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A REVIEW OF THE PRESENTENCE DIAGNOSTIC STUDY PROCEDURE IN NORTH CAROLINA

BY

CHARLES E. SMITH, M.D.*

The scientific study of the offender has a long tradition in Anglo-American jurisprudence. The most usual types of examinations employed are medical, social, psychological, and psychiatric.¹ Courts request these examinations in order to increase their knowledge and understanding of individual offenders and to obtain additional information which is needed to determine the sentence to be imposed. In most jurisdictions, resources for these special studies are available on an informal, ad-hoc basis. Several jurisdictions, including North Carolina, have enacted statutory authorizations for these examinations.²

When a defendant is referred for study prior to the imposition of final sentence, a judge may delegate to the study group the responsibility for developing collateral information to be used in sentencing, but he may not delegate his ultimate responsibility for imposing final sentence. Preferably, the judge who presides at the trial should impose final sentence, unless there are compelling reasons to do otherwise.

The format currently employed in the diagnostic study of offenders follows a medical model, which is primarily psychiatric in character. Legal views of the efficacy of these psychiatrically oriented studies of offenders have

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1. See generally, N. EAST, *SOCIETY AND THE CRIMINAL* (1949). See also M.S. Guttmacher, *The Psychiatric Approach to Crime and Correction*, LAW AND CONTEMPORARY PROBLEMS, 23 LAW AND CONTEMP. PROB. 633 (1958) and C.E. Smith, *Recognizing and Sentencing the Exceptional and Dangerous Offender*, 35 FED. PROBATION 3 (1971).

2. States having statutory provisions for special examinations of adult felons include Kansas, California, Massachusetts and Maryland. Statutes providing for examination of sex offenders exist in several jurisdictions including New Jersey, Massachusetts, California, and the District of Columbia. In addition, court psychiatric clinics for the study of adult offenders have been authorized in several cities including Chicago, Philadelphia, Detroit, Baltimore, Cleveland, New York City, Pittsburgh, and the District of Columbia. For discussions of representative state presentence diagnostic study programs see Comment, *The Kansas State Reception and Diagnostic Center: An Empirical Study*, 19 KAN. L. REV. 821 (1971), and *Presentence Diagnosis for California Superior Courts*, CORRECTIONAL REVIEW, 16 (1965). For a review of the workings of adult court psychiatric clinics, see M.S. Guttmacher, *The Status of Adult Court Psychiatric Clinics*, 1 NAT'L PROBATION AND PAROLE A.J. 97 (1955), and B. O'Connell, *Court Clinics—The American Experience*, 4 MEDICINE, SCIENCE AND THE LAW 266 (1964). For a general discussion of special diagnostic and treatment programs for sex offenders see C.E. Smith, *Correctional Treatment of the Sexual Deviate*, 5 AM. J. OF PSYCH. 125 (1968).

reflected wide differences of opinion.³ Thus, this review of presentence diagnostic procedures in North Carolina is made against a backdrop of controversy and uncertainty.⁴

3. *E.g.*, In his article entitled, *Psychiatry and the Conditioning of Criminal Justice*, 47 YALE L.J. 319 (1938), George H. Dession recommends the involvement of psychiatrists in the sentencing process. He states: "It follows that provision for routine psychiatric examination and report carries with it a considerable broadening of the scope of the hearing on sentence, or of the hearing on parole, as the case may be. New elements for consideration are injected, and they are elements whose import and place in the sentencing picture have yet to be appraised and assimilated. The problem presented by each case becomes more complicated from the point of view of those charged with rendering the decision. . . . So it is that the participation of the psychiatrist cannot be compared with the much more subordinate role of other technical 'experts' who are from time to time called in to give opinion evidence in the course of trials and hearings. Utilizations of the services of those others—ballistics experts, medical examiners, chemists, examiners of questioned documents, engineers, and so on—is entirely compatible with a continuance of the status quo insofar as penal objectives and general policies are concerned. The psychiatrist, on the other hand, is commonly understood to represent a generalized approach with respect to problems of personality and of human behavior quite at variance with the attitude finding expression in our criminal law as a whole. He carries this distinctive attitude with him when called upon to participate in the administration of criminal law."

Presenting another viewpoint of psychiatry, the late Mr. Justice Frankfurter observed, speaking for the Supreme Court in *Greenwood vs. United States*, 350 U.S. 366, 375 (1956): ". . . [t]heir testimony illustrates the uncertainty of diagnosis in this field and the tentativeness of professional judgment. The only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment" *Id.* at 325.

More recently, expressing yet another viewpoint, Chief Judge, John Biggs, Jr., speaking for the Third Circuit Court of Appeals in *United States vs. Currens*, 290 F.2d 751, 770 (3rd Cir. 1961) observed: "Since the turn of the century great strides in the advancement of psychiatry have been made and since the beginning of World War II the treatment and the cure of the mentally ill, the insane, has progressed at an astounding pace. But the criminal law has failed utterly to move forward with this achievement. In this country it has with few exceptions noted remained unchanged. It is as if those who sit cannot read."

For a contemporary critique of the involvement of psychiatry in legal proceedings see also B.J. Ennis and Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693 (1974).

