TEMPERING HARSH STATE SENTENCING RECOMMENDATIONS

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In the Wisconsin circuit-court system, judges in felony cases may order that a pre-sentence investigation (PSI) report be generated by a probation/parole agent from the Department of Corrections (DOC) so that the court has the fullest understanding possible of the defendant's life and circumstances at sentencing. Wis. Stat. § 972.15(1). *See also* Lloyd E. Ohlin & Frank J. Remington, *Discretion in Criminal Justice: The Tension Between Individualization and Uniformity* 148 (1993).

This, of course, is so that the court will be able to make the most fully-informed and fairest dispositional decision possible. At times, PSI reports prepared by state corrections agents recommend prison sentences which are harsher than what the prosecutors recommend. One way of ameliorating an undue prison-sentence recommendation in a court-ordered PSI report is for the defense to present its own alternate PSI report for the judge's information and consideration at sentencing. This article describes the main purposes of a PSI report, the typical structure of PSI reports, potentially prejudicial effects of state-generated PSI reports, and how defense counsel may try to counter an unduly harsh state PSI recommendation by submitting a defense alternate PSI report.

The Anatomy of a Pre-Sentence Investigation Report

In Wisconsin's state courts, a PSI report normally consists of two parts.

First is a state-mandated cover sheet containing the basic personal information about the defendant, such as date of birth, sex, height, and weight and information about the county circuit court involved and the charged offense(s).

Second, the state form is usually stapled on top of a multi-page document of varying styles and length which all present, more or less, separate paragraphs outlining the information sources relied on by the PSI writer, a review of the defendant's general background, the offense(s) as alleged, the defendant's version of the offense(s), victim impact and restitution needs, a review of any pending criminal charges (see *Handel v. State*, 74 Wis. 2d 699, 247 N.W.2d 711 (1976) where the court held a judge does not deny due process by considering pending criminal charges in determining a sentence), past arrests and existing conviction record of the defendant, an analysis of the defendant's acceptance or not of responsibility, and any possible prison programs or prison alternatives that might be available for the defendant under the circumstances, such as eligibility for earned release or the Challenge Incarceration Program. Wis. Stat. §§ 972.15(2b) & (2c).

Finally, the writer's sentencing recommendation is given.

Unlike their federal counterparts which typically contain an exhaustive analysis of federal sentencing guideline applications (*See generally*, Gregory W. Carman & Tamar Harutunian, *Fairness at the Time of Sentencing: The Accuracy of the Presentence Report*, 78 St. John's L. Rev. 1, 6 (2004)), Wisconsin state-generated PSI reports are normally around a dozen pages long, depending on the defendant's criminal history review, and normally contain little or no analysis of applicable sentencing guidelines. The State of Wisconsin has official sentencing guidelines for many crimes which our courts must at least consider at sentencing, though it is not mandatory that they follow them. *See State v. Gallion*, 2004 WI 42, 270 Wis.2d 535, 678 N.W.2d 197. The DOC also has its own sentencing guidelines, with a number of strictly subjective factors to be applied, in order to formulate their recommendations in court-ordered PSI reports. *See Michael Lew & Eric Kim, DOC Changes its Pre-Sentence Investigation Process by Developing Truth-in-Sentencing Recommendation Grids, Wisconsin Defender*, Spring 2004, available at <http://www.wisspd.org/html/publications/wdefspring04/presentinv.pdf>

Among the items of information that must be included in a state-generated PSI report is a victim-impact statement. The agent-writer is required, by statute, to contact any victims involved to ascertain any economic, physical and psychological impact on them (see Wis. Stat. §§ 972.15(2m)) and the writer may interview anybody whom the writer believes it is appropriate to contact. Ohlin & Remington, *Id.* The writer is therefore required by law to act as an advocate for any victims involved and, thereby, essentially serves in other than an impartial capacity. The judge may conceal the identity of any person who gives the writer a statement. Wis. Stat. § 972.15(3). Court-ordered PSI reports are confidential and may not be made available to any person, with the exception of the defendant, his or her attorney and the prosecutor's office, except upon specific authorization of the court. Wis. Stat. §§ 972.15(4) & (4m). A defendant and/or his or her attorney have an absolute right to review the report prior to sentencing. Wis. Stat. § 972.15(2); *See State v. Skaff*, 152 Wis. 2d 48, 447 N.W.2d 84 (Ct. App. 1989). After sentencing, the DOC may use the report as it sees fit for the defendant's rehabilitative and punitive needs, and it may share the report with other agencies for purposes related to "correctional programming." Wis. Stat. § 972.15(5).

