

SENTENCING — Disclosure of presentence report under Rule 26.6
Rev. 3/2010

Rule 26.6, Ariz. R. Crim. P., governs the disclosure of presentence reports prepared pursuant to Rule 26.4 and also the disclosure of diagnostic reports and mental health reports prepared pursuant to Rule 26.5. Rule 26.6 generally provides that both the prosecution and defense may "inspect all presentence, diagnostic and mental health reports." In addition, the victim may inspect the presentence report, except for any parts that the court has excised or that are confidential as a matter of law, and such reports are generally matters of public record. The rule states:

Rule 26.6. Disclosure of the pre-sentence, diagnostic, and mental health reports

a. **Disclosure to the Parties.** The court shall permit the prosecutor and defense counsel, or if without counsel, the defendant, to inspect all presentence, diagnostic and mental health reports. A portion of any report not made available to one party shall not be made available to any other. Once the pre-sentence report is made available to the defendant, the court shall permit the victim to inspect it except those parts excised by the court or made confidential by law.

b. **Date of Disclosure.** Reports ordered under Rules 26.4 and 26.5 shall be made available to the parties at least 2 days prior to the date set for sentencing. Reports ordered under Rule 26.7(c) shall be made available no more than 2 days after delivery to the court and no less than 2 days prior to the pre-sentencing hearing unless agreed otherwise by the parties.

c. **Excision.** The court may excise from the copy of the pre-sentence, diagnostic and mental health reports disclosed to the parties:

- (1) Diagnostic opinions which may seriously disrupt a program of rehabilitation,
- (2) Sources of information obtained on a promise of confidentiality and,
- (3) Information which would disrupt an existing police investigation. When a portion of the pre-sentence report is not disclosed, the court shall inform the parties and shall state on the record its reasons for

making the excision.

d. Disclosure After Sentencing.

(1) After sentencing, all diagnostic, mental health and pre-sentence reports, other than those portions excised under (c)(2) and (c)(3), shall be furnished to persons having direct responsibility for the custody, rehabilitation, treatment and release of the defendant. The unexcised reports shall be made available to a reviewing court when a relevant issue has been raised and to a court sentencing the defendant after a subsequent conviction.

(2) Neither a pre-sentence report nor any statement made in connection with its preparation shall be admissible as evidence in any proceeding bearing on the issue of guilt.

e. Public Disclosure of Pre-Sentence Diagnostic and Mental Health Reports. Reports prepared under Rules 26.4, 26.5 and 26.7(c) are matters of public record unless otherwise provided by the court or made confidential by law.

The usual rule is that all such reports are public information and should be disclosed. A party who is seeking to block disclosure bears the burden of showing the probability that specific, material harm will result from disclosure. *Mitchell v. Superior Court*, 142 Ariz. 332, 335, 690 P.2d 51, 54 (1984).

Under Rule 26.6(c), the sentencing court may delete from the reports three types of information: first, any information that may "seriously disrupt" the defendant's rehabilitation; second, the sources of information obtained on promises of confidentiality; and third, any information that would disrupt an ongoing police investigation. However, if the court makes any such deletions, the court must inform the parties that it has done so and "shall state on the record its reasons" for excising that material from the reports. Note that Rule 26.6(c)(2) allows the trial court discretion to withhold the "sources of information obtained on a promise of confidentiality." The rule refers to withholding the source of the information -- that is, the identity of the person

who gave the information -- not the information itself. "The exception applies to the identity of a source of information not the information." *State v. Weatherholt*, 121 Ariz. 240, 242, 589 P.2d 883, 885 (1979). In *Weatherholt*, the problem was that disclosing the information to the defendant would itself reveal its source. The Arizona Supreme Court held: "If information given in confidence identifies the source, the policy of the rule forbids its consideration in the sentencing when the information is not disclosed." *Id.*

Rule 26.6(d)(2) states that neither the presentence report, nor any statement made in preparation of a presentence report, is "admissible as evidence in any proceeding bearing on the issue of guilt." That statement refers only to the issue of the guilt of the defendant who is making the statement to the probation officer. In *State v. Vaughn*, 124 Ariz. 163, 602 P.2d 831 (App. 1979), Vaughn's codefendant was arrested implicated Vaughn in statements to police. The codefendant pleaded guilty and in his own presentence report, he also made statements implicating Vaughn. At trial, the codefendant testified against Vaughn and repeated those statements. Vaughn argued that admitting the codefendant's statements violated Rule 26.6(d)(2) precluding the use of any statement made in connection with a presentence report "in any proceeding bearing on the issue of guilt." *Id.* at 165, 602 P.2d at 833. The court rejected that argument, stating, "The purpose of the rule is to encourage a defendant to be candid with the probation officer preparing the report. It has no application to a proceeding bearing on the issue of the guilt of someone other than the declarant." *Id.* [citation omitted].

Rule 26.6(d)(2) also refers only to statements made by the defendant to the probation officer, not his statements to other persons such as witnesses. In *State v.*

Rice, 116 Ariz. 182, 568 P.2d 1080 (App. 1977), the defendant pleaded guilty to child molestation. Before sentencing, he circulated a petition among his friends asking the court to be lenient in sentencing him; also, at the probation officer's request, he asked certain friends to write letters of recommendation for him. As the probation officer suggested he do, the defendant told them that he had, in fact, molested a child before asking them to act on his behalf. At the sentencing, when it became clear that the trial court would not put the defendant on probation, he withdrew from his plea and went to trial. At trial, the State called one of the defendant's friends. The friend testified that the defendant had told her he had molested the child. On appeal, the defendant argued that admitting the friend's testimony about the defendant's admission violated Rule 26.6(d)(2) because the statement was made in connection with a presentence report. The court disagreed, noting, "the rule only governs statements made to the probation officer. It does not apply to statements made by [the defendant] to third persons such as [his friend]." *Id.* at 117, 568 P.2d at 1085.