

ORIGINAL

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

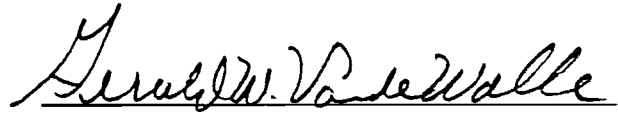
ORDER OF ADOPTION
Supreme Court No. 20010270

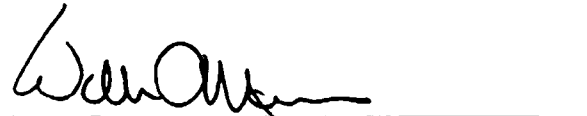
Amendments to Rule 32, North Dakota Rules of Criminal Procedure

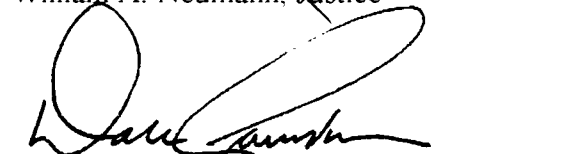
On October 30, 2001, the Attorney General petitioned this Court to amend subdivision (c)(4)(A) of Rule 32, North Dakota Rules of Criminal Procedure, and the Explanatory Note. A copy of the amended rule is attached.

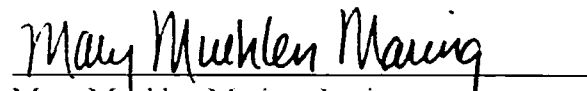
ORDERED, the proposed amendments to N.D.R.Crim.P. 32, as further amended by the Court, are **ADOPTED** effective immediately under N.D.R.Proc.R. § 6, subject to comment.

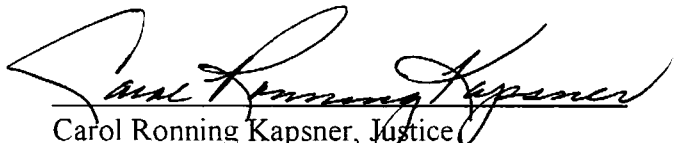
Dated at Bismarck, North Dakota, October 31, 2001.


Gerald W. VandeWalle, Chief Justice

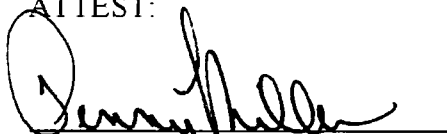

William A. Neumann, Justice


Dale V. Sandstrom, Justice


Mary Muehlen Maring, Justice


Carol Ronning Kapsner, Justice

ATTEST:


Penny Miller, Clerk

RULE 32. SENTENCE AND JUDGMENT

(a) Sentence.

(1) *Imposition of Sentence.* Sentence must be imposed or other authorized disposition made without unreasonable delay. Until disposition, the court may continue or alter bail or require the defendant to be held without bail. Before imposing sentence, the court shall:

(A) determine the defendant and the defendant's counsel had an opportunity to read and discuss the presentence investigation report if made available under subdivision (c)(4)(A) or a summary made available under subdivision (c)(4)(C):

(B) give counsel an opportunity to speak on behalf of the defendant; and

(C) determine whether the defendant wishes to make a statement in the defendant's own behalf or wishes to present information in mitigation of punishment or information which would require the court to withhold pronouncement of judgment and sentence. The prosecution must be given an opportunity to be heard on any matter material to the imposition of sentence.

(2) *Notification of Right to Appeal.* After imposing sentence in a case that has gone to trial, the court shall advise the defendant of the defendant's right to appeal and of the right of a person who is unable to pay the costs of an appeal to apply for appointment of counsel for purposes of appeal. The court is under no duty to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty.

(b) Judgment. A judgment of conviction must include the plea, the verdict, and the sentence imposed. If the defendant is found not guilty or for any reason is entitled to be discharged, judgment must be entered accordingly. The judgment must be signed by the judge and entered by the clerk.

(c) Presentence Investigation.

(1) When Made. The court may order a presentence investigation and report at any time. Except with the written consent of the defendant, the report may not be submitted to the court or its contents disclosed unless the defendant has pleaded guilty or has been found guilty.

(2) Presence of Counsel. The defendant's counsel is entitled to notice and a reasonable opportunity to attend any interview of the defendant by parole and probation staff in the course of a presentence investigation.

(3) Report.

(A) The report of the presentence investigation may contain any previous criminal record of the defendant and information about the defendant's characteristics, including the defendant's family, educational, and social history, the defendant's employment history and financial condition and the circumstances affecting the defendant's behavior which may be helpful in imposing sentence or in the correctional treatment of the defendant, and any information required by the court.