The Potentially Adverse Impact of a State-Generated PSI Report

Being utilized by any number of state actors relative to a defendant's future after a judge uses it as a basis for determining the sentence in a stage of the felony prosecution process where normal evidentiary rules do not apply (*See Hammill v. State*, 52 Wis. 2d 118, 187 N.W.2d 792 (1971)), it is clear that a PSI report can have long-term repercussions for a defendant, impacting his or her life long after he or she serves any court-ordered prison time. That said, it should seem obvious that a PSI report needs to be as free from bias and as neutral as possible. But, in addition to the victim-impact statement, several of the other items contained in a PSI report, such as the writer's impression of the defendant's acceptance of responsibility and remorse for his or her actions, are highly subjective. Case-law developments have generally opened the door wide to the use by corrections agents and consideration by courts of potentially-prejudicial subjectivity and bias in PSI reports. Specifically, the Wisconsin Supreme Court has ruled that, where a PSI report consists of highly subjective information about a defendant's personality, social

circumstances, and general pattern of behavior in sections with titles like "Agent's Impressions," it is not necessarily biased, nor does it necessarily contain incompetent material, as such reports are not limited to evidence that is admissible in court. See *State v. Jackson*, 69 Wis. 2d 266, 230 N.W.2d 832 (1975). In 1997, the Court of Appeals ruled that it was permissible for a judge to consider for purposes of sentencing a PSI report written by an agent who was married to the prosecutor, though the report was deemed to be biased against the defendant as a matter of law. See *State v. Suchocki*, 208 Wis. 2d 509, 561 N.W.2d 332 (Ct. App. 1997) where the Court of Appeals found that the PSI report was *per se* biased and improper to use by the Kewaunee-County judge in question even though the Court allowed the PSI report and sentence to stand.

One Remedy for an Unfairly Slanted PSI Report

A defendant's attorney may generate his or her own PSI report for the judge. See generally *State v. Greve*, 2004 WI 69, 272 Wis. 2d 444, 681 N.W.2d 479. In a practical sense, there is too great a risk that a state PSI report can harm the fairness and neutrality of a court's independent, decision-making process at sentencing for a defense attorney not to try to directly counter that risk with an alternate, defense PSI report. Judges typically take what's involved in the sentencing process very seriously and they read PSI reports carefully. See Ohlin & Remington, *Id.* at 148. Aware that most judges tend to carefully consider everything presented to them for sentencing, this writer has found that supplementing a defense sentencing memorandum with a PSI report generated by a qualified defense expert, or even letting a defense's alternate PSI report stand alone at sentencing, can sometimes ameliorate the unfair influence that emotional victim-impact statements in a state PSI report might have on a busy judge's sentencing decision. Care must be taken, however, to reconcile differences in information presented in both the state-generated PSI report and a defense alternate PSI report; it has been this writer's experience in the past that some clients are reported by the state PSI writers to have said something which differs from statements given to the defense PSI writer. A state PSI report must be thoroughly compared to a defense PSI report, and inconsistencies in what a client tells a state corrections agent and what he or she tells the defense PSI writer must be reconciled before appearing in court for the sentencing hearing. Otherwise, defense counsel will end up in the uncomfortable position of having to hash out such differences on the spot in open court.

There are advantages to presenting a well-written defense alternate PSI report that should not be passed up by the defense attorney when he or she knows that his or her client is before a judge for sentencing who will give fair weight to a defense-generated PSI report. For example, the restrictions placed on state-generated PSI reports do not apply to reports generated by the defense. See *State v. Greve*, *Id.* A defense alternate PSI report may be submitted for review to anyone who might be able to improve it or add to it constructively, and copies of the finished report may be provided to anyone before sentencing, including the assigned writer of the state's PSI report. Providing the state's agent a copy of a balanced, fair assessment by a well-qualified dispositional expert of a defendant's sentencing profile, especially one that contains a thorough review and analysis of any pertinent sentencing guidelines, to include the DOC's own sentencing guidelines, has proven well worth the effort in the past for this writer.

Another advantage to submitting a defendant's alternate PSI report to a court is that a court will find it much easier to formulate a non-prison disposition at sentencing when competently presented with viable treatment programs and non-prison options by a credible professional who has an intimate knowledge of realistic prison options in the court's geographic area. Even if prison is found to be appropriate, this writer's over-all experience dictates that a balanced, well-drafted defense PSI report can be extremely helpful in reducing the amount of prison time meted out.

