Guide to Judiciary Policy

Vol. 8: Probation and Pretrial Services
Pt. D: Presentence Investigation and Report

Ch. 1: Overview

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§ 110 Purpose

This part provides guidance on how to conduct a presentence investigation and draft a presentence report and sentencing recommendation.

§ 120 Applicability

The guidance provided in this part applies to employees of the United States probation and pretrial services system in the performance of their duties. This guidance should be applied in conjunction with the *Presentence Investigation and Report Procedures Manual* (law enforcement sensitive) and other applicable parts of *Guide to Judiciary Policy*, Volume 8.

§ 130 Scope

This part addresses the following areas:

- Presentence investigations (Ch. 2);
- Presentence report (Ch. 2);
- Notice, objections, and the addendum process (Ch. 2);
- Sentencing recommendation and analysis (Ch. 3);
- Other post sentencing issues (Ch. 4); and
- Confidentiality and disclosure to third parties and outside agencies (Ch. 5).

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§ 140 Statutory Authority and Requirements

(a) United States probation and pretrial services officers' authority to investigate and supervise federal defendants is established in Titles 18 and 21 of the United States Code and in the Federal Rules of Criminal Procedure.

(b) Rule 32(c) of the Federal Rules of Criminal Procedure (Fed.R.Crim.P.) outlines the requirements for:

- the presentence investigation;
- the presentence report;
- the disclosure process;
- the objection and amendment process;
- notice obligations; and
- sentencing procedures.

(c) The Sentencing Reform Act of 1984 created the United States Sentencing Commission (Commission) and charged it with establishing sentencing guidelines. The Commission created the United States Sentencing Guidelines (USSG), which at the time were mandatory, meaning that judges were required to impose a sentence within the guideline range except in very limited circumstances. In 2005, the Supreme Court held that the mandatory guidelines violated the Sixth Amendment right to a jury trial, because the guidelines permitted increasing a defendant's sentence by judge-found facts rather than jury-found facts. **See:** *United States v. Booker*, 543 U.S. 220 (2005). Rather than discarding the guideline system, the Supreme Court rendered the guidelines advisory rather than mandatory. Now, when imposing a sentence, courts are required to properly calculate and consider the sentencing guidelines and policy statements but may impose any sentence authorized by Congress.

§ 150 Philosophy and Objectives

(a) The purposes and goals of the presentence investigation and report are established by various statutes and rules and the policies of the Judicial Conference of the United States.

(b) Selection of an appropriate sentence is one of the most important decisions made in the criminal justice system. The primary vehicle to assist the sentencing court in fulfilling this responsibility is the presentence report. The task of conducting presentence investigations is assigned to United States probation officers.

(c) As a component of the federal judiciary responsible for community corrections, the United States probation and pretrial services system is fundamentally committed to protecting the public and assisting in the fair administration of justice.

(d) As community corrections professionals, probation officers preparing presentence reports possess and use skills from various disciplines to:

(1) investigate relevant facts about defendants;

(2) assess those facts in light of the purposes of sentencing;

(3) apply the appropriate guidelines, statutes, and rules to the available facts; and

(4) provide timely, accurate, complete but concise, and objective reports that assist:

(A) the sentencing court in determining the appropriate sentence;

(B) the Federal Bureau of Prisons (BOP) in its inmate classification process;

(C) the United States Sentencing Commission (Commission) in policy considerations; and

(D) probation officers with the post-conviction supervision process.

(e) The presentence process should be carried out consistent with evidence-informed methods. Evidence-informed decision-making involves the integration of:

(1) evidence-based practices (EBP);

(2) other available evidence (e.g., from new and promising research or other academic disciplines such as education, medicine, and implementation science);

(3) the probation officer's professional judgment; and

(4) the probation office's own evidence, which includes data on outcomes at the district and individual levels.

(f) The probation officer's role as the court's independent investigator is critical. To provide the court with a thorough and balanced picture of the

defendant, the officer should be open to receiving information from all parties and should strive to remain objective.

