

The
Presentence Investigation Report

*A Guide to the Presentence Process
for Defense Attorneys*



**Prepared by the
U. S. Probation Office
for the
Western District of North Carolina**

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I. Introduction

The selection of an appropriate sentence is one of the most important decisions to be made in the criminal justice system, and the primary vehicle for assisting the U.S. District Courts in this responsibility is the Presentence Investigation Report. The Federal Rules of Criminal Procedure assign the task of conducting presentence investigations to the U.S. Probation Office, and this guide has been prepared to provide defense attorneys practicing in the Western District of North Carolina with information about the U.S. Probation Office and the presentence process.

While this Guide can not provide an exhaustive explanation of the application of the U.S. Sentencing Guidelines, it is hoped that this Guide will assist defense attorneys in their understanding of the presentence process, and that by doing so, all parties: defendants, defense attorneys, the government, the probation officers, and the court, will benefit.

Should you have any questions during any part of the presentence process, including pre-plea negotiations, particularly regarding guideline issues, please feel free to contact the U.S. Probation Office. We will make every effort to assist you.

Mission Statement of the U.S. Probation Office, Presentence Unit:

To diligently serve as an accurate and impartial source of information for the Court.

Policy:

Presentence services in the Western District of North Carolina will conform with the Guidelines established by the Administrative Office of the United States Courts as found in the *Guide to Judiciary Policies and Procedures*, Vol. X, *The Presentence Investigation Report*, Publication 107, and Rule 32 of the Federal Rules of Criminal Procedure.

Disclaimer:

The information contained in this guide is offered to assist in understanding the presentence report process. However, the requirements of the Court are subject to change without notice, and this guide should not be considered definitive. Procedures also vary from judge to judge, and from office to office, within this District. This guide is not binding on the Court or the U.S. Probation Office.

II. Authority and Referral for Presentence Investigations

The statutory authority for the preparation of presentence investigations and reports is found in 18 U.S.C. § 3552 and Rule 32(c)(1) of the Federal Rules of Criminal Procedure. They provide that the U.S. Probation Office will conduct a presentence investigation, and provide a presentence report, to the defendant, the defendant's counsel and the U.S. Attorney's office, containing verifiable information regarding the offense, and the defendant, to aid the court in determining an appropriate sentence. Included is factual information used to formulate the basis for the application of the sentencing guidelines, and other relevant information that may form the basis for a departure from the guideline sentencing range.

The court may waive the report if the court finds that there is sufficient information in the record to enable the meaningful exercise of its sentencing authority. Defendants may not waive preparation of the report under Rule 32.

Uses of the Presentence Report

The primary purpose of the presentence investigation and report is to assist the court in determining an appropriate sentence. However, the presentence report is also intended to assist the probation office in supervising defendants during any subsequent terms of probation, parole or supervised release. The report also aids the U.S. Bureau of Prisons in its designation, classification, programming and release planning processes, and provides the U.S. Parole Commission with data relevant to parole consideration, where applicable. The report also supports the Sentencing Commission's monitoring and research responsibilities.

The role of the Probation Officer

The probation officer is responsible for the preparation of all sections of the presentence report. In this endeavor the officer is an independent reporter to the court about the offense and the defendant, and also provides an analysis of how that information applies to the sentencing guidelines. The probation officer does not reinvestigate the offense of conviction.

III. Investigative Procedures

The Plea and Rule 11 Hearing: the Probation Officer's Role

In some offices a probation officer is present in the courtroom when a guilty plea is entered, or when a guilty verdict is handed down. The officer is available to answer any questions related to preparation of the presentence report and to determine whether defense counsel wishes to be present for the presentence interview. In addition, the officer obtains the defendant's signature on an authorization to release information form. The officer may also give the defendant an instruction sheet requesting certain documents, and requesting completion of a personal financial statement.

Defense counsel is also given an information sheet explaining the procedure for providing a statement from the defendant to be included in the presentence report.

In other offices, an officer is not always present in court, but does make contact with defense counsel prior to, and following, entry of plea.

Assignment of Cases

Soon after entry of a plea or verdict of guilty the presentence investigation is assigned to a probation officer in the divisional office designated to handle matters from that court division. However, due to fluctuations in the workload throughout this district, it is sometimes necessary to assign an investigation to an officer in another divisional office. The assignments are equitably distributed to the presentence team members, with efforts made to involve as few officers as necessary in multi-defendant indictments.

Documents and Verification of Information

The probation officer is responsible for gathering all information about the defendant and the offense, verifying the information gathered, interpreting and evaluating the data, applying the sentencing guidelines to the facts, and presenting the information in an organized, objective report. Since the complexity of cases vary with the nature of the offense and the background of the defendant, in addition to basic investigative procedures, specialized areas of inquiry are determined by the officer on a case-by-case basis.

Where possible, the investigation is started immediately after assignment of the case to maximize the time available for verification of information. The process of information gathering includes communication with the defendant, agents, victims, attorneys, family members and others, for verification of statements and assertions; setting deadlines for the submission of information from these individuals; documenting the investigative process in the case file, noting dates of conversations and deadlines set; identifying gaps in the information needed to complete the report; and communicating disputes with the parties throughout the process.

The defendant is encouraged to furnish key documents to the probation officer to facilitate the investigation. Where the defendant presents documentation of birth, education, etc., and where there is no statutory provision or guideline application which would depend upon such information, it will generally be unnecessary for the probation officer to seek independent verification, greatly expediting the process.

The probation officer's acquisition of specific types of information such as employment records, substance abuse treatment records, psychiatric and medical treatment, Social Security earnings history, and credit bureau reports require the authorization of the defendant. Information not provided upon request to the defendant can generally be obtained directly by the probation officer;

however, information located in other districts, particularly arrest records, routinely requires a collateral investigation request to the U.S. Probation Office in that district.

Defendant Interviews

The probation officer's interview of the defendant is the pivotal component of the presentence investigation. Prior to the presentence interview the officer has become familiar with the statutes violated and is knowledgeable about the conduct that will form the basis for applying the sentencing guidelines. The interview is generally scheduled several weeks after the plea or verdict, though occasionally the officer will conduct an interview at the time of the plea. However, because the officer may not always be thoroughly familiar with the case at that time, necessitating a follow-up interview later, this practice is discouraged. Defendants and attorneys should request immediate interviews only under extraordinary circumstances.

