

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

**ORDER OF ADOPTION**  
Supreme Court No. 20080051

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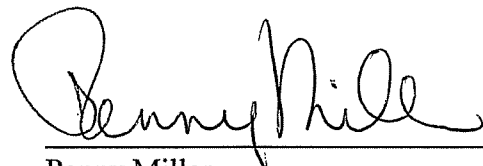
**Proposed Amendments to North Dakota Rules of Criminal Procedure 32**

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On October 9, 2007, the Department of Corrections and Rehabilitation forwarded a Petition to Amend Rule 32, N.D.R.Crim.P. along with proposed amendments which would allow the disclosure of the presentence report and any addendum to the Department. The Petition and proposed amendments were referred to the Joint Procedure Committee for review and recommendations. On January 30, 2008, the Joint Procedure Committee filed its proposed recommendations. The Court considered the matter, and

**ORDERED**, that the proposed amendments to N.D.R.Crim.P. 32, as further amended by the Court, are ADOPTED effective March 1, 2008. A copy of N.D.R.Crim.P. 32, as amended, is attached.

The Supreme Court of the State of North Dakota convened February 20, 2008, with the Honorable Gerald W. VandeWalle, Chief Justice, and the Honorable Dale V. Sandstrom, the Honorable Mary Muehlen Maring, the Honorable Carol Ronning Kapsner, the Honorable Daniel J. Crothers, Justices, directing the Clerk of the Supreme Court to enter the above order.



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Penny Miller

Clerk

North Dakota Supreme Court

RULE 32. SENTENCING AND JUDGMENT

(a) Sentence.

(1) Time of sentencing. The court must impose sentence or other authorized disposition without unnecessary delay. Until disposition, the court may continue or alter bail or require the defendant to be held without bail.

(2) Presentence requirements. Before imposing sentence, the court must:

(A) determine whether the defendant and the defendant's counsel had an opportunity to read and discuss the presentence investigation report, if made available under Rule 32(c)(4)(B), or a summary made available under Rule 32(c)(4)(D);

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

(C) determine whether the defendant wishes to make a statement on the defendant's own behalf or wishes to present information in mitigation of punishment or information that would require the court to withhold judgment and sentence.

The court must give the prosecution an opportunity to be heard on any matter material to the imposition of sentence.

(3) Notification of right to appeal. After imposing sentence in a case that has gone to trial, the court 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 right of appeal when sentence is imposed following a plea of guilty.

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

26 (c) Presentence investigation.

27 (1) When made. The court may order a presentence investigation and report at any  
28 time. Except when the defendant consents in writing, the report may not be submitted to the  
29 court or its contents disclosed unless the defendant has pleaded guilty or has been found  
30 guilty.

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

34 (3) Report.

35 (A) Contents of report. The presentence report may contain the defendant's previous  
36 criminal record and information about the defendant's characteristics, including:

37 (i) family, educational, and social history;

38 (ii) employment history and financial condition;

39 (iii) circumstances affecting the defendant's behavior that may be helpful in imposing  
40 sentence or in the correctional treatment of the defendant; and

41 (iv) any information required by the court.

42 (B) Information excluded from report. The following types of information may not

43 be included in a presentence report, but may be submitted to the court as an addendum to the  
44 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 Rule 32(C)(4)(A);

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

50 (iv) any victim impact statement; or

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 of presentence report.

56 (A) Confidentiality. The presentence report and any addendum are confidential.  
57 Neither the public nor the parties may read or copy the presentence report or any addendum,  
58 unless the court, in its discretion, gives permission.

59 (B) Disclosure to defendant. If the court allows the defendant to examine any part of  
60 the presentence report or any addendum, this disclosure must be made at least ten days before  
61 sentence is imposed, unless the defendant waives the ten-day requirement. The court must  
62 provide the defendant and the defendant's counsel a copy of the disclosed material and give  
63 them an opportunity to comment. The court may allow the defendant and the defendant's

64 counsel to introduce testimony or other information relating to any alleged factual inaccuracy  
65 in the disclosed material. Any material disclosed to the defendant and the defendant's counsel  
66 must also be disclosed to the prosecuting attorney.