(g) Recognizing that each defendant is unique and that the presentence process plays a significant role in a defendant's life, officers should treat defendants with dignity, respect, and objectivity. This promotes fairness and may assist in building a positive relationship between defendants, the court, and community corrections officials.

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§ 210 The Presentence Investigation

§ 210.10 Overview of the Presentence Investigation

(a) The presentence investigation's goal is to gather the information necessary to provide a timely, accurate, objective, and comprehensive presentence report to the court. The report assists the court in making a fair sentencing decision and assists corrections and community corrections officials in managing persons under their supervision.

(b) Fed.R.Crim.P. 32(c) outlines the statutory requirements of the presentence investigative process. Under the rule:

(1) the probation officer must conduct a presentence investigation, unless:

(A) 18 U.S.C. § 3593(c) or another statute requires otherwise; or

(B) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553 and the court explains its finding on the record;

(2) if the law permits restitution, the probation officer must conduct an investigation regarding restitution and submit a report that contains

sufficient information for the court to decide whether to order restitution; and

(3) the probation officer who interviews a defendant as part of a presentence investigation must give the defendant's attorney notice and a reasonable opportunity to attend the interview.

(c) Proper preparation for and organization of the investigation process will save time and increase efficiency.

(d) Since a case's complexity will vary with the nature of the offense and the defendant's background, the officer may determine further areas of inquiry on a case-by-case basis in addition to basic investigative procedures.

§ 210.20 Conducting the Presentence Investigation

(a) In conducting a thorough investigation, the probation officer is responsible for:

(1) gathering facts about the defendant, the defendant's criminal history, and the offense through:

(A) an interview with the defendant;

(B) a review of case materials, including but not limited to court filings, discovery, and criminal history documentation;

(C) contact with the attorney for the government, the defendant's attorney, the case agent, the victim, or other relevant parties;

(D) a home inspection;

(E) contact with collateral sources;

(F) contact with pretrial services; and

(G) other relevant sources, as necessary.

(2) verifying the information gathered;

(3) interpreting and evaluating the information, including as to its reliability;

(4) applying the advisory guidelines and statutes to the facts; and

(5) presenting the information in an organized, objective report.

(b) A defendant may refuse to be interviewed by the probation officer, sometimes upon advice of counsel. When this occurs, the officer proceeds with the investigation, attempting to obtain information from as many sources as possible. Where no information is available, this fact is reported to the court.

(c) The interview may indicate to the probation officer that a psychological or psychiatric evaluation is necessary to assist the court in determining the sentence.

(1) The probation officer should contact the sentencing judge as soon as it becomes apparent that such an evaluation may be necessary.

(2) Under 18 U.S.C. § 3552, the court may order a study to obtain more information concerning any mental or emotional condition of the defendant. Under § 3552(b), the court may order that an evaluation be completed. The statute requires that the evaluation "be conducted in the local community" by qualified personnel, unless the judge finds that:

- there is a compelling reason for the evaluation to be completed by the BOP, or
- there are no resources available within the local community.

(3) If the defendant is committed to BOP custody for an evaluation, the study will be for a period of 60 days.

(A) The court may extend this period for an additional 60 days if the BOP notifies the court of the need for such an extension.

(B) The order for the evaluation will specify the additional information being sought by the court and will permit disclosure of materials held by the probation office concerning the defendant, including the presentence report.

(C) Disclosure of the presentence report to the BOP for purposes of the study must comply with local district disclosure rules.

(d) During the presentence investigation, the probation officer has access to information from numerous sources of varying reliability. The probation officer should carefully evaluate the reliability of all information received.

(e) The probation officer should carefully evaluate any allegation about the defendant, particularly when such information cannot be independently verified.

(f) While the court may consider a vast amount of information in determining an appropriate sentence, it is important that the probation officer distinguish between information that is verified and unverified.

Note: Under 18 U.S.C. § 3661, "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

(g) Facts considered when applying the guidelines at sentencing must be proven by a preponderance of the evidence unless a greater standard of proof is required by binding case law or a specific provision of the sentencing guidelines. **See:** Commentary to U.S.S.G. §6A1.3 ("The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of the case."). **See also:** *United States v. Watts*, 519 U.S. 148, 156 (1997) ("[W]e have held that application of the preponderance standard at sentencing generally satisfies due process.").