During the interview all information relevant to sentencing is reviewed with the defendant. Information is also gathered at this point that, although not included in the presentence report, may be of value to an officer later providing supervision services.

At the officer's discretion a home visit or telephone interview with a family member may be conducted to review information obtained during the investigation. This enables background information to be verified with family members, provides the officer an opportunity to assess the defendant's standard of living (an aspect of the financial investigation), the defendant's community ties, the presence of drug or alcohol abuse, and other factors that may be relevant to sentencing or later supervision.

If the investigation discloses information that is substantially different from statements previously given by the defendant, the officer reviews this with the defendant in order to resolve the conflicting statements, or to advise the defendant of the facts that have been established that contradict the defendant's position.

As the investigation progresses the probation officer may determine the need for interviews of other individuals in order to understand the details of the offense, the effects on the victim, or the background of the defendant. As such, the officer may contact the Assistant U.S. Attorney (AUSA), defense attorney, case agent, victim, AUSA victim/witness coordinator, and relatives or associates of the defendant who can assist in the collection or verification of information. The decision to interview such parties is determined by the relevancy and importance of the information being sought.

Rule 32 provides that upon request the defendant's counsel is entitled to notice and to a reasonable opportunity to attend any interview of the defendant by the probation officer. This provision includes any communication with the defendant that is initiated by the probation officer with the intent of obtaining information to be used in preparation of the report. While Rule 32 provides that counsel be afforded a reasonable opportunity to attend any interview, it does not provide for any delay in the preparation of the report. Thus, the burden falls on counsel to attempt to comply with the probation

officer's interview timetable and deadlines. The officer will also make every effort to accommodate counsel's schedule.

Interview Refusals

On rare occasions a defendant may refuse to be interviewed by the probation officer. In such cases the officer proceeds with the investigation, attempting to develop as many sources of information as possible. The officer pursues the information that is available, and where no information is obtainable, that fact is reported to the court. Refusal to be interviewed may affect acceptance of responsibility.

IV. The Presentence Investigation Report

The Face Sheet and Identifying Data

The face sheet (page one) of the presentence report contains information relating to the sentencing hearing, including court of jurisdiction, identification of the defendant, the sentencing judge, the probation officer, the prosecutor, and the defense counsel. It also lists the offense of conviction, the statutory penalties, and the defendant's release status, noting any existing detainers. Also identified are codefendants, and any other related cases, by name and docket number. The dates the report was prepared and revised, if applicable, are also included on the face sheet.

The identifying data, or the second page of the face sheet, lists demographic data provided for the use of the sentencing judge, probation officers, U.S. Sentencing Commission, U.S. Parole Commission, and the Bureau of Prisons (BOP). While certain demographic data such as age, race and sex are precluded from consideration in the sentencing process both by statute and by the guidelines, the Sentencing Commission does require such information. This demographic data is entered into the BOP's internal computer system directly from the presentence Report, providing BOP officials with information relating to the identification of the defendant.

Probation officers glean the majority of this information from charging documents, district court records, the defendant, family members, and/or collateral documentation. In an attempt to provide BOP officials with complete and detailed information, probation officers typically include all aliases reported by reliable sources for that defendant, including aliases retrieved from arrest histories produced by the National Crime Information Center (NCIC), other law enforcement records and investigative reports.

PART A: THE OFFENSE

Charges and Convictions

This section of the Presentence Investigation Report provides a chronological history of the prosecution of the case against the defendant from the filing of the initial charges, to the entry of a guilty plea or verdict. This section of the report also identifies the charges filed against the defendant and any co-defendants, the type of charging document, and the charge, or charges, of conviction. The method of conviction is noted, and a summary of the defendant's bond hearing is provided, as well as a synopsis of the plea agreement, if applicable. The status of any co-defendants is also summarized.

Pretrial Supervision Adjustment

If applicable, this section of the report provides a brief summary of the defendant's adjustment to pretrial supervision. Reference may be made to the U.S. Pretrial Services Officer assigned to the case and to any comments that officer may have about the defendant's adjustment. This section may also reference any violations noted by the officer. The court may use information contained in this section when considering the applicability of voluntary surrender and acceptance of responsibility, as well as motions for departure based upon substantial assistance.

The Offense Conduct

The offense conduct section of the report provides a description of the defendant's conduct, and the conduct of codefendants or other participants, that occurred during the offense of conviction, in preparation for the offense, or in the course of attempting to avoid detection or responsibility for that offense. All information pertinent to the application of the sentencing guidelines is documented, including information pertaining to relevant conduct, specific offense characteristics, and any other applicable guideline adjustments. This section also provides the court with the factual basis for the defendant's plea of guilty, as well as providing information that may assist the court in its consideration of a departure.

Information presented in this section is obtained from the investigative reports contained in the discovery file of the U.S. Attorney, interviews with the investigating officers/agents, victims, and the defendant, and represents the best information available to the probation officer at the time the report is prepared.

Defendant's Written Statement Regarding the Offense

This section of the report is provided to afford the defendant an opportunity to have his or her own statement regarding the offense included in the report. Any information received must be typed and submitted to the probation officer within 14 days of plea or verdict. If a statement is submitted, it may be either inserted into the body of the report, or attached to the report.

Defense counsel should be aware, however, that any statement provided by the defendant may affect the application of the sentencing guidelines, especially acceptance of responsibility. In some cases statements may also affect motions for downward departure based upon substantial assistance.

Victim Impact

Federal Rule of Criminal Procedure 32 requires that the presentence report include a verified assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed. Although distinguished with a subheading, the victim impact assessment is actually part of the offense conduct for which the defendant is responsible, and includes the impact on all victims of an offense, regardless of whether the information affects guideline application.