However, one significant weakness in submitting a defense PSI report is that a defense PSI report is accorded lesser status than, and is given less consideration and weight as, a court-ordered PSI report. *See State v. Greve, Id.*, ¶28 where the court held that the defense sentencing memorandum is to be afforded less status than a court-ordered pre-sentence investigation report primarily because the document is a defense-advocacy document and may not serve the public interest. This is why it is vitally important that the defense PSI writer be selected based not only on credibility and experience in the legal community, but also based on his or her knowledge of viable treatment and other program options to prison. A PSI writer who is a tenured professor of a relevant, forensic-science field at a well-known area teaching hospital or university may seem to be a highly credible expert with unbeatable experience in his or her area of expertise, but he or she may lose all credibility in the eyes of a skeptical judge when his or her report carries an opinion that a defendant is unlikely to reoffend based primarily on the results of tests assessing future risk of recidivism after examining the defendant only once after having reviewed the criminal complaint and copies of pertinent discovery materials. *See State v. Jose Lomeli-Lozano*, 2004AP365-CR, ¶28 (Ct. App. 2004)(unpublished), available at <http://www.wisbar.org/res/capp/2005/2004ap000365.htm> (leery Milwaukee judge characterized highly-credentialed and experienced psychiatry professor's data-supported opinion that defendant presented little risk of reoffending as "wonderful tests and actuarials [that] predict what's going to happen in the future," choosing then to give no weight to the expert's qualified recommendation that the defendant could be placed on probation instead of being incarcerated). If an expert's opinion is that a defendant who has been charged with committing one or more heinous criminal offenses more than once leading up to his or her arrest and conviction should be placed on probation, then that recommendation realistically needs to be tempered with common sense and it must be supported by more than just empirical data. In this writer's experience, an offender's best chances of avoiding substantial prison time and being placed on probation may only come with a viable recommendation that the defendant be placed in an appropriate, available treatment setting or other option which provides some amount of more intense, formal, corrections-sanctioned supervision prior to being released on probation. Defense counsel will always be free to argue for a more lenient sentence than that recommended in a defense PSI report, and that can serve to give the defense PSI writer invaluable credibility with both the court and the prosecution.

The Cost and Availability of Defense PSI Report Writers

In this writer's experience, an effective defense PSI report writer can cost, at the time of this writing, anywhere between \$1,500 and \$3,500. Some will accept assignments at rates

approved by the State Public Defender's Office. This writer has found that the best way to discover qualified defense PSI writers in one's community is to ask colleagues or ask the local SPD office for recommendations. Case-law research can also turn up the names of experienced PSI writers, but no guarantees of their effectiveness.

Working with a Defense PSI Report Writer

In order to get started, the defense PSI writer normally needs to receive copies of the criminal complaint and pertinent discovery materials, such as any available police incident reports and victim/witness statements. In order to do the actual presentence-investigation portion of his or her job, the defense PSI writer will also need the names, telephone numbers and other contact information of available defense witnesses, family members, friends, current or past employers and other people involved in the defendant's life who might be helpful in providing personal information about the defendant for the report.

Once the PSI writer has copies of pertinent charging documents and discovery, he or she may choose to interview the defendant first before contacting any available defense witnesses and family members. If the defendant is incarcerated, the defense PSI writer will need the defense attorney to contact the place of confinement to advise its administration that the defense PSI writer has been hired and will need access to the defendant to conduct his or her interview. Though every place of confinement has its own administrative rules, most, if not all of them will want the defense attorney to send them the PSI writer's information and defense attorney's request for the PSI writer to have contact with the defendant in writing. Most, if not all places of confinement in Wisconsin with which this writer has coordinated in the past accept the defense attorney's written request for PSI writer-defendant contact via facsimile. Some will want the defense attorney to expressly indicate if the PSI writer may have contact with the defendant without the defense attorney being present. Calling the main administrative office of the place of confinement is usually all it takes to get the name and facsimile number of the official in charge of professional visits.

Finally, if the defendant speaks a language which the defense PSI writer does not speak fluently, then the defense attorney will need to take the extra step of securing an interpreter for the defense PSI writer. This usually entails some extra cost, and the defense attorney will need to arrange payment for the interpreter's services performed at the place of confinement during the PSI writer's interview. If the defense attorney was appointed by the SPD's Office, he or she will need to check to see if an expense request needs to be submitted to the SPD for authorization to pay for an interpreter *before* the interview is scheduled.

Conclusion

A well-crafted defense alternate PSI report can be advantageous in providing the court balanced input about a client and have very positive results for him or her at sentencing. If cost is not such an issue that a defense PSI report can be funded, it is, in this writer's experience, always worth the price when before a judge at sentencing who will fairly consider it. Though a properly written and realistically balanced defense PSI report can

stand on its own at sentencing and be very effective by itself, defense counsel should consider supplementing it with a sentencing memorandum or well-organized oral argument at the sentencing hearing requesting a disposition other than recommended in either the state or the defense PSI report. This strategy can lend more credibility to the defense PSI report writer and thus, get more just results for the defendant if it brings a court to follow more, either in whole or in part, the recommendation in the defense PSI report.



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