EXHIBIT G

136

FEDERAL PUBLIC DEFENDER
DISTRICT OF COLUMBIA
SUITE 550
625 INDIANA AVENUE, N.W.
WASHINGTON, DC 20004

A. J. KRAMER
Federal Public Defender

Telephone (202) 208-7500
FAX (202) 208-7515

May 15, 2017

Honorable Beryl A. Howell
Chief Judge
United States District Court
Room 2010
United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Dear Chief Judge Howell,

I am writing asking the Court to revisit the issue of disclosure to the parties of the probation officer's sentencing recommendation. Both our office and the government have twice previously requested that the Court make it a policy to disclose the recommendation in every case, although there may be rare exceptions for individual cases. This letter has been reviewed by Jonathan Malis, the Chief of the Criminal Division in the U.S. Attorney's Office. While that office does not necessarily agree with all the analysis below, it is still that office's position that it agrees that the probation officer's sentencing recommendation should be disclosed to the parties.

Enclosed are copies of the prior correspondence on the issue. In 1995, I first wrote to Judge Hogan about the issue shortly after the adoption of what is now Fed.R. Crim.P. 32(e)(3) -- at the time it was Fed.R. Crim.P. 32(b)(6). The Rule provides that:

> By local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence.

In response to my 1995 letter, the then-Chief Probation Officer, Richard Houck, Jr., wrote a letter to the Court opposing the disclosure of the sentencing recommendation. Subsequently, the U.S. Attorney at the time, Eric Holder, Jr.,

wrote to the Court agreeing with me that the sentencing recommendation should be disclosed.

I am unclear what happened after the letters were received by the Court. The sentencing recommendations continued to not be disclosed, although, as far as I know, the Court did not adopt a local rule directing the probation officer not to disclose the recommendation.

In 2014, I wrote again about the subject to then-Chief Judge Roberts, asking the Court to revisit the issue. This was because you had, from the time you came onto the court, required that the recommendation be disclosed in every case. Not only had no problems arisen from your policy, but both sides agreed that your policy made sentencing fairer for both sides. In addition, my 2014 letter recounted instances where factual material in the recommendation section was not in the presentence report itself.

The 2014 letter also noted that the government still agreed that the recommendation should be disclosed. As a result, our office has filed a number of unopposed motions to disclose the recommendation, most of which have been routinely granted by various judges.

I did not receive any response to my 2014 letter, nor do I know if any action was ever taken.

The history of Rule 32, and recent caselaw, further support disclosure of the recommendation. Rule 32, as originally enacted, excluded "any recommendation as to sentence" from disclosure. Since that time, the Advisory Committee, however, has embarked on a course of requiring fuller disclosure of the presentence report and other materials.

What is now Rule 32(e)(3) was adopted in 1994. The Advisory Committee Notes state that:

> Under the new provision (changing former subdivision (c)(3)(A), the court has the discretion (in all individual cases or in accordance with a local rule) to direct the probation officer to withhold any final recommendation concerning the sentence. Otherwise, the recommendation, if any, is subject to disclosure.

Thus, Rule 32 evolved from excluding the recommendation from disclosure to subjecting it to disclosure unless otherwise directed.

This Court does have a local rule, LGR 32.2, that provides:

> Nothing in this Rule requires the disclosure of any portions of the presentence report that are not disclosable under Rule 32 of the Federal Rules of Criminal Procedure.

The Court's local rule does not direct the probation office not to disclose the sentencing recommendation, which is disclosable absent such a directive. Thus, apparently under this Court's rules, the recommendation should be disclosed in every case. For whatever reason, that has not been done, and other than in cases before you, the probation office will not disclose the recommendation without a court order.

Yet, Rule 32(e)(3) itself makes clear that the default position is that the recommendation should be disclosed, unless the Court directs that it not be. This continues a trend in Rule 32 toward full disclosure of materials in connection with sentencing. Beginning in the 1966 amendments to the Rule, the Advisory Committee has stressed that disclosure of the presentence report is preferable "so that defendants may be given full opportunity to rebut or explain facts in presentence reports which will be material factors in determining sentences." In the 1974 amendments, the Advisory Committee believed that the "best way of ensuring accuracy is disclosure with an opportunity for the defendant and counsel to point out to the court information thought by the defense to be inaccurate, incomplete, or otherwise misleading." In 1975, the Committee stated that, "[s]ince the presentence report is to be used by the court in imposing sentence and since the consequence of any significant inaccuracy can be very serious to the defendant, the Committee believes that it is essential that the presentence report be completely accurate in every material respect."