The identification of victims, both primary and secondary, and their losses, is the responsibility of the case agent and the U.S. Attorney's Office. It is the responsibility of the probation officer to provide notification to the identified victims of the amount subject to restitution, and to provide any victim an opportunity to submit information to the probation officer concerning his or her losses for inclusion in the presentence report. A second notification is also required of the probation officer notifying the victim of the scheduled date, time and place of the defendant's sentencing hearing.

The provisions of the Mandatory Victims Restitution Act of 1996, effective for defendants whose offenses were committed after April 24, 1996, also require the court to order full restitution in most cases.

Adjustment for Obstruction of Justice

In this section of the report any effort by the defendant to impede the investigation, prosecution, or sentencing of the case is reported. Additionally, any conduct that created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer is also reported. Conduct pertaining to the obstruction guidelines is generally separated from the offense conduct because the evaluation of behavior constituting obstruction is distinct from the analysis of the offense conduct, focusing instead on behavior occurring after law enforcement authorities have initiated an investigation or arrest. All obstructive behavior is included, even if the obstruction does not support an adjustment to the guidelines, as it may be considered by the court in selecting a sentence within the guideline range, and in consideration of voluntary surrender.

Adjustment for Acceptance of Responsibility

Acceptance of responsibility is another adjustment based on the defendant's conduct. In the same manner as the adjustment for obstruction of justice, this adjustment is distinguished from the offense conduct because an assessment of the defendant's acceptance focuses primarily on behavior occurring after law enforcement authorities have initiated an investigation or arrest, and is distinct from the analysis of the offense conduct.

In this section the report identifies conduct, or omissions, that demonstrate acceptance of personal responsibility for the offense conduct. Information relevant to this provision includes the defendant's actions prior to, during, and after the prosecution of the case; the timeliness of the defendant's admission of guilt; the extent of the defendant's admission of guilt; statements made by the defendant to the probation officer concerning the offense; or any other conduct that may be relevant to the assessment of this adjustment. If the defendant obstructed justice the guidelines provide that the adjustment for acceptance of responsibility will not generally be appropriate. If there are extraordinary facts suggesting that both the obstruction and acceptance adjustments apply, the report addresses these facts.

Offense Level Computations

This section of the presentence report presents the classification of the offense under the categories established by the U.S. Sentencing Guidelines that the probation officer believes to be applicable to the defendant's counts of conviction. Each element of the offense level computation, including specific offense characteristics and other adjustments, is supported by information presented in the preceding sections of the report. However, pursuant to the court's directive, guideline computations in this District do incorporate the provisions found in the Plea Agreement.

The section begins with identification of the edition of the United States Sentencing Commission Guidelines Manual that was used to apply the guidelines. This information is important in determining whether there are any *ex post facto* issues.

After application of all relevant guidelines the final, total offense level is displayed. This forms the vertical axis of the guideline sentencing table.

Offense Behavior Not Part of Relevant Conduct

In some cases the offense behavior of counts to be dismissed is not considered part of relevant conduct as defined by the guidelines. Since such behavior is not part of relevant conduct and is not included in the guideline application, the conduct is included in this section to make clear to the court that the conduct is not captured within the guideline application. Presentation of information in this manner assists the court in evaluating any plea agreement.

There may also be instances in which related offense behavior that is not part of relevant conduct has not been included in the criminal charges. If sufficient reliable information is present to establish that the conduct took place, it may be included in this section.

PART B. DEFENDANT'S CRIMINAL HISTORY

This section of the Presentence Investigation Report provides information about the defendant's previous criminal behavior, and determines the defendant's criminal history category in accordance with sentencing guidelines. The probation officer lists all prior occasions where a court has

determined that the defendant was guilty of criminal behavior, including juvenile adjudications, if available. All sentences imposed prior to the instant sentencing are presented, including sentences for conduct which occurred concurrently with or subsequent to the offense conduct previously described. The officer includes all verifiable adjudications and convictions, including those not assigned criminal history points, to assist the court in judging the adequacy of the criminal history category. Additionally, officers who later supervise the defendant on probation or supervised release will need to know the defendant's complete criminal history for assessment of risk factors.

All adjudications and convictions which the court can accept as proof the defendant was guilty are reported. As such, adult prosecutions in which diversion was granted after a finding or admission of guilt are included, and are eligible to receive criminal history points. These include charges for which the defendant was placed on Deferred Prosecution or Pretrial Diversion, and on which Prayer for Judgement Continued was granted.

Each entry, in chronological order, lists the date of arrest, the charge of conviction and court, the date the sentence was imposed, the disposition, and the applicable guidelines and criminal history points awarded. Following each entry a paragraph provides details about the conviction, if available. If the defendant was imprisoned, the adjustment while incarcerated is discussed, if available, including the date of release. If the disposition included a term of supervision, the defendant's performance is also described. If a term of supervision was revoked, the disposition of the revocation and subsequent dates of imprisonment are also included.

The officer also indicates whether the defendant was represented by counsel, or waived counsel. However, if state law required counsel, the officer may cite the statute or source at the beginning of this section. If unable to verify the status of counsel, the probation officer still reports the conviction and assigns criminal history points; the defendant has the burden of establishing that a facially valid conviction is unconstitutional.

Detentions and arrests which did not result in conviction or prosecution are included in Other Criminal Conduct, Pending Charges, or Other Arrests, depending upon the circumstances of the case and the information that is available.

Due to the increasing automation of criminal records, many of the details surrounding prior offenses, particularly descriptions of the offense conduct, are no longer available for inclusion in the presentence report.

Criminal History Computation

In this section of the report the probation officer determines the defendant's criminal history category. Criminal history points previously assigned are carried forward, and a determination is made whether additional points should be assigned due to the defendant being under a criminal justice sanction at the time of the offense, or due to the recency of the defendant's release from imprisonment. Such points are a measure of the recency of a defendant's criminal history, and defendants granted suspended sentences or unsupervised probation are considered to be under

criminal justice control (see USSG §4A1.1, application note four, and N.C.G.S. §15A-1341). If more than four points have been assigned for sentences of less than 60 days imprisonment, a maximum of only four points is added to the points assigned for longer sentences. There is also a three-point limit for certain related counts of conviction for crimes of violence.