4. Lawyers and judges are not alone in this area of controversy. Psychiatrists have their own intradisciplinary differences. For instance, writing in a commentary entitled, *The Psychiatrist as Physician*, 234 J. OF THE AM. MED. A. 603 (1975), Dr. Arnold M. Ludwig makes the following statements: "If psychiatry is to regain its sanity and credibility as a medical profession, it will have to undertake a painful reexamination of the legitimacy of its many roles. . . . In my opinion, there can be only one sound foundation for psychiatry, that based on the medical model, and only one legitimate domain of expertise, that pertaining to mental illness. . . . According to this conceptualization, disorders such as problems of living, social adjustment reactions, character disorders, maladaptive learning patterns, dependency syndromes, existential depressions, and various social deviancy conditions would be excluded from the concept of mental illness, since these disorders arise in individuals with presumably intact neurophysiological functioning and are produced primarily by psychosocial variables. As such, these nonpsychiatric disorders could be appropriately handled by nonmedical professionals."

Expressing a somewhat different viewpoint in an essay entitled, *The Life of Psychiatry* 133 AM. J. OF PSYCH. 495 (1976), Dr. Bertram S. Brown makes the following statements: "Psychiatry is undergoing severe criticism from within and without, but the demand for psychiatric services has shown no concomitant diminution and none is in sight. . . . The interface between psychiatry and social systems is an area in which psychiatry has in some ways overpromised. This interface is the site of hope for integrating prevention efforts with social concerns, for integrating scientific knowledge with humanistic concerns, and, in my opinion, it is a proper domain of psychiatry."

PRESENTENCE DIAGNOSTIC STUDY

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I. LEGISLATIVE HISTORY

The Department of Correction Act, which authorizes the presentence diagnostic studies in North Carolina was enacted in 1967.⁵ Actually, this bill gives statutory sanction for a service which was already being provided by the Department of Correction on an informal basis. The bill, which was developed by Department of Correction Staff, was drafted by Mr. V. Lee Bounds, who was then Commissioner of Correction.

These statutory provisions, which were adopted without opposition, were seen as a progressive move toward bringing the judiciary closer to the prison system. As a result of the Act, it was hoped that the courts would make greater use of screening and study procedures in the sentencing process. Such utilization would demonstrate the need for, and justify improvements and expansions in the prison diagnostic and classification programs, thereby facilitating more individualized treatment for larger numbers of committed prisoners. In addition, a closer coordination of all correctional agencies, including prisons, probation and parole services, and courts, was envisioned.⁶

Although the North Carolina procedures are modeled after the federal observation and study procedures,⁷ there are some significant differences between them. For instance, in North Carolina, presentence diagnostic studies may be ordered after a finding of guilt and prior to the imposition of sentence.⁸ Under federal proceedings, the study may be ordered after a finding of guilt, and the imposition of the maximum permissible sentence, subject to later modification, as may be warranted by the results of the study.⁹ Also, under North Carolina proceedings, both misdemeanants and felons may be candidates for study, while under the federal proceedings only felons are eligible.

Neither the federal nor North Carolina proceedings define specific criteria for the selection of cases for study. Also, neither North Carolina nor federal statutes require judges to explain their reasons for ordering study commitments, though this requirement might effectively remove formidable handicaps and obstacles to these studies in many cases.¹⁰ In this context, it should be noted that the federal procedures require that the defendant understand and

For a general discussion of the relationship between psychiatry and law see also Robitscher, *The Impact of New Legal Standards on Psychiatry or Who Are David Bazelon and Thomas Spasz and Why Are They Saying Such Terrible Things About Us? Or Authoritarianism Versus Nihilism in Legal Psychiatry*, 3 THE J. OF PSYCH AND L. 151 (1975), and A.A. Bartholomew, *Some Problems of the Psychiatrist in Relation to Sentencing*, 15 THE CRIM. L. 325 (1972), and C.E. Smith, *A Contemporary View of Psychiatry in Corrections*, 25 FED. PROBATION 16 (1961).

5. N.C. GEN. STAT. § 148-12(b) (1974).

6. Personal communication from Mr. V. Lee Bounds.

7. See generally, *Symposium on Sentencing Alternatives in the Federal Courts*, Reprinted from 26 FED. PROBATION 3 (1962) and FED. PRISON SYS. POL'Y. STATEMENT, SUBJECT: 4208(b), 5010(c), and 5037 STUDY AND OBSERVATION CASES, No. 7200.1b (Oct. 23, 1975).

8. N.C. GEN. STAT. § 148-12(b) (1974).

9. 18 U.S.C. § 4208(b) (1970)

10. William F. Smith, *Sentencing Alternatives Available to the Courts*, 26 FED. PROBATION 5 (1962).

accept the fact that he is to be imprisoned for the study period. Under federal rules of procedure, at this juncture the defendant must be afforded an opportunity "to make a statement in his own behalf in mitigation of punishment."¹¹

In order to provide the defendant with an ample opportunity to controvert the contents of the report, if he so desires, the North Carolina statute stipulates that a copy of the diagnostic summary report will be made available to defense counsel before final sentence is pronounced.¹² Since the federal statutes are silent on this question, it may be assumed that disclosure of their study results is discretionary.

