SUMMARY OF ARGUMENT

Traditionally, courts have uniformly regarded pre-sentence reports as confidential documents that are not to be made available to the public, recognizing that important policy considerations support such a practice. Recently, however, Congress has enacted the Protect Act, which now mandates that pre-sentence reports be made available to the Sentencing Commission and Congress, without creating any rules or procedures to ensure that such reports remain confidential. Because the two federal statutes which generally protect individuals from the public disclosure of private information, the Freedom of Information Act and the Privacy Act, do not apply to either the Commission or Congress, the Protect Act has now created a significant risk that sensitive and confidential information contained in a pre-sentence report may be disclosed to the public. Accordingly, the defense requests, under Rule 32(d)(3) of the Federal Rules of Criminal Procedure, that the Court exclude from the pre-sentence report in this case [certain sensitive information that must remain confidential, ...].

ARGUMENT

Federal courts have traditionally treated pre-sentence reports as confidential documents: *See United States Department of Justice v. Julian*, 486 U.S. 1, 12 (1988) ("[I]n both civil and criminal cases the courts have been very reluctant to give *third parties* access to the presentence investigation report prepared for some other individual or individuals."). Such treatment is based on a recognition that the confidentiality of pre-sentence reports "is supported by powerful policy considerations." *United States v. Huckaby*, 43 F.3d 135, 138 (5th Cir. 1995).

Perhaps most important among these policy considerations is a defendant's "privacy interest in the pre-sentence report," a document which routinely describes, among other things,

the defendant's financial status, mental and emotional condition, cooperation with the government in other criminal prosecutions, prior criminal history, and uncharged crimes. *Id*. In addition, disclosure of a pre-sentence report to the public "may stifle or discourage that vital transmission of information by the defendants, whose contribution to a PSIR is significant, and by cooperating third parties." *Id*. Finally, pre-sentence reports are confidential in order to not compromise the government's access to information that is necessary for criminal investigation. *See id*.; *United States v. Corbitt*, 879 F.2d 224, 229-30 (7th Cir. 1989) (three general factors justify secrecy of pre-sentence reports: (1) privacy interests of defendant, defendant's family, and crime victim; (2) interest of court in full disclosure of information relevant to sentencing; and (3) interest of government in secrecy of information related to ongoing criminal investigations); *see also United States v. Anderson*, 724 F.2d 596, 598-99 (7th Cir. 1984) ("Confidentiality of pre-sentence reports is vitally important to the efficacy of the sentencing process.").

Based on these important policy considerations, federal courts have uniformly held that pre-sentence reports are not public documents and should not be disclosed to third persons "absent a demonstration that disclosure is required to meet the ends of justice." *United States v. McKnight*, 771 F.2d 388, 390 (8th Cir. 1985); *see Julian*, 486 U.S. at 12 (courts typically require showing of special need before allowing third party to obtain copy of pre-sentence report); *United States v. Charmer Industries, Inc.*, 711 F.2d 1164, 1176 (2nd Cir. 1983) (court should not release pre-sentence report to third person unless person has shown "a compelling need for disclosure to meet the ends of justice"); *Hancock Brothers, Inc. v. Jones*, 293 F. Supp. 1229 (N.D. Cal. 1968) (same); *see also Huckaby*, 43 F.3d at 138 ("That the defendant has pled guilty or been convicted of a crime does not require the dissemination of his entire personal background in the public domain.").

The District of Maryland also recognizes that pre-sentence reports must remain confidential, via a local rule instructing that such reports be sealed and not included in the public court file. *See* Dist. Md. Local Rule 213. Pursuant to the local rule, unless the court orders otherwise, a pre-sentence report "is a confidential internal Court document to which the public has no right of access." *Id*.

Recently, Congress enacted the Protect Act, which mandates that a district court submit to the Sentencing Commission certain information regarding a defendant's sentencing, including the pre-sentence report. The law further requires that the Commission, upon request, make the pre-sentence report available to the House and Senate Committees on the Judiciary, and the Attorney General. The Protect Act thus now makes a pre-sentence report, treated as confidential by all federal courts, public information to be disseminated to, and potentially by, the Sentencing Commission, Congress, and the Department of Justice. This in turn presents potentially serious problems regarding the public release of information that could endanger a federal inmate and his or her family.