(h) In considering whether a fact has been proven by a preponderance of the evidence, the court is not bound by the Federal Rules of Evidence at sentencing, but information should have a "sufficient indicia of reliability to support its probable accuracy." U.S.S.G. §6A1.3.

§ 220 The Presentence Report

§ 220.10 Purposes of the Presentence Report

(a) The presentence report is a comprehensive document that serves several purposes. It is used to assist:

(1) the sentencing court in determining the appropriate sentence;

(2) the Federal Bureau of Prisons (BOP) in its inmate classification process;

(3) the United States Sentencing Commission (Commission) in policy considerations; and

(4) probation officers with the post-conviction supervision process.

(b) The different components of a presentence report are designed to satisfy Fed.R.Crim.P. 32(d) and 18 U.S.C. § 3553:

(1) The defendant's criminal history and characteristics are required by Rule 32(d)(2) and § 3553(a)(1).

(2) A description of the offense conduct and a calculation of the offense level are required by Rule 32(d)(1)(B) and § 3553(a)(1).

(3) Sentencing options are required by Rule 32(d)(1) and § 3553(a)(3)-(6).

(4) Factors that may warrant a departure or variance are required by Rule 32(d)(1)(E) and § 3553(b)(1).

§ 220.20 Legal Framework

(a) 18 U.S.C. § 3553 governs imposition of a sentence, including factors to be considered in imposing a sentence. The presentence report helps the court when considering the factors listed under § 3553(a).

(b) Fed.R.Crim.P. 32(d) outlines the statutory requirements of a presentence report. Under the rule, a presentence report must:

(1) identify all applicable guidelines and policy statements of the Commission;

(2) calculate the defendant's offense level and criminal history category;

(3) state the resulting sentencing range and kinds of sentences available;

(4) identify any factor relevant to:

(A) the appropriate kind of sentence; or

(B) the appropriate sentence within the applicable sentencing range; and

(5) identify any basis for departing from the applicable sentencing range.

(c) Fed.R.Crim.P. 32(d) also requires that a presentence report contain the following information:

(1) The defendant's history and characteristics, including:

(A) any prior criminal record;

(B) the defendant's financial condition; and

(C) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment.

(2) Verified information regarding the impact on any victim, including any financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed.

(A) Special rights for child victims and child witnesses are provided in 18 U.S.C. § 3509. The term "child victim" is defined in 18 U.S.C. § 3509(a)(2) as a person under the age of 18 who is alleged to be:

(i) a victim of a crime of physical abuse, sexual abuse, or exploitation, or

(ii) a witness to a crime committed against another person.

(B) The identity of a child victim is protected under 18 U.S.C. § 3509(d).

(i) Minor victims should be identified in the presentence report using letters, numbers, or pseudonyms, and officers must take care to avoid revealing a child victim's identity throughout the presentence report.

(ii) Revealing the identity of a child victim is punishable as contempt under 18 U.S.C. § 403.

(3) When appropriate, the nature and extent of non-prison programs and resources available to the defendant.

(4) Information sufficient for a restitution order when the law provides for restitution. Under 18 U.S.C. § 3664, the presentence report must include, to the extent practicable:

(A) a complete accounting of the losses to each victim;

(B) any restitution owed under a plea agreement; and

(C) information relating to the defendant's economic circumstances.

(5) Any resulting report and recommendation if the court orders a study under 18 U.S.C. § 3552(b).

(6) A statement of whether the government seeks forfeiture under Rule 32.2 or other legal authority.

(7) Any other information that the court requires.

(d) The presentence report should include all information relevant to sentencing, whether or not the information is directly relevant to guideline application. Under 18 U.S.C. § 3661, "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

(e) The presentence report will follow the defendant through the federal criminal justice system. Many decisions — from the sentence imposed to the type of prison — are made based on information presented in the report. The officer should seek verification of all reported information through collateral contacts or documentation and distinguish among information that is verified or unverified. Every effort should be made to provide the court with reliable information, since inaccurate information that the court or others rely upon may lead to unfair or unintended results.