(B) The following types of information may not be included in a presentence report, but may be submitted to the court as an addendum to the report:

(i) any diagnostic or prognostic opinion that, if disclosed, might seriously disrupt a program of rehabilitation;

(ii) information or sources of information obtained confidentially, but subject to disclosure by the court as provided in subdivision

(C)(4)(A);

(iii) any sentence recommendation by parole and probation staff or the victim;

(iv) any victim impact statement;

(v) any other information, including medical, psychiatric, or psychological information, information relating to the victim or victims, and other matters the court may consider confidential, that if disclosed, might result in harm, physical or otherwise, to the defendant, to a victim, or to other persons.

(4) Disclosure.

(A) The presentence investigation report is confidential and may not be read or copied by the public, or copied by the parties unless permitted by the court in its discretion. Any addendum to the presentence investigation report is confidential and may not be read or copied by the public or the parties unless permitted by the court in its discretion. If the court is of the opinion the report contains information that would be harmful to the defendant or other persons if disclosed, the court may not allow the public or the parties to read or copy that portion of the presentence investigation report or addendum. Notwithstanding these confidentiality provisions, the presentence investigation report and addendums may be disclosed to the Attorney General or his designee for purpose of compliance with N.D.C.C. Section 12.1-32-15. The presentence investigation reports and addendums will remain confidential and may not be read or copied by anyone other than the individuals mentioned above unless specifically authorized by the court in its discretion.

(B) Any disclosure to the defendant of the presentence investigation report and addendum, or any part thereof, must occur at least 10 days before sentence is imposed unless this minimum period is waived by the defendant. Any disclosure to the defendant must be made by providing the defendant and the defendant's counsel with a copy of the material to be disclosed. The defendant and the defendant's counsel must be given an opportunity to comment on the disclosed material, and in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy.

(C) If the court finds there is information in the presentence report or addendum, which would be harmful to the defendant or to other persons if disclosed, the court shall state orally or in writing a summary of the factual information to be relied on in determining sentence, and shall give the defendant or the defendant's counsel an opportunity to comment. The statement may be made to the parties in camera.

(D) Any material disclosed to the defendant and the defendant's counsel must also be disclosed to the prosecuting attorney.

(E) If the comments of the defendant and the defendant's counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or any of the information summarized, the court, as to each matter controverted, shall make (i) a finding as to the allegation, or (ii) a determination no finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of those findings and determinations must be appended to and accompany any copy of the presentence

investigation report later made available to the State Parole Board or to the pardon clerk.

(d) Plea Withdrawal.

(1) The court shall allow the defendant to withdraw a plea of guilty whenever the defendant, on a timely motion for withdrawal, proves withdrawal is necessary to correct a manifest injustice.

(2) A motion for withdrawal is timely if made with due diligence, considering the nature of the allegations, and is not necessarily barred because made subsequent to judgment or sentence.

(3) In the absence of a showing that withdrawal is necessary to correct a manifest injustice, a defendant may not withdraw a plea of guilty as a matter of right once the plea has been accepted by the court. Before sentence, the court in its discretion may allow the defendant to withdraw a plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea.

(e) Probation. After conviction of an offense, the defendant may be placed on probation as provided by law.

(f) Revocation of Probation Where the Court Retains Jurisdiction Under the Law.

(1) *Taking Into Custody.* On probable cause to believe a probationer has violated a condition of probation, any State parole and probation officer, or any peace officer directed by a State parole and probation officer or directed by an order of the court having jurisdiction may take the probationer into custody and bring the probationer before the court that originally placed the probationer on probation for a hearing on the alleged violation. Costs incurred in bringing the probationer before the court must be borne by the county in which the probation was granted. The probationer may be admitted to bail pending the hearing.

(2) *Hearing*. The hearing must be in open court with:

(A) the probationer present,

(B) a prior written notice of the alleged violation given to the probationer, and

(C) representation by retained or appointed counsel unless waived.

If the violation is contested, the prosecution shall establish the violation by a preponderance of the evidence. After the hearing, the court, subject to limitations imposed by law, may revoke an order suspending a sentence or an order suspending the imposition of sentence, or continue probation on the same or different conditions, as the circumstances warrant. A record of the proceedings must be made.

EXPLANATORY NOTE

Rule 32 was amended, effective January 1, 1980; March 1, 1986; March 1, 1990; March 1, 1992, on an emergency basis; July 14, 1993; March 1, 1999; October 31, 2001, on an emergency basis.