II. SCOPE AND CONTENT OF THE PRESENTENCE STUDY

Presentence diagnostic studies are broad-ranging inquiries into the background, character traits, social status, and the mental and physical health status of the offender under scrutiny. It has been suggested that the basic questions to be answered by the study are the following:

- (1) What led this individual to commit this offense? What social, environmental, or personal factors influenced this defendant to commit this crime?
- (2) What measures are necessary to lessen and prevent this defendant's tendency toward crime and to safeguard the interests of the community?¹³

Thus, the presentence study procedures are designed to respond to a variety of concerns including those of prevention, deterrence, punishment, and protection of the community.

Of necessity, the study is a multidisciplinary inquiry which may consider social, environmental, psychological, psychiatric, medical, physical, and even ethical and moral factors related to the offender's behavior. Within the broad scope of these studies, it is possible to deviate from procedural safeguards which are ordinarily required in criminal proceedings. For instance, while courts will not permit the determination of guilt to be biased by a recitation of a defendant's past criminal history, heavy reliance may be placed upon the significance of past criminal behavior in the course of a presentence diagnostic study, the results of which may subsequently be applied in the imposition of sentence. Furthermore, it is possible for a study group to draw conclusions from information which might have been classed as hearsay in a trial proceeding.

11. *Id.*

12. One of the more controversial aspects of the presentence diagnostic study procedures is the question of what restrictions are to be placed on the disclosure of reports of the results of these studies. For a general discussion of the disclosure debate see *Proposed Changes In Presentence Investigation Procedures*, 66 J. OF CRIM. L. AND CRIMIN. 56 (1975).

13. C. E. Smith, *Achieving Consistent and Appropriate Sentencing Through the Use of the Scientific Examination of the Offender*, PROC. OF NAT'L CONF. ON CORRECTIONS 146, Williamsburg, Virginia, December 6-8, 1972.

A. *Ethical and Moral Considerations*

Notwithstanding the accepted advantage of the scientific study of individual offenders, it is important to recognize the occurrence of certain ethical and moral problems in the implementation of the study procedures. At times, the very nature of the examination requires that the offender disclose information which may bear on his culpability. There is also some risk that psychological and psychiatric inquiry may give rise to increased tension and anxiety in the offender, to his immediate disadvantage. Sensitive problems also arise in these procedures in determining the extent to which information obtained in the examination should be disclosed to the public at large. Finally, one must consider the nature of the examiner-examinee relationship created in these procedures, wherein an individual undergoes examination by persons not of his own choosing.

Although these considerations should not be construed as serious obstacles to these procedures, nor as factors which are irreconcilable with the preservation of basic human rights, they illustrate clearly the need for professional discretion. Certainly, the successful performance of an examination will require the creation of a good examiner-examinee relationship, devoid insofar as possible of strain and suspicion. The defendant will need some assurances that his disclosures will not be employed to his disadvantage. Also, treatment must be available for those defendants who develop heightened anxiety or other untoward mental disturbance during the course of the examination. In short, those who perform these examinations must maintain a continuous regard for human dignity and human rights, striving at all times to attain the highest possible ethical and moral standards. Our procedures should be reviewed periodically to insure that these standards are being met.¹⁴

B. *Confinement for Study*

It is apparent that the statutes which authorize the special study procedures in North Carolina contemplate that the studies will be performed in confinement.¹⁵ Certainly, there are instances in which it may be desirable and even necessary to confine a defendant for a study. For instance, the court may empirically determine at the outset that the defendant to be studied is one whose treatment needs can only be met under conditions of total confinement. Furthermore, if there is uncertainty about the need for total confinement,

14. C. E. Smith, *Observation and Study of Defendants Prior to Sentence*, 26 FED. PROBATION 6 (1962).

15. "Within the limits of its capacity, and in accordance with standards established by the Department, a diagnostic center may, at the request of any sentencing court, make a presentence diagnostic study of any person who has been convicted, is before the court for sentence, and is subject to commitment to the Department. Where necessary for this purpose, the defendant may be received in the center for such period of study as the court may authorize, but may not be held there for more than 60 days unless the court grants an extension of time, which may be granted for an additional period not to exceed 30 days. The total time spent in the center shall not exceed 90 days or the maximum term of imprisonment authorized as punishment for the offense of which the person has been convicted if the maximum is less than 90 days." N.C. GEN. STAT. § 148-12(b) (1974).

observation and study under confinement may be warranted both as a form of preventive detention, and as a means of providing systematic behavioral observation in a structured environment.

However, it should be noted that the requirement that the defendant be confined for study may be a shortcoming of the North Carolina procedure. Problems arise when courts refer minor offenders for study, particularly in the cases of some misdemeanants whose offenses do not involve degrees of violence or danger to the public, which warrant confinement. Also, confinement of misdemeanants to penitentiary-type institutions for study may result in unnecessary criminalization of the offender.¹⁶

C. *Presentence Investigation as a Prerequisite*

It is generally agreed that the social history background study is facilitated by the availability of a presentence investigation.¹⁷ The presentence investigation can be a useful screening device in the selection of cases for presentence diagnostic study, to the extent that there are some cases in which an adequate presentence investigation may provide all the information which the court needs to make an effective disposition of the defendant. Such information is readily obtainable by probation officers working in the defendant's home community.

When the community's attitude toward a defendant may be relevant in making disposition of his case, such information can be obtained through a presentence investigation and made available to the institution study group. For these reasons, we believe that a presentence investigation should be a prerequisite to the presentence diagnostic study. Conversely, the presentence diagnostic study procedure should not be used as a substitute for a presentence investigation, but only when the latter will not address the court's needs.

