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*The*  
**PRESENTENCE  
INVESTIGATION  
REPORT**

Publication 105

**PROBATION DIVISION**

**ADMINISTRATIVE  
OFFICE**

**OF THE**

**UNITED STATES  
COURTS**



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**1984**

U.S. Department of Justice  
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# *The* PRESENTENCE INVESTIGATION REPORT

*Division of Probation*  
ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS  
*Washington, D.C. 20544*

January 1978 (revised September 1978, April 1984)

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## Preface

In 1965 the Federal Probation System initiated a new set of standards for the preparation of presentence investigation reports. Known as Publication 103, *The Presentence Investigation Report*, this document was soon regarded as the state of the art for not only the Federal criminal justice system but state and local systems as well. In 1974 the Administrative Office issued Publication 104, *The Selective Presentence Investigation Report*, setting forth a shorter format for reports in routine cases. In 1978 the first edition of this monograph, Publication 105, marked another step for the judiciary in the continuing evolution of standards—dating from 1943—for one of the most difficult and demanding jobs of the probation officer, preparation of presentence investigation reports. Publication 105 combines the best ideas of previous publications and updates presentence investigation practice in light of current law. This 1984 edition incorporates the changes adopted by the Judicial Conference Committee on the Administration of the Probation System since the publication of this monograph. The modifications included in this edition reflect the improvements developed from the 6 years that the monograph has been utilized.

A committee chaired by a member of the Judicial Conference Committee on the Administration of the Probation System, and with representatives from field probation offices, the U.S. Parole Commission, Federal Bureau of Prisons, General Counsel's Office of the Administrative Office and Probation Division, developed the first edition of this monograph. The Probation Committee approved this document as the standard guide for all U.S. probation officers and the monograph was reported to the Judicial Conference of the United States at the September 1977 meeting. This revised edition was reviewed by the probation Chiefs Management Council in May and December 1982, the Committee on the Administration of the Probation System in June 1982, and January 1983, and was again reported to the Judicial Conference of the United States at the September 1982 meeting.

Publication 105 introduces the *core concept* which sets forth a flexible model for preparing presentence investigation reports. The core concept requires the probation officer to develop a core of essential information which is supplemented by additional pertinent data. That amount of information which is essential and pertinent determines the content and length of the report. Application of the core concept will result in more succinct reports, for the concept emphasizes inclusion of only that information which is germane to the sentencing decision.

Due to the fact that a number of changes in corrections law affect the presentence investigation and sentencing processes, readers will find a substantial increase in the contents devoted to legal issues. This monograph sets new standards for probation practice with special attention to how current law governs disclosure of the presentence report and the use of prior record information in sentencing. Careful adherence to the principles set forth in this monograph will result in several benefits: greater uniformity in report writing; shorter, more concise reports for courts and other users; closer observation of the latest standards of law with respect to contents and disclosure.

As a part of a closely integrated network of field offices serving all district courts in the 50 States, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands, Federal probation officers may be called on to prepare a presentence report for any one of the 94 district courts. For this reason it is essential to maintain uniformity in the outline, format, and contents of the report; however, the probation officer should portray the individual offender in a meaningful way.

The official outline adopted by the Committee on the Administration of the Probation System is shown on page 6 of the monograph. The face sheet (Probation Form No. 2) approved for all presentence reports appears on page 49. The suggested contents for each of the marginal headings in the approved outline are given starting on page 7. The items listed under *essential data* are those which should appear in all presentence reports. Those listed under *include if pertinent* will appear in some reports, depending on the requirements in the specific case. The officially approved format for the presentence report is presented in the appendix of the monograph.

Donald L. Chamlee, chief of probation, and Susan D. Krup Grunin, regional probation administrator, are responsible for preparation of this revision, with the able assistance of William A. Maio, Jr., managing editor, FEDERAL PROBATION Quarterly, Lorene Lake, probation programs specialist, and Millie A. Raby and Joan Costa, our faithful and long-suffering secretaries. Special thanks go to Michael Keenan, deputy chief; and regional probation administrators Fred Pivarnik, Dan Stowers, Harold Wooten and Gene Wesley for their suggestions from their reviews of presentence reports; Paul R. Falconer, chief probation officer, Maryland, and U.S. Probation Officer Edward A. DiToro, E.D. N.Y., for their assistance concerning victim impact statements; Judd D. Kutcher and Lisa Kahn, General Counsel's Office, for their contributions on the legal aspects; Steve Mora, printing officer, for his production assistance; and to all probation officers who submitted material for the revised edition.

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**NCJRS**  
 MAY 22 1986  
 ACQUISITIONS

# The Presentence Investigation Report

## Introduction

In 1965 the Administrative Office of the United States Courts issued Publication 103, *The Presentence Investigation Report*, and in 1974 published No. 104, *The Selective Presentence Investigation Report*. Those documents represented the best professional judgment of what a presentence report should contain. A committee of special consultants prepared those publications under the guidance of the Judicial Conference Committee on the Administration of the Probation System. Since these earlier publications, statutory and case law have redefined the contents and the uses of the report. Publication 105 reflects the requirements of new laws. This 1984 edition includes changes brought about from the 6 years of utilization of this monograph.

*Aside from the determination of guilt or innocence, selecting an appropriate sentence is perhaps the most important decision to be made in the entire criminal justice system.* The primary vehicle to assist the sentencing court in fulfilling this responsibility is the presentence investigation report. The Federal Rules of Criminal Procedure assign the task of conducting presentence investigations to U.S. probation officers. This assignment requires a professional presentence report of the highest quality.

## Functions and Objectives

This document is a guide for U.S. probation officers in the preparation of presentence reports. Its use provides a common format for presentence reports throughout the Federal judiciary. The presentence investigation report is a basic working document in judicial and correctional administration. *Its primary purpose is to aid the court in determining the appropriate sentence.* It also serves four other functions: (1) to aid the probation officer in supervision efforts during probation and parole; (2) to assist the Federal Bureau of Prisons in classification, institutional programs, and release planning; (3) to furnish the U.S. Parole Commission with information pertinent to consideration of parole; and (4) to serve as a source of information for research.

If the report is to fulfill its purpose, it must include:

- (a) All objective information that is significant to the decisionmaking process;
- (b) An assessment of the problems of the defendant and a consideration for the safety of the community; and
- (c) A sound recommendation with supporting rationale that follows logically from the probation officer's assessment.

The presentence report describes the defendant's character and personality, evaluates his or her problems, helps the reader understand the world in which the defendant lives, reveals the nature of his or her relationships with people, and discloses those factors that underlie the defendant's specific offense and conduct in general. It provides the sentencing options and a general plan to meet the defendant's problems.

Rule 32(c) of the Federal Rules of Criminal Procedure reflects the significance attached to the presentence report by the judiciary. This rule requires the preparation of a report in each case unless waived by the defendant with the court's permission, or unless the court makes the appropriate finding (Appendix A(1)).

When a defendant is committed to the custody of the Attorney General, a copy of the presentence report goes to the designated institution. If the court did not order a presentence report, a postsentence report must be prepared for the U.S. Parole Commission for all offenders receiving a custody sentence of more than one year. The institution relies on the presentence report for pertinent data relating to the kind and degree of custody required by the defendant, needed medical attention, capabilities, and problems of the individual. The report also provides information regarding any supportive community ties of the defendant. This information will aid the institution in formulating an institutional program.

In considering whether to grant or deny parole, the Parole Commission assesses the essential information in the presentence report about the offender's personal and social adjustment prior to commitment, the offense and prior record, and personal relationships within the community to which the offender may return. The Parole Commis-

sion is required by statute to consider the presentence report in the parole decisionmaking process (Appendix B).

### Disclosure and Confidential Nature of the Report

*Disclosure.*—Rule 32(c)(3) of the Federal Rules of Criminal Procedure requires that the court shall permit the defendant and his counsel to read the presentence investigation report exclusive of any exempted information or recommendation as to sentence (Appendix A(1)). The presentence investigation report should be written in such a manner that the contents may be disclosed to the defendant and defense counsel. Any material which *may* be disclosed to the defendant and his counsel *shall* be disclosed to the attorney for the government. Rule 32(c)(3) requires the court to disclose the report a reasonable time prior to the imposition of sentence to afford the parties a reasonable opportunity to be informed of its contents and to prepare a challenge to any alleged factual inaccuracies.

Rule 32(c)(3) of the Federal Rules of Criminal Procedure states that there are three types of information which the court *may* exempt from disclosure. They are:

- (1) Diagnostic opinion which if revealed might seriously disrupt a program of rehabilitation and treatment;
- (2) Sources of information obtained upon a promise of confidentiality; and
- (3) Any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons (i.e. protected witness information).

In the first instance, withholding of this information may be necessary when the knowledge of a psychiatric diagnosis or prognosis might interfere with a defendant's receptivity to treatment. Another situation allowing for exemption occurs when the disclosure of information obtained upon a promise of confidentiality would reveal the identity of the source of information. Not all information provided by the confidential source is protected, but only that information that would in any way reveal the identity of the source. The presentence investigation report often contains highly privileged information about the defendant and the family as well as confidential data from cooperating public and private welfare agencies, law enforcement agencies, employers, and others who know the defendant. This information is sometimes obtained by the probation officer on a promise of confidentiality to protect the source.

The third allowable exemption permits the court to withhold information which might result in harm,

physical or otherwise, to a defendant or others. Some defendants have had a close relationship with dangerous associates or have had serious family difficulties. If unfavorable information about the defendant or other persons is divulged and there may be risk of retaliation, such information would also be exempt from disclosure. Where information is withheld, the court shall provide a summary of withheld factual information utilized in determining the sentence.

The Parole Commission and Reorganization Act, effective May 14, 1976, requires that the Commission consider, among other documents, the information in the presentence report (if available) when making a determination relating to release on parole. *Section 4208 of the same Act requires that, at least 30 days prior to a parole determination hearing, the inmate shall be provided with reasonable access to the presentence report and any other document to be used by the Commission in making its determination (Appendix B).*

This Act provides for the withholding of essentially the same categories of information exempted from mandatory disclosure by Rule 32(c)(3)(A) of the Federal Rules of Criminal Procedure. *When portions of the presentence report are deemed excludable under this statute by the sentencing court, the probation officer must summarize the contents of the material "bearing in mind the need for confidentiality or the impact on the inmate or both" (18 USC 4208(c)).* If the presentence report is not provided in its entirety to the inmate, he must be given a summary of the information excluded. If this summary of the information is provided to the inmate, the Parole Commission may utilize all of the excluded information.

If the presentence investigation report has been disclosed to the defendant prior to sentencing in accordance with Rule 32(c)(3)(A) no problem should be encountered when the Commission later releases the identical information to committed defendants. The portions of the presentence report which were withheld and summarized at sentencing should be identified for the Commission for its later use in parole determination hearings. The Commission will then have before it the entire report and be able to permit the inmate to read (1) a copy of the report less any withheld material and (2) the summary of excluded material.

*Confidential Nature of the Report.*—The presentence investigation report is a confidential document and, as a general rule, is not available to anyone other than as described above without permission of the court. There are a few circumstances in which disclosure may be warranted. In some instances the court delegates to the probation office the responsibility for determining what information from the re-

port may be disclosed (Appendix E). In most instances, if release of the information is otherwise deemed proper, it is best to obtain the defendant's written consent for release of information. *Unso-solicited* letters on behalf of the defendant, however, are generally not part of the report and are therefore subject to full disclosure to not only the defendant and both counsels, but also to the public as well.

Prosecutorial use of a presentence report is incompatible with the purpose of the report as a sentencing and correctional tool. Candor and openness on the part of the report's primary source, the defendant, may be stifled if the report is available for subsequent prosecutorial or investigative use.

### Probation Officer Liability and Protections From Civil Suits

Current case law has held that probation officers are immune from a civil suit for monetary damages, based upon alleged misconduct in the officer's investigation and preparation of a presentence report (*Spaulding v. Nielson*, Appendix H). The court concluded that since "the presentence report is an integral part of the sentencing process," and the probation officer prepares the report at the court's direction, pursuant to Rule 32, this probation officer function is also "intimately associated with the judicial phase of the criminal process" and is thus immune.

If a civil suit or administrative claim is filed against a probation officer, he will either be immune or have a winning defense *provided* he has performed the subject act, or omission of an act, *within the scope of his duties and in good faith belief of its legality*. The officer's protections from such suits include (1) the assertion of the court's judicial immunity; (2) the officer's quasi-judicial immunity; (3) the officer's good faith defense; or (4) the Federal Tort Claims Act, depending upon the specific circumstances (for details on these protections see Appendix H).

### Investigative Role of Probation Officer

The probation officer is responsible for searching out all pertinent facts about the defendant, verifying the information gathered, interpreting and evaluating the data, and presenting it in an organized objective report. The officer is responsible for investigating each defendant without preconception or prejudice as to the outcome of the case.

The information should distinguish between what is factual, inferred or alleged. In most circumstances *verification by personal contact is best*; otherwise documents such as letters, facsimiles, and

certified statements may be used. For obtaining specific types of information on a defendant's background, i.e., employment, education, medical, psychiatric, or financial records, an authorization form to release the information should be utilized (Appendix G(1), (2), and (3)).

It is important that the defendant be seen at least twice during the course of the presentence investigation. At least one contact should be a home visit, since this gives the probation officer an opportunity to evaluate the defendant in familiar surroundings. Seldom does the defendant reveal his or her true self in a single interview. Often it takes more than one interview to establish a cooperative relationship and to give the defendant confidence in the probation officer.

If the investigation discloses information that is substantially different from statements given by the defendant, it is important that the probation officer reinterview the defendant and attempt to resolve the conflicting statements. This process will assist the probation officer in determining the motivation behind any erroneous statements and may help to explain the defendant's personality and character. Unresolved discrepancies are reported as such.

Rule 32(a) of the Federal Rules of Criminal Procedure provides that sentence shall be imposed without unreasonable delay. Generally, the probation officer will have 3 to 4 weeks to complete the investigation and write the report. While neither the "Speedy Trial Act of 1974" nor Rule 50(b) of the Federal Rules of Criminal Procedure sets an express time limit on the sentencing process, the intent of both laws makes it clear that sentencing is to be expedited.

*Required Content of the Presentence Report.—* Rule 32(c) of the Federal Rules of Criminal Procedure is the probation officer's authorization for preparing presentence reports. It specifies what the presentence report shall contain, i.e.,

"(A) any prior criminal record of the defendant;

"(B) a statement of the circumstances of the commission of the offense and circumstances affecting the defendant's behavior;

"(C) information concerning any harm, including financial, social, psychological, and physical harm; done to or loss suffered by any victim of the offense; and

"(D) any other information that may aid the court in sentencing, including the restitution needs of any victim of the offense."

Rule 32 does not exclude any specific kinds of information. Case law has imposed, however, some limitations on the information contained in the presentence report. In making its sentencing decision the court is prohibited from considering prior convictions of a defendant that were invalid because, in

violation of his sixth amendment right to counsel, he had not been represented by counsel or had not properly waived counsel. Similarly, the court is prohibited from treating as a conviction any previous criminal charges against the defendant that resulted in dismissal or acquittal (Appendix C).

*Investigations Prior to Conviction or Plea.*—Rule 32(c) provides for a presentence investigation to be ordered prior to conviction when the defendant consents. This may occur in any of the following situations: (1) Rule 11 plea agreement procedures; (2) Rule 20 transfers for plea and sentence; or (3) where it is the practice of the court. In every instance the defendant must sign a consent form. (See Appendix F(1).) With the written consent of the defendant, presentence reports may be inspected by the court at any time. The defendant can waive a presentence investigation but only with the permission of the court (Rule 32(c)). (See Appendix F(2) for the waiver form.)

*Start Where the Defendant Is.*—In conducting the investigation and writing the report, the probation officer is primarily concerned with the defendant as he or she is today. The court must deal with the end product of the defendant's experiences, both positive and negative. Accordingly, in this format, past experiences are reported *only* to the extent they assist in understanding what motivates the defendant's behavior or aid in predicting what kinds of behavior may be anticipated in the future.

During the presentence investigation the defendant may be amenable to personal change. The investigation may have both a salutary and traumatic effect on the defendant. The crisis of the situation often brings about a reevaluation of the offender's personal situation. Thus, it is an excellent time to develop a positive atmosphere for the subsequent supervisory relationship.

*Tangible Facts Not Enough.*—A presentence report is more than a compilation of tangible facts. Information about family, employment, health, and other factors has relatively little value unless interpreted in relation to the defendant's behavior. Likewise the attitudes and feelings of the offender regarding the offense and his or her reactions to opportunities, accomplishments, disappointments, and frustrations are important. Time, patience, and skill are required to uncover these more subjective factors and to develop their relevance. Both the tangible facts and the intangible information are best presented in a manner which reveals their relevance to the problems of the defendant and the protection of the community. Above all it is the ability to select the pertinent data, to separate fact and inference, to draw out the subjective elements and to assess their relative importance that distinguishes the trained and skilled probation officer.

*Discussion of the Report With the Judge.*—Judges are encouraged to discuss the presentence report with the chief probation officer and the probation officer who conducted the investigation. *Bear in mind that additional factual information provided at this time is subject to the rules on disclosure.* Cooperation and communication between the probation officer and sentencing judge are essential to the sentencing process.

## Composing the Report

The presentence report contains information which is related to the present character and behavior of the offender. Information about the defendant's birth and early development is generally unnecessary in the case of an adult who has normal intelligence and relatively normal behavior.

Detailed information about family members with whom an adult defendant has had no contact in many years may be of little significance. A comprehensive school report will be more pertinent in understanding a juvenile or youth offender than a person in his forties or fifties. An extended history of similar types of offenses, history of unemployment, instability, and family discord, however, can provide pertinent insights.