Rule 32 was amended, effective March 1, 1999, to address whether a presentence investigation report and any addendum may be inspected by the public or the parties.

When conducting a presentence investigation, parole and probation staff must be mindful they cannot make a binding promise of complete confidentiality as to information included in the addendum to a presentence report. The promise of confidentiality is subject to the court's discretion to allow the parties to inspect the addendum.

Subdivision (b) follows Fed.R.Civ.P. 32(d); but the words "or findings" are omitted from the first sentence as unnecessary. N.D.C.C. § 1-01-41, includes in the definition of "verdict," findings of fact by the judge.

The amendment to subdivision (c)(4) allows disclosure of the presentence report and addendums to the Attorney General or his designee only for purposes of assigning risk levels to sex offenders as required in N.D.C.C. Secion 12.1-32-15. The court recognizes that the presentence report materials may include information relating to an individual's participation in federally assisted drug and alcohol programs. Notwithstanding the amendment to this rule, release of such information must comply with 42 U.S.C. 290dd-2 and the implementing regulations found at 42 C.F.R. Part 2.

Subdivision (d) is adapted from A.B.A. Standards for Criminal Justice, Standards Relating to Pleas of Guilty. §§ 2.1(a), 2.1(a)(i) and 2.1(b). (Approved Draft, 1968).

Subdivision (f)(1) is adapted from and supersedes N.D.C.C. § 12-53-15.

Subdivision (f)(2) is adapted in part from the A.B.A. Standards for Criminal Justice, Standards Relating to Probation, § 5.4 at 65 (Approved Draft, 1970).

SOURCES: Joint Procedure Committee Minutes of January 29-30, 1998, pages 10-11; September 25-26, 1997, pages 3-6; January 30, 1997, pages 2-6; September 26-27, 1996, pages 6-8; April 25, 1996, pages 16-18; November 7-8, 1991, page 4; October 25-26, 1990, pages 15-16; April 20, 1989, page 4; December 3, 1987, page 15; November 29, 1984, pages 15-18; April 26, 1984, page 6; December 7-8, 1978, pages 15-23; October 12-13, 1978, pages 10-14; December 11-15, 1972, pages 5-16; November 20-21, 1969, pages 5-6; May 15-16, 1969, pages 1-2; February 20-21, 1969, pages 5-14; Fed.R.Crim.P. 32.

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. §§ 12-53-15, 29-14-22, 29-26-01, 29-26-02, 29-26-15, 29-26-19, 33-12-26, 33-12-27, 33-12-29.

CONSIDERED: N.D.C.C. §§ 1-01-41, 12-53-03, 12-53-04, 12-53-05, 12-53-06, 12-53-10, 12-53-11, 12-53-12, 12-53-13, 12-53-14, 12-53-17, 12-53-20, 12-55-30, 29-26-03, 29-26-11, 29-26-12, 29-26-13, 29-26-14, 29-26-16, 29-26-17, 29-26-18, 29-26-20, 29-26-23, 33-12-28.

ORIGINAL

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

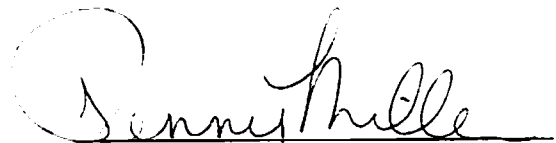
NOTICE OF COMMENT
Supreme Court No. 20010270

Amendments to Rule 32, North Dakota Rules of Criminal Procedure

On October 31, 2001, the Supreme Court adopted amendments to subdivision (c)(4)(A) of Rule 32, North Dakota Rules of Criminal Procedure, and the Explanatory Note. The amendments were adopted subject to comment. A copy of the Order of Adoption and amendments are attached.

ORDERED, that any person wishing to comment on the amendments may do so in writing before **Monday, December 3, 2001**. Address written comments to Penny Miller, Clerk of the Supreme Court, 600 E. Boulevard Ave., Dept. 180, Bismarck, ND 58505-0530.

The Supreme Court of the State of North Dakota convened October 31, 2001, with the Honorable Gerald W. VandeWalle, Chief Justice, and the Honorable William A. Neumann, and the Honorable Dale V. Sandstrom, the Honorable Mary Muehlen Maring, and the Honorable Carol Ronning Kapsner, Justices, directing the Clerk of the Supreme Court to enter the above order.



Penny Miller
Clerk
North Dakota Supreme Court