D. *Criteria for Selecting Study Cases*

In general, defendants committed under these study provisions will include those requiring specialized psychiatric and medical study, those requiring evaluation of their education and vocational training needs, and those for which additional social history is required. Important indicators of the need for psychiatric study include a history of unusual behavior, unusual or obscure motivation for the offense charged, behavior suggestive of personality deterioration, and evidence of sexual pathology.¹⁸

16. In this connection, it should be noted that adult misdemeanants who are committed for presentence diagnostic study are studied under confinement at the Central Prison at Raleigh, which is a maximum security penitentiary type institution.

17. For some suggested standards for the preparation and content of presentence investigation reports, see CORRECTIONS, NAT'L. ADVISORY COMM. ON CRIM. JUST. STANDARDS AND GOALS, Standard 5.14, at 184 (1973) and *Standards Relating to Sentencing Alternatives and Procedures*, AM. B. A. PROJ. ON MINIMUM STANDARDS FOR CRIM. JUST., Part IV §§ 4.1, 4.2 (1947).

18. C. E. Smith, *Recognizing and Sentencing the Exceptional and Dangerous Offender*, 35 FED. PROBATION, 3 (1971).

Experience has demonstrated that certain criteria will be applied in the selection of offenders referred for these special examinations. Principal among these have been the following: (1) The personality and behavior of the offender; (2) the offense; (3) the offender's social history; and (4) the nature of the treatment under consideration.

Employing these criteria, we have observed that individuals with apparent personality disturbance or mental disorder or defect as shown by unusual attitudes or behavior will be referred for examination. By the same token, individuals who have been charged with certain types of offenses such as sexual offenses, arson, aggressive physical assault, and other crimes in which motive is not apparent may also be subjects for referral. Persons with unusual and unexplained backgrounds of recidivism, and those with histories of prior observation for mental disorder, will generally be referred for examination. Finally, in those cases where treatment and disposition are uncertain, scientific study may prove helpful.

III. FINDINGS OF A STUDY OF THE NORTH CAROLINA PRESENTENCE DIAGNOSTIC STUDY PROCEDURE

A. *Method and Materials*

With these theoretical considerations in mind let us move on to examine some data bearing on the application of the presentence diagnostic study procedures in North Carolina. Late in 1967, shortly after the enactment of the enabling legislation for the North Carolina presentence diagnostic procedures, the author was named Chairman of the North Carolina Presentence Diagnostic Committee and served until early 1974. This committee was charged with the responsibility of implementing the study procedures in the Department of Correction. It reviewed all cases on an individual basis and developed the summary reports of these studies which were then forwarded to the courts. During this time the Diagnostic Committee studied and reviewed approximately 1000 cases.

For purposes of this study, we have undertaken a record review of 150 of these cases, comprising three cohorts of 50 cases each, selected from cases processed under the presentence diagnostic study procedures during the years 1971, 1972, and 1973. The data tabulated on these cases, which is summarized in Table 1 below, included the following: court of origin, defendant's age, offense charged, presence of pending charges, whether or not a guilty plea was made, questions raised by the court at the time of commitment, whether or not the study answered these questions, results of psychiatric examination, and the recommendations of the study group. Specific aspects of the findings tabulated in Table 1 are discussed further below.

TABLE I
CHARACTERISTICS OF A SAMPLE OF NORTH CAROLINA
DEFENDANTS REVIEWED BY PRESENTENCE
DIAGNOSTIC STUDY PROCEDURES

FROM 1971-1973 (N = 150)

SAMPLE YEAR	COURT OF ORIGIN SUPERIOR DISTRICT	PLEAD "GUILTY"	CASES WITH OTHER CHARGES PENDING	AGE AVERAGE	NO. 21 OR LESS	COURT NO. OF CASES	QUESTIONS ANSWERED NO. OF CASES	PSYCHIATRIC DIAGNOSIS NO. OF CASES	RECOMMENDATIONS PROBATION CONFINES	TOTAL SAMPLE CASES
1971	27 (54%) ¹	23 (46%)	21 (42%)	26	20 (40%)	4 (8%)	3 (6%)	14 (28%)	26 (52%)	50 (100%)
1972	25 (50%)	25 (50%)	19 (38%)	32	28 (56%)	12 (24%)	8 (16%)	13 (26%)	30 (60%)	50 (100%)
1973	21 (42%)	29 (58%)	24 (48%)	32	27 (54%)	13 (26%)	9 (18%)	7 (14%)	36 (72%)	50 (100%)

¹ Row Percentages.

B. *Courts of Origin of Study Cases and Types of Offenses Charged*

The data suggests that individuals referred for presentence diagnostic study in North Carolina are often defendants who have been charged with less serious offenses. Approximately half of the cases in these three study cohorts originated from district courts where they had been charged with misdemeanors. Likewise, an analysis of the cases which were referred from superior courts shows, with few exceptions, that defendants were charged with less serious offenses. For instance, in the 1971 cohort all but two of the 27 individuals referred from superior courts had been charged with property crimes. In the two cases which had been charged with crimes against persons, one was listed as a rape charge and the other a charge of child molestation.