Reporting all points in these sections assists the court in determining the correct criminal history category should one or more of the convictions be subsequently disallowed. Additionally, the listing of all points in these sections may be helpful in the court's consideration of a departure addressing the adequacy of the criminal history category. The total number of criminal history points then determines a criminal history category. This criminal history category constitutes the horizontal axis of the sentencing table.

If any Chapter Four enhancements override the criminal history category, such as the career offender or armed career criminal provisions, the officer calculates the criminal history category, then determines if the category should be increased in accordance with those Chapter Four provisions.

Other Criminal Conduct

In this section the officer reports reliable information about other past criminal behavior which may indicate that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct, or the defendant's likelihood to commit future crimes. The decision to include or exclude information about criminal conduct in this section is based upon whether there is reliable information to support the allegation of criminal behavior. Entries in this section must be supported by documentation because they may be considered as grounds for departure. The information contained in this section assists the court in evaluating the adequacy of the criminal history category.

Pending Charges

In this section of the report the officer lists all criminal charges pending against the defendant. The jurisdiction, charges, and status of each pending case are reported, along with a brief synopsis, if available. This information assists the court in evaluating the adequacy of the criminal history category and whether grounds for departure exist. If a defendant has sustained a conviction but has not been sentenced, the conviction may still receive a criminal history point.

Other Arrests

In this section of the report the probation officer reports all other verified arrests of the defendant. This information provides the court with information about the defendant's additional contact with law enforcement authorities. However, because there is no reliable information to establish that the defendant committed a criminal act, such information may not be considered for departure.

PART C. OFFENDER CHARACTERISTICS

This section of the Presentence Investigation Report provides information about the defendant's history and present condition. When coupled with Part B of the report this section fulfills the mandate expressed in Rule 32 and 18 U.S.C. § 3553 that the sentencing courts consider the history and characteristics of the defendant whether or not the information is directly relevant to guideline application.

Information regarding the defendant's personal background is of assistance to the court in selecting appropriate sentencing options and in determining the need for supervision, as well as the length of the term, and appropriate conditions. Such information is also relevant in determining the defendant's ability to pay financial sanctions, and may also be important in assessing risk factors. Community supervision of the defendant is dependent upon an understanding of the defendant's personality and motivations, the extent of family and community support that can be anticipated, employment patterns, abuse of controlled substances, financial stability, and a variety of social factors that vary by case. These factors may be considered by the court when determining a specific term within a guideline range, or when determining sentencing options. In extraordinary cases these factors may be considered when determining if a departure is warranted.

The information in this section is also important for implementation of various elements of the sentence. Officials with the Bureau of Prisons rely on this information as part of the classification process for determining institutional assignments. Probation officers supervising terms of probation and supervised release will also consult this information in assessing risk factors for supervision classification.

Personal and Family Data

In this section the probation officer describes present and historic social factors that have had a significant bearing on the defendant's personality and behavior. Though information about a defendant's past is included in this section, the focus is on the present, including only the information necessary to understand the defendant and to formulate an appropriate sentence.

The defendant's immediate family members are identified, including parents and/or guardians, siblings, marriages, divorces, and dependents, along with an analysis of the defendant's fulfillment of responsibilities toward the spouse, ex-spouse, children, or any other dependents. This information is relevant for a determination of the ability to pay a fine or restitution.

The officer also describes the defendant's usual living situation and current living situation, if different. If the defendant's living situation is subject to change after a period of confinement, future residence plans are noted if known.

Physical Condition

In this section of the report the probation officer reports any past or present health problem that may have an impact on sentencing, institutional classification, or community supervision. The treatment history of that condition is summarized, and the defendant's current prescriptions are listed. This information assists the court in selecting appropriate sentencing options and determining whether conditions of supervision should be tailored to accommodate health conditions. This information is critical for Bureau of Prisons designation decisions.

Mental and Emotional Health

In this section the probation officer identifies any mental or emotional problem that may have an impact on sentencing, institutional classification, or community supervision. If the defendant requires psychological or psychiatric care, especially if medication is required, that is also noted. Any history of treatment for mental, emotional or behavioral problems is summarized. In cases where court-ordered psychological examinations are received prior to the preparation of the presentence report, a summary of those findings is also included.

Information regarding the defendant's mental and emotional health is of assistance to the court in selecting appropriate sentencing options, in assessing whether a departure is warranted, and in determining the need for supervision as well as the length of the term and appropriate conditions. Such information is also critical in assessing any specific third-party risk for community supervision, or potential risk to officers subsequently supervising the case. It is also critical in Bureau of Prisons designation decisions.

Substance Abuse

In this section the probation officer indicates if the defendant presently abuses alcohol or uses controlled substances, and if treatment is currently required. Identification of the specific substances used and the pattern of use is frequently important for development of an appropriate sentence or treatment strategy. Since there is frequently a correlation between alcohol and substance abuse and criminal behavior, any history of alcohol abuse or substance use, including the results of urinalyses by the pretrial services office is also reported. Any prior treatment for abuse of alcohol or controlled substances is summarized if available. Such information may also be critical in assessing third-party risk, or risk to the community or supervising probation officer during community supervision. This information is also used by the Bureau of Prisons in determining if any substance abuse treatment will be offered.

Education and Vocational Skills

In this section of the report the probation officer summarizes the defendant's educational accomplishments and describes any special training or skills. Those skills which may have facilitated the commission of the instant offense are explained, especially if there is an indication of an abuse of those skills. It is also noted if the defendant's primary language is not English, or if

the defendant is illiterate. This information assists the court in selecting appropriate sentencing options and in determining an appropriate term and conditions for community supervision. The defendant's possession of vocational skills may also be an indicator of ability to pay a fine or restitution, or an ability to perform community service.

Employment Record

In this section the probation officer describes the defendant's prior employment record, including places and dates of employment, specific job descriptions, salary, and reasons for separation from employment, if available. Military service is also included. Significant periods of unemployment, and other sources of income, are also reported. The defendant's employment status at the time of the instant offense, and at the time of sentencing, is also reported, and a brief description of the defendant's usual occupation is given. This summary generally details employment for the 10 years prior to sentencing. Earlier employment is described more generally unless the earlier employment history is directly relevant to sentencing.