In 1983, the Committee believed that "Rule 32 in its present form is failing to fulfill its purpose." The Committee stated that:

> Unless disclosure is made sufficiently in advance of sentencing to permit the assertion and resolution of claims of inaccuracy prior to the sentencing hearing, the submission of additional information by the defendant when appropriate, and informed comment on the presentence report, the purpose of promoting

> accuracy by permitting the defendant to contest erroneous information is defeated.

In 1989, the Committee expressed some discomfort at using "undisclosed information" at sentencing. And, in 1994, what is now Rule 32(e)(3) was added, essentially reversing the previous position that the recommendation was not subject to disclosure. It is clear that the Rules have been on a steady path of requiring more disclosure and transparency in sentencing.

I recognize that the case law holds that there is no constitutional right to receive the sentencing recommendation. *See, e.g., United States v. Peterson*, 711 F.3d 770, 776-78 (7th Cir. 2013). The court in *Peterson*, though, discussed at length whether the recommendation should be revealed:

> The policy question nevertheless remains whether disclosure of a probation officer's sentencing recommendation is desirable even if not constitutionally compelled. A blanket rule against disclosure of a probation officer's sentencing recommendation, though explicitly endorsed by several of the district courts in this circuit, is far from universal. Many district courts favor releasing the sentencing recommendation to the parties and others leave disclosure to the district judge's discretion. *See, e.g.*, E.D. Cal., L.R. 460(c) ("A copy of the probation officer's proposed presentence report, including the probation officer's recommendations, shall be made available to the United States Attorney's Office and to defense counsel not less than thirty-five (35) days before the date set for sentencing hearing."); S.D. Ohio Crim. R. 32.1(f) ("[U]nless otherwise ordered in an individual case, the Probation Officer's recommendation, if any, on the appropriate sentence shall be disclosed in all copies of the initial and final presentence report including those furnished to counsel."); W.D. Mich. LCrR 32.2(b) ("The sentencing judge may ... direct the probation officer not to disclose the officer's recommendation on the sentence.") The American Bar Association Criminal Justice Section has adopted a standard providing that all rules of procedure "should prohibit confidential sentencing recommendations." ABA Crim. Justice Section: Sentencing, Standard 181-5.7, 3d ed. (1993).

Concern about an absolute non-disclosure rule stems from a desire to maintain openness in the sentencing process. Because so few defendants proceed to trial, the sentencing hearing is often a defendant's first and last opportunity to present argument to the court. And probation officers play an important role in that process. We have often explained that a probation officer "acts as an arm of the court" during sentencing and does not take on the role of an adversary. But we have also urged "district judges, U.S. Attorneys, and probation officers [to take steps] to prevent the perception that probation officers are 'surrogate prosecutors.'" To the extent confidential sentencing recommendations create the appearance of hidden information or a secret tilt in the government's favor, we offer the view that our federal sentencing procedures might be better served by allowing the parties to evaluate any analysis that might form the basis of a judicial determination.

We do not suggest that district courts should necessarily release confidential sentencing recommendations in all cases and under all circumstances. But the federal rules allow courts the opportunity to make these determinations on a case-by-case basis. *See* Fed.R.Crim.P. 32(e)(3) ("By local rule *or by order in a case*, the court may direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence." (emphasis added)). If a district court is concerned about a probation officer's ability to produce a forthright assessment because of a potential supervisory relationship or a case-specific factor, the court could request that the probation officer submit the sentencing recommendation to the court confidentially. An order from the district court requiring confidentiality would produce the added benefit of informing the defendant that a confidential recommendation exists, something that could remain a mystery to defendants' when the court does not reference the recommendation during sentence. If, on the other hand, no such concerns exist because of the structure of the probation office or because of the nature of the case, the district court could direct that the parties receive all portions of the PSR, including the probation officer's sentencing recommendation. This practice could allow the defense an opportunity to see and comment on the recommendation and

> independently confirm that all facts forming the basis for the recommendation are contained elsewhere in the report.

Id. at 778-79 (citations and footnote omitted.)

In light of the above discussion, and the enclosed material, I am respectfully asking the court to reconsider its position and make clear that disclosure of the recommendation should be the norm, unless in an individual case the Court directs otherwise. Thank you for your consideration, and please just let me know if you have any questions or need any more information.

Sincerely,

A.J. KRAMER

A.J. Kramer
Federal Public Defender

cc: Jonathan M. Malis
United States Attorney's Office