C. *Age of Study Cases*

The ages tabulated for this group of study cases shows them to be predominantly younger offenders. Thus, the average age of the defendants in this group was 30, with those of the 1971 cohort having an average age of 26 and those of the 1972 and 1973 cohorts having an average age of 32 years. The fact that half of the 150 cases in this series were 21 years of age or younger indicates the frequency with which youthful offenders were selected for study.

Several inferences may be drawn from these findings. First, one may assume that courts are concerned about interrupting the criminal careers of youthful offenders who come before them. The referral of youthful offenders is consistent with the contemporary trend toward placing them in special treatment programs.¹⁹ Finally, the large number of youthful offenders has probably influenced the prevalence of less serious offenses among this series of cases.

19. In this context, the study procedures may be employed to determine whether or not a given youthful defendant is believed to be a person who can benefit from the flexible provisions of the Youth Offender Act by being afforded a specialized treatment program in a youth institution. On the other hand, if the study suggests that the youthful offender is likely to be a disruptive influence in a youth institution the defendant may be recommended for placement in an adult institution. The Department of Correction enjoys a great deal of discretion in the handling of youthful offenders under the provisions which are set down in N.C. GEN. STAT. §§ 148-49.1—49.9 (1974), which is entitled "Facilities and Programs for Youthful Offenders." For instance, if a court orders a defendant committed as a youthful offender, with the intention that he be placed in an institution for youthful offenders, this order may subsequently be constructively modified by the Secretary of Correction within his authority to "... order the committed youthful offender confined and afforded treatment under such conditions as he believes best designed for the protection of the public." N.C. GEN. STAT. § 148-49.6 (1974). For a discussion of the application of presentence studies to youthful offenders see, J.L. Gallemore, Jr., *Problematic Youthful Offenders*, 5 N.C. J. OF MENT. H. 5 (1971).

D. *Guilty Pleas*

An analysis of the data in Table 1 indicates that a significant number of the defendants in the sample were committed for study after having entered a guilty plea. For instance, 44% of the 1972, and 64% of the 1973 cohorts entered pleas of guilty. Unfortunately, accurate data concerning the numbers of defendants in the 1971 cohort who entered guilty pleas is not available.

Of the several factors contributing to the high frequency of guilty pleas among these study cases, the plea-bargaining process probably has the greatest impact upon the presentence diagnostic procedures. Inevitably, the plea-bargaining process tends to obscure the nature of the offense which led to the defendant's arrest and trial. Thus, in plea-bargained cases, the task of study groups is complicated by the fact that it is usually difficult, if not impossible, to gain an accurate description of the offense; information which must be a primary concern of the study.

While the study group may be disadvantaged by its lack of a factual description of the behavior which led to the defendant's arrest, the defendant, having negotiated advantageously in the plea-bargaining process, often enters the study in a mood to negotiate additional concessions. This can convert the study into an adversary proceeding in which the study group finds itself outmatched by the defendant in a situation in which the staff is unable to prescribe for the correction of misbehavior, the nature of which may be uncertain or even unknown.

E. *Pending Charges*

More than 40% of the study cases in these three cohorts had other charges pending or were already on probation at the time of their arrest for the offense for which they had been referred for study. Actually, 20% of these study cases were on probation at the time that the study commitment was made. This situation was further complicated by the fact that in some instances, the pending charges lay in jurisdictions other than the one which had ordered the presentence diagnostic study.

Obviously, the handling of a study case in this posture poses a difficult problem for a study group which is obliged to provide the court with a recommendation for sentence. To formulate a recommendation to the court which considered the pending charges would seem to be clearly beyond the prerogatives of the study group. On the other hand, to make a recommendation without considering the implications of the pending charges would appear to be foolhardy at worst, and perhaps of limited value at best.

Similar problems occur in the cases of defendants who were on probation, parole, or conditional release at the time of their arrest for the offense for which the presentence diagnostic study was ordered. From a procedural standpoint, it seems clear that the presentence diagnostic study is not intended

to be employed to determine whether or not probation should be revoked. On the other hand, if a probationer is committed for study on a new charge, it would appear that his probation has been constructively revoked, without benefit of a revocation hearing, due to the requirement for confinement. Thus, it is our impression that in these circumstances a study cannot be ordered until probation has been judicially revoked, at which point the indication for study may be nullified, unless it be to advise the court on the desirability of consolidation of the charges.

F. Presentence Diagnostic Studies Following Appeal

There have been cases on appeal from a district court in which a presentence diagnostic study was ordered by a superior court. To the extent that such appeals are ordinarily made in the context of the defendant's questioning or denying guilt, the adversary attitude of such defendants usually makes them poor candidates for the study procedure. Since appeals constitute *de novo* proceedings, it is important that in such instances the superior court hold a new trial and make a new finding of guilt before the defendant is committed for diagnostic study. Certainly, a superior court should not use a lower court's findings as a basis for requesting a presentence diagnostic study in this context. Also, it is important that a superior court give its reasons for seeking a presentence diagnostic study after a new trial and finding of guilt, and that these reasons be understood by, and acceptable to, the defendant to minimize the possibility of the defendant's falling into an adversary position with the study group.