Information about the defendant's employment assists the court in selecting appropriate sentencing options and in determining appropriate conditions for community supervision. A defendant's employment status or history is also important in assessing the defendant's ability to pay financial sanctions or the ability to perform community service. The employment history may also provide information necessary to determine if criminal livelihood sanctions should be applied. Additionally, the employment history may reveal the need to impose occupational restrictions upon the defendant as a condition of probation or supervised release.

Financial Condition: Ability to Pay

In this section of the report the probation officer reports detailed information about the defendant's financial condition. Defendants are asked to provide a financial statement reporting all assets and liabilities. Supporting documentation is then obtained from a variety of sources, including pay stubs, credit reports, real property records, Social Security Earnings Statement, Department of Motor Vehicles records, and others. This information assists the court in selecting appropriate sentencing options and in assessing the defendant's ability to pay financial sanctions.

PART D. SENTENCING OPTIONS

This section of the Presentence Investigation Report delineates the statutory and guideline provisions for imprisonment, as well as those for probation, supervised release, fines, restitution and denial of federal benefits. Also included in this section is a description of the impact of the plea agreement on those sentencing options. The sentencing options available to the court are determined by both the statutes applicable to the counts of conviction, and the sentencing guidelines. If there is a conflict between a statutory provision and a guideline provision, the statutory provision will override the guideline. The statutory provisions are listed adjacent to the guideline provisions to allow a

comparison of the sentencing options that are statutorily available versus those that are available within the guidelines.

Custody

Statutory Provisions:

In this section the statutory provisions for imprisonment for each count of conviction are displayed. In addition, if the government has filed a motion for an enhanced penalty, the effects of that enhancement on the statutory provision will be noted.

Guideline Provisions:

The guidelines for imprisonment are set forth in the sentencing table, and a sentence conforms with the guidelines for imprisonment if it is within the stated minimum and maximum terms. Only one guideline range is presented for all counts of conviction unless a count requires a consecutive term of confinement by statute. Certain terms in a guideline range allow the court to impose imprisonment, alternate sanctions, a combination of sanctions, or substitute sanctions. The availability of those sanctions is also presented.

Impact of the Plea Agreement

Here the probation officer describes the counts to be dismissed and any stipulations contained in the plea agreement. The officer also provides an analysis of how the sentencing options would be different were the defendant being sentenced on all of the counts in which she or he is named, and/or without those stipulations. This assists the court in evaluating the impact of the plea agreement on the ultimate sentence, and allows the court to determine that the agreement does not undermine the statutory and guideline purposes of sentencing.

Supervised Release

Statutory Provisions

The statutes make imposition of a term of supervised release following imprisonment mandatory in all but a few cases, and the authorized terms of supervised release are determined by the classification of the offense. Though standard conditions of supervised release and probation applicable to all defendants have been adopted by this district, the court may add special conditions that are tailored to each case.

Guideline Provisions

This section of the report describes the various sentencing ranges that either require supervised release, or leave imposition of supervised release to the discretion of the court. Certain minimum terms in a guideline range allow the court to impose imprisonment, alternate sanctions, a

combination of sanctions, or substitute sanctions. The availability of those sanctions is also presented.

Probation

Statutory Provisions

In this section of the report the officer reports whether the defendant is statutorily eligible or ineligible for probation. If the defendant is ineligible, the reason is reported.

Guideline Provisions

Eligibility for probation is determined by the minimum term of the guideline range. Certain minimum ranges allow for probation, or probation with community confinement, or home detention as a condition of probation, while other ranges preclude probation. All options available to a defendant are discussed. If probation is not allowed by the guidelines the officer reports that the defendant is ineligible, citing the relevant guideline.

Fines

Statutory Provisions

In this section of the report the probation officer specifies the statutory provisions for the fine amount. If the court imposes a fine, payment is due immediately. In cases where special assessments, fines, and restitution are all ordered, payments are applied first to special assessments, followed by restitution, and then fine payments. Special assessments are also mandated by statute.

Guideline Provisions

The guideline provisions for fines are based upon the defendant's total offense level unless overridden by the fine established by the statute.

Restitution

Statutory Provisions

In this section of the report the officer identifies any restitution owed. Also reported are the options available to the court in apportioning restitution obligations among co-defendants, if applicable.

Guideline Provisions

The guideline requirements for restitution mirror those of the statutory requirements.

Denial of Federal Benefits

Statutory Provisions

If applicable, this section of the report outlines the court's options in making the denial of certain Federal benefits a part of the judgement. For individuals convicted of a drug offense, the court may order that the defendant be ineligible for certain Federal benefits. However, social welfare related programs or programs requiring contributions such as social security or retirement programs, are not included. Denial also does not apply to defendants who have cooperated with, or testified for, the government.

Guideline Provisions

The guideline requirements for denial of Federal benefits mirror those of the statutory requirements.

PART E. FACTORS THAT MAY WARRANT DEPARTURE

In this part of the Presentence Investigation Report the officer identifies and discusses factors that may warrant a departure from the applicable guideline sentencing range. Probation officers are authorized, as part of their independent role, to discuss departure factors and to make a recommendation to the court regarding departures. However, inclusion of such information does not signal that the officer will, in fact, recommend a departure. The purpose is to provide notice to the court so that the court can consider each factor independently.

The court may depart from the otherwise applicable guideline if it finds there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission. In addition to the factors discussed in Chapter 5 of the Guidelines Manual, the Commission has identified factors throughout the guidelines that may also warrant an upward or downward departure.

Pursuant to *Burns v. United States*, 501 U.S. 129, 135-139 (1991), the probation officer's discussion in the presentence report of possible departures is sufficient notice to the parties of the potential departure. As such, defense attorneys are encouraged to identify and discuss departure issues with the probation officer. The officer can then corroborate the factual circumstances and indicate them in the report.

V. Recommendation

According to Local Rule 32.1 the recommendation section of the Presentence Investigation Report is a confidential record that is disclosed only to the court.