Avoid verbatim repetition of the indictment. *Describe the defendant's offense behavior specifically enough to permit an evaluation of the severity of the offense.* Do not recite details which add nothing to the evaluation, or tell nothing about the defendant's personality and conduct in general.

*Brevity.*—For clarity and interest use short sentences and paragraphs confined to single topics or thoughts. Avoid repetition. Do not employ brevity, however, at the expense of completeness. Avoid irrelevant statements such as, "This juvenile has no military experience"; "The defendant had no brothers and sisters"; and "There is no history of hospitalization for emotional disorders."

*Use of "Label" Terms.*—Generalized terms and unsupported adjectives frequently fail to define the difference between persons, situations, and circumstances. Terms such as "disorderly home," "shocking conduct," "lacking in judgment," "poor disciplinarian," "undependable person," "makes a good living," "heavy drinker," have different meanings to different people. The judge, the probation officer, the defendant, and the employer do not give the same evaluation to such terms. Therefore, if used, these terms should be defined.

When the presentence investigation is conducted prior to conviction, the probation officer must not presume the guilt of the defendant. Labeling of a defendant is to be avoided because it connotes varying perceptions of the defendant which may not be

accurate. If a defendant is to be termed a "ring-leader" or a major "organized crime" figure, the source, such as the investigating officer, must be revealed or the facts from which such a conclusion is derived clearly set forth. If the defendant challenges the veracity of the information, the court can determine its accuracy or discount reliance on it in sentencing. A probation officer may be required to provide substantiation of challenged information. Hearsay information is permissible but its reliability is critical.

Basic reporting skills—the who, what, when, where, and how—dictate the essential elements to be reported. It is not necessary to give identification, such as check numbers or auto serial numbers.

*Verbatim Style.*—Use caution in verbatim reporting. Use a direct quotation *only* if it gives a better picture of the defendant or the situation than would a paraphrased statement. Quotation marks are used for the *exact words* of the person quoted—not an interpretation. Be careful that language is *not* taken out of context. Meanings may be distorted or altered if any preceding or following statement or any part of the quoted portion is omitted.

Verbatim reporting is helpful for the picture it gives of the defendant's thinking processes, attitudes, and feelings, and the precise way in which he expresses himself. It is best to take complete notes in the presence of the defendant when verbatim reporting is to be used. Recording direct quotations following the interview is less reliable.

Handwritten statements by the defendant on certain aspects of the presentence investigation fall in the category of verbatim reporting and are carried in quotes, or attached as an appendix to the presentence report.

*Sources of Information.*—Verify the facts contained in the presentence investigation report. Whenever the disclosure of information sources is appropriate, such sources are to be shown in the body of the report. In reading about the defendant's employment record, for example, the reader should know whether the statement is given by the defendant, the spouse, the employer, or some other source. When reporting that the defendant gets along well with his wife, it is essential to know whether it is based on his statement only, the wife's, or the statement of each of them. *Clearly label any unverified information.* Immeasurable harm may result from unverified information presented as fact.

If, in unusual circumstances, a presentence report is based solely on the defendant's statements, this should be made clear at the outset. This might oc-

cur, for example, in the case of an illegal alien about whom additional sources of information are not available.

*Technical Words and Phrases.*—Use technical words and phrases only if they have wide usage and a common meaning. Such terms as "sociopath," "schizophrenic," "paranoid," "sexual psychopath," "neurotic," "psychotic," and "character-disorder" often are used indiscriminately by the public, the press, and sometimes by probation officers. Each of these words has a particular professional meaning to psychiatrists and psychologists. The probation officer should not attempt to use them on his own. When psychiatric, medical, or psychological terminology is used in the presentence report, include an explanation of the diagnostic statements.

*Style and Format in Writing the Report.*—A simple, direct, lucid style is effective. The report need not be elaborate nor seek a dramatic effect. *The officer should follow the format of this publication, utilizing the writing style with which he or she is most comfortable.*

A broad descriptive vocabulary is an essential tool. Repeated referral to the offender as "defendant" or "subject" can be too impersonal. A juvenile or youth offender may be referred to by first name. Avoid frequent use of "he said," "she said." Some variations are: mentioned, asserted, replied, recalled, admitted, acknowledged, suggested, promised, emphasized, disclosed, revealed, divulged, and explained.

*Writing the Report.*—Organize all of the information gathered prior to dictation. Dictate the presentence report at the earliest possible time upon completion of the investigation. Notes grow cold if they are not dictated soon. The longer the delay, the greater is the chance of overlooking significant observations. *The probation officer who dictates the report signs it.*

### Quality Control Review

The chief probation officer administers and manages all probation services within the judicial district, and the supervising probation officer is responsible for the quality of all such services provided by the unit. An inherent part of this responsibility requires the development of a management review process wherein the supervisor and/or chief reviews the completed presentence report prior to its submission to the court to insure that the probation officer has identified the problems which seem to be related to the offense behavior and that the essential information has been included and verified. The supervisor's signature\* on the presentence re-

\*On occasions where time does not permit this review prior to sentencing, a procedure should be established to insure that at some point a review occurs.

port reflects that the presentence report has been reviewed and from the available evidence it appears that: (1) the presentence report contains all pertinent, factual information or that efforts have been made to secure this information; (2) the defendant has been thoroughly interviewed and wherever possible a home visit was made; (3) *the information contained in the report is necessary and sufficient to assist the court in understanding the individual and the circumstances of the offense*; (4) the report conforms to the Publication 105 format; (5) *the recommendation includes specific, accurate information which does not include any new facts (facts which are not stated in the body of the report or in the excludable information section), and that the recommendation conforms to statute*; and (6) *all unverified information is clearly labelled*.

### Core Concept

*Pertinent Facts Determine Length.*—This monograph sets forth a flexible model for preparing presentence reports known as the *core concept*—a core of *essential* information supplemented by additional *pertinent* information. The amount of information which is *essential* and *pertinent* will determine the content and length of the report. By leaving out any information not related to the sentencing decision the probation officer produces reports that are factual, germane, precise, and succinct.

Each report is prepared after a thorough exploration of the defendant's background. The officer evaluates the facts and reports only the information which will help the court understand the individual and the circumstances of the offense. *A concise report read in its entirety and considered by the court in sentencing is more effective than a lengthy one not considered or used.*

The length of a presentence report and the number of items it contains will vary. The greater the consequences of a judgment the more likely it is that the court will need a greater range and variety of information. For example, in the case of an individual who has committed a violent or potentially violent offense, any consideration for probation requires substantially more knowledge of the individual than the case of a situational, nonviolent first offender.

*The Body of the Report.*—The presentence report consists of the following five core categories and subsections:

#### 1. Offense (Core)

*Prosecution Version*  
*Victim Impact Statement*

*Defendant's Version*  
Codefendant Information  
Statement of witnesses and complainants

#### 2. Prior Record (Core)

Juvenile adjudications  
Adult record

#### 3. Personal and Family Data (Core)

*Defendant*  
Parents and siblings  
Marital  
Education  
Employment  
Health  
    Physical  
    Mental and emotional  
Military service  
Financial condition  
    Assets  
    Liabilities

#### 4. Evaluation (Core)

*Probation Officer's Assessment*  
*Parole Guideline Data*  
*Sentencing Data*  
*Special Sentencing Provisions*

#### 5. Recommendation (Core)

Recommendation and Rationale  
Voluntary Surrender

*All reports will use all core categories. THE NONITALICIZED SUBSECTIONS MAY BE SUMMARIZED IN A SINGLE NARRATIVE STATEMENT OR, AS NEEDS DICTATE, MAY BE ENLARGED UPON UNDER SEPARATE PARAGRAPH HEADINGS. As the investigation proceeds, unless the court has directed otherwise, the probation officer, after consultation with his supervisor, will determine the extent to which each subsection needs to be probed and reported.*

After completing the investigation, professional discretion must be exercised in deciding whether to report the personal and family history in a single narrative section or in specific subheadings. When one or more areas of the defendant's personal life has played a major role in contributing to his or her present problems, the probation officer may elect to examine those areas under specific subheadings.

# Outline, Contents, and Format of the Presentence Report

*Identifying Information (Face Sheet).*—The face sheet of the presentence report provides the court with a brief overview of significant identifying and court related information. It is important to provide *accurate* information on the face sheet. *Any unverified information must be labeled.* Example: \*Information not verified. The first page of all presentence reports contains the following identifying information as set out on Probation Form No. 2. Some items do not apply to corporations.

- (1) **NAME:** Enter the name of the defendant as shown on the court record and any aliases ("also known as" is abbreviated "a/k/a"). Enter the defendant's legal name if different from the court name. (Caution should be used in the cases of protected witnesses.)
- (2) (a) **DATE:** Scheduled sentencing date.  
(b) **DATE:** Date of dictation of the report.
- (3) **ADDRESS:** Give the present home address; indicate "transient" when applicable.
- (4) **LEGAL RESIDENCE:** Give the legal residence if different from the present home address. Otherwise state "same."
- (5) **DOCKET NUMBER:** This 9-digit number may be obtained from the court clerk's or U.S. attorney's file. In cases disposed of by the U.S. magistrate, the magistrate case number should be entered.
- (6) **RACE:** Race is determined by ancestry and is to be recorded as Caucasian, Black, American Indian, Asian, or other.
- (7) **CITIZENSHIP:** Enter the name of the country of which the defendant is a subject or a citizen. If a naturalized citizen, so indicate.
- (8-10) **AGE/DATE/AND PLACE OF BIRTH:** Give the age in years on the last birthday and the date of birth reflecting the month, day, and year of defendant's birth. Place of birth is shown below the date. This entry should be recorded as follows:  
31 3/21/51  
Clio, MI.
- (11) **SEX:** Identify whether male or female.
- (12) **EDUCATION:** Enter the highest grade for which defendant has received credit. If the defendant is presently attending school, record the last grade level completed, and the grade or year in which presently enrolled.
- (13) **MARITAL STATUS:** Select the defendant's marital status from the following: single,

married, cohabiting, widowed, divorced, or separated.

- (14) **DEPENDENTS:** This includes defendant's spouse, children, and stepchildren living in defendant's household as well as any other person to whom defendant contributes more than 50 percent support. This should be stated as "Two (wife and one child)."
- (15) **SOCIAL SECURITY NUMBER:** Enter the 9-digit Social Security number.
- (16) **FBI NUMBER:** The defendant's FBI fingerprint number is entered in this section. This may be obtained from the arresting agency, U.S. attorney, U.S. marshal, or the fingerprint record.
- (17) **U.S. MARSHAL NUMBER:** The defendant's U.S. marshal number is entered in this place. This number can be obtained from the U.S. marshal or the U.S. attorney. This number is essential for drug treatment contracts.
- (18) **OTHER IDENTIFYING NUMBERS:** This space may be used to record local police agency numbers, driver's license number, passport number, Medicare/Medicaid number, Immigration and Naturalization Service number, or similar identifiers.
- (19) **OFFENSE:** State the title of the offense or offenses with U.S. Code section for which the defendant is to be sentenced. Example: Possession of Stolen Mail, 18 U.S.C. 1708.
- (20) **PENALTY:** Enter the maximum statutory penalty for the specific offense(s), including special parole terms, fine, and restitution. This information can be obtained from the U.S. Code and/or the U.S. attorney. State eligibility for Youth Corrections Act, Young Adult Offenders Act, Narcotic Addict Rehabilitation Act, or other special sentencing provisions.
- (21) **CUSTODIAL STATUS:** If the defendant is not in custody, indicate the condition of release, including amount of bond: (1) *personal recognizance*—the defendant is released upon personal or own recognizance *without* an unsecured appearance bond being ordered; (2) *unsecured bond*—the defendant is released on own recognizance *with* an unsecured bond being ordered; (3) *10 percent de-*

*posit*—the defendant is required to execute an appearance bond in a specific amount and deposit said amount with the clerk of the court, *in cash or other security as directed*, of a sum not to exceed 10 percent of the amount of the bond; (4) *surety bond*—requires the execution of bail bond by the deposit of cash; (5) *collateral*—requires the execution of bail bond, i.e., property of equal or greater value to the bail set by the judicial officer; (6) *third party custody*—the court may place the person in the custody of a designated person or organization; and (7) *custody*—if the defendant is in custody, state the location. It is essential to indicate *accurately* the number of days the defendant has been in Federal custody in connection with the offense or acts for which sentence is to be imposed. This information may be obtained from the U.S. marshal. If in custody at the time the presentence report is completed, state that the person “Remains in custody since (date).” If in the custody of another jurisdiction so state.

- (22) **DATE OF ARREST:** Enter the date the defendant was arrested for the instant offense.
- (23) **PLEA:** Enter the nature of the plea, the date of the plea, and the count or counts to which the plea was made. Example: Guilty on 5-10-82 to counts 3 and 4 and not guilty to counts 1 and 2 of a 4-count indictment.
- (24) **VERDICT:** Enter the date of the conviction and the source of conviction; that is, by jury or by the court. Also indicate the count or counts on which convicted. Example: Guilty on 5-11-82 on both counts; by jury.
- (25) **DETAINERS OR CHARGES PENDING:** Give the name and address of the office issuing the detainer or preferring the charge, the nature of the official charge, and the current status of the case.
- (26) **OTHER DEFENDANTS:** Enter the names of codefendants and defendants of companion cases, if any, and status, including dispositions, of their respective cases.
- (27) **ASSISTANT U.S. ATTORNEY:** Give the name and telephone number of the assistant U.S. attorney handling the case.
- (28) **DEFENSE COUNSEL:** Give the name, address, and telephone number of the de-

fense counsel. Also state if the defense counsel has been retained by the defendant or appointed by the court. Enter “pro se” if the defendant is serving as his or her own counsel. Enter “Waived” if the defendant has waived the right to counsel.

The following information below the double line on Form 2 is inserted after the final disposition of the case:

- (29) **DISPOSITION:** Sentence imposed by the court on each count.
- (30) **DISPOSITION DATE:** Date the sentence was imposed.
- (31) **SENTENCING JUDGE:** Enter the name of the judge imposing sentence on the defendant.

*Body of the Report.*—Each presentence report follows the title and sequence of the core headings. If subsections are used under Personal and Family Data, they should follow the recommended sequence.

The information is reported in narrative form whenever possible. Where it does not sacrifice accuracy, the information is summarized rather than reported in detail. For example:

*Employment.* The defendant has been steadily employed as a machinist working for three different firms for the past 10 years. He has held his current job with Apex Machine Shop for 3 1/2 years and now earns \$8.85 per hour. He is considered to be a reliable honest employee by the present supervisor.

*The items listed under Essential Data are those which appear in all presentence reports. Those listed under Include if Pertinent appear when the officer determines they are significant to the defendant's present situation and bear on the sentencing decision. The contents for the core categories are given below:*

*Offense*

Prosecution Version

Essential Data:

Summary of the indictment or information containing number of counts, period covered, and nature, date(s) and place(s) of offense(s). Extent of property or monetary loss. In juvenile cases reasons why prosecution was not diverted to local courts. Details of the offense including a summary of the defendant's specific involvement. Role of defendant in planning and commission of crime (total offense behavior). How

and where crime was committed. Defendant's profit from this crime and any aggravating or mitigating circumstances. Summary of codefendant(s) involvement even if named on (a) separate indictment(s). In all drug offense cases, include a statement of the amount of pure drug found to be present through chemical analysis. (See *U.S. Probation Manual*, Vol. X, Chapter 2, for details on calculating the net weight of the pure drug.)

#### Include if Pertinent:

Date and place of arrest. Statement of arresting officer. Attitude of defendant toward arresting officer. Degree of cooperation. Extent to which offense follows pattern of any previous offense. Relation of offense to organized crime or racketeering. Amount of loss recovered. Full or partial restitution. Other alleged violations. If a plea agreement has been offered, attach a copy or provide the terms (Rule 11(e), Federal Rules of Criminal Procedure). However, *in those plea agreements which indicate that the defendant testified or will testify against another individual, do NOT include that information in this section. It should be summarized and placed in the Potentially Excludable Information section.*\* Information as to the defendant's adjustment while on bond. If under the supervision of a pretrial services officer, the probation officer should use the pretrial case material in preparing the presentence report.

*Comment:* Information for the prosecution version of the offense may be obtained primarily from the office of the U.S. attorney. *It is the probation officer's responsibility to prepare all sections of the presentence report.* Lengthy statements submitted by the prosecutor or any other individual can be edited by the probation officer, but consultation with the party may be necessary to assure that the edited information is factual and accurate.

In keeping with the Privacy Act of 1974 (Appendix D) make arrangements with the U.S. attorney's office or obtain the defendant's consent for the release of information from government files. The U.S. attorney's office in each district can advise of the procedure for obtaining this information. Most of the essential offense data may be found in the U.S. attorney's file, including the nature of the charge, details of the offense, statements of arrest-

ing officer(s), statements of codefendants, complainants, witnesses, and victims, and a summary of the arrest record. For offenses involving multiple defendants, probation officers must consult with one another on the prosecution version and include complete and consistent information regarding all defendants. For drug offenses obtain details on the net weight and purity of the drugs purchased, seized or sold. If this information is not available from the U.S. attorney, the Drug Enforcement Administration should be contacted.