67 (C) Disclosure to attorney general. The court may disclose the presentence report and  
68 any addendum to the Attorney General or the Attorney General's designee only for purposes  
69 of the individual risk assessment required by N.D.C.C. § 12.1-32-15(12) and (13). A  
70 presentence report and addendum disclosed to the Attorney General or the Attorney General's  
71 designee must remain confidential and may not be read or copied by anyone else except as  
72 allowed by Rule 32(c) or applicable federal law.

73 (D) Disclosure to Department of Corrections and Rehabilitation. The  
74 presentence report and any addendum is available to the Department of Corrections  
75 and Rehabilitation for use in providing assessment and treatment services to the  
76 person when in the Department's custody, on parole from the Department, or under  
77 the supervision and management of the Department. The Department may share the  
78 presentence report and any addendum with a public treatment or transition facility or  
79 licensed private treatment or transition facility providing assessment and treatment  
80 services to the person when in the Department's custody, on parole from the  
81 Department, or under the supervision and management of the Department. The  
82 Department may share the presentence report and any addendum with the compact  
83 administrator of a supervising state in accordance with the Interstate Compact for

84 Adult Offender Supervision, N.D.C.C. ch. 12-65. A presentence report and any  
85 addendum disclosed under this provision must remain confidential and may not be  
86 read or copied by anyone else except as allowed by Rule 32(c) or federal law.

87       ~~(D)~~ (E) Harmful information. If the court finds there is information in the presentence  
88 report or any addendum that would be harmful to the defendant or to other persons if  
89 disclosed, the court must not permit the public or the parties to read or copy that portion of  
90 the report or the addendum. The court must give an oral or written summary of any  
91 non-disclosed information it will rely on in determining sentence and must give the defendant  
92 or the defendant's counsel an opportunity to comment. The court may give its summary to the  
93 parties in camera.

94       ~~(E)~~ (F) Defendant's comments. If the comments of the defendant and the defendant's  
95 counsel, or testimony or other information introduced by them, allege any factual inaccuracy  
96 in the presentence report or any addendum, or in any of the information summarized, the  
97 court, for each matter controverted, must:

- 98           (i) make a finding on the allegation, or  
99           (ii) make a determination that no finding is necessary because the matter controverted  
100 will not be taken into account in sentencing.

101       A written record of the court's findings and determinations must be appended to and  
102 accompany any copy of the presentence report later made available to the parole board or the  
103 pardon clerk.

104       (d) Plea withdrawal.

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

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

111 (3) Court's discretion. If the defendant does not show that withdrawal is necessary to  
112 correct a manifest injustice, the defendant may not withdraw a plea of guilty as a matter of  
113 right once the court has accepted the plea. Before sentence, the court in its discretion may  
114 allow the defendant to withdraw a plea for any fair and just reason unless the prosecution has  
115 been substantially prejudiced by reliance on the defendant's plea.

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

118 (f) Revocation of probation where court retains jurisdiction under law.

119 (1) Taking into custody. If there is probable cause to believe a probationer has  
120 violated a condition of probation, the court that originally placed the probationer on  
121 probation may conduct a hearing on the alleged violation. Any state parole and probation  
122 officer or any peace officer directed by a state parole and probation officer or directed by an  
123 order of the court having jurisdiction may take the probationer into custody and bring the  
124 probationer before the court. Costs incurred in bringing the probationer before the court must  
125 be borne by the county in which the probation was granted. The probationer may be admitted

126 to bail pending the hearing.

127 (2) Transfer. If the probationer does not contest the violation, the hearing may be  
128 transferred, under the procedure set out in Rule 20, to the county where the probationer is  
129 arrested, held or present. This procedure is available only upon the consent of the court that  
130 placed the probationer on probation.

131 (3) Hearing.

132 (A) In general. The hearing must be in open court with:

- 133 (i) the probationer present;
- 134 (ii) a prior written notice of the alleged violation given to the probationer; and
- 135 (iii) representation by retained or appointed counsel unless waived.

136 The probationer must be given an opportunity to make a statement and present  
137 evidence in mitigation.

138 (B) Resolution. If the probationer contests the violation, the prosecution must  
139 establish the violation by a preponderance of the evidence. After the hearing and subject to  
140 limitations imposed by law, the court may:

- 141 (i) revoke an order suspending a sentence or an order suspending the imposition of  
142 sentence; or
- 143 (ii) continue probation on the same or different conditions.