G. Referral Questions Raised by the Court

Assuming the desirability of requiring the courts to state the reasons for referring cases for presentence diagnostic study and stating explicitly the questions concerning the defendant for which they seek information and advice, the data suggests that compliance with this requirement leaves something to be desired. However, with the passage of time it would appear that the courts are more sensitive to these issues. For example, in the 1971 cohort, specific questions were raised by the courts in only 8% of the cases. Although the frequency with which the study group was able to answer court inquiries was less than perfect, the studies were able to answer three out of the four questions asked in 1971, eight out of twelve of the questions in 1972 and nine out of thirteen asked in 1973. Finally, it is interesting to note that the questions asked by the courts usually had to do with the mental condition of the defendant, his treatability, and the related question of dangerousness.

H. Psychiatric Diagnosis

It is likely that the quantitative and qualitative aspects of study group responses to court questions are a reflection of the uncertain state of

knowledge regarding the diagnosis, prognosis and treatment of various character, behavior, and personality disorders.²⁰ Thus, an analysis of the psychiatric diagnoses which were made among this group show a preponderance of diagnoses indicating personality disorders, character trait defects, and behavior disorders, with only about 20% of these individuals being diagnosed as having a specific, mental disease entity such as a neurosis, depression, or psychosis. It should be noted that secondary diagnoses of drug and alcohol dependency were prevalent in this group, probably as the result of increased prosecutorial vigilance in this area.

In addition to the foregoing, it is the author's impression that in the last several years increasing numbers of study cases have been diagnosed as having more severe mental disorder, including psychosis and severe degrees of mental retardation. It is probable that this occurrence is an outgrowth of changes in the availability of institutional treatment resources which have occurred as a consequence of changes in the commitment procedures²¹ along with the increased use of community mental health center treatment facilities. Thus, we hypothesize that larger numbers of severely mentally ill offenders are finding their way into presentence diagnostic study procedures simply because of the lack of other dispositional alternatives.

I. *The Value of Routine Psychiatric Examinations*

Traditionally there has been a tendency to place a great reliance upon psychiatric examination as a routine part of the presentence diagnostic study for all referrals.²² In the author's judgment, the results hardly justify this

20. Most psychiatrists would probably agree that the criteria for the diagnosis of character, behavior, and personality disorders are vague and inconclusive. Some cogent psychiatric arguments have been made for the removal of these entities from the psychiatric diagnostic nomenclature. There are a few very vocal psychiatric proponents of a notion that mental illness simply does not exist at all. See generally, THOMAS SZASZ, *THE MYTH OF MENTAL ILLNESS* (1961).

21. In 1961, the Joint Commission on Mental Illness and Health recommended that persons with major mental illness be treated in the community insofar as possible. During the ensuing years, community treatment and the phasing out of public mental health hospitals, have become official policy of all state and local governments. More recently, policies governing involuntary commitment have been changed so that in most jurisdictions (North Carolina included) the criteria for commitment is dangerousness to the self or others, rather than need for treatment as it was previously. There can be little doubt that this change has affected admissions to mental hospitals. These factors have drastically reduced the numbers of patients in public mental hospitals, with a consequent rise in the number of chronically mentally ill persons in many communities which have failed to develop adequate or alternative resources for their care. See generally, Franklyn N. Arnhoff, *Social Consequences Of Policy Toward Mental Illness: Indiscriminate Shifts From Hospital to Community Treatment May Incur High Social Costs*, 188 *SCI.* 1277 (1975).

22. It seems important to me to recognize that lawyers were trying to understand the workings of the human mind long before there was anything which could be identified as a science of psychiatry. One has but to go back into the Anglo-American Common Law to find examples of such cases where jurists were dealing with concepts of, "madness and lunacy", in the context of proceedings which are known today as the "Insanity Defense." Notwithstanding continuing conflicts between psychiatry and law, jurists continue to seek psychiatric advice. Some have alleged that psychiatry has oversold itself in this area and no doubt some psychiatrists have

effort. Instead, it would appear that more efficient and effective use of psychiatric expertise can be made by referring cases on a more selective basis, with referrals for psychiatric examination being made only after the implementation of other appropriate screening procedures. For practical purposes, most of the determinants which would indicate a need for psychiatric examination can be developed in the course of a comprehensive social work study, coupled with an initial evaluation by a clinical psychologist. Within this framework, available psychiatric expertise could be used more advantageously to develop study and treatment programs for the more severely mentally ill persons who are occasionally found among the study case referrals.

Theoretically, the need to involve a psychiatrist in the presentence study procedure should be minimal if one accepts the premise that seriously mentally ill individuals should not be referred for these procedures in the first place, since they are incapable of comprehending or taking part in the study procedures, as far as their participation would require. Furthermore, such seriously mentally ill persons should be recognized early during the trial proceedings and consideration given to their initial fitness for trial. Thus, when a defendant is so obviously mentally ill that incompetence may be suspected, or when he is so ill as to be in need of hospitalization, experience suggests that he should not be referred for presentence diagnostic study.²³ Rather, it would be preferable to suspend the proceeding and order commitment to an appropriate hospital or other facility for the determination of competency for trial, and for such immediate treatment as may be indicated. To refer a severely mentally ill defendant, for presentence diagnostic study, may unduly delay the judicial proceedings and the treatment of the mentally ill defendant, to the disadvantage of all concerned.