The potential dangers created by these provisions of the Protect Act are reflected not only in the traditional practice of the federal courts, which unanimously treat pre-sentence reports as confidential documents, but also in recent regulations passed by the Bureau of Prisons that prevent inmates from obtaining copies of their reports. *See* Federal Bureau of Prisons, Program Statement 1351.05 (September 19, 2002) ("For safety and security reasons, inmates are prohibited from obtaining or possessing photocopies of their PSRs [pre-sentence reports], SORs [statement of reasons], or other equivalent non-U.S. Code sentencing documents (e.g., D.C., state, foreign, military, etc.)"). Recognizing that such reports contain information regarding "the inmates' government assistance, financial resources, community affiliations, etc.," the Bureau

"has documented an emerging problem where inmates pressure other inmates for a copy of their PSRs and SORs to learn if they are informants, gang members, have financial resources, etc." *Id*. The Bureau found this to be a serious concern, because "[i]nmates who refuse to provide the documents are threatened, assaulted, and/or seek protective custody," and, likewise, "inmates providing PSRs and SORs containing harmful information are faced with the same risks of harm." *Id*.

These very same risks are potentially at play following passage of the Protect Act. The Act requires that pre-sentence reports be provided to the Commission and the Judiciary Committees, without creating any guidelines to ensure the confidentiality of information in those reports relating to "the inmates' government assistance, financial resources, community affiliations, etc." The Act thus may serve to indirectly make pre-sentence reports available to other inmates, as well as confederates of those inmates or rival gang members who are not incarcerated. Were such persons able to learn the identity of defendants who have cooperated with the government by providing information in a criminal case, or the "community affiliations" of such a defendant, it would endanger not just the defendant but also his or her family and friends.

If the Freedom of Information Act applied to the judicial and legislative branch of the federal government, sensitive information contained in pre-sentence reports which are in the possession of the Sentencing Commission and Congress would be protected from disclosure to the public. *See* 5 U.S.C. § 552(b)(7) (exception for law enforcement records that could reasonable be expected to constitute unwarranted invasion of privacy, disclose the identity of a confidential source, or endanger the life or physical safety of any individual). However, the FOIA does not apply to the Sentencing Commission, *see Andrade v. United States Sentencing*

Commission, 989 F.2d 308 (9th Cir. 1993), or to Congress, *see* 5 U.S.C. § 551(1)(A). Nor does the Privacy Act, 5 U.S.C. § 552a, apply. *See United States v. Connolly*, 206 F. Supp.2d 187 (D. Mass. 2002) (Privacy Act does not apply to judiciary); 5 U.S.C. 552a(b)(9) (Privacy Act does not apply to Congress). The fact that neither Act applies to protect confidential information in a PSR possessed by the Commission or Congress highlights the risk that such information may be disclosed to the public as a result of the newly enacted provisions of the Protect Act.

Currently, there appears to be no legal impediment in place to prevent an individual from gaining ready access to the records of the Sentencing Commission and the Judiciary Committees, including pre-sentence reports that may contain very sensitive information. Accordingly, for the reasons set forth above, the defense requests, under Rule 32(d)(3) of the Federal Rules of Criminal Procedure, that the Court exclude from the pre-sentence report in this case any diagnosis that may disrupt a rehabilitation program, any confidential source information, and "any other information that, if disclosed, might result in physical or other harm to the defendant or others." In particular, the defense requests that . . . . [information relating to cooperation or membership in gang or conspiracy should be excluded, as should sensitive medical information or diagnoses (diminished capacity, ...), which may well be constitutionally protected from disclosure;[1] highly personal background information, ...]

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[1] Cases supporting the notion that a person possesses constitutional protection against the disclosure of private information include: *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (constitutional right to privacy protects individual's interest "in avoiding disclosure of personal matters") (footnote omitted); *Doe v. City of New York*, 15 F.3d 264 (2nd Cir. 1994) (individuals infected with HIV virus "clearly possess a constitutional right to privacy regarding their condition"); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3rd Cir. 1980) (employee's medical records protected by constitutional right to privacy); *A.L.A. v. West Valley City*, 26 F.3d 989, 990 (10th Cir. 1994) ("There is no dispute that confidential medical information is entitled to constitutional privacy protection.").