

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

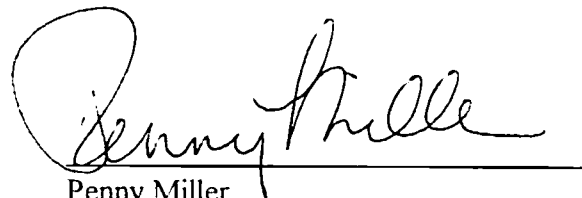
FINAL ORDER OF ADOPTION
Supreme Court No. 20010270

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 N.D.R.Crim.P. 32, and the Explanatory Note, subject to comment. The amendments were also referred to the Joint Procedure Committee for consideration. Comments were due by December 3, 2001; no comments were received. On March 6, 2002, the Joint Procedure Committee filed its report recommending further amendments to N.D.R.Crim.P. 32. The Court considered the matter, and

ORDERED, that the amendments proposed to N.D.R.Crim.P. 32, are approved and N.D.R.Crim.P. 32, as amended, is **ADOPTED** effective April 1, 2002.

The Supreme Court of the State of North Dakota convened March 13, 2002, with the Honorable Gerald W. VandeWalle, Chief Justice, and the Honorable William A. Neumann, the Honorable Dale V. Sandstrom, the Honorable Mary Muehlen Maring, 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

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 counsel for purposes of appeal. The court is under no duty to advise the defendant of any

22 right of appeal after sentence is imposed following a plea of guilty.

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

27 (c) Presentence Investigation.

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

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

35 (3) Report.

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

42 (B) The following types of information may not be included in a presentence report,

43 but may be submitted to the court as an addendum to the report:

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

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

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

49 (iv) any victim impact statement:

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

54 (4) Disclosure.

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

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

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

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

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

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

93 (d) Plea Withdrawal.

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

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

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

105 (e) Probation. After conviction of an offense, the defendant may be placed on

106 probation as provided by law.

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

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

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

117 (A) the probationer present,

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

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

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

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EXPLANATORY NOTE

127 Rule 32 was amended, effective January 1, 1980; March 1, 1986; March 1, 1990;
128 March 1, 1992, on an emergency basis; July 14, 1993; March 1, 1999; October 31, 2001,
129 on an emergency basis; April 1, 2002.

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

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

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

139 ~~The amendment to subdivision Paragraph (c)(4) allows was amended, effective~~
140 ~~October 31, 2001, to allow disclosure of the presentence report and addendums any~~
141 ~~addendum to the Attorney General or his the Attorney General's designee only for purposes~~
142 ~~of assigning risk levels to sex offenders as required in to enable the Attorney General to~~
143 ~~comply with subsections 12 and 13 of N.D.C.C. Section § 12.1-32-15. The court recognizes~~
144 ~~that the presentence report materials may include information relating to the individual's~~
145 ~~participation in federally assisted drug and alcohol programs. Notwithstanding the~~
146 ~~amendment to this rule, release of such information must comply with 42 U.S.C. 290dd-2~~
147 ~~and the implementing regulations found at 42 C.F.R. Part 2: Disclosure to the Attorney~~

148 General or the Attorney General's designee must comply with all applicable state and federal
149 statutes, rules and regulations governing drug and alcohol records and private medical
150 information.

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

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

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

156 SOURCES: Joint Procedure Committee Minutes of January 24-25, 2002, pages 9-14;
157 January 29-30, 1998, pages 10-11; September 25-26, 1997, pages 3-6; January 30, 1997,
158 pages 2-6; September 26-27, 1996, pages 6-8; April 25, 1996, pages 16-18; November 7-8,
159 1991, page 4; October 25-26, 1990, pages 15-16; April 20, 1989, page 4; December 3,
160 1987, page 15; November 29, 1984, pages 15-18; April 26, 1984, page 6; December 7-8,
161 1978, pages 15-23; October 12-13, 1978, pages 10-14; December 11-15, 1972, pages 5-16;
162 November 20-21, 1969, pages 5-6; May 15-16, 1969, pages 1-2; February 20-21, 1969,
163 pages 5-14; Fed.R.Crim.P. 32.

164 STATUTES AFFECTED:

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

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

169 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,

170 33-12-28.

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