Clearly then, the presentence diagnostic study procedure should not be used as a substitute for a mental competency proceeding in the disposition of severely mentally ill defendants. On the other hand, should the competency proceedings not operate effectively for some reason, such as impediments in

indeed oversold themselves from time to time. At the same time, there is also reason to believe that some lawyers and judges may unduly disparage the efforts of psychiatrists. Perhaps, the answer lies somewhere in the words of Sir James Stephen who stated, "I think that in dealing with matters so obscure and difficult the two great professions of law and medicine ought rather to feel for each other's difficulties than to speak harshly of each other's short comings. If it is true, as I think it is, that the law of England on this subject is insufficiently expressed, it is no less true that medical knowledge relating to insanity is fragmentary, not well arranged and, to say the very least, quite as incomplete as the law." 2 SIR JAMES STEVEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 128 (1883).

23. Since incompetency on the part of the defendant is a bar to further proceedings in a criminal case, these study procedures should not be applied in any case where the court has cause to believe that the defendant may be incompetent. When there is doubt about the defendant's competency, he should be processed in accordance with the provisions of N.C. GEN. STAT. § 15A-1001 and 15A-1002 (1975). Although misdemeanants may now be committed for examination to determine competency, it is unlikely that competency proceedings will be instituted very often in such cases, all things considered.

policy or resources, one may expect that the courts will utilize the presentence diagnostic study as a practical expedient in dealing with obviously mentally ill defendants.²⁴ There are reasons to believe that this phenomenon is occurring in North Carolina, and when it does occur, a study group may find itself "with the right case for the wrong reason". Paradoxically, when this does happen, the mentally ill defendant suffers the greatest loss, having been unwittingly caught up in a procedure which was supposed to have served his best interest.

J. Other Categories of Unsuitable Referrals for Presentence Diagnostic Studies

Experience suggests that the presentence diagnostic study procedures have little to offer certain categories of offenders, such as chronic alcoholics who have been charged with alcohol-related misdemeanors, offenders who have been charged with minor offenses related to domestic problems, and some recidivistic offenders, such as those who are habitually involved in forgeries, writing of worthless checks, and auto larcenies.

Programmatically, the Department of Correction has very limited resources for the treatment of alcoholism. Thus, offenders who are convicted of public drunkenness, and who are recognized to be chronic alcoholics, should be directed to alcohol rehabilitation centers which have specific programs for alcoholics. By the same token, offenders who have been convicted of minor offenses resulting from marital discord, such as non-support cases, are probably best handled at the local level, using local social service resources. Presentence diagnostic studies of repetitive offenders, who have been studied extensively during prior terms of imprisonment, generally add little additional knowledge to what is already known.

As a general rule, courts should avoid committing defendants for presentence diagnostic study when local resources are available for the provision of diagnosis, counseling, and specialized vocational rehabilitational services. Certainly, many minor offenders with mild emotional disorders can be effectively handled and treated at local mental health centers. In short, it is this author's opinion that defendants should not be committed to the Department of Corrections for presentence diagnostic studies unless their situation and condition warrants the total confinement required by the study procedure and current statutory provisions.

K. Other Questionable Uses of the Presentence Diagnostic Commitment

In our work with the presentence diagnostic study procedures, we have had reason to suspect that some commitments have been due to the court's opinion

24. It should be recognized that unavailability of competency proceedings as well as a low standard for competency may increase the numbers of more severely mentally ill persons who are put to trial. It is expected that some of these same mentally ill defendants will subsequently be referred for presentence diagnostic study for want of a better disposition.

that a brief period of confinement might prove to be an effective deterrent. There have also been some cases in which the commitment served a useful purpose as a "cooling off device" when community feelings toward a defendant were running high.

Empirical observations suggest that the brief exposure to confinement, which the defendant experiences during the presentence observation commitment, may have some continuing deterrent effect, which will positively reinforce his motivation to succeed on probation should this be subsequently granted.²⁵

However, there are at least two good reasons for recommending against the use of presentence study commitment for deterrent purposes. First, it is uneconomical to undertake a scientific examination of an offender when all that is really desired is to give him "a taste of prison." Second, placing defendants in the study program for purposes of deterrence will certainly undermine the basic therapeutic aims of the program. For these reasons, we recommend that when deterrence is the primary goal, courts should make use of split-sentencing procedures. In our opinion, courts should not use the study procedures to confine misdemeanants who may be ineligible for a split sentence.²⁶

L. *Significance of Study Group Recommendations*

A review of the data indicates that presentence diagnostic studies result in recommendations for probation in the preponderant number of cases, with an apparent concurrent increase in the number of cases recommended for probation over the several years from which our sampling was taken. Thus, in 1971, 52% of the cases were recommended for probation, with 60% in 1972 and 72% in 1973. It is interesting to consider this finding in the context of an overall observation (consistent throughout the several years that the procedures have been available) that the sentencing courts follow the presentence diagnostic study group recommendations in more than 80% of the cases referred.²⁷ We have speculated for some time as to the possible significance of this finding. For instance, does it mean that presentence diagnostic studies provide correct answers in 80% of the cases referred, or could it be that the courts received the answer which they wanted, and perhaps expected, in 80% of the cases?

25. C. E. Smith, *Presentence Diagnostic Procedures in North Carolina* (paper delivered at Conference of Superior Court Judges Continuing Education Seminar, Chapel Hill, North Carolina, December 5, 6 1969, reproduced and distributed by Institute of Government).

