

State of North Dakota
JOINT PROCEDURE COMMITTEE

ORIGINAL
20010270

CHAIR
JUSTICE DALE V. SANDSTROM
STAFF ATTORNEY
MICHAEL J. HAGBURG

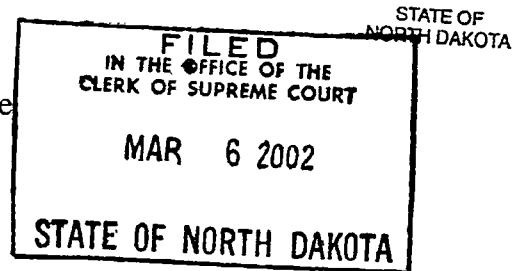
SUPREME COURT
STATE CAPITAL
BISMARCK, NORTH DAKOTA 58505
(701) 328-4215

February 26, 2002

RECEIVED BY
Chief Justice
Supreme Court

FEB 2 2002

Honorable Gerald W. Vandewalle, Chief Justice
North Dakota Supreme Court
600 East Boulevard Avenue
Bismarck, ND 58505-0530



Re: Comments on the Emergency Amendments to N.D.R.Crim.P. 32
Supreme Court No. 20010270

Dear Chief Justice:

On October 31, 2001, the Supreme Court adopted emergency amendments to N.D.R.Crim.P. 32. The amendments were referred to the Joint Procedure Committee for comment. The Committee reviewed the amendments at its January 24-25, 2002, meeting and proposed several changes. A legislative copy of N.D.R.Crim.P. 32 containing the Committee's proposed revisions is attached.

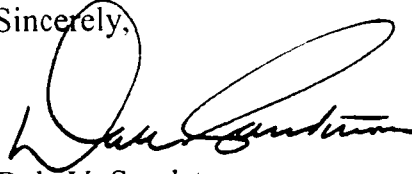
The Committee engaged in extensive discussions of N.D.R.Crim.P. 32 at its meeting. Jonathan Byers of the Attorney General's office was present during these discussions to provide information and assistance to the Committee. Based on its discussions, the Committee proposed substantive changes to N.D.R.Crim.P. 32(c)(4)(A). The Committee's proposed changes were focused on narrowing the language of this provision to clarify that presentence reports are to be used by the Attorney General only in connection with the individual risk assessment required by subsections 12 and 13 of N.D.C.C. § 12.1-32-15.

The Committee also proposed substantive changes to the language of the Explanatory Note consistent with the changes made in N.D.R.Crim.P. 32(c)(4)(A). The Committee also removed references to specific federal statutes and regulations from the Explanatory Note, substituting language requiring compliance in general with federal privacy statutes and regulations.

The Committee also proposed stylistic changes throughout N.D.R.Crim.P. 32(c)(4)(A) consistent with the federal government's Guidelines for Drafting and Editing Court Rules. The proposed stylistic changes are intended to clarify the rule and to eliminate repetitive language.

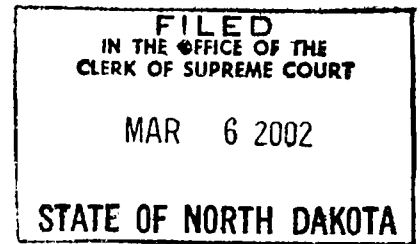
Thank you for referring this matter to the Joint Procedure Committee.

Sincerely,

A handwritten signature in black ink, appearing to read "Dale V. Sandstrom". The signature is fluid and cursive, with a large, prominent initial "D".

Dale V. Sandstrom
Chair, Joint Procedure Committee

MH:kh
attachment



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~~ subparagraph (c)(4)(A) or a summary made available under ~~subdivision~~ subparagraph (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~~ must 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

22 counsel for purposes of appeal. The court is under no duty to advise the defendant of any
23 right of appeal after sentence is imposed following a plea of guilty.

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

28 (c) Presentence Investigation.

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

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

36 (3) Report.

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

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

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

47 (ii) information or sources of information obtained confidentially, but subject to
48 disclosure by the court as provided in subdivision (C)(4)(A);

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

50 (iv) any victim impact statement;

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

55 (4) Disclosure.