*Other Sources of Information* can include the investigating agent, other law enforcement agencies involved in the investigation, and the clerk of the court's file. In this section the probation officer should include additional data not obtained from the prosecution and *any statements or evidence provided by a source which offers differing views of the offense behavior*, including firsthand statements of complainants and witnesses. *The source of this information should be clearly labeled.*

#### Victim Impact Statement

Include where there is an identifiable victim:

"Information concerning any harm, including financial and social, psychological, and physical harm done to or loss suffered by any victim of the offense; and any other information that may aid the court in sentencing, including the restitution needs of the victim," Rule 32(c), Federal Rules of Criminal Procedure, as amended by P.L. 97-291 (October 12, 1982). *All parties making such statements to a probation officer should be aware that the court must disclose all such information to the defendant and the attorney for the government.*

The financial assessment can also be useful to the court in making restitution orders under P.L. 97-291 (18 U.S.C. 3579) or 18 U.S.C. 3651 (see Financial Section for details on information to be included). Note: The restitution provisions of P.L. 97-291 apply only to Title 18 and certain subsections of the Federal Aviation Act (49 U.S.C. 1472). However, under 18 U.S.C. 3651 restitution may be ordered for any offense, but *only* as a condition of probation. 18 U.S.C. 3651 — "The defendant may be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense *for which conviction was had.*"

An example of a victim impact statement is set forth below:

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\*Information regarding the defendant's testimony and cooperation, which is part of a plea agreement and not included in the presentence report (as a protection to the defendant if he is incarcerated), may be disclosed by the court to the defendant or his attorney. If there is additional potentially excludable information (see page 17) this should be separated from the above information. A notation on the former page may be useful in assisting the court regarding disclosure.

Mr. Ray Reed of Washington, D.C., was the victim of the instant offense in which the defendant hit him over the head and stole his wallet. The wallet had \$50, his driver's license, credit cards, and car keys. The defendant also stole his car. The offense occurred at gun point outside Mr. Reed's apartment. Mr. Reed's 1982 Chrysler LeBaron was discovered by local police four weeks later in damaged condition in Charlotte, North Carolina.

Although Mr. Reed was covered by insurance, he was not compensated for the damage to his car by his insurance company because his car was recovered and he did not have comprehensive coverage. Damages to the car included a broken windshield, two flat tires, and a smashed right front fender. Further, he had to travel to Charlotte, North Carolina, at his own expense, in order to pick up his car. Mr. Reed was also hospitalized for a slight concussion, and as a result, lost two weeks work. Mr. Reed certified by receipts (with the exception of the cash) that his total loss, because of the defendant's offense, was as follows:

*Hospital bill (deductible costs):	\$ 100.00
Bus ticket to North Carolina:	35.00
Gasoline return trip:	18.50
Loss of 2 weeks work at \$6.70 per hour:	536.00
Two tires at \$45 each:	90.00
Windshield:	150.00
New right fender/paint job:	200.00
Cost of new driver's license:	20.00
Cash lost: (unable to verify)	50.00
Replacement of wallet/keys:	25.00
	<hr/>
	TOTAL: \$1,224.50

\*In addition to Mr. Reed's losses, the hospital bill paid by Immortal Insurance Co. was \$450.00.

Mr. Reed also stated that he now suffers from anxiety attacks when he considers leaving his apartment at night. He would like to attend counseling for this problem but presently does not have any money for this expense. It would not be covered by his health insurance. An estimate of the cost of such counseling is \$50 per session. Mr. Reed thought he might need as many as 10 counseling sessions to clear up this anxiety problem.

Mr. Reed has no savings and even though he is employed, he is earning only \$6.70 per hour and must support his wife and himself on his income. Thus, the probation officer's assessment of Mr. Reed's financial situation is that he is in dire need of being compensated for his financial losses and of receiving the money for 10 counseling sessions.

### Defendant's Version

#### Essential Data:

Summary of offense and arrest by defendant. Extent to which defendant admits guilt. Defendant's explanation of why he became involved and what he hoped to accomplish. Defendant's statements regarding damage done to a victim's property, the victim's loss, or any injury suffered by a victim. Include the probation officer's assessment of any differences between the defendant's version and the prosecution version.

#### Include if Pertinent:

Defendant's feelings from time of offense until arrest and defendant's reactions after arrest (e.g., defiant, relieved, indifferent, etc.). The

defense counsel may also submit a statement which should be included in this section of the report. However, a lengthy statement may be edited in consultation with the defendant or attorney.

*Comment:* It is helpful to obtain both a written and verbal statement from the defendant. If possible, the written statement should be included verbatim. A verbal statement should be so labeled and paraphrased. Whatever the defendant says about the offense and his involvement is helpful in understanding him. The offender's statements may vary from those of the law enforcement officer's and the U.S. attorney's, but the defendant is entitled, nevertheless, to make clear his version of the offense and to give his own interpretation of the underlying circumstances and his motivations.

### Codefendant Information

#### Include if Pertinent:

Extent of codefendant's participation in the offense and the present status of his prosecution, including separate indictments. Relative culpability of the defendant in relation to codefendant(s) and coconspirator(s). Codefendant's version if available. Codefendant's attitude toward the offense, and the defendant, plus codefendant's statement of defendant's participation.

*Comment:* If there is a codefendant, it is important to have his version of the offense and the extent to which he may have been a leader or an aggressor. *The court is interested in knowing the relative culpability of all the defendants.* This report should indicate whether the codefendant(s) has been apprehended and what disposition was made or when it will occur in that case.

### Prior Record

#### Juvenile Adjudications

##### Essential Data:

Date, charge, location, disposition, and representation by counsel of all referrals to juvenile court by law enforcement officials.

*Comment:* The probation officer should report all referrals to the juvenile court involving acts which would, if committed by an adult, constitute a crime. Status offenses, e.g., runaway, incorrigible, truant, beyond parental control, etc., are more properly described in the Personal and Family Data section.

Each entry, in chronological order, should include the date of referral, the name and location of the

juvenile court, whether or not the juvenile was represented by counsel, the juvenile's age, charge, and the disposition.

Example:

10/1/66 Age 14	Shoplifting	Marion County Juvenile Court Salem, Oregon	10/20/66: Informal Probation Supervision (6 mos.)
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Defendant was represented by counsel.

A subsequent paragraph may be appropriate to describe circumstances surrounding serious violations, to describe the defendant's performance under supervision or the defendant's institutional adjustment.

An offender's past is often highly relevant to the sentencing inquiry. Hence a court may consider an offender's juvenile history including any juvenile court dispositions. There are, however, several caveats to observe. *First, juvenile delinquency adjudications are not criminal convictions and should not be identified as such.* Second, even though state laws generally limit the use of juvenile records as evidence in any court proceedings, the weight of authority is that sentencing use is permissible. The presentence should also report, however, whether the juvenile record is a set-aside or sealed court record, or whether such information is of a confidential nature. If a juvenile court disposition has been *destroyed*, then a probation officer should *not* refer to it in the presentence report.

Finally, *juvenile delinquency proceedings in which a juvenile was not afforded his right to counsel are invalid and may not be relied upon by the sentencing judge.* During the presentence investigation the officer should verify whether the juvenile had counsel or waived his right to counsel with respect to each juvenile disposition.

#### Adult Record

##### Essential Data:

Date of arrest, charge, location, date and disposition of all arrests, and representation by counsel.

##### Include if Pertinent:

Detainers and details of charges lodged against defendant. Defendant's explanation of why he was involved in previous offenses. Codefendants in previous offenses. Details of arrests occurring subsequent to present offense. For serious offenses include a summary of the offense, and prior probation, parole or institution adjustments and dates.

*Comment:* The identification record (fingerprint record) of the Federal Bureau of Investigation is a good source of information on the arrest record of a defendant. The FBI record is not always complete and the probation officer should also make inquiry from state and local identification bureaus, police departments, and sheriffs' offices in those cities and communities in which the defendant has worked or resided. The defendant can also be a valuable source of knowledge and may provide information regarding missing dispositions or pending charges, and whether or not he was represented by counsel.

The sixth amendment to the Constitution provides the right to counsel in all criminal cases, other than petty offenses where a fine is the only penalty. In 1972 the Supreme Court in *U.S. v. Tucker* (Appendix C) made it essential, for sentencing purposes, to determine whether or not the defendant was represented by counsel or had legally waived counsel in any prior convictions where the right to counsel applied. Only convictions in which the constitutional right to counsel was provided are valid. Invalid convictions may not be considered when determining the sentence. It must be stated in the report whether or not the defendant was represented by counsel. If it cannot be determined whether or not the defendant was legally represented, this circumstance must also be stated. (Generally, for offenses committed subsequent to the Tucker decision, the defendant should have been represented by counsel.)

Where the FBI fingerprint record does not give the disposition of a case, the probation officer should communicate with the law enforcement office which filed the print or the court in which the case was tried to determine the outcome. *Arrests without dispositions are not convictions and should be clearly identified.*

*Many times one offense will result in multiple entries on the fingerprint record. When this duplication occurs, make only one entry for each offense.* If the defendant admits arrests which are not reflected in official arrest records, indicate they are by his or her admission.

If the defendant has an institutional record, ascertain the date of commitment and release, the institutional adjustment, and the present release status. When available, include information about prior probation or parole adjustment and dates of supervision.

All military courts-martial are reported in a Military subsection. Serious military offenses with a civilian counterpart may be cross referenced in the prior record section.

List all prior arrests in chronological order, including the date of arrest, age of the defendant, charge, arresting agency, court disposition, and the

source(s) providing the information. If there are a number of sources, they may be included in the summary of the offense.

**Example:**

Age 27	4/6/69:	Multnomah	7/13/69:
	Burglary I	County, Port-	3 years
		land, Oregon	State Prison
		(Multnomah	released:
		Sheriff's	7/12/71;
		Office)	parole supervi-
			sion expired:
			7/6/72

Not determined whether represented by counsel.

According to the Sheriff's office report, sheriff deputies were called by neighbors who had seen the subject break a back window and then enter the house next door. When the deputies arrived subject was apprehended while fleeing the premises with a camera, silverware, and jewelry.

According to his state parole officer, subject cooperated and satisfactorily completed his period of parole supervision.

For serious offenses summarize the circumstances of the offense. If the defendant has compiled a lengthy history of misdemeanor and/or traffic arrests, these may be summarized in a narrative form. Data should include the time period involved, the general type(s) of offenses and the range of dispositions.

**Example:**

From 1968 to 1977, Mr. Jones was arrested five times for drunkenness and four times for minor traffic violations resulting in bail forfeitures or fines ranging up to \$50, and two jail terms of less than 10 days (both for drunkenness). He was represented by counsel for only three of the intoxication offenses.

Arrests subsequent to the present offense are to be recorded in the same manner as those set forth in the Adult section. They should be clearly labeled because they may reflect persistent problems. Further, the interest of other jurisdictions may have an impact on disposition of the present case.

*Personal and Family Data*

The core category Personal and Family Data is comprised of the following subsections:

*Defendant*

- Parents and Siblings
- Marital
- Education
- Employment
- Health
  - Physical
  - Mental and Emotional
- Military Service
- Financial Condition
  - Assets
  - Liabilities

In all cases this core category will be used to report information about the defendant's family, marriage, education, employment, health, military service, and financial condition. IF AFTER EXPLORING ALL OF THE SUBSECTIONS THE INFORMATION IS FOUND TO BE UNREMARKABLE OR ROUTINE, IT IS TO BE REPORTED IN A SINGLE NARRATIVE. Whenever information is received which indicates unusual social or personal circumstances which may have contributed to the defendant's present difficulties, report this in a separate subsection with an appropriate heading.

*Defendant*

**Essential Data:**

Influences of early life that may have a significant bearing on defendant's present personality and behavior. Extent of family cohesiveness, attitudes of parents, and important factors in the home and neighborhood environment. Persons who reared defendant if other than parents. Present status of this relationship. Family members with whom defendant is especially close. Age left home, reason for leaving. Any history of running away from home. Primary factors affecting defendant's present mode of living, including relationship with family members, associates, and home and neighborhood influences. Career and social accomplishments. Any other major factor affecting defendant's present behavior.

**Include if Pertinent:**

Naturalization status (country of birth and place and date of entry into United States). Order of birth among siblings. Significance of religion in the defendant's life. Home and neighborhood. *Special* talents, interests, and leisure-time activities (including sports, hobbies, and organizations).

*Comments:* Include only that family background information which is necessary to understand the defendant and to help in his or her personal and social adjustment. Start where the defendant is now.

What are the most important influences in his or her life? Portray early life experiences in a manner which points out their relevance to defendant's present life. Attitudes and the relationship between the defendant and his or her parents and family are especially significant if the defendant has regular contact with them. Parents' and siblings' names are useful to the Bureau of Prisons if the defendant is

committed. What does the defendant say that is favorable or unfavorable about the family? What family problems and relationships are disturbing and with which ones is he or she unable to cope?

In appropriate instances, report those environmental or economic factors which contributed to the defendant's present situation. For example, is the defendant attempting to maintain a standard of living beyond his financial means?

Defendant's past or present involvement in religious activities should be included in the report if they are relevant to his or her current situation. Meaningful religious involvement may be a major influence on one's life and also on an offender's feelings regarding involvement in illegal activities.

Include talents, interests, and leisure-time activities only if they are an important part of the defendant's social adjustment.

### *Parents and Siblings*

Include if Pertinent:

Parents and siblings—name, age, address, citizenship, naturalization status, employment, education, marital status, health, religion, economic status. If deceased, cause and age at time of death. History of emotional disorders, diseases, and criminal behavior in the family. Attitude of parents and siblings toward defendant's offense.

*Comment:* Resist the tendency to report extraneous information about parents and siblings. Such information as dates and places of birth, health, education, religion, employment, and earnings may in many instances have little or no relevance. Detailed information about the family generally is more pertinent in understanding juvenile and youth offenders than older offenders. What is the cultural background of the family? What family influences are apparent? What stabilizing factors are there in the parental family? To what community agencies is the family known?

### *Marital*

If defendant has never married or cohabited, omit this section.

Essential Data:

Present marriage or relationship if cohabiting. Date and place of marriage; name and age of spouse at time of marriage as well as present status of the relationship. Quality of the relationship between defendant, spouse, and children—cohesive or stressful? Previous marriage(s). Name of previous spouse(s) (death, di-

orce, or annulment). Children from previous relationships. Problems in the current marriage and the attitudes of both parties toward resolving them.

Include if Pertinent:

Significant facts in spouse's background presently affecting relationship with defendant. History of courtship and reason for marriage. Name, age, and custody of children and voluntary or court ordered support obligation. Attitude of spouse and children toward offense. Contacts with domestic relations court indicating abuse or neglect of children or abuse of spouse. Juvenile court involvement of children. Social agencies involved with the family. Divorce date including grounds, date of final decree, special conditions, and to whom granted.

*Comment:* A presentence investigation is not complete unless an attempt has been made to interview the spouse, or cohabiting partner, if any. This person can be a valuable source of information about the family and the relationship. Such a person, however, can also be a biased source either against or in protection of the defendant.

A disorganized family life can contribute in large measure to the defendant's conduct and the partner can be a factor in the offender's difficulties with the law. Therefore, it is important to know about the partner's personality, character, problems, and social adjustment. Sometimes neighbors, relatives, and other social agencies can also cast considerable light on the relationship.

It is helpful to know which family problems each marital partner finds it especially difficult to address. Stabilizing influences provided by each partner should be noted. Does each partner display a responsible attitude toward the relationship?

### *Education*

Essential Data:

Educational achievement, age left school and reason for leaving. Last grade completed and the grade or year in which presently enrolled if the defendant is attending school.

Include if Pertinent:

Date and name of last school attended. Social adjustment while in school as evidenced by conduct, scholastic standing, training, leadership, special abilities and disabilities. Business and trade training. Inability to read, write or understand English.

*Comment:* The school is a valuable source of information about the defendant particularly in juvenile and youth offender cases. Sources of information include teachers, attendance officers, guidance counselors, social workers, and school nurses. Report significant patterns of behavior which persist from school days.

## Employment

### Essential Data:

Employment stability and how this relates to present personal adjustment. Specific information about his or her employment record. Beginning with the most recent job, list the verified employment history for the past 10 years including dates, nature of work, and reasons for leaving. Employer's evaluation of defendant (immediate supervisor, where possible) including attendance, capabilities, reliability, honesty, personality, attitude toward work, and relationships with coworkers and supervisor. Occupational skills, interests, and ambitions. If unemployed, source of support. Defendant's capacity for employment. Verified employment or vocational training opportunities currently available to the defendant.

*Comment:* Demonstrate how the defendant's employment adjustment and attitude toward the job relate to his or her personal and social adjustment. Verify the employment history by contact with each employer. Specify any part of the employment history that has not been verified. If the employer's evaluation differs from the defendant's, explore the discrepancies. It is important to find out why the defendant left employment. Was it a result of the instant offense? It is not necessary to report on the employment history beyond the most recent 10-year period unless there is obvious relevance to the defendant's present life. Summarize in a single statement any history of employment at a variety of menial jobs. If the offender is unemployable, describe nature of limitation or handicap.

## Health

### Physical:

#### Essential Data:

Any physical illness(es) for which the defendant is presently being treated. Type of treatment or medication, if known. General physical condition. Health problems based on defendant's estimate, medical reports, and probation officer's observations. Urinalysis results.

### Include if Pertinent:

Evidence of excessive alcohol consumption. Dependence upon drugs or alcohol to a degree that shows a noticeable mental disturbance, damage to physical health, or interference with interpersonal relations and social and economic functioning. Opiates or other drug abuse. History of serious diseases, major surgeries, and hospital treatment presently affecting defendant. History of chronic illnesses. Allergies especially to any common medicines; e.g., penicillin.

*Comment:* A drug abuser is a person who is using a controlled substance as defined in Title 21 U.S.C. 802(6) and who is in a state of psychological or physical dependency arising from the use of that substance on a continuing basis. Drug dependency is characterized by behavior and other responses which include a strong compulsion to take a substance on a continuing basis in order to experience its psychic effects or to avoid the discomfort caused by its absence. What type of drug abuse or addiction does the defendant exhibit? Are there obvious psychological or social disturbances which preceded drug dependence? Common drugs of abuse consist of opiates which include heroin, codeine, morphine, opium, dilaudid, demerol, percodan and illicit methadone. Other drugs include barbiturates, methaqualone, PCP, amphetamines, tranquilizers, talwin, cocaine, LSD, mescaline, glue/solvents, hashish, and marihuana. Verification of drug abuse as well as identification of the type of drug *may* be determined by urinalysis. Urinalysis is provided with the defendant's consent or with a court order in each probation office through laboratories under contract to the Administrative Office of the United States Courts. Urinalysis results are best corroborated by physical evidence, observed behavior, arrest information, or admission of drug use. Refusal to submit to urinalysis may be an indication of drug use and should be reported to the court.