This section of the report provides the court with a sentencing chart displaying the statutory and guideline provisions, along with a recommendation by the probation officer, as to custody, probation, supervised release, fine, restitution, and special assessment. The sentencing chart is designed so that the court can easily compare the statutory and guideline provisions, and the recommended sentence, to determine if there is any conflict among them, and to identify any possible recommendation for a departure.

Also included is the probation officer's evaluation and analysis of the offense, the defendant, and the court's sentencing options, and the officer's basis for the recommended sentence. Recommended special conditions of probation or supervised release are also explained. This information assists the court in developing a statement of reasons for imposing a sentence as required by 18 U.S.C. §

3553. This section also provides the court with any departure recommendations, including the officer's justification for recommending a departure, and the recommended extent of the departure.

This section also includes an assessment of the defendant's suitability for voluntary surrender. Detention is recommended if the statute requires mandatory detention. However, if factors exist that indicate that the defendant would otherwise be a good candidate for voluntary surrender, those factors are detailed.

This section also includes the officer's recommended sentence stated in the language of Model Sentencing Forms.

VI. Disclosure and the Addendum Process

After the Presentence Investigation Report has been completed, the initial report is disclosed to the defendant, the defendant's counsel, and the attorney for the Government within the time mandated. Rule 32 establishes the time allowed for disclosures and objections, and unless the defendant waives this time requirement, the probation officer makes disclosure by furnishing the presentence report not less than 35 calendar days prior to the date of sentencing. This initial report is not forwarded to the court.

The parties involved then may, within 14 calendar days after receipt of the report, raise objections to any material information contained in or omitted from the report, communicating such objections in writing to the probation officer, and to each other. The time period for submitting objections is strictly observed and further objections can be raised only when good cause is shown.

Upon receipt of the written objections the officer conducts any further investigation that is necessary, considers all reliable and relevant information submitted, compares the arguments and evidence with the verifiable facts gathered, and reviews the relevant statutes and guidelines. If the probation officer is convinced of the merits of the arguments presented, the officer makes the appropriate adjustments or revisions to the original presentence report. If, however, the officer maintains the initial position of the report, an addendum to the report is prepared summarizing the objections presented. The officer then provides a response to each argument, supported by justification based on statutes or sentencing guidelines, and on the evidence collected and verified.

The report, containing revisions that may impact the sentencing guidelines, if any (Revised Presentence Investigation Report), along with an addendum providing a synopsis of the issues remaining to be resolved at sentencing, and the probation officer's comments on those issues, is then forwarded to all parties, including the court. The court also receives the probation officer's recommendation. Notification is also forwarded to the Clerk of Court so that a sentencing date may be scheduled.

The addendum is intended to provide the court with a summary of unresolved issues; it is not intended to replace sentencing memoranda from counsel. The probation officer may also use the addendum to forward to the court any relevant information that has become available since preparation of the report. Such information may also be forwarded to the parties via a Supplement to the report.

When submitting objections defense attorneys may use standard letter format, and may combine multiple objections that address the same guideline issue in one objection. Multiple corrections/clarifications to the report that do not affect guideline issues may also be combined. When not combined, the probation officer will often do so in order to simplify the issues for the court.

Below is the recommended format for filing objections to the presentence report. Note that this format is required for objections filed on reports prepared for U.S. District Court Judge Lacy H. Thornburg pursuant to Miscellaneous Order No. 1:95MC30.

1. Objections or challenges to presentence reports must be in writing and must be filed with the originating probation office within 14 calendar days of the date of the receipt of the report.
2. Each objection must specify the page and paragraph of the presentence report to which such objection applies.
3. Each objection shall include a proposed amendment or modification to the language of the relevant paragraph of the presentence report. Such proposed amendment shall include the entire paragraph as it would be amended or modified should the objection or challenge be allowed.

4. Each objection or challenge shall include a statement as to how the calculation of offense level and/or criminal history of the defendant will be affected if the objection or challenge is allowed.
5. A summary shall be included showing the changes in total offense level, criminal history, and guideline ranges for imprisonment and fines.

VII. Factors Germane to Inmate Classification and Designation

The Federal Bureau of Prisons assigns a custody classification to each inmate and designates that inmate to an institution based upon factors in the presentence or supplemental report. Among the factors that are considered in classification and designation are: age, release residence area, voluntary surrender, medical problems or history of psychiatric problems, security threats, facts of the offense (violence, amounts of drugs, firearms), sex offense history, threats to government officials, INS detainers, escape history, extensive financial resources, international connections, major figures in large criminal organization, special skills, ties with terrorist organizations, and the number and nature of prior prison or jail commitments.

A judicial recommendation for a specific institution or program in the Judgment will be honored by the Bureau when the recommendation is consistent with Bureau policies.

VIII. Other Types of Presentence Reports

Expedited Presentence Reports

In certain cases the sentencing process can be expedited, with presentence reports being completed within five weeks of plea. Sentencing may then occur as early as six weeks after plea. Expedited reports are full presentence reports, but can be completed more quickly due to the parties agreeing to certain stipulations, and the cases meeting certain criteria. All cases are reviewed prior to plea and are considered for expedited treatment if they meet the following criteria:

1. All parties must indicate their willingness to proceed immediately.
2. The defendant's known criminal history does not include extensive out-of-state arrests.
3. All foreseeable drug amounts, loss and/or restitution amounts will be stipulated in the plea agreement, in open court at the plea hearing, or will be agreed upon by all parties.
4. All parties agree that they do not anticipate any disputed guideline or departure issues. USSG Chapter 2 or Chapter 3 adjustments should be addressed in the plea agreement, in open court at the plea hearing, or agreed upon by all parties.

5. All parties will waive their rights pursuant to Rule 32 time limits and agree to be sentenced on the next available sentencing date.
6. Objections must be received by the sentencing Judge within seven days of receipt of the presentence report for ruling at sentencing. A copy must also be received by all parties for informational purposes. The Probation Officer will make an effort to resolve any objections/clarifications prior to sentencing. If unresolved issues remain, the Court will have the option of addressing the objections/clarifications or continuing the sentencing to afford the Officer time to respond in writing.
7. If the defense attorney wants to be present during the presentence interview, the probation officer must be contacted within five days after plea to schedule an appointment. Interviews will occur within 10 days after plea. Defendants must make themselves available to the probation officer within this time period.
8. During the investigation, if it is determined that the case does not meet the criteria established for an Expedited Presentence Report, the parties will be notified. In such cases, Rule 32 time limits will apply and sentencing may be delayed.