144 A record of the proceedings must be made.

145 EXPLANATORY NOTE

146 Rule 32 was amended, effective January 1, 1980; March 1, 1986; March 1, 1990;



147 March 1, 1992, on an emergency basis; July 14, 1993; March 1, 1999; October 31, 2001, on  
148 an emergency basis; April 1, 2002; March 1, 2006; March 1, 2007; March 1, 2008.

149 Rule 32 was amended, effective March 1, 2006, in response to the December 1, 2002,  
150 revision of the Federal Rules of Criminal Procedure. The language and organization of the  
151 rule were changed to make the rule more easily understood and to make style and  
152 terminology consistent throughout the rules.

153 Paragraph (c)(4) was amended, effective March 1, 1999, to allow the court to decide,  
154 in its discretion, whether a presentence investigation report and any addendum may be  
155 inspected by the public or the parties.

156 Parole and probation staff conducting a presentence investigation must be mindful that  
157 they cannot make a binding promise of complete confidentiality regarding information  
158 included in the addendum to a presentence report. Under paragraph (c)(4), the promise of  
159 confidentiality is subject to the court's discretion to allow the parties to inspect the addendum.

160 Paragraph (c)(4) was amended, effective October 31, 2001, to allow disclosure of the  
161 presentence report and any addendum to the Attorney General or the Attorney General's  
162 designee to enable the Attorney General to comply with subsections 12 and 13 of N.D.C.C.  
163 § 12.1-32-15. Disclosure to the Attorney General or the Attorney General's designee must  
164 comply with all applicable state and federal statutes, rules and regulations governing drug  
165 and alcohol records, and private medical information.

166 Paragraph (c)(4) was amended, effective March 1, 2008, to allow disclosure of the  
167 presentence report and any addendum to the Department of Corrections and Rehabilitation

168 or its designees so that the Department can obtain assessment and treatment services.  
169 Disclosure to the Department or its designees must comply with all applicable state and  
170 federal statutes, rules and regulations governing drug and alcohol records, and private  
171 medical information.

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

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

175 Paragraph (f)(2) was added, effective March 1, 2006, to allow transfer of a revocation  
176 hearing to the county where the probationer is present. Rule 20 (Transfer from the County  
177 for Plea and Sentence) sets out the procedure for obtaining a transfer.

178 Paragraph (f)(3) is adapted in part from the A.B.A. Standards for Criminal Justice,  
179 Standards Relating to Probation, § 5.4 at 65 (Approved Draft, 1970). Paragraph (f)(3) was  
180 amended, effective, March 1, 2007, to clarify that a probationer must be given the  
181 opportunity to make a statement and present mitigating information at a revocation hearing.

182 Sources: Joint Procedure Committee Minutes of January 24, 2008; January 26, 2006,  
183 page 9; April 28-29, 2005, pages 3-5; January 27-28, 2005, pages 28-29; January 24-25,  
184 2002, pages 9-14; January 29-30, 1998, pages 10-11; September 25-26, 1997, pages 3-6;  
185 January 30, 1997, pages 2-6; September 26-27, 1996, pages 6-8; April 25, 1996, pages 16-18;  
186 November 7-8, 1991, page 4; October 25-26, 1990, pages 15-16; April 20, 1989, page 4;  
187 December 3, 1987, page 15; November 29, 1984, pages 15-18; April 26, 1984, page 6;  
188 December 7-8, 1978, pages 15-23; October 12-13, 1978, pages 10-14; December 11-15,

189 1972, pages 5-16; November 20-21, 1969, pages 5-6; May 15-16, 1969, pages 1-2; February  
190 20-21, 1969, pages 5-14; Fed.R.Crim.P. 32.

191 Statutes Affected:

192 Superseded: N.D.C.C. §§ 12-53-15, 29-14-22, 29-26-01, 29-26-02, 29-26-15,  
193 29-26-19, 33-12-26, 33-12-27, 33-12-29.

194 Considered: N.D.C.C. §§ 1-01-41, 12-53-03, 12-53-04, 12-53-05, 12-53-06, 12-53-10,  
195 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,  
196 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.

197 Cross References:

198 N.D.R.Crim.P. 20 (Transfer from the County for Plea and Sentence); N.D.C.C. §  
199 12.1-32-15.