Does defendant's alcohol or drug abuse contribute to his criminal involvement? Indicate alcohol or drug treatment programs in which the defendant participates and an evaluation of his progress. Report hospitalization which resulted from alcohol or drug abuse. Duration of abuse is an important consideration especially with opiates. *It is the duration that differentiates the acute from the chronic abuser.* (Note: Federal Regulations on the Confidentiality of Alcohol and Drug Abuse Patient Records (42 CFR Part 2) prohibit alcohol or drug treatment programs from releasing client/patient records without a specific written release of information.)

Describe any medical problems or physical disabilities which limit the defendant's ability to maintain gainful employment or otherwise adversely affect overall adjustment. Any current illnesses or conditions requiring professional treatment should be discussed in detail. It may be helpful to attach current medical reports, if available. Include in the

report no more than is necessary to understand the defendant's present health condition.

## Mental and Emotional:

### Essential Data:

Social adjustment and personality characteristics as assessed by associates, family members, and mental health professionals, if any. Social and personal characteristics in relation to overall adjustment. Awareness of emotional problems and willingness to accept responsibility for seeking solutions. Ability to cope with family and social demands.

### Include if Pertinent:

I.Q. (Support with test scores.) Findings of psychological and psychiatric examination (name of test, scores, date, by whom given.) Emotional instability. History of psychiatric treatment. Unusual fears, hostilities, obsessions, compulsions, depressions, or sexual deviations.

*Comment:* If a current psychiatric or psychological evaluation is available, this is of primary importance, and should be attached. Previous diagnoses may be appropriate to indicate the duration or intensity of the problem(s) involved. Psychiatric terms and diagnostic labels need explanation by the examining expert.

*The probation officer is called upon to offer a subjective opinion of the defendant's capacity to effect positive attitudinal and behavioral changes. For example, do personality problems exist which adversely affect the defendant's self-concept, interpersonal relationships, or value system?*

## Military Service

If the defendant has not been in military service omit this section.

### Essential Data:

Branch of service. Service number. Dates of each period of military service and total length of service. Type of discharge. Highest grade or rank achieved and grade or rank at separation.

### Include if Pertinent:

Inducted or enlisted. Special training received. Foreign service, combat experience, decorations, and citations. Disciplinary action, including all courts-martial. Eligibility for benefits.

*Comment:* If defendant is currently in the military, contact the commanding officer. A written authorization is required to obtain information on military personnel. Include medical history supplied by the military in the section on Health. For those

individuals inducted into the military after January 1, 1972, their Social Security number is identical with their service number. Types of discharge are: honorable, general under honorable conditions, undesirable, bad conduct, dishonorable, medical, or retired.

## Financial Condition\*

### Assets:

#### Essential Data:

Statement of financial assets. Average monthly income. Spending habits in relation to level of income. If unemployed, source of support such as unemployment insurance, public assistance, veteran's/military benefits, Social Security benefits, private assistance, retirement funds, family help, or criminal activities.

#### Include if Pertinent:

Net worth statement. Real estate (type, location, value, equity). Insurance (type, amount, cash value, company). Checking, saving, and money market accounts (bank or institution, amount). Stocks and bonds (type, value). Personal property (car, furniture, appliances). Income from pensions (e.g., IRA's, KEOGH's), rentals, boarders, and spouse's and children's income. Available resources through relatives and friends. Other property (jewelry, silver, gold, antiques), and other valuable items and collections.

### Liabilities:

#### Essential Data:

Statement of financial obligations including balance due and monthly payments (home mortgage, taxes, rent, utilities, medical, personal property, home repairs, charge accounts, loans, fines, restitution, child support, and legal fees).

#### Include if Pertinent:

Money management and financial delinquencies. Credit rating.

*Comment:* This section should permit an assessment of the defendant's ability to pay a fine or restitution. Knowledge of the defendant's assets and financial obligations is a good indicator of how responsible he is. A credit report, available through local retail credit associations, may offer helpful leads to his or her financial status.

\*Note: For presentence reports where an order of restitution can be imposed by the court, the financial section must include details on the financial resources, needs, and earning ability of the defendant and the defendant's dependents. (See P.L. 97-291 - Oct. 12, 1982, added, 18 U.S.C. 3580(a).)

Probation officers can request the defendant to provide his most recent tax returns. If the returns are obtained by the probation officer, they must be safeguarded under the requirements of title 26 U.S.C. 6103. This statute provides that Federal tax returns are confidential and may only be disclosed in accordance with the rules set down in Title 26.

### *Evaluation*

#### Essential Data:

Probation officer's assessment of the defendant's problems, attitude, and behavior. Specifically, consider the role of parents, spouse, residence, employment, and any pertinent medical, psychiatric, or drug treatment that is indicated. Briefly set forth goals and general action steps which might achieve those goals. Include parole guideline data and sentencing data. *Include a general supervision plan to meet the defendant's problems through the services of the probation office and available resources.*

#### Include if Pertinent:

Special Sentencing Provisions. List whether defendant is eligible for the Youth Corrections Act, a Special Parole Term is applicable, whether restitution can be considered as a part of the sentence and under which statute, and any other *special* sentencing provision which could be applicable to this offense/offender.

### *Probation Officer's Assessment*

The evaluation contains the probation officer's professional assessment of the objective material in the body of the report. It goes beyond summarizing the more significant contents, although some highlighting may be necessary to lend continuity. Having gathered all the facts, the probation officer should now consider the protection of the community and the problems of the defendant.

Consider first the offense. Is it situational in nature or indicative of persistent problems? Was violence threatened or used? Was the defendant armed? Was the offense against person or property? What is the relative culpability of the defendant and codefendants? What was the motive for the offense? What was the amount of financial loss to an individual or the government?

Consider next the community. Does the defendant pose a direct threat to the safety and welfare of others? Would a disposition other than incarceration tend to depreciate the seriousness of the crime? Is probation a sufficient deterrent? Would the most

benefit derive by working with the defendant in the community? What community resources are available?

Consider now the defendant. What developmental factors were significant in contributing to the defendant's current behavior pattern? What is the history of antisocial behavior and when did it begin? Does the defendant acknowledge responsibility for the offense? Is the defendant motivated to change his behavior? What are his strengths or weaknesses? Is the defendant employable? Does he have a supportive family? What are the positive features that can affect supervision? Does he demonstrate remorse? The defendant who voluntarily attempts to make restitution or compensate the victim may display a more conscientious attitude than one who attempts to rationalize, justify, or deny that he committed the crime.

*The conclusion reached in the officer's assessment should provide a logical basis for the recommendation.*

*Parole Guideline Data.*—Probation officers should complete the U.S. Parole Commission Tentative Guideline Worksheet. From these results, include the probation officer's *estimate* of the offender's characteristics (Salient Factor Score), offense characteristics, type of guidelines (adult or youth), and the probable months to be spent in custody (guideline range) according to the U.S. Parole Commission guidelines for decisionmaking. Bear in mind that these are *estimates* since the Commission prepares the official computation for those defendants committed to imprisonment.

Remember that in calculating the offense severity the Commission considers dismissed counts, where they are supported by a preponderance of the evidence. Moreover, if offense behavior can be classified under more than one category, the Parole Commission selects the *most* serious applicable category. If there is any doubt as to the proper estimate of offense severity, the officer should attempt to clarify that with commission staff. The safest policy is to favor the most severe application of the classifications. This will minimize unpleasant surprises for those defendants who are incarcerated.

These data will assist the court not only in arriving at an equitable sentence, but also in specifying factors which the court wishes the Parole Commission to consider should the court send the Commission its recommendation as to parole (Form AO 235, Appendix J). In providing this information to the court, the probation officer must keep apprised of how Parole Commission regulations affect actual length of prison stay.

*Sentencing Data.*—Include the range of sentences imposed for the offense for which the defendant is

being sentenced. The national data may be obtained from the most recent annual report of the Director of the Administrative Office of the United States Courts, Table D-5, "Criminal Defendants Sentenced After Conviction, by Nature of Offense." More detailed data on sentencing by offense are available from the *Sentences Imposed Chart*, published by the Statistical Analysis and Reports Division of the Administrative Office. Before using these data, first read the caveat in the *Sentences Imposed Chart* which sets out important cautions on interpreting the tables. Remember also that the offense reported in each of the tables is the most serious offense of conviction and that the tables do not report the number of counts, or less serious additional offenses of conviction. The data from the tables are used only to provide a national or district pattern and general guidelines on sentences.

*Special Sentencing Provisions.*—The probation officer provides a statement of any special sentencing provisions available to the court, exclusive of regular adult sentencing provisions. This section of the presentence report should include any eligibility for sentencing under the Youth Corrections Act, Narcotic Addict Rehabilitation Act, any Special Parole Term required by law, and whether restitution can be ordered (if so, under which statute).

### *Recommendation*

#### Essential Data:

The recommendation for disposition including supporting rationale and purposes of sentencing.

#### Include if Pertinent:

Special conditions including fine, restitution, community service, drug or alcohol treatment. Include supporting rationale. Include the level of supervision activity indicating how often the defendant would be seen by the probation officer if placed on probation. Include a recommendation of whether or not the defendant would be a good candidate for voluntary surrender.

*Recommendation and Rationale.*—All pertinent data have been gathered for the principal purpose of determining the most appropriate sentence. The probation officer is responsible for offering a sound recommendation with a supporting sentencing purpose (i.e., deterrence, punishment, incapacitation, or rehabilitation) which will assist the court in achieving its sentencing goals. The recommendation can be as specific as the court desires, including

number of years of custody or supervision, special conditions of probation, and dollar amounts for a fine and/or restitution.

*Comment:* If the court does not disclose the recommendation, it should be presented on a separate sheet of paper so that it may be detached when the presentence report is disclosed to the defendant or counsel. Recommendations are to be reviewed by a supervisor and it is good practice for them to be reviewed by a staff committee or the administrative staff. This is especially true in cases involving multiple defendants.

A probation officer may include any recommendation and rationale for a specific institution where a sentence could be served. **NO ADDITIONAL FACTS SHOULD BE REPORTED IN THE RECOMMENDATION SECTION WHICH WERE NOT INCLUDED IN THE BODY OF THE REPORT OR IN THE POTENTIALLY EXCLUDABLE INFORMATION SECTION. THE RECOMMENDATION IS NOT TO BE USED AS A CONDUIT FOR CONFIDENTIAL INFORMATION.**

*Voluntary Surrender.*—Under voluntary surrender a sentenced offender is ordered by the court to report to the designated institution on his own. The U.S. marshal does not transport him. (See *Guide to Judiciary Policies and Procedures, Probation Manual, Vol. X-A.*) Include a statement of whether or not the defendant would be a good candidate for voluntary surrender. Consider any previous escape history or failure to appear. Generally, persons who have been released on bond and who have complied with the conditions of their bond should be considered for this program. The court order effecting voluntary surrender should include a date and a time that the defendant is to report to the designated institution. The time should be no later than 2:00 p.m. on the date designated.

### **Information Potentially Exempt From Disclosure (Rule 32(c))**

Generally, in a presentence report, under Rule 32, the nature and source of information must be disclosed to the defendant or his counsel. However, when the probation officer considers information to be exempt from disclosure under Rule 32(c) of the Federal Rules of Criminal Procedure, it should be identified for the court on a separate sheet of paper. *Probation officers must use the standards set forth in Rule 32(c) in determining whether or not information can be considered exempt from disclosure.* This information is then submitted with the presentence report under this heading: "INFORMATION EXCLUDED FROM THE PRESENTENCE RE-

PORT AS POTENTIALLY EXEMPT FROM DISCLOSURE: RULE 32(c)(3)(A)." Identify the information by the appropriate core category or subsection. Prepare a summary of the excluded information and present it to the court for its use for providing the factual information to be relied on in determining the sentence.

*Rule 32 requires that a summary of factual information be made.* The summary should be as specific as the facts and circumstances of the case permit. The summary should include more than a recitation of statutory exemptions. Indicate the general nature of the excluded information but do not be so specific in summarization that the protected information, e.g., the confidential source, would be disclosed.

For a discussion of the contents of a summary of excluded information, see *U.S. v. Woody*, 567 F. 2nd, 1353 (5th Cir. 1978). This opinion holds that generally, the defendant should be advised of the precise nature of any behavioral characteristics or instances of illegal conduct detailed in the report, unless to do so would breach the protective provisions of Rule 32(c)(3)(A).

*Once approved by the court, the presentence report, the excluded information, and a summary of the excluded information must be transmitted via certified, "confidential" mail for disclosure to inmates applying for parole (minus the excluded information) and use by the U.S. Parole Commission and the U.S. Bureau of Prisons.*

NOTE: A probation officer should indicate in this section any security risks including any escape potential as well as any threats made to, or received from, the community or other defendants and identify any defendant who is a protected witness or who has cooperated with the government. According to the Rules of Criminal procedure, any information which was part of a plea agreement can be disclosed to the defendant and his counsel. Extracting this information from the disclosable section of the presentence report is a precaution against providing the information to unauthorized individuals. This precaution reduces the potential of harm being done to the defendant if he is institutionalized. If the defendant is committed, the probation officer is to provide information about protected witnesses to the Bureau of Prisons community programs manager.

### **Record of Disclosure of the Presentence Report**

Under Rule 32(c)(3)(A) of the Federal Rules of Criminal Procedure, a reasonable time before imposing sentence the court shall permit the defendant and his counsel to read the report of the presentence investigation, exclusive of any recommendation as to sentence. Some courts have established procedures for the probation officer to disclose the pre-

sentence report prior to the sentencing hearing. A record of that disclosure should be retained in the probation office file. This can be accomplished by having the defense counsel and defendant, at the time the report is reviewed, sign Form 13D, Notice to Defendant Concerning the Presentence Investigation Report (Appendix I). If the defendant is given a custody sentence, this form is to be sent to the Federal Prison System along with the presentence report, a written record of any court determinations as to any alleged inaccuracies in the report, and the tentative parole guideline worksheet (Parole form F-5).

### **Correcting the Presentence Report**

The court shall afford the defendant and his counsel an opportunity to comment on the report and in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracies contained in the presentence report. The court is required by Rule 32(c)(3)(D) to address any alleged factual inaccuracies contained in the report. The court shall, as to each matter controverted, make (1) a finding as to the allegation or (2) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Federal Bureau of Prisons or the U.S. Parole Commission. This should, in most cases, preclude later allegations of inaccuracies by the defendant, after he/she is in custody. Direction from the court should be sought regarding what, if any, further corrective measures should be taken in cases where information is disputed and the court determines the information will not be used in sentencing.

If at a later date *critical decisionmaking data* are alleged to be in error by the U.S. Parole Commission, the Federal Prison System or the inmate, the party may write to the probation officer with supporting evidence. The officer should consult with the court and then, if directed, provide written findings. If it was determined that there was a critical error in the report, the probation officer shall send a letter to the Parole Commission, Federal Prison System, and the inmate stating the correction.

### **AO Forms 235 and 337 and U.S. Department of Justice Form 792**

The probation officer fills out the top portion of the AO Form 235, Report on Sentenced Offender by United States District Judge (Appendix J), and

transmits the form with the presentence report to the sentencing judge. After the judge completes the rest of the form, the probation office forwards two copies to the Bureau of Prisons community programs manager.

The defense attorney has input into the parole

process by utilizing AO Form 337, Defense Attorney's Parole Report (see Appendix K).

The assistant U.S. attorney's transmittal to the U.S. Parole Commission is generally done through the U.S. Department of Justice Form 792 (Appendix L).

## Appendixes

Rule 32(c) and Probation Statute	Appendix A (1) and (2)
Parole Commission and Reorganization Act Abstract	Appendix B
Analysis of <i>United States v. Tucker and Townsend v. Burke</i>	Appendix C
Analysis of Freedom of Information Act and Privacy Act ( <i>United States v. Carson</i> )	Appendix D
Request for PSI or Probation Records (Sample Response)	Appendix E
Consent Forms — 13A & C	Appendix F
Authorization to Release Information Forms (1), (2), and (3)	Appendix G
Probation Officer Liability <i>Spaulding v. Nielson</i>	Appendix H
Notice to Defendant — Form 13D	Appendix I
AO Form 235 (for judges)	Appendix J
AO Form 337 (for defense attorneys)	Appendix K
U.S. Department of Justice Form 792 (for prosecutors)	Appendix L

## APPENDIX A (1)

### Rule 32(c), Federal Rules of Criminal Procedure

#### PRESENTENCE INVESTIGATION

(c) Presentence Investigation.

(1) When Made. The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless, with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record.

The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty, except that a judge may, with the written consent of the defendant, inspect a presentence report at any time.

(2) REPORT.—The presentence report shall contain—

(A) any prior criminal record of the defendant;

(B) a statement of the circumstances of the commission of the offense and circumstances affecting the defendant's behavior;

(C) information concerning any harm, including financial, social, psychological, and physical harm, done to or loss suffered by any victim of the offense; and

(D) any other information that may aid the court in sentencing, including the restitution needs of any victim of the offense.

(3) Disclosure.

(A) At a reasonable time before imposing sentence the court shall permit the defendant and his counsel to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinions which, if disclosed, might seriously disrupt a program of rehabilitation; or sources of information obtained upon a promise of confidentiality; or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. The court shall afford the defendant and his counsel an opportunity to comment on the report and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it.