56 (A) The presentence ~~investigation~~ report is and any addendum are confidential and
57 may not be read or copied by the public, or ~~copied~~ by the parties unless permitted by the
58 court in its discretion. ~~Any addendum to the presentence investigation report is confidential~~
59 ~~and may not be read or copied by the public or the parties unless permitted by the court in~~
60 ~~its discretion.~~ If the court is of the opinion the presentence report or any addendum contains
61 information that would be harmful to the defendant or other persons if disclosed, the court
62 may not allow the public or the parties to read or copy that portion of the presentence
63 investigation report or the addendum. Notwithstanding these confidentiality provisions, the

64 presentence ~~investigation~~ report and ~~addendums~~ any addendum may be disclosed to the
65 Attorney General or ~~his~~ the Attorney General's designee only for ~~purpose~~ purposes of
66 ~~compliance with~~ the individual risk assessment required by subsections 12 and 13 of
67 N.D.C.C. Section § 12.1-32-15. ~~The~~ A presentence ~~investigation reports~~ report and
68 ~~addendums~~ will addendum disclosed to the Attorney General or the Attorney General's
69 designee must remain confidential and may not be read or copied by anyone else other than
70 ~~the individuals mentioned above unless specifically authorized by the court in its discretion~~
71 as provided in this subdivision or by applicable federal law.

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

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

84 (D) Any material disclosed to the defendant and the defendant's counsel must also

85 be disclosed to the prosecuting attorney.

86 (E) If the comments of the defendant and the defendant's counsel, or testimony or
87 other information introduced by them allege any factual inaccuracy in the presentence
88 ~~investigation~~ report or any addendum, or in any of the information summarized, the court,
89 as to each matter controverted, shall make (i) a finding as to the allegation, or (ii) a
90 determination that no finding is necessary because the matter controverted will not be taken
91 into account in sentencing. A written record of those findings and determinations must be
92 appended to and accompany any copy of the presentence ~~investigation~~ report later made
93 available to the State Parole Board or to the pardon clerk.

94 (d) Plea Withdrawal.

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

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

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

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

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

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

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

118 (A) the probationer present,

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

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

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

126

127 EXPLANATORY NOTE

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

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

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

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

140 ~~The amendment to subdivision Paragraph (c)(4) allows was amended, effective~~
141 ~~October 31, 2001, to allow disclosure of the presentence report and ~~addendums~~ any~~
142 ~~addendum to the Attorney General or his the Attorney General's designee ~~only for purposes~~~~
143 ~~~~of assigning risk levels to sex offenders as required in~~ to enable the Attorney General to~~
144 ~~comply with subsections 12 and 13 of N.D.C.C. Section § 12.1-32-15. The court~~
145 ~~recognizes that the presentence report materials may include information relating to the~~
146 ~~individual's participation in federally assisted drug and alcohol programs. Notwithstanding~~
147 ~~the amendment to this rule, release of such information must comply with 42 U.S.C. 290dd-~~

148 ~~2 and the implementing regulations found at 42 C.F.R. Part 2: Disclosure to the Attorney~~
149 ~~General or the Attorney General's designee must comply with all applicable state and federal~~
150 ~~statutes, rules and regulations governing drug and alcohol records and private medical~~
151 ~~information.~~

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

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

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

157 SOURCES: Joint Procedure Committee Minutes of January 24-25, 2002, pages
158 _____; January 29-30, 1998, pages 10-11; September 25-26, 1997, pages 3-6; January 30,
159 1997, pages 2-6; September 26-27, 1996, pages 6-8; April 25, 1996, pages 16-18;
160 November 7-8, 1991, page 4; October 25-26, 1990, pages 15-16; April 20, 1989, page 4;
161 December 3, 1987, page 15; November 29, 1984, pages 15-18; April 26, 1984, page 6;
162 December 7-8, 1978, pages 15-23; October 12-13, 1978, pages 10-14; December 11-15,
163 1972, pages 5-16; November 20-21, 1969, pages 5-6; May 15-16, 1969, pages 1-2;
164 February 20-21, 1969, pages 5-14; Fed.R.Crim.P. 32.

165 STATUTES AFFECTED:

166 SUPERSEDED: N.D.C.C. §§ 12-53-15, 29-14-22, 29-26-01, 29-26-02, 29-26-15,
167 29-26-19, 33-12-26, 33-12-27, 33-12-29.

168 CONSIDERED: N.D.C.C. §§ 1-01-41, 12-53-03, 12-53-04, 12-53-05, 12-53-06,

169 12-53-10, 12-53-11, 12-53-12, 12-53-13, 12-53-14, 12-53-17, 12-53-20, 12-55-30,
170 29-26-03, 29-26-11, 29-26-12, 29-26-13, 29-26-14, 29-26-16, 29-26-17, 29-26-18,
171 29-26-20, 29-26-23, 33-12-28.

172 CROSS REFERENCES: N.D.C.C. § 12.1-32-15.