Abbreviated Presentence Reports

In certain cases abbreviated presentence reports can be prepared that contain offense level calculations, criminal history calculations and statutory provisions only. As such, these reports can be completed within five weeks of plea, with sentencing occurring as early as six weeks after plea. All cases are reviewed after plea and are considered for an Abbreviated report if they meet the following criteria:

1. All parties must agree that a full presentence investigation and report is not needed, and the Court must find that the information in the record enables it to exercise its sentencing authority meaningfully under 18 U.S.C. § 3553. Should the Court find that an Abbreviated Report is not sufficient, the probation office will proceed with a full investigation and report. In such cases, Rule 32 time limits will apply and sentencing may be delayed.
2. All parties must consent to the Abbreviated Report process and waive their rights regarding any applicable time limits pursuant to Rule 32 by executing the appropriate waiver.
3. Cases to be considered for an Abbreviated Report should generally fall into one of the following categories:
 - a. The offense is a Class A Misdemeanor
 - b. The defendant appears to fall within Zone A, B or C of the U.S. Sentencing Guidelines
 - c. The defendant appears to have served the majority of his projected sentence in pretrial detention
 - d. The defendant has previously had a full presentence investigation and report prepared

4. Generally, cases involving restitution issues should not be considered for an Abbreviated Report unless an agreement concerning loss amounts and restitution amounts has been reached between the parties.
5. Parties agree that they do not anticipate any disputed guideline or departure issues. All foreseeable drug amounts, loss amounts, restitution amounts, and Chapter 2 and 3 adjustments should be addressed in the plea agreement, in open court at the Plea/Rule 11 hearing, or agreed upon by all parties.
6. Abbreviated Reports will not contain personal history information and therefore do not usually require an additional interview with the defendant if an interview has been conducted by Pretrial Services.
7. Abbreviated Reports will provide offense level calculations, criminal history calculations and statutory provisions.
8. Objections must be received by the sentencing judge within seven days of receipt of the Abbreviated Presentence Report for ruling at sentencing. A copy must also be received by all parties for informational purposes. Unless otherwise directed by the Court, the probation office will not address objections prior to sentencing. The Court will have the option of addressing the objections or continuing the sentencing to afford the Officer time to respond in writing.

Presentence Report Options

	Standard Report	Expedited Report	Abbreviated Report
Qualifying Criteria	<u>Any</u> defendant subject to sentencing in US District or Magistrate Court under Sentencing Guidelines	Defendants subject to sentencing in US District or Magistrate Court under Sentencing Guidelines who: <ul style="list-style-type: none"> - Have no extensive out-of-state arrest records - Agree on drug, loss and/or restitution amounts - Agree on all Chpt. 2 & 3 adjustments - Do not anticipate disputed guideline or departure issues 	Defendants subject to sentencing in US District or Magistrate Court under Sentencing Guidelines who: <ul style="list-style-type: none"> - Are convicted of a Class A Misdemeanor; or - Appear to fall within Zone A, B or C of sentencing guidelines; or - Appear to have served the majority of projected sentence in pretrial detention; or - Have previously had a full presentence investigation & report prepared - Agree on drug, loss and/or restitution amounts - Agree on all Chpt. 2 & 3 adjustments - Do not anticipate disputed guideline or departure issues
Procedures	<ul style="list-style-type: none"> - PSR ordered following entry of plea or verdict and case is continued for sentencing - Probation notifies court when report is complete and ready for sentencing - Rule 32 time limits apply 	<ul style="list-style-type: none"> - All parties sign “Waiver/Agreement-Expedited Presentence Report” - All parties waive Rule 32 time limits - Defendant must consent to interview within 10 days of plea - All parties consent to sentencing within six to eight weeks of plea 	<ul style="list-style-type: none"> - All parties sign “Presentence Investigation and Report Waiver- Consent to Abbreviated Report” - All parties waive Rule 32 time limits - Court finds there is sufficient information to sentence under 18:3553 - All parties consent to sentencing at the pleasure of the Court (generally four to six weeks after plea)
Objection Process	<ul style="list-style-type: none"> - Rule 32 and local court rules apply to the objection process 	<ul style="list-style-type: none"> - Rule 32 time limits waived - Objections must be filed with the sentencing judge within seven days of receipt of report with copies to all parties - Objections will not be addressed by Probation office unless directed to do so by the court 	<ul style="list-style-type: none"> - Rule 32 time limits waived - Objections must be filed with the sentencing judge within seven days of receipt of report with copies to all parties - Objections will not be addressed by the probation office unless directed to do so by the court
Report Format	<ul style="list-style-type: none"> - Full reports containing complete Parts A, B, C, D & E 	<ul style="list-style-type: none"> - Full reports containing complete Parts A, B, C, D & E 	<ul style="list-style-type: none"> - Reports contain only offense level calculations, criminal history calculations and statutory provisions

Presentence Reports for Petty Offenses

A petty offense as defined in 18 U.S.C. §19 refers to a Class B or C misdemeanor or an infraction. In essence, petty offenses are offenses for which the maximum term of imprisonment is six months or less, and, in most cases, where the maximum fine is \$5,000 for an individual.

The Court may either directly sentence a defendant charged with a petty offense, or order a presentence investigation and report. The format mirrors the model used for guideline presentence reports. However, because the sentencing guidelines are not applicable to petty offenses, the sections of the report that were designed for guideline application are not included.

Without guideline application the need to research legal issues is uncommon, and use of an addendum to answer written objections is infrequent. The offense conduct for a petty offense is also ordinarily less complex, reducing investigative effort. Because the maximum fine is restricted and crimes entailing large amounts of restitution are not frequently prosecuted as petty offenses, the financial condition section of the report is also condensed. However, information regarding the defendant's personal life remains critical in making an informed recommendation regarding sentence, particularly regarding whether to recommend probation, a sentencing option which, in contrast to guideline cases, is available in virtually every petty offense case.