(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant and his counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

(C) Any material which may be disclosed to the defendant and his counsel shall be disclosed to the attorney for the government.

(D) If the comments of the defendant and his counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the

court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons or the Parole Commission.

(E) Any copies of the presentence investigation report made available to the defendant and his counsel and the attorney for the government shall be returned to the probation officer immediately following the imposition of sentence or the granting of probation, unless the court, in its discretion, otherwise directs.

(F) The reports of studies and recommendations contained therein made by the Director of the Bureau of Prisons or the Parole Commission pursuant to 18 U.S.C. §§ 4205(c), 4252, 5010(e), or 5037(c) shall be considered a presentence investigation within the meaning of subdivision (c)(3) of this rule.

## APPENDIX A (2)

### Probation Statute (18 U.S.C.)

#### § 3651. Suspension of sentence and probation

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, if the maximum punishment provided for such offense is more than six months, any court having jurisdiction to try offenses against the United States, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best.

Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.

The court may revoke or modify any condition of probation, or may change the period of probation.

The period of probation, together with any extension thereof, shall not exceed five years.

While on probation and among the conditions thereof, the defendant—

May be required to pay a fine in one or several sums; and

May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and

May be required to provide for the support of any persons, for whose support he is legally responsible.

The court may require a person as conditions of probation to reside in or participate in the program of a residential community treatment center, or both, for all or part of the period of probation: *Provided*, That the Attorney General certifies that adequate treatment facilities, personnel, and programs are available. If the Attorney General determines that the person's residence in the center or participation in its program, or both, should be terminated, because the person can derive no further significant benefits from such residence or participation, or both, or because his such residence or participation adversely affects the rehabilitation of other residents or participants, he shall so notify the court, which shall thereupon, by order, make such other provision with respect to the person on probation as it deems appropriate.

A person residing in a residential community treatment center may be required to pay such costs incident to residence as the Attorney General deems appropriate.

The court may require a person who is an addict within the meaning of section 4251(a) of this title, or a drug dependent person within the meaning of section 2(q) of the Public Health Service Act, as amended (42 U.S.C. 201), as a condition of probation, to participate in the community supervision programs authorized by section 4255 of this title for all or part of the period of probation.

The defendant's liability for any fine or other punishment imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation.

(As amended June 20, 1958, Pub. L. 85—463, § 1, 72 Stat. 216; Aug. 23, 1958, Pub. L. 85—741, 72 Stat. 834; Oct. 22, 1970, Pub. L. 91—492, § 1, 84 Stat. 1090; May 11, 1972, Pub. L. 92—293, § 1, 86 Stat. 136; Oct. 27, 1978, Pub. L. 95—537, § 2, 92 Stat. 2038.)

## APPENDIX B

### Abstract of Parole Commission & Reorganization Act (18 USC)

#### § 4206. Parole determination criteria

(a) If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:

(1) that release would not depreciate the seriousness of his offense or promote disrespect for the law; and

(2) that release would not jeopardize the public welfare;

subject to the provisions of subsections (b) and (c) of this section, and pursuant to guidelines promulgated by the Commission pursuant to section 4203(a)(1), such prisoner shall be released.

(b) The Commission shall furnish the eligible prisoner with a written notice of its determination not later than twenty-one days, excluding holidays, after the date of the parole determination proceeding. If parole is denied such notice shall state with particularity the reasons for such denial.

(c) The Commission may grant or deny release on parole notwithstanding the guidelines referred to in subsection (a) of this section if it determines there is good cause for so doing: *Provided*, That the prisoner is furnished written notice stating with particularity the reasons for its determination, including a summary of the information relied upon.

(d) Any prisoner, serving a sentence of five years or longer, who is not earlier released under this section or any other applicable provision of law, shall be released on parole after having served two-thirds of each consecutive term or terms, or after serving thirty years of each consecutive term or terms of more than forty-five years including any life term, whichever is earlier: *Provided, however*, That the Commission shall not release such prisoner if it determines that he has seriously or frequently violated institution rules and regulations or that there is a reasonable probability that he will commit any Federal, State, or local crime. (Added Pub. L. 94—233, § 2, Mar. 15, 1976, 90 Stat. 223.)

#### § 4207. Information considered

In making a determination under this chapter (relating to release on parole) the Commission shall consider, if available and relevant:

(1) reports and recommendations which the staff of the facility in which such prisoner is confined may make;

(2) official reports of the prisoner's prior criminal record, including a report or record of earlier probation and parole experiences;

(3) presentence investigation reports;

(4) recommendations regarding the prisoner's parole made at the time of sentencing by the sentencing judge; and

(5) reports of physical, mental, or psychiatric examination of the offender.

There shall also be taken into consideration such additional relevant information concerning the prisoner (including information submitted by the prisoner) as may be reasonably available.

(Added Pub. L. 94—233, § 2, Mar. 15, 1976, 90 Stat. 224.)

**§ 4208. Parole determination proceeding; time**

(a) In making a determination under this chapter (relating to parole) the Commission shall conduct a parole determination proceeding unless it determines on the basis of the prisoner's record that the prisoner will be released on parole. Whenever feasible, the initial parole determination proceeding for a prisoner eligible for parole pursuant to subsections (a) and (b)(1) of section 4205 shall be held not later than thirty days before the date of such eligibility for parole. Whenever feasible, the initial parole determination proceeding for a prisoner eligible for parole pursuant to subsection (b)(2) of section 4205 or released on parole and whose parole has been revoked shall be held not later than one hundred and twenty days following such prisoner's imprisonment or reimprisonment in a Federal institution, as the case may be. An eligible prisoner may knowingly and intelligently waive any proceeding.

(b) At least thirty days prior to any parole determination proceeding, the prisoner shall be provided with (1) written notice of the time and place of the proceeding, and (2) reasonable access to a report or other document to be used by the Commission in making its determination. A prisoner may waive such notice, except that if notice is not waived the proceeding shall be held during the next regularly scheduled proceedings by the Commission at the institution in which the prisoner is confined.

(c) Subparagraph (2) of subsection (b) shall not apply to—

(1) diagnostic opinions which, if made known to the eligible prisoner, could lead to a serious disruption of his institutional program;

(2) any document which reveals sources of information obtained upon a promise of confidentiality; or

(3) any other information which, if disclosed, might result in harm, physical or otherwise, to any person.

If any document is deemed by either the Commission, the Bureau of Prisons, or any other agency to fall within the exclusionary provisions of subparagraphs (1), (2), or (3) of this subsection, then it shall become the duty of the Commission, the Bureau, or such other agency, as the case may be, to summarize the basic contents of the material withheld, bearing in mind the need for confidentiality or the impact on the inmate, or both, and furnish such summary to the inmate.

(d)(1) During the period prior to the parole determination proceeding as provided in subsection (b) of this section, a prisoner may consult, as provided by the director, with a representative as referred to in subparagraph (2) of this subsection, and by mail or otherwise with any person concerning such proceeding.

(2) The prisoner shall, if he chooses, be represented at the parole determination proceeding by a representative who qualifies under rules and regulations promulgated by the Commission. Such rules shall not exclude attorneys as a class.

(e) The prisoner shall be allowed to appear and testify on his own behalf at the parole determination proceeding.

(f) A full and complete record of every proceeding shall be retained by the Commission. Upon request, the Commission shall make available to any eligible prisoner such record as the Commission may retain of the proceeding.

(g) If parole is denied, a personal conference to explain the reasons for such denial shall be held, if feasible, between the prisoner and the Commissioners or examiners, conducting the proceeding at the conclusion of the proceeding. When

feasible, the conference shall include advice to the prisoner as to what steps may be taken to enhance his chance of being released at a subsequent proceeding.

(h) In any case in which release on parole is not granted, subsequent parole determination proceedings shall be held not less frequently than:

(1) eighteen months in the case of a prisoner with a term or terms of more than one year but less than seven years; and

(2) twenty-four months in the case of a prisoner with a term or terms of seven years or longer.

(Added Pub. L. 94—233, § 2, Mar. 15, 1976, 90 Stat. 224.)

## APPENDIX C

- *United States v. Tucker*

In *United States v. Tucker*, 404 U.S. 443 (1972), the Supreme Court ruled that it was unconstitutional for a court to consider in its sentencing decision prior convictions of the defendant that were invalid because counsel had not represented the defendant or no waiver of counsel had been made (violation of sixth amendment). Prior criminal record is a determinative factor in sentencing; however, unconstitutional convictions may not serve to enhance the sentence an offender receives. The rationale of *Tucker* is that consideration of invalid prior convictions in sentencing misinforms rather than informs the court's discretionary judgment.

Accordingly, since convictions obtained in violation of a defendant's sixth amendment rights are improperly relied on as prior record, it is incumbent on the probation officer preparing the presentence report to verify, during the course of his investigation, whether the defendant's previous convictions\* were obtained when the defendant was represented by or waived counsel. Examination of the court records relating to such convictions ordinarily will provide the requisite information. The verification and its results should be listed for each prior conviction. It will be the court's responsibility to disclaim on the record reliance on invalid convictions at the time of imposing sentence.

- *Townsend v. Burke*

A second limitation which the Supreme Court has placed on sentencing information is found in *Townsend v. Burke*, 334 U.S. 736 (1948). In *Townsend* the Court ruled invalid the sentencing of a defendant based on assumptions about his criminal record that were materially false. For example, the sentencing court in *Townsend* had treated as convictions previous criminal charges against the defendant that either had been dismissed or had resulted in acquittals. A probation officer must carefully note on the presentence report the disposition of all charges or arrests with respect to the arrest or criminal record of an offender. *This rule of accuracy applies to all data in a presentence report because it is a patent violation of due process to sentence on the basis of materially false information.*

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\*Under present constitutional doctrine no criminal defendant may be deprived of his liberty as the result of any criminal conviction, whether felony or misdemeanor, unless he was afforded the right to counsel. See *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). As a general rule, a defendant has a right to counsel in all felony cases and in all other offenses for which incarceration is a potential penalty.

## Appendix D

### Freedom of Information Act and Privacy Act The Presentence Report

The Freedom of Information Act and the Privacy Act impose limitations on the availability, use, and disclosure of Government records and documents. The Freedom of Information Act, 5 U.S.C. 522<sup>1</sup>, establishes a scheme for gaining access to Government records. On the other hand, the Privacy Act, 5 U.S.C. 522(a)<sup>2</sup>, provides a structure for safeguarding the privacy of individuals by restricting the dissemination to third parties or agencies, of records or the information contained in Government records relating to such individuals.

The FOIA enjoins Government agencies to make available to the public its publications, orders, policy decisions and other records unless they fall within certain enumerated disclosure exceptions. The "agencies" bound by the requirements of the FOIA are all, with the exception of the independent regulatory agencies, in the executive branch. The "Courts of the United States" are excluded explicitly from the definition of "agency" found in the FOIA, 5 U.S.C. 551(1)(B), 552(e).

Federal courts are not bound by the requirements of the FOIA. As officers of the courts, probation officers perform several major functions, one of which is the preparation of presentence reports, *Fed. R. Crim. P.* 32 (c). Presentence reports are not covered by the FOIA, 5 USC 551(1)(B), 552(e) (1970, Supp. IV, 1974). Consequently, even though a presentence report may be found in the files of the Bureau of Prisons, it nevertheless, retains its status as a court document *not* discoverable under the FOIA (See *Cook v. Willingham*, 400 F.2d 885 10th Cir. 1968).

A separate question is whether a presentence report in the physical possession of an executive agency (U.S. Parole Commission or Federal Bureau of Prisons) is subject to the FOIA. At least one circuit has ruled that absent an express restriction asserting the court's continued control of a presentence report provided for official purposes to an executive agency, the report may be subject to a prisoner's or parolee's FOIA request. (See *U.S. v. Carson*, 631 F.2d 1008 D.C. Cir. 1980). To ensure that the court retains its control of the presentence report, it is necessary, when forwarding a presentence report to an institution, to stamp it confidential and indicate that it is not to be disclosed pursuant to the FOIA. The face of the report should note that any copy of a presentence report which the

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<sup>1</sup>Pub. L. No. 89-554, 80 Stat. 383 (Sept. 6, 1966), Pub. L. No. 90-23, Sec. 1, 81 Stat. 54 (June 5, 1967), Pub. L. No. 93-502, Sec. 1-3, 88 Stat. 1561-64 (Nov. 21, 1974).

<sup>2</sup>Pub. L. No. 93-579, Sec. 3, 88 Stat. 1897 (Dec. 31, 1974).

<sup>3</sup>While it is true that probation officers perform various duties as requested by the United States Parole Commission and thus are "agents" of the Commission for some purposes, such as parole supervision or post-release planning, 18 USC 3655, as amended by Pub. L. No. 94-233, Sec. 14 (Mar. 15, 1976); 18 USC 4203(a)(4) (Mar. 15, 1976), preparing presentence reports is not one of those duties. Presentence reports are used by the Bureau of Prisons and Parole Commission because the courts have permitted such use. The reports are not converted, however, by such use into documents of "agencies" subject to the prescriptions of the FOIA. Access to such reports at the time of parole release hearings, when available to the Parole Commission, has recently been given to inmates by the Parole Commission and Reorganization Act, 18 USC 4207, 4208 (Mar. 15, 1976). Nothing in the Act, however, alters the fact that the presentence report is a court document which is not within the purview of the FOIA. It cannot be obtained under the FOIA by an inmate or parolee from the Parole Commission.

court makes available, or has made available, to the United States Parole Commission or the Bureau of Prisons constitutes a confidential court document and shall be presumed to remain under the continuing control of the court during the time it is in the temporary custody of these agencies. Such copy shall be lent to the Parole Commission and the Bureau of Prisons only for the purpose of enabling those agencies to carry out their official functions, including parole release and supervision, and shall be returned to the court after such use, or upon request. Disclosure of a report is authorized only so far as necessary to comply with 18 U.S.C. § 4208(b)(2). Courts should stamp the presentence reports as follows:

MODEL LEGEND

CONFIDENTIAL  
PROPERTY OF U.S. COURTS  
SUBMITTED FOR OFFICIAL USE OF  
U.S. PAROLE COMMISSION AND  
FEDERAL BUREAU OF PRISONS. TO BE  
RETURNED AFTER SUCH USE, OR UPON REQUEST.  
DISCLOSURE AUTHORIZED ONLY TO  
COMPLY WITH 18 USC 4208(b)(2).

Similarly, offenders sentenced by Federal courts have *no right* under the FOIA to obtain a copy of their presentence report directly from the responsible probation officer. A sample routine reply to such a request is attached (Appendix E). With respect to the question of an individual's access to his presentence report or probation files, the response is the same under the Privacy Act as it is under the FOIA. The courts (and probation offices) are not under the coverage of the Privacy Act, 5 U.S.C. 552(a)(1); see 5 U.S.C. 551(1)(b), 552(e). The sample letter applies to requests made under both Acts (Appendix E).

The Privacy Act imposes restrictions on agency dissemination of records pertaining to individuals to other agencies or persons. An individual is given the right of access to his records and the further right to prevent such records from being used or divulged for purposes other than their original purpose without his consent. Hence, probation office access to information in Government files pertaining to individuals has been limited by the Privacy Act, except where the concerned individual consents to the release of information or such release comes within the eleven enumerated exceptions to the Privacy Act's nondisclosure rule. The probation system must abide by the Privacy Act in obtaining for its use and that of the courts, information contained in Government records or files that are subject to the strictures of the Privacy Act. To gain information, a probation officer must have the individual's consent or the request must fall within the exceptions from nondisclosure set forth in 552(a)(b). That section provides in pertinent part:

(b) Conditions of disclosure.—No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—(within eleven specific exemptions).

In gathering, and before releasing, information for a presentence report, it is necessary for the probation officer to follow the procedures each Government

agency has established for complying with the Privacy Act. It is important to remember, however, that if the individual consents in writing to the disclosure to a particular person or agency, then disclosure is permissible. Consensual release is a practical technique for probation offices to follow.

## APPENDIX E

### Model Response to Request for Presentence Report or Probation Records

Dear:

We are in receipt of your letter dated \_\_\_\_\_ which was received by this office on \_\_\_\_\_. Pursuant to your request for certain information pertaining to you in the files of the U.S. Probation Office, District of \_\_\_\_\_, under the provisions of the Freedom of Information Act, 5 U.S.C. 552 (1970, Supp. IV, 1974), and the Privacy Act, 5 U.S.C. 552a (Supp. IV, 1974), I must advise you that neither the Freedom of Information Act nor the Privacy Act have any application to the courts of the United States or, therefore, to Probation Offices of the Federal Courts, 5 U.S.C. 551(1)(B); (1970, Supp. IV, 1974); 5 U.S.C. 552(e), 552a(a)(1) (Supp. IV, 1974); see *Cook v. Willingham*, 400 F.2d 885 (10th Cir. 1968).

For this reason there is no right under these Acts to obtain the documents you requested (or to receive a list of agencies or persons to whom information in our files has been disseminated). Similarly, for that reason we have no regulations regarding disclosure of our files or records under these two Acts.

If this office can be of further assistance to you, please feel free to correspond with the undersigned.

Yours truly,

U.S. Probation Officer

APPENDIX F(1)

**UNITED STATES DISTRICT COURT**

\_\_\_\_\_  
DISTRICT \_\_\_\_\_  
\_\_\_\_\_

**Defendant's Approval To Institute a Presentence Investigation  
Before Conviction or Plea of Guilty**

\_\_\_\_\_

I, \_\_\_\_\_, hereby consent  
(Name of Defendant)

to a presentence investigation by the probation officers of the United States district courts. This investigation is for the purpose of obtaining information useful to the court in the event I should hereafter plead guilty or nolo contendere or be found guilty.