26. N.C. GEN. STAT. § 15-197.1 (1975).

27. These figures have been tabulated on an annual basis by Department of Correction personnel. In a representative study which was done in 1972, it was found that the judges followed the study group recommendations in 80% of the cases overall. A further breakdown showed that the judges followed recommendations for probation in 87% of the cases and recommendation for imprisonment in 70% of the cases. See also F. S. Alexander, *Overview and Evaluation of the Presentence Diagnostic Program*, (unpublished manuscript of December 15, 1972).

In any event, this author is concerned that the high incidence of probation cases among the referrals may reflect an unduly extravagant use of the study procedures, which does little more than reassure courts of the validity of conclusions which they had already been able to reach without benefit of the study. Furthermore, the high incidence of probation referrals seems to place the Department of Correction in the probation business, which is hardly their proper field. Thus, if the primary mission of the Department of Correction is to develop and plan treatment programs for individuals who require imprisonment (total confinement), their involvement in the presentence diagnostic study programs may take them away from their primary mission and at the same time dilute their resources for the performance of their primary mission. Finally, the results appear to reinforce the notion that large numbers of minor offenders are being exposed to imprisonment which they might not experience at all, if it were not for the availability of the study procedures.

On the other hand, to the extent that the Correction Department is interested in diverting defendants from the prison system whenever possible and justifiable, their participation in the presentence diagnostic study procedure provides them with opportunities to participate in the diversionary process. However, if a defendant is early recognized to be a possible candidate for diversion out of the correctional system into some community program, it would seem more efficient to arrange for his study to be performed in the community where the resources to which he is to be diverted are located, rather than in a security type prison institution.

M. *Limitations in Facilities*

Because of limitations in space and personnel, the Department of Correction found it necessary to place a ceiling on the numbers of cases that could be accommodated in 1970.²⁸ During the ensuing years the annual number of cases processed has ranged from a low of 168 in 1973 to a high of 198 in 1975.

During this period, the numbers of staff available to perform the studies have remained essentially stationary. For practical purposes, the presentence diagnostic study programs have been conducted without any special appropriations of funds for this purpose. Additional funds have been made available for the development of diagnostic centers, whose primary mission is the provision of diagnostic and classification programs for committed prisoners. To the extent that the presentence diagnostic study programs have been superimposed upon the work of these diagnostic centers, they may benefit from expansions in diagnostic center programs.

IV. CONCLUSIONS

In theory, the presentence diagnostic study procedure has much to recom-

28. Memorandum from V.L. Bounds, Commissioner of Correction, to Sentencing Court Judges, Subject: Presentence Diagnostic Studies (Apr. 16, 1970).

mend it as a useful adjunct in the administration of the criminal justice system. Properly implemented, it affords an idealized model for individualized diagnosis and treatment of offenders. Thus, it provides a mechanism for identifying the special needs of a wide variety of criminals, whose behaviors cannot be understood in the context of the usual trial proceedings. These procedures permit the optimal use of behavioral science disciplines and foster the development of treatment resources in other agencies and in the community at large. Hopefully, in the implementation of these procedures, the various segments of the criminal justice system will be brought into closer contact with each other. Judges should gain an improved understanding of the potentials and limitations of correctional institutions, and correctional workers should develop closer liaisons with parole and probation workers. Finally, as various disciplines and segments of the criminal justice system collaborate in the implementation of the study procedures, this can result in the development of a forum within which various forms of interdisciplinary training can be conducted. For instance, correctional workers can join with judges in sentencing institutes which are concerned with the administration of presentence diagnostic procedures.

Thus far, progress toward the realization of these highly desirable goals has been limited in North Carolina. During the period of time that the presentence diagnostic study procedures have been available in North Carolina, the prison population has increased nearly 25 percent while the development of diagnostic center facilities and resources has lagged. Under these circumstances, the presentence diagnostic study procedure is becoming an increasingly precious commodity, whose use should be governed by strict criteria to minimize waste and to insure the realization of desired goals.

In this report we have attempted to describe an acceptable rationale for the use of these procedures; to highlight some of the problems which have occurred in the implementation of the procedures; to describe some of the characteristics of the individual defendants who have been referred for study during the several years that the procedures have been available; and to identify some questionable uses which have been made of the procedures.

We have observed that many of the cases referred for study are individuals who have committed relatively minor offenses, but with few exceptions appear to have serious social problems. The typical study case was a socially and culturally deprived individual with a modest educational attainment, a paucity of meaningful work experience, and very little in the way of personal resources, either by way of family and friends or tangible assets. Study groups often referred to such defendants as "little criminals with big problems".

These socially and culturally disadvantaged individuals often found it difficult to understand the study procedure. It is generally agreed that individuals entering procedures of this kind should do so only after informed consent has been made. Our experience suggests that this will require a high level of social work skills. Our basic concern is that this highly sophisticated,

theoretically advantageous procedure, is being applied to disadvantaged persons, as often as not, possibly to their ultimate further disadvantage.

It is apparent from the foregoing that the efficient use of the presentence diagnostic study procedures depends on close collaboration between the courts who use the service and the Department of Correction which provides the service. Each must understand and meet the needs of the other in achieving the goals of the study procedures. As one means of facilitating communication between the courts and the Department of Correction, we suggest continuing joint participation in sentencing institutes devoted to the discussion of these procedures, as well as other areas of mutual interest and concern.