(f) While much information is included in the presentence report, Fed.R.Crim.P. 32(d)(3) identifies three types of information that must be excluded from the presentence report:

(1) Any diagnoses that, if disclosed, might seriously disrupt a rehabilitation program;

(2) Any sources of information obtained upon a promise of confidentiality; and

(3) Any other information that, if disclosed, might result in physical or other harm to the defendant or others.

(g) If information is to be withheld, Fed.R.Crim.P. 32(i)(1) requires the court to:

(1) provide a written or in-camera summary of the excluded factual information that will be relied upon in determining sentence; and

(2) provide the defendant and the attorney for the government an opportunity to comment.

§ 220.30 Composition of the Presentence Report

A presentence report generally includes the following sections:

(a) Face Sheet

The face sheet provides the court with a summary of the significant court-related information and offense data.

(b) Identifying Data

The identifying data page provides the court with demographic and identifying information regarding the defendant.

(c) The Offense

This section is designed to:

(1) provide all information necessary to understand the offense;

(2) assess the impact on any victim;

(3) calculate the offense level;

(4) evaluate whether the United States sentencing guidelines take into account important elements of the offense; and

(5) facilitate the Commission's collection, analysis, and reporting of comprehensive federal sentencing data.

(d) Defendant's Criminal History

This section is designed to:

(1) provide information about the defendant's previous criminal behavior;

(2) determine the defendant's criminal history category under the sentencing guidelines;

(3) provide information to assist the court in determining whether the defendant's criminal history is accurately represented by the criminal history category calculated under the guidelines;

(4) provide information to corrections officials and community correction officials for classification, programming decisions, treatment services, and supervision strategies; and

(5) facilitate the Commission's collection, analysis, and reporting of comprehensive federal sentencing data.

(e) Defendant's Personal Characteristics

This section is designed to:

(1) provide information about the defendant's personal history and present condition to assist the court in:

(A) selecting appropriate sentencing options;

(B) determining the defendant's ability to pay financial sanctions; and

(C) considering the need for supervision, the length of the term, and appropriate conditions;

(2) provide information about the defendant's personal history and present condition to assist with post-conviction supervision strategies, including assessing the defendant's criminal risks and identifying the defendant's criminogenic needs.

(3) facilitate the Commission's collection, analysis, and reporting of comprehensive federal sentencing data; and

(4) provide the BOP with information necessary to implement various elements of the sentence, such as inmate classification, designation, and programming decisions.

(f) Sentencing Options

This section informs the court of the available sentencing options as determined by:

(1) the statutes applicable to the counts of conviction and the sentencing provisions at 18 U.S.C. §§ 3551-3586; and

(2) USSG, Chapter 5.

(g) Factors That May Warrant a Departure

(1) Under the advisory guideline system, the court may depart and impose a sentence outside the range established by the applicable guidelines if the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Commission in formulating the guidelines. 18 U.S.C. § 3553(b)(1).

(2) Departures are authorized by the guidelines manual and provide adjustments to a sentencing range within the advisory guideline system. Chapter 5, Section K of the Guidelines Manual provides various grounds for departure identified by the United States Sentencing Commission. Additionally, as part of its Index, the Guidelines Manual provides a List of Departure Provisions and a Compilation of Departure Provisions.

(3) This section is designed to:

(A) notify the court and counsel that the officer has considered each factor under USSG, Chapter 5, Section K, and other applicable guidelines and policy statements in the Guidelines Manual that may warrant a departure before making a sentencing recommendation; and

(B) allow the court to independently consider and analyze each factor.

Note: Before the court may depart from the applicable sentencing range on a ground *not* identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure. Fed.R.Crim.P. 32(h).

(h) Factors That May Warrant a Variance

(1) Having considered the sentencing options within the guidelines, including any departures authorized by the Guidelines Manual, the court then has the discretion to sentence outside the advisory guideline system based on the factors provided in 18 U.S.C. § 3553(a).

(2) A variance is the imposition of a sentence that is outside the guidelines framework. **See