By this consent, I do not admit any guilt or waive any rights. I understand that any reports prepared will not be shown to the court or anyone else unless and until I have been found guilty or entered a plea of guilty or nolo contendere. I understand, however, that I may hereafter agree in writing to disclosure of such reports to the court before I have been found guilty or entered a plea of guilty or nolo contendere.

I have read, or had read to me, the foregoing consent and fully understand it. No promise has been made to me as to what final disposition will be made of my case.

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Signature of Defendant)

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Defendant's Attorney)

APPENDIX F(2)

**UNITED STATES DISTRICT COURT**

\_\_\_\_\_  
DISTRICT \_\_\_\_\_

**Defendant's Waiver of Preparation of Presentence  
Investigation and Report**

I, \_\_\_\_\_, hereby waive  
(Name of Defendant)

my right to have the probation officers of the United States district courts conduct a presentence investigation for presentation to the sentencing court. This investigation and report which I now forego is for the purpose of obtaining information useful to the court in setting sentence.

I have read, or had read to me, and fully understand the preceding waiver form.

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Signature of Defendant)

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Defendant's Attorney)

APPENDIX G(1)

**AUTHORIZATION TO RELEASE INFORMATION**  
*(PRIVATE PERSON OR ORGANIZATION)*  
**TO PROBATION OFFICER**

TO WHOM IT MAY CONCERN:

I, \_\_\_\_\_, the undersigned, hereby authorize the United States Probation Office for the \_\_\_\_\_ District of \_\_\_\_\_ or its authorized representative(s) or employee(s), bearing this release or copy thereof, to obtain any information in your files pertaining to my:

- Employment
- Education Records (including but not limited to academic achievement, attendance, athletic, personal history, and disciplinary records)
- Medical Records
- Psychological and Psychiatric Records

I hereby direct you to release such information upon request of the bearer. This release is executed with full knowledge and understanding that the information is for the United States Probation Office's official use.

I hereby release you, as custodian of such records, any school, college, or university, or other educational institution; hospital or other repository of medical records; social service agency; any employer, or retail business establishment including its officers, employees, or related personnel both individually and collectively, from any and all liability for damages of whatever kind which may at any time result to me, my heirs, family, or associates because of compliance with this authorization and request for information or any other attempt to comply with it.

The information hereby obtained by the aforementioned probation office is to be used only for the purpose of presentence investigation and report and, if applicable, for supervision.

<i>(Authorizing Signature—Full Name)</i>	<i>(Full Name—Printed or Typed)</i>	<i>(Date)</i>
WITNESS —	<i>(Probation Officer)</i>	<i>(Date)</i>

Appendix G(2)

PROB 11H  
(2/81)

**AUTHORIZATION  
TO RELEASE GOVERNMENT (STATE OR FEDERAL) INFORMATION  
TO PROBATION OFFICER**

I, \_\_\_\_\_, the undersigned, hereby waive my rights under the Privacy Act, 5 U.S.C. 552a (Supp. IV, 1974), and authorize the disclosure to the United States Probation Office of the \_\_\_\_\_ District of \_\_\_\_\_, or its authorized representative(s) or employee(s), any and all information pertaining to me, contained in the files or systems of records maintained by any government agency subject to the Privacy Act, which such agency sees fit to convey, either orally or in writing, to the aforementioned Probation Office.

I hereby waiver any rights I may have under the Privacy Act to prior notice of such disclosure or of any rights I may have to an accounting of such disclosure to the aforementioned Probation Office.

I understand that this consent will be used by the aforementioned Probation Office to request disclosure of information pertaining to me from any or all Federal agencies.

This information is to be obtained for the purpose of conducting a presentence investigation and making a report or for supervision.

\_\_\_\_\_ authorizing signature (full name) \_\_\_\_\_ full name (printed or typed) \_\_\_\_\_ date

\_\_\_\_\_ parent/guardian sig., if required

\_\_\_\_\_ attorney signature, if available

WITNESS — \_\_\_\_\_ probation officer \_\_\_\_\_ date

**APPENDIX G(3)**  
**CUSTOMER CONSENT AND AUTHORIZATION**  
**FOR ACCESS TO FINANCIAL RECORDS**

I, \_\_\_\_\_, having read the explanation  
*(Name of Customer)*

of my rights which is attached to this form, hereby authorize the

\_\_\_\_\_  
*(Name and Address of Financial Institution)*

to disclose the following financial records:

\_\_\_\_\_  
\_\_\_\_\_

to \_\_\_\_\_, an officer of the United  
*(Name of Probation Officer Allowed Access)*

States District Court for the \_\_\_\_\_,  
*(Name of District Court)*

for the following purpose(s):

- Presentence Investigation Report
- Supervision

I understand that this authorization may be revoked by me in writing at any time before my records, as described above, are disclosed and that this authorization is valid for no more than three (3) months from the date of my signature. I understand further that my authorization cannot be required as a condition of my doing business with the above named financial institution.

\_\_\_\_\_  
*(Date)*

\_\_\_\_\_  
*(Signature of Customer)*

\_\_\_\_\_  
*(Address of Customer)*

\_\_\_\_\_  
*(City/State/Zip Code)*

Section 1104(a) of the Right to Financial Privacy Act, 12 U.S.C. 3404(a).

## **STATEMENT OF CUSTOMER RIGHTS UNDER THE RIGHT TO FINANCIAL PRIVACY ACT OF 1978**

Federal law protects the privacy of your financial records. Before banks, savings and loan associations, credit unions, credit card issuers or other financial institutions may give financial information about you to a federal agency, certain procedures must be followed.

### **Consent to Financial Records**

You may be asked to consent to make your financial records available to the government. You may withhold your consent, and your consent is not required as a condition of doing business with any financial institution. If you give your consent, it can be revoked in writing at any time before your records are disclosed and, in any event, is effective for a period of not more than three months. Your financial institution must keep a record of the instances in which it discloses your financial information to the government, and this record will be available to you upon request, unless a court order restricting your right to such record has been obtained by the government.

### **Without Your Consent**

Without your consent, a Federal agency that wants to see your financial records may do so ordinarily only by means of a lawful subpoena, summons, formal written request, or search warrant for that purpose.

Generally, the Federal agency must give you advance notice of its efforts to obtain your records by one of the above means, explaining why the information is being sought and telling you how to object in court to the release of your records.

### **Exceptions**

If the government obtains a search warrant for your records, or if the government convinces the court that there are legitimate reasons to delay giving you notice, the Federal agency will be able to obtain your records without providing you with notice beforehand.

In situations where you do not receive advance notice that the government is seeking your financial records, you will be notified once the reason for the delay of notice no longer exists.

### **Transfer of Information**

Generally, a Federal agency which obtains your financial records is prohibited from transferring them to another Federal agency unless it certifies in writing that the transfer is proper and sends a notice to you that your records have been sent to another agency.

### **Penalties**

If the Federal agency or financial institution violates the Right to Financial Privacy Act, you may sue for damages or to seek compliance with the law. If you win, you may be repaid your attorney's fees and costs.

## APPENDIX H

### PROBATION OFFICER LIABILITY AND PROTECTIONS FROM CIVIL SUITS

#### I. • *Spaulding v. Nielson* *Preparation of Presentence Reports; Civil Liability*

Probation Officer Civil Liability regarding Presentence Reports, *Spaulding v. Nielson*, 599 F.2d 728 (5th Cir. 1979).

In this case, the Fifth Circuit ruled that a Federal probation officer was absolutely immune from a Federal parolee's civil suit for money damages. The parolee based the suit upon alleged misconduct by the probation officer who had investigated and prepared his presentence report, and by the officer's chief who had supervised the officer's work.

Specifically, Spaulding, the parolee-plaintiff in the case, claimed that the probation officer, who had prepared the report, had included incorrect and incomplete information in his presentence report. Spaulding also alleged that the chief probation officer, upon being informed of the alleged errors, failed to correct them, ultimately causing the United States Parole Commission to delay his parole. Spaulding asked for damages of \$86,000 from each officer.

The Fifth Circuit affirmed the district court's dismissal of Spaulding's claims for the following reasons: In order to allow judges who act within the scope of their authority to be free of harassing civil suits, the Supreme Court has clothed judges with absolute immunity. *Stump v. Sparkman*, 435 U.S. 349 (1978); *Pierson v. Ray*, 386 U.S. 547 (1967). The Supreme Court has extended this same absolute immunity to government prosecutors for functions which they perform which are "intimately associated with the judicial phase of the criminal process . . ." *Imbler v. Pachtman*, 424 U.S. 409 (1976) (denoted as "quasi-judicial immunity"). *Spaulding, supra*, 599 F.2d at 729. Since "the presentence report is an integral part of the sentencing process," and the officer prepares the report at the court's direction (pursuant to Rule 32), this probation officer function is also deemed to be "intimately associated with the judicial phase of the criminal process," and thus absolutely immune. *Id.*

The court in *Spaulding* specifically noted that its decision only pertained to the probation officer's performance of his presentence functions, not his supervision duties. 599 F.2d at 729 n.4. Notwithstanding the court's disclaimer regarding supervision duties, it is noteworthy that the court, in reaching its decision as to presentence reports, specifically relied on a series of Federal court decisions concerning suits by persons alleging that state probation officers had deprived them of their civil rights under the Civil Rights Act, 42 U.S.C. § 1983. *E.g.*, *Burkes v. Callion*, 433 F.2d 318 (9th Cir. 1970). Presumably, Federal case law relating to a state probation officer's performance of supervision duties would serve as persuasive precedent on the issue of whether a Federal probation officer's performance of certain supervision duties were sufficiently related to the judicial phase of the criminal process to be considered quasi-judicial. This assumption would be significant because there are several such cases which take the view that most of a probation officer's duties, other than law enforcement functions such as searches or arrests, would be considered quasi-judicial functions. *See e.g.*, *Thompson v. Burke*, 556 F.2d 231, 236 (3rd Cir., 1977) (probation officer's

participation in decision to revoke parole is "adjudicatory" in nature); *Timson v. Wright*, 532 F.2d 552, 553 (6th Cir., 1976) (per/curiam).

## II. • Types of Immunity

### (1) *Absolute Immunity*

A probation officer would be "clothed" in the court's absolute immunity for actions taken in compliance with ministerial court directives, such as arresting, confining, or releasing a probationer in accordance with a specific court order or instruction. *Galvin v. Gamon*, Civil Action No. A-81-CA-286 (W.D. Tex., April 23, 1982) (unpublished memorandum order by Judge Lucius D. Bunton) (county probation officer who executed false arrest because of error concerning identity is immune). Cf. *Waits v. McGowan*, 516 F.2d 203, 206 (3rd Cir. 1975); *Fowler v. Alexander*, 478 F.2d 695, 696 (4th Cir. 1973).

A probation officer who acts within the scope of his official capacity is also entitled to absolute quasi-judicial immunity for the performance of a discretionary act or function "intimately associated with the judicial phase of the criminal process," (i.e., an action taken at the direction of the district court, such as the investigation and preparation of a presentence report). *Spaulding v. Nielson*, 599 F.2d 728, 729 (5th Cir. 1979); *Burke v. Callion*, 433 F.2d 318 (9th Cir. 1970). Quasi-judicial immunity has also been applied to the discretionary function of petitioning the court for a probation violator's warrant, *Hall v. Schaeffer*, 556 F. Supp. 539 (E. D. Pa. 1983), and would also be available to probation officers engaged in the preparation of probation reports and other discretionary supervision duties.

### (2) *Qualified Immunity*

If a probation officer breaches a ministerial duty, he will no longer be protected by absolute immunity. *Semler v. Psychiatric Institute of Washington, D.C.*, 538 F.2d 121 (4th Cir. 1976), cert. denied, 429 U.S. 827 (state probation officer liable for failing to comply with ministerial court order of release of defendant from mental institute). But he would, nevertheless retain a qualified or official immunity which would enable him to escape liability if he can successfully assert a defense of "good faith." The procedural difference between absolute judicial or quasi-judicial immunity on the one hand, and qualified immunity and assertion of a "good faith" defense on the other, is significant. *Absolute immunity defeats the suit at its inception.* Qualified immunity requires the official to prove that he sincerely believed in the legality of his acts and that his belief was a reasonable one. *Pierson v. Ray*, 386 U.S. 547 (1976).

A probation officer would also be entitled to qualified immunity if, in performing a law enforcement function (as opposed to a function intimately associated with the judicial phase of a criminal process), he violated an individual's civil rights. For example, a probation/parole officer who fails to follow certain constitutionally required procedures in conducting a parole revocation would be allowed to assert a "good faith" defense. *Wolfel v. Sanborn*, 555 F.2d 583 (6th Cir. 1977). In such a situation, the burden would be on the probation/parole officer to prove to the jury his subjective "good faith." *Wolfel v. Sanborn*, 666 F.2d 1005 (6th Cir. 1982).

(3) *Federal Tort Claims Act (F.T.C.A.)*  
28 U.S.C. § 2671 et seq.

The Federal Tort Claims Act applies to the negligent breach of ministerial duties and to some intentional tortious acts done within the scope of probation officers' official duties. If a probation officer is sued for conduct which is covered by the F.T.C.A., an assistant United States attorney should try to persuade the court to sever the officer from the personal liability suit. Where a lawsuit is filed against a probation officer as the result of the operation of a motor vehicle on official business, the F.T.C.A. provides for the exclusive remedy to be against the United States, which shall be substituted as the defendant (28 U.S.C. § 2679). In any case, U.S. probation officers are entitled to legal representation for conduct arising out of their official duties regardless of whether they are sued in their personal or official capacity (28 U.S.C. § 516 and 28 C.F.R. § 50.15).

## APPENDIX I

PROB 13D  
(2/84)

### NOTICE TO DEFENDANT CONCERNING THE PRESENTENCE INVESTIGATION REPORT

DEFENDANT'S NAME	U.S. DISTRICT COURT	DOCKET NO.
------------------	---------------------	------------

The following information is provided concerning the presentence investigation report prepared by the U.S. Probation Office in this district.

If a defendant is incarcerated, the presentence report is used by the Federal Bureau of Prisons to determine the institution in which the sentence is to be served, the defendant's classification within the facility, his ability to obtain furloughs, and his eligibility for programs within the institution.

The presentence report also plays an important role in the parole process. The United States Parole Commission uses it as a primary source of information for calculating the inmate's parole release date.

Initial appropriate box(es)

- I have read and understand this notice.
- I have read the presentence investigation report.

Signed \_\_\_\_\_  
Defendant Date

- I have read and understand this notice.
- I have read the presentence investigation report.

Signed \_\_\_\_\_  
Counsel Date

Witnessed \_\_\_\_\_  
U.S. Probation Officer

### APPENDIX J

### REPORT ON SENTENCED OFFENDER

<b>United States District Court</b>	DISTRICT
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**TO BE COMPLETED BY THE PROBATION OFFICER**

NAME OF OFFENDER	FBI NO.	DATE OF BIRTH
OFFENSE	SENTENCE	

**TO BE COMPLETED BY THE SENTENCING JUDGE OR MAGISTRATE**

**Sentencing Objectives:** *(Court's intent or purpose for sentence imposed.)*

  
  
  

**Comments on Treatment Needs:** *(What treatment or training should the Probation Office or Bureau of Prisons provide?) [e.g., vocational, educational, medical, alcoholic, narcotic.]*

  
  
  
  
  

**Recommended Institution:** *(Type of institution by classification or by name)*

  
  
  

**Comments and Recommendation Relative to Parole:** *(Give comments regarding the appropriateness of parole in view of the present offense, prior criminal background, and any mitigating or aggravating circumstances.)*

  
  
  
  
  
  
  

NO COMMENT

**This form will be disclosed to the offender and the Parole Commission in connection with parole consideration, unless the court directs otherwise. (See 18 U.S.C. 4208)**

<b>ORIGINAL:</b> U.S. Probation Office Sentencing Judge	SIGNATURE	
<b>COPIES:</b> 2 copies to Bureau of Prisons' institution designated for confinement	NAME (TYPED)	DATE

## APPENDIX K

AO 337  
(3/80)

### DEFENSE ATTORNEY'S PAROLE REPORT

NAME OF CLIENT

CRIMINAL CASE NO.

CONVICTED OF

DISTRICT COURT

**NOTE:** This report may be completed for the use of the U.S. Parole Commission in all cases in which the defendant has received a prison term of more than one year. Please refer to the Commission's Paroling Policy Guidelines at 28 C.F.R. § 2.20 before completing this report. Supporting documentation is recommended.

**I. THE OFFENSE BEHAVIOR:** How do you believe the Commission should rate this offense in its guidelines? Is there any circumstance about the offense behavior that should be considered as a factor in mitigation? Comment on any aggravating circumstances that have been alleged by the Government, or that appear in the presentence report. **NOTE:** The Commission considers any available information as to the "nature and circumstances of the offense" (18 U.S.C. § 4206), including the total harm resulting from the defendant's behavior and any additional criminal activity of the defendant surrounding the offense of conviction. See 28 C.F.R. § 2.19(c).

*(SEE REVERSE SIDE)*

**SUPPLEMENTAL INFORMATION:** You may attach any supplemental information you feel is appropriate for the Commission to consider.

**II. SALIENT FACTOR SCORE.** Indicate what you believe the defendant's correct salient factor score to be. Explain any disagreement with the information in the presentence report regarding the salient factor score items. Particular attention should be paid to establishing employment history and whether any prior convictions were obtained in violation of the defendant's right to counsel. In addition, are there any special circumstances that might make your client a better parole risk than his or her salient factor score would indicate?

**III. YOUR RECOMMENDATION RELATIVE TO PAROLE.** Based on the above information, (1) what do you believe to be the parole guideline range applicable to your client? (2) Is there any reasoning which might justify a decision outside the guideline range?