Although it is anticipated that most petty offense reports will be concise, if the offense is aggravated or if there are complicated issues, the format will accommodate more comprehensive information. Reduced requirements for petty offense presentence reports are consistent with the needs of agencies that routinely utilize presentence reports. The U.S. Sentencing Commission does not collect data pertaining to petty offenses, as these offenses are not guidelines applicable. Also, the Bureau of Prisons frequently designate petty offense inmates to local facilities because the prison terms are short. Additionally, since petty offenses result in a maximum of six months incarceration, petty defendants are not generally enrolled in programs operated by the Bureau of Prisons.

Supplemental Reports to the Bureau of Prisons (formerly Postsentence Reports)

A supplemental report is prepared on any defendant who was sentenced without a presentence report to probation, a commitment to the Bureau of Prisons for more than six months, or a term of supervised release. The supplemental report assists in supervision efforts for defendants receiving probation or supervised release and is necessary for revocation purposes. It also assists the Bureau of Prisons in classification and designation procedures.

The format of a supplemental report mirrors the model for the guideline presentence report and petty offense presentence report. Since the court has already applied the guidelines the officer does not reapply them, instead reporting the court's findings regarding the guidelines. The computation sections regarding the offense level and criminal history category in the supplemental report are not necessary, nor is acceptance of responsibility, since acceptance has already been assessed by the court at sentencing.

Upon completion of the report it is placed in the probation file. If the defendant is serving a sentence, a copy is forwarded to the Bureau of Prisons where the defendant is housed. Neither the court, the government, defense counsel, nor the defendant receives a copy of the supplemental report, and there is no opportunity for defense to object to the information provided in the report.

IX. How the Defendant and Defense Attorney can Contribute to the Presentence Process

The Federal Rules of Criminal Procedure provide that counsel, upon request, must be given a reasonable opportunity to attend the presentence interview, and following the Plea and Rule 11 hearing, or guilty verdict, defense counsel should notify the probation office of their intention to be present at the interview. Also at that time the defendant will be instructed to furnish certain information to expedite the presentence process. The defendant's failure to furnish the requested information will not only delay the investigation, but may be reported to the court in the presentence report. Defense counsel should ensure that the defendant has submitted all requested information to the probation officer in the time requested.

Defense counsel and defendants are encouraged to maintain an open line of communication with the probation officer. Defense attorneys should identify and discuss departure issues with the probation officer so that the officer can corroborate the factual circumstances and indicate them in the report. Counsel is also encouraged to present his or her perspective on the offense conduct,

anticipated points of contention, and the defendant's cooperation, prior to preparation of the report. In most cases, failure to do so leaves the probation officer with little option but to present the case as presented by the government.

The probation officer plays a key role in the sentencing process, making critical recommendations to the court on guideline applications, sentencing options and departures. As such, good communication among all parties is essential if the officer is to provide an accurate and detailed report to the defendant and to the court.

X. The U.S. Probation Office

The Western District of North Carolina is one of three Federal judicial districts in North Carolina. It comprises thirty-two counties bordering Georgia, South Carolina, Tennessee and Virginia, and includes five divisions: Asheville, Bryson City, Charlotte, Hickory and Statesville. A sixth division in Shelby was eliminated in 1999.

The headquarters for the Western District Probation Office is located in Charlotte. Field offices are situated in Asheville, Bryson City, Hickory and Statesville. Each office staffs a supervision unit, while presentence and pretrial units are housed only in Charlotte, Asheville and Statesville.

Cases are generally prosecuted in the division that covers the county where the offense occurred. Defendants under pretrial supervision, probation, supervised release or parole are generally supervised in the division that covers their county of residence; in a few counties supervision jurisdiction may overlap. The divisions are as follows:

Asheville Division

(Docket Numbers begin with 1)

Counties covered:

Avery, Buncombe, Burke, Cleveland, Haywood, Henderson, Madison, McDowell, Mitchell, Polk, Rutherford, Transylvania and Yancey.

Mailing address:

B-3 U.S. Courthouse Building
100 Otis Street
Asheville, NC 28801
(828) 771-7340

Bryson City Division

(Docket Numbers begin with 2)

Counties covered:

Cherokee, Clay, Graham, Jackson, Macon and Swain.

Mailing address:

Post Office Box 490
U.S. Courthouse, 50 Main St.
Bryson City, NC 28713
(828) 488-5080

Charlotte Division

(Docket Numbers begin with 3)

Counties covered:

Anson, Gaston, Mecklenburg and Union.

Mailing address:

200 S. College Street, Suite 1650
Charlotte, NC 28202
(704) 350-7600

Statesville Division

(Docket Numbers begin with 5)

Counties covered:

Alexander, Alleghany, Ashe, Caldwell, Catawba, Iredell, Lincoln, Watauga and Wilkes.

Mailing address:

Post Office Box 1227
200 West Broad Street
Statesville, NC 28687
(704) 883-1030

Hickory Division

(No court)

Counties covered:

Alleghany, Ashe, Burke, Caldwell, Catawba, Cleveland, Watauga, and Wilkes.

Mailing Address:

816 Highway 321, NW
Hickory, NC 28601
(828) 267-3500

XI. Resource Guide

Defense attorneys can receive guideline application assistance from the U.S. Sentencing Commission's Information Assistance Helpline at 202-273-4545, and from the Sentencing Guidelines Group at 202-208-0262. The Sentencing Commission also has a web site (www.ussc.gov) containing a variety of materials, including guidelines manuals, Commission publications and data files, proposed guideline amendments, working group reports and case law.

The Federal Judicial Center's web site (www.fjc.gov) also contains information about its publications, education programs, and links to other court-related sites.

The Federal Bureau of Prisons' web site (www.bop.gov) offers a directory of Bureau facilities, an overview of various Bureau inmate policies, and offers on-line inmate location information.

The U.S. Clerk of Court for the Western District of North Carolina also offers information on its web site (www.ncwd.uscourts.gov) including court calendars, downloadable forms, docket entries with viewable document images, and information about the U.S. Probation Office. This Manual is also available at this site.

(June 2004)