I understand that this report will be shown to my client prior to the parole hearing.

\_\_\_\_\_  
Date

Signed \_\_\_\_\_, Esq.

**INSTRUCTIONS:** Initial parole hearings are held within 120 days after arrival at the designated institution [except where there is a minimum term of 10 years or more]. Therefore, this report should be sent without delay to the Warden of the institution to which the defendant has been designated. The U.S. Marshal, the Bureau of Prisons Community Program Officer, or the Bureau of Prisons Regional Office will have this information.

If the prisoner is designated to a State prison facility, send the report to the Parole Commission's regional office directly.

# APPENDIX L

U.S. Department of Justice

Report on Convicted Prisoner By United States Attorney

---

NAME \_\_\_\_\_  
CONVICTED OF \_\_\_\_\_  
TERM IMPOSED \_\_\_\_\_  
CRIMINAL CASE NO. \_\_\_\_\_  
U.S.C. \_\_\_\_\_  
DISTRICT \_\_\_\_\_

**NOTE:** This report must be completed for the use of the U.S. Parole Commission in all cases in which the defendant has received a prison term of more than one year. It is an essential source of information for parole decision-making. Submit the report as soon as the defendant has been sentenced.

**I. DESCRIPTION OF THE OFFENSE:** Give a full account of the offense and describe any mitigating or aggravating circumstances. Be specific about such matters as total dollar amounts or property values involved, drug quantities and purities, the number of victims and extent of injury, and the overall extent of any joint or on-going criminal conduct. Estimate relative culpability if the offense involved co-defendants.

**II. CORROBORATING EVIDENCE:** If there are aggravating circumstances not established by the conviction, explain what evidence supports the Government's version.

**III. COOPERATION:** Was the defendant of assistance to the Government? The Parole Commission will consider substantial cooperation otherwise unrewarded as a possible circumstance in mitigation of punishment.

**IV. RECOMMENDATION RELATIVE TO PAROLE:** This section is optional. (See the paroling policy guidelines at 28 CFR § 2.20)

**DISCLOSURE INSTRUCTIONS (to institution staff):**

\_\_\_\_\_ This report may be disclosed to the prisoner.

\_\_\_\_\_ Do not disclose this report under any circumstances and retain it in a secure file. A disclosable copy of this report with deletions, and a summary of deleted material pursuant to 18 U.S.C. 4208 (c) is attached for disclosure to the prisoner. The original is to be shown to the Parole Commission.

**NOTIFICATION REQUEST:**

\_\_\_\_\_ I wish to be notified of the date and place set for this prisoner's parole hearing.

\_\_\_\_\_ I wish to be notified of the Commission's decision in this case.

For the United States Attorney

\_\_\_\_\_  
DATE

Signed: \_\_\_\_\_

Assistant U.S. Attorney

**Disposition of copies:** This form is to be completed in triplicate. The original and one copy are to be sent to the Chief Executive Officer of the institution to which the prisoner is committed and a copy retained by the U.S. Attorney. The institution copies should be given to the Bureau of Prisons' Community Program offices for delivery with the prisoner. If not possible, they should be mailed to the institution as soon as possible after sentence is imposed. The CPO will be able to advise of the institution to which the defendant was committed. (The U.S. Marshal can put you in contact with your local CPO.)

**SAMPLE**  
**PRESENTENCE INVESTIGATION REPORTS:**

**David H. Long**  
**Herman P. Hesse**

UNITED STATES DISTRICT COURT

PRESENTENCE REPORT

NAME (Last, First, Middle) Long, David H.				DICTATION DATE 1/4/84	
ADDRESS 29 Everett Street Springfield, MA. 01104		LEGAL RESIDENCE same		SCHEDULED SENT. DATE 2/25/84	
				DOCKET NO. 84-00840-02	
				CITIZENSHIP U.S.	
AGE 19	RACE Caucasian	DATE OF BIRTH 9/25/64	PLACE OF BIRTH Springfield, MA	SEX Male	EDUCATION 12th Grade
MARITAL STATUS Single		DEPENDENTS None		SOC. SEC. NO. 111-22-3353	
FBI NO. 123 456 A7		U.S. MARSHAL NO. 54928-038		OTHER IDENTIFYING NO.	

OFFENSE

Possession of Stolen Mail, 18:U.S.C., 1708  
Two-Count Information

PENALTY (Each Count):

5 years and/or \$2,000 ELIGIBLE FOR YOUTH CORRECTIONS ACT

CUSTODIAL STATUS Personal Recognizance	DATE OF ARREST NA
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PLEA  
Offered plea of guilty to both counts pursuant to Rule 11(e) Plea Agreement,  
12/18/83

VERDICT

DETAINEES OR CHARGES PENDING

None

OTHER DEFENDANTS

Lawrence Hill pled guilty; disposition scheduled 2/15/84 - MA

ASSISTANT U.S. ATTORNEY George Young, Esq.	DEFENSE COUNSEL William Olds, Esq. (Appointed) 112 State Street Springfield, MA (413) 555-1234
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DISPOSITION Imposition of sentence suspended - Probation 1 year pursuant to section 5010(a) of Youth Corrections Act. Special Condition: make restitution in amount of \$150 via payment schedule determined.

SENTENCING JUDGE Honorable Jane R. Doe	DATE 2/25/84	PROBATION OFFICER Michael Reed
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## OFFENSE:

*Prosecution Version.* The offense involved a two-count information which charged the defendant, David H. Long, with possession of stolen mail. According to Assistant U.S. Attorney David Nealy, on October 1, 1983, postal inspectors in Springfield, Massachusetts, received an anonymous telephone call that Lawrence Hill had sold items stolen from the mail. Inspectors ascertained that Hill was employed as a truck driver for Elegant Remembrances, Inc., a gift mail order firm located in Springfield. He was frequently sent to pick up parcels for the company at the nearby post office. David Long was also employed by Elegant Remembrances. He worked as a janitor and occasionally accompanied Hill on these trips. Postal inspectors subsequently instituted surveillance at the Springfield post office.

On October 5, 1983, inspectors observed Hill and Long removing a large parcel from a loading dock and placing it in their truck. This vehicle was stopped at the gate and both men were arrested after inspectors uncovered the aforementioned carton, which contained a dozen women's robes. This wearing apparel had a total retail value of \$385.

When questioned by postal inspectors, both defendants admitted that they had taken packages on this and two previous occasions. They estimated the value of the other stolen goods which they had sold, and which included a man's overcoat and a Tiffany lamp, to be about \$200. A complaint had been filed regarding one of these prior thefts, namely, the Tiffany lamp, which was handmade by a local artisan, John McKinley, of Westfield, Massachusetts.

On December 18, 1983, Long appeared before the Honorable Jane Doe and offered a plea of guilty pursuant to an agreement under Rule 11(e)(1)(C) of the F.R. Crim. P. The agreement proposes that the imposition of sentence be suspended and the defendant be placed on probation for one year under the Federal Youth Corrections Act. Acceptance of the plea was deferred pending a presentence report. The defendant has executed consent forms authorizing the preparation of a presentence report and the court's inspection of the same.

*Victim Impact Statement.* When interviewed at his residence by the undersigned, John McKinley indicated that he has earned his livelihood for the past 10 years by making and selling Tiffany lamps out of his home. He further related that since 1978, he had handcrafted these lamps exclusively for Elegant Remembrances, but on a special-order basis only.

Mr. McKinley valued the stolen lamp at \$450, which includes parts and his labor. He stated that pursuant to his arrangements with Elegant Remembrances, he would send the company each lamp on a consignment basis. After the company received its payment from the customer, he, in turn, would be paid. Mr. McKinley went on to say that on this particular occasion, the lamp was mailed without insurance coverage. He provided the following documentation: (1) the order form from Elegant Remembrances which indicated that he would receive \$450 for making this lamp; and (2) receipts totaling \$75 for the lamp materials. He valued his labor at \$375 for three days work.

Presently, Mr. McKinley is the sole support of his family: his wife and four small children. Because he is dependent upon receiving his income in a timely fashion, it was necessary for him to borrow money from his parents until he received his next payment. Based on this officer's assessment of Mr. McKinley's financial situation, it would appear that he is in need of being compensated for the loss of income from this lamp (\$450).

*Defendant's Version.* Mr. Long states that he was an accomplice to codefendant Hill who originally proposed that they take the packages. The defendant asserts that Hill opened the packages and sold the contents. After the sales, Hill would give Long \$15.00 or \$20.00 for his share. Mr. Long said that he went along because it seemed an easy way to make extra cash. The defendant declined to respond to any clarifying questions asked by the probation officer.

*Codefendant Information.* Codefendant Lawrence Hill also offered a plea of guilty and Hill admitted to the probation officer that he was the prime mover in the theft from the loading dock.

## PRIOR RECORD:

### *Juvenile Adjudication*

Age	Charge	Place	Disposition
16	10/28/80: Disorderly Conduct	Springfield, Mass. Juvenile Court	11/20/80: 6 months Probation

The defendant was represented by Attorney Robert Parker. Mr. Long and four other juveniles were arrested for fighting and throwing bottles at a rock concert. The juvenile probation officer reported that David performed satisfactorily under supervision.

## PERSONAL & FAMILY DATA:

David Long is the younger of two children born to Henry and Ruth Brown Long with whom he resides. His early years were unremarkable and he was a happy and outgoing child. However the family circumstances changed in 1980 when Henry Long suffered a stroke which left him partially paralyzed and unable to work. This event forced Ruth Long to seek employment and she now works full time in a factory in Springfield. Both parents agree that the necessity of focusing family resources on Henry Long's medical condition had a detrimental effect on David. Since 1980 David has become withdrawn and uncommunicative with his parents. Mr. and Mrs. Long feel responsible for this and regret that Mrs. Long had to find full time work while David was still in school. The parents feel that part of the blame for David's involvement in the present offense rests with them.

David was educated in the Springfield Public School System. He graduated from Vocational High School on June 6, 1982. He completed a general program and he took specialized courses in radio and television repair. David's high school counselor reports that he seldom came to the attention of school authorities and he was considered an average student. David's I.Q. was tested twice and each test placed him in the slightly above average range of intelligence.

David was unemployed for 5 months after graduating from high school. On November 4, 1982, he began working as a janitor at Elegant Remembrances in Springfield, where he earned \$3.00 an hour. He stayed at this job until he was fired as a result of the present offense.

David was considered a reliable employee who kept largely to himself. He had indicated a willingness to accept additional responsibility. However, the company would not consider reemploying David who is now dependent on his parents for financial support. He has no substantial assets or liabilities.

David is in good health. He admits to having experimented with marijuana, but denies frequent use. He is reluctant to talk about himself and he expresses no strong feelings on any subject. He indicated no particular personal or career goals.

## EVALUATION:

### *Probation Officer's Assessment*

This young man accepts responsibility for his actions, as he admitted his participation in the theft of packages from the mail. He was less culpable than his codefendant who instigated the theft. David's expected compensation was small and his involvement in the offense was casual and impulsive. His participation has cost him his job.

David's family is concerned about him, but his parents feel powerless to communicate with him. His father's disability has affected him deeply, but he is unsure of how to handle these feelings. David adopts an attitude of indifference which has characterized his performance in school, as well as his relationship with his family. This attitude results in a passive approach to life although his job did seem to engage his interest.

It could also be very important for David to improve his relationship with his parents. His parents could provide important emotional support if he is willing to accept it. Mr. and Mrs. Long have agreed to participate in some type of counseling sessions. David is reluctant but perhaps he can be persuaded to attend counseling and resolve some conflicts that he has with his parents.

*Supervision Plan.* If Mr. Long is placed on supervision, the probation officer would implement a supervision plan as described below:

For the first few months of supervision, David would appear to be a candidate for monthly contact with his probation officer while the details of a plan were implemented and his classification completed. If he progressed in obtaining employment and/or vocational skills, and made regular restitution payments to Mr. McKinley, the level of supervision could be reduced. Presently, his major problem is his lack of employment skills. If placed on probation, David could be referred to the Springfield Regional Skills Center for an interview and aptitude test. The Center might accept David in their building maintenance program, where he could receive 16 weeks of training in basic carpentry, plumbing, and electrical work. He would be eligible to receive a stipend during the training period and he would have prospect for employment upon completion. During the 16-week training period, the skill center would provide weekly progress reports. It is also recognized that David could likely benefit from counseling, particularly in improving his relationship with his parents.

*Parole Guideline Data*

(Estimate) Offender Characteristics (SFS): 8; Offense Category: II;  
Youth and Adult Guideline Range: Both less than 8 months.

*Sentencing Data*

The following information was obtained from the Statistical Analysis and Reports Division of the Administrative Office of the U.S. Courts for 1983. (The data could contain statistical errors and it is provided only to give a national or district pattern.)

*Offense: Larceny/theft offenses; possession of stolen mail*

	NATIONAL		DISTRICT: D/MA	
	NUMBER	PERCENT*	NUMBER	PERCENT*
Total defendants sentenced:	717		41	
Imprisonment:	415	57.9	19	46.3
1-12 months:	52	7.3	5	12.2
13-35 months:	89	12.4	8	19.5
36-59 months:	90	12.6	2	4.9
60 months and over:	34	4.7	0	
Average number of months of imprisonment:	33.1		20.6	
Split Sentence:	96	13.4	4	9.8
Indeterminate:	28	3.9	0	
YCA:	26	3.6	0	
Probation:	298	41.6	22	53.7
Average number of months of probation:	35.4		28.4	
Fine only:	2	.3	0	
Other:	2	.3	0	

\*Percentages are calculated on the total number of defendants.

*Special Sentencing Provisions*

This individual is eligible for sentencing under the Youth Corrections Act, unless the court makes a "no benefit" finding and decides to sentence him as an adult. YCA does afford the opportunity to consider the "setting aside of the conviction" at a later date. He could be ordered to pay restitution up to \$450 under 18 U.S.C. 3579 in lieu of or in addition to any other sentence.

Respectfully submitted,  
Michael Reed  
U.S. Probation Officer

**RECOMMENDATION:**

The plea agreement calls upon the court to suspend imposition of sentence and to place the defendant on probation for one year under the Youth Corrections Act. This course of action appears reasonable and the probation officer recommends that the court accept the plea with an added condition, that restitution be ordered in an amount commensurate with Mr. Long's degree of involvement in the instant offense. It should also be noted here that codefendant Lawrence Hill, who has also pled guilty, was the prime mover in these thefts and the more culpable of the two. It is recommended that Hill be held responsible for providing the greater share of the \$450 restitution to Mr. McKinley. The probation officer requests that the court take this factor into consideration when imposing sentence and ordering restitution under 18 U.S.C. 3579.

*Voluntary Surrender.* If the defendant were to be incarcerated, he would be a suitable candidate for voluntary surrender.

Respectfully submitted,

Michael Reed  
U.S. Probation Officer

Approved: \_\_\_\_\_  
J. Grant Hogan  
Supervising U.S. Probation Officer

UNITED STATES DISTRICT COURT

PRESENTENCE REPORT

NAME (Last, First, Middle) Hesse, Herman P.			DICTATION DATE 10/14/83		
ADDRESS Hampden County House of Correction Hampden, MA.			LEGAL RESIDENCE 71 Lee Avenue Holyoke, MA		SCHEDULED SENT. DATE 10/26/83
					DOCKET NO. 83-00124-01
					CITIZENSHIP U.S.
AGE 28	RACE Caucasian	DATE OF BIRTH 9/16/55	PLACE OF BIRTH Boston, MA	SEX Male	EDUCATION 10th Grade
MARITAL STATUS Divorced			DEPENDENTS one, in custody of former wife		SOC. SEC. NO. 987-65-4321
FBI NO. 124 568 B9			U.S. MARSHAL NO. 67382-038		OTHER IDENTIFYING NO.

OFFENSE  
(District of Massachusetts)  
Distribution of Heroin, 21:U.S.C., 841(a)(1) (one count)

PENALTY  
at 21:U.S.C. (b) (1) (A)  
15 Yrs. and/or \$25,000 and SPT of at least 3 years.

CUSTODIAL STATUS In custody in lieu of \$100,000 surety bond	DATE OF ARREST 8/15/83
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PLEA  
Guilty to D-MA indictment 9/29/83; will plead under Rule 20 to WD-TX indictment.

VERDICT

DETAINERS OR CHARGES PENDING  
Rule 20, WD-TX, Docket, #82-00135-01, violation of 21:U.S.C., 952(a) and 960(a)(1) and 841(a)(1), two counts, same penalty.

OTHER DEFENDANTS  
Nancy Rooney in Federal custody in Texas pending trial.

ASSISTANT U.S. ATTORNEY David Crawford, Esq.	DEFENSE COUNSEL Philip Pratt, Esq. (retained) 981 Main Street Springfield, MA (413) 555-4321
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DISPOSITION  
3 years imprisonment and 3 years special parole term

SENTENCING JUDGE Honorable Dwight Lester Reid	DATE 10/26/83	PROBATION OFFICER Susan Deavers
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## OFFENSE:

*Prosecution Version.* Herman Hesse is the subject of two separate indictments, one in the District of Massachusetts and one in the Western District of Texas. On August 20, 1983, the Grand Jury in Massachusetts returned an indictment against Hesse and Nancy Rooney, charging that on June 23, 1983, they distributed a quantity of heroin. On August 26, 1983, a grand jury in El Paso, Texas returned an indictment against Hesse and Rooney charging that they imported 101.7 grams of heroin into the United States on or about July 30, 1983, and that they distributed that heroin on the same date in El Paso, Texas. Hesse appeared on September 29, 1983, and pled guilty on the Massachusetts indictment. He has indicated his intention to plead guilty to both counts of the Texas indictment under Rule 20.

The Drug Enforcement agent's report indicated that this investigation began in May 1983, when the Drug Enforcement Administration received information that Hesse was looking for a buyer for a large quantity of heroin. On May 28, 1983, an undercover agent was introduced to Hesse at a bar in Springfield and Hesse acknowledged that he was looking for a buyer for a kilo of heroin. He was initially reluctant to deal with a stranger, but after four meetings, he offered to make the agent a partner if the agent agreed to purchase the heroin as soon as it came across the border into Texas. The agent accepted the offer but insisted on first receiving a sample of the heroin.

On June 23, 1983, the agent and Hesse met in Springfield and drove to a shopping mall where they met Hesse's girlfriend, Nancy Rooney. After receiving instructions from Hesse, Rooney went to her car and returned with a sample of 2.7 grams of heroin, which she gave to the agent. The latter paid Hesse \$300. The substance was tested and found to contain 31.7 percent heroin or .86 grams of pure heroin (total net weight).

On July 21, 1983, the agent informed Hesse that the sample was of acceptable quality. On July 24, Hesse instructed the agent to meet him in El Paso, Texas, on July 29. The agent flew to El Paso where he met with Hesse and Nancy Rooney at the Yellow Rose Motel.

On July 30, Hesse and Rooney crossed the border into Juarez. They returned 2 hours later and Hesse told the agent that he was able to obtain only a quarter kilogram of heroin. The agent expressed disappointment, but Hesse said that the heroin was of very high quality and could be cut many times. Hesse then sold the agent the first installment of 101.7 grams for \$6,000. Tests determined that this substance contained 44.6 percent heroin or 45.36 grams of pure heroin (total net weight). Hesse explained that Rooney and he would return to Mexico that afternoon to obtain the balance.

Hesse and Rooney crossed from Juarez into the United States and were arrested by U.S. Customs later in the day. Nancy Rooney had 147.3 grams of heroin in her possession, 44.6 percent heroin or 65.7 grams of pure heroin (total net weight). No heroin was found on Hesse, who was released that day. Rooney was held for trial. Hesse returned to Massachusetts where he was arrested on August 15, 1983. (Total net weight = 111.92 grams of pure heroin from the three sales.)

*Defendant's Version.* "I was going to Mexico on a vacation and Nancy decided to come with me. This guy she met in Springfield was pestering her to get him some heroin. I had seen him a couple of times in June. All of a sudden he shows up in El Paso and demands to know where the stuff is. She finally agreed to get him some, and she asked me to come in case anything happened. I was there so I guess I'm guilty. All of a sudden I was arrested by customs but they let me go because they didn't have anything on me. Then, all of a sudden I'm arrested up here. My lawyer says entrapment is hard to prove so I guess I'm guilty. But I didn't say all those things the narc claims. I don't deserve to go to jail."

## PRIOR RECORD:

### *Juvenile Adjudications*

Age	Charge	Place	Disposition
14	10/6/69: Using Motor Vehicle Without Authority	Springfield, Mass. Juvenile Court	11/5/69: 1 year Probation Probation Expired: 11/4/70

Mr. Hesse was represented by counsel. He and two other juveniles stole a car and went on a "joy ride." Mr. Hesse made a good adjustment on probation during the initial months, but became increasingly uncooperative thereafter.

15	10/28/70: Breaking & Entering	Holyoke, Mass. District Court	11/17/70: Committed, Youth Service Board (paroled on: 6/1/71; parole expired: 6/1/72)
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Mr. Hesse was represented by counsel. He and one other juvenile broke into a home in Holyoke. The Youth Service Board sent him to the Industrial School at Shirley, Massachusetts, where he remained until June 1971, when he was paroled. His institutional performance was routine. He participated in a woodworking course and was placed on report on one occasion for fighting in the dining hall. His parole performance was satisfactory.

*Adult Record*

Age	Charge	Place	Disposition
20	12/23/75: Shoplifting	Springfield, Mass. Police Dept.	12/24/75: Dismissed, Lack of Prosecution

Hesse was arrested after he allegedly attempted to steal several jewelry items from a department store. The store manager declined to press charges.

20	4/11/76: Receiving Stolen Property	Holyoke, Mass. District Court	5/11/76: 4 months, County Jail; Suspended sentence; Probation 1 year; Expired: 5/10/77
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Mr. Hesse was represented by counsel. He was arrested after he sold a stolen television set to a pawn shop. The probation officer reports that he had little success with Mr. Hesse who was constantly on the borderline of violation.

21	9/16/76: Burglary & Entering in the Nighttime	Northampton, Mass. District Court	11/15/76: 6 months Hampshire County Jail; Released on 5/14/77
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Mr. Hesse was represented by counsel. He was apprehended at 2:15 a.m., inside a drug store. He had activated a silent alarm when he entered the building. Jail officials recall that Mr. Hesse tended to be reclusive while incarcerated. He voluntarily spent several months in segregation because of his fear of attack by other inmates. Holyoke District Court declined to revoke probation.

24	4/13/80: Larceny over \$100 and Forgery	Hampden Cty., Mass. Superior Court	6/27/80: 2 years prison Suspended sentence; 12 months probation with restitution; Probation expired: 6/26/81
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Mr. Hesse was represented by counsel. He withdrew \$500 from a bank account using a stolen passbook and forged withdrawal slips. He was identified through bank photographs. Mr. Hesse paid \$310 in restitution and the balance was remitted. He performed well under probation supervision.

**PERSONAL AND FAMILY DATA:**

*Defendant.* Herman Hesse was born on September 16, 1955, in Boston, Massachusetts. His parents, natives of Austria, came to the United States as displaced persons after World War II. The family has lived for the last 15 years at their present residence in Holyoke. The defendant's early years were turbulent because of

many violent arguments between his parents. These were caused by Mrs. Hesse's belief that her husband was an excessive drinker. She summoned police assistance on several occasions, although no arrests were made. In 1966, Mrs. Hesse contracted tuberculosis. She was hospitalized for almost one year and the father was unable to keep the family together. The defendant and his siblings were placed in the Western Massachusetts Home for Children, but the family was reunited when Mrs. Hesse recovered. The defendant remained with his family until he married at the age of 20. He returned to the family home after his divorce 3 years later.

Mr. and Mrs. Hesse picture their son as a well-intentioned individual whose difficulties with the law were caused by his unwise selection of associates. They are bitter towards codefendant Nancy Rooney who they believe was responsible for this offense. They view his previous juvenile and adult transgressions as minor matters which were treated with undue harshness by police and the courts. His parents describe the defendant as an intelligent and ambitious individual, who values financial success above all else. They are proud of the fact that, in recent years, the defendant has acquired such material possessions as an expensive automobile and a boat. They also note that he has been especially generous with his younger brother and sister.

*Parents and Siblings.* The father, Henry Hesse, age 59, resides with his family and for the last 17 years has been employed as a machine operator earning a moderate salary. The home atmosphere improved considerably when Mr. Hesse stopped drinking approximately 5 years ago. The mother, Geraldine Ericksen Hesse, age 58, resides with her husband and is a housewife. Her health is poor due to respiratory ailments.

There are two siblings. Stanley Hesse, age 24, resides with his parents and is unemployed. Stanley believes that his brother is the victim of harassment by law enforcement authorities. Audrey Hesse, age 19, resides with her parents and is a community college student.

*Marital.* Herman Hesse married Barbara Raymond in a civil ceremony in Hartford, Connecticut, on November 22, 1975. Both parties were 20 years old at the time and she was pregnant. The couple had one child, Herman, Jr., who was born on April 29, 1976. Mrs. Hesse reports that the marriage was troubled from the start by financial problems since the defendant was unemployed. He turned to illegal means of supporting the family and his subsequent arrests caused even more strain on the couple's relationship. There were several brief separations during 1976 and a longer one when the defendant was sentenced to serve 6 months in November 1976. When he was released, Mrs. Hesse found him a "different man" and it was impossible to reconcile their relationship. The Hampden County Probate Court granted a divorce on December 28, 1978, on grounds of incompatibility and awarded her custody of the child. The defendant was required to pay \$20 a week child support. Mrs. Hesse is employed as a telephone operator. She reports that her ex-husband's support payments have been sporadic. He often goes for months without visiting the child or making any payments, but he will then arrive with lavish gifts for his son and lump sum support payments. Mrs. Hesse says that her relationship with the defendant is now amicable, but they see each other infrequently.

Mr. Hesse asserts that he has no plans to marry again. He stated that Nancy Rooney was merely a friend.

*Education.* Mr. Hesse was educated in local public schools. He left junior high school in October 1970, when he was committed by the Youth Service Board. He returned to Baran High School in Holyoke in the fall of 1971, and dropped out of the 11th grade in April 1972.

School officials describe Mr. Hesse as an intelligent individual who never worked up to his capabilities. His grades were generally C's and D's. Mr. Hesse left school because he wanted to get a job.

*Employment.* Between November 1982, and the time of his arrest, Mr. Hesse was unemployed and collected unemployment compensation of \$72 a week. From August 1980 to November 1982, he was a forklift operator at the Smith Chemical Company in Northampton. He earned \$4.10 an hour, but he was subject to frequent layoffs. Company officials described him as an uncooperative employee with a high degree of tardiness. He would not be considered for reemployment.

Between March 1978 and December 1979, Mr. Hesse worked in the warehouse of the United Rug Company in Easthampton, Massachusetts. He earned \$2.75 an hour and he quit after a disagreement over hours. Between 1974 and 1977, Mr. Hesse was sporadically employed in the roofing business. This work paid well but he seldom was able to get more than 3 or 4 months work in any year.

After he left high school, Mr. Hesse worked on a delivery truck for Central Bakery, Inc., of Holyoke. He held this job between April 1972 and October 1974, and earned the minimum wage. He lost this job when the company went out of business. Mr. Hesse said that he would like some day to open his own business.

## **HEALTH:**

*Physical.* Mr. Hesse is in good physical condition. He denies having used drugs of any kind and he specifically disclaims the use of heroin. Discussion with family members, as well as with law enforcement sources, revealed no information that would contradict Mr. Hesse's assertions in this report. A physical examination and urinalysis test performed at the jail were negative for heroin use.

*Mental and Emotional.* On two occasions, Mr. Hesse was tested in public schools and received I.Q. scores of 102 and 103. He has been examined by mental health professionals on two occasions. The first occurred shortly after Mr. Hesse was committed by the Youth Service Board in 1970. A psychologist diagnosed him as "a person whose anxiety is stimulated by a frustrated need for affection. Herman has developed no healthy conscience. His response to social demands is not based on any close commitment to moral principles."

Mr. Hesse was examined once again as a result of this court's pretrial order. Dr. Robert Land administered a battery of psychological tests, the results of which suggested, "that he seems to be unusually fearful of the power and influence of others. It is obvious that he has been unable to resolve childhood problems and continues to feel quite rejected. He tends to view threatening environmental forces as coming outside his control."

## **FINANCIAL CONDITION:**

*Assets.* Mr. Hesse lists two main assets: one is a 1983 Cadillac purchased in January 1983, for \$20,640. This automobile was confiscated by the Drug Enforcement Administration. The other asset is a 19-foot fiberglass speedboat with a 115 horsepower Mercury outboard engine worth approximately \$5,500.

Mr. Hesse's parents displayed to the probation officer a savings account passbook with a present balance of \$7,146.23. The account was listed to Mr. Hesse and his mother, but the parents made it clear that the defendant had made the deposits. When questioned about this, Mr. Hesse asserted that the account, in fact, belonged to his mother and that his name was on it only as a matter of convenience. His mother subsequently contacted the probation officer and retracted her earlier statement. She said that she made a mistake and that the money in the account belonged to her.

*Liabilities.* The only debt Mr. Hesse lists is a loan from GMAC to finance the purchase of his 1983 Cadillac. The loan balance is presently \$6,200 and Mr. Hesse plans to make no further payments until such time as his car is returned to him by the Government.

## **EVALUATION:**

### *Probation Officer's Assessment*

Although he attempts to shift responsibility to his codefendant, Mr. Hesse was the principal figure in the importation and sale of over 100 grams (net weight) of pure heroin. Were it not for the intervention of the U.S. authorities, he would have completed the sale of an additional quarter kilogram to an undercover agent. Mr. Hesse is not a user of the drug. He apparently values financial success to the point that he made a calculated decision that heroin trafficking was profitable. His lack of concern about the moral aspects of his decision, confirms the observation of mental health professionals that his personality lacks some of the constraints under which most people operate. For Mr. Hesse, participation in this offense, as well as in earlier offenses, was a logical means of satisfying his economic motives.

The members of Mr. Hesse's family are intensely loyal to him and they have an unrealistic view of his participation in criminal activities. They do not question the sources of his assets, which are surprisingly large for a person with his employment history. The family cannot be counted upon to exert the pressure that might convince Mr. Hesse to conform to law-abiding behavior. Mr. Hesse, himself, is unrealistic in his personal

goals. Without much education or skill, he expects a high degree of financial compensation, but he has not thus far shown a willingness to work towards that goal. It is unlikely that Mr. Hesse will attempt conventional paths to economic success until he is convinced that illegal means are too hazardous.

*Supervision Plan.* Eventually, under most sentences imposed, Mr. Hesse will come under the supervision of a probation officer. For at least the first 6 months of supervision it would appear that Mr. Hesse will have to have, *at least*, semimonthly contact with a probation officer. It is also believed that Mr. Hesse would best respond to supervision in a highly structured environment which a halfway house could provide. Mr. Hesse would need to focus on his lack of job skills. The probation officer will need to engage him in a job skills program and scrutinize his finances.

*Parole Guideline Data*

(Estimate) Offender Characteristics (SFS): 6; Offense Category: VI;  
Adult Guideline Range: 52-64 months.

*Sentencing Data.* The following information was obtained from the Statistical Analysis and Reports Division of the Administrative Office of the U.S. Courts for 1983. (The data could contain statistical errors and it is provided only to give a national or district pattern.)

Offense: *Drugs (21 U.S.C. 841(a))*

	NATIONAL		DISTRICT: D/MA	
	NUMBER	PERCENT	NUMBER	PERCENT
Total defendants sentenced:	2,438		35	
Imprisonment:	1,856	76.1	28	80
1-12 months:	150	6.2	4	11.4
13-35 months:	250	10.3	7	20
36-59 months:	355	14.6	4	11.4
60 months and over:	618	25.3	2	5.7
Average number of months of imprisonment:	62.7		28.1	
Split Sentence:	219	9	10	28.6
Indeterminate:	187	7.7	0	0
YCA:	77	3.2	1	2.9
Probation:	570	2.3	7	20
Average number of months:	40.3		36	
Fine only:	2		0	

*Special Sentencing Provisions.* Adult sentencing provisions apply in this case, along with a statutory requirement for a special parole term of at least 3 years, and a possible fine of \$25,000.

Respectfully submitted,

Susan Deavers  
U.S. Probation Officer

**RECOMMENDATION:**

It is recommended that the defendant be committed to the custody of the Attorney General for 5 years and a special parole term of 3 years. This recommendation considers the quantity and quality of the heroin involved, the defendant's prior record, and Mr. Hesse's central involvement in a serious offense in which he fails to exhibit concern for his illegal behavior. This officer believes that punishment is the most appropriate sentencing objective in this case.

The court may wish to consider imposing sentence under 18 U.S.C. 4205(b)(2) to permit flexibility as to the release date. The court might also consider recommending commitment to a minimum security institution, where Mr. Hesse might feel less threatened.

*Voluntary Surrender.* If the court imposes a custody sentence, voluntary surrender would not appear wise. Mr. Hesse lacks maturity and ability to assume responsibility for his conduct. Moreover, he has been in custody since August 15, 1983, in lieu of \$100,000 surety bond. In this officer's opinion, having been convicted and sentenced, he would pose a high risk of failing to surrender.

Respectfully submitted,

Susan Deavers  
U.S. Probation Officer

Approved: \_\_\_\_\_  
J. Grant Hogan  
Supervising U.S. Probation Officer

## SAMPLE

### INFORMATION EXCLUDED FROM THE PRESENTENCE REPORT AS POTENTIALLY EXEMPT FROM DISCLOSURE: RULE 32(c)(3)(A)

*Marital.* The defendant's ex-wife reported that when he was released from jail in early 1977, he showed no interest in resuming sexual relations with her. His behavior was also unusual in other respects, and he exhibited great tension and insomnia. Mrs. Hesse began to suspect that he had some experience in jail that had affected his sexual function. She questioned him about this on several occasions and he responded with bitter denials. Mrs. Hesse became convinced that it was impossible to save the marriage and she filed for divorce. Mrs. Hesse was adamant that her husband not learn that she provided this information.

Officials of the Hampshire County Jail confirmed that Mr. Hesse was the victim of a homosexual assault in the jail. He refused to identify his attackers but he asked to be moved to an isolated cell. This request was granted.

Officials of the Hampden County Jail, where Mr. Hesse is now lodged, report that he has displayed acute anxiety during his confinement. They are not aware of the reasons for this, but they note that Mr. Hesse has requested a transfer to the administrative segregation section. The jail has not complied with this request because of overcrowding.

*Mental and Emotional.* The latest psychological report suggests that Mr. Hesse will continue to experience acute anxiety whenever he is placed in a situation that threatens recurrence of the homosexual assault. The psychologist believes that Mr. Hesse is not overtly homosexual, but that his sexual orientation is ambiguous. Since this attack, Mr. Hesse has reportedly experienced complete sexual dysfunction.

### SUMMARY OF WITHHELD FACTUAL INFORMATION:

If the court is of the view that the above information is excludable under Rule 32(c)(3)(A) and if the court intends to rely on that information in determining sentence, a summary of the withheld factual information is provided for disclosure to the defendant or his counsel:

The court has received information about experiences of the defendant while previously incarcerated which caused him to have serious emotional problems. Subsequent psychological examination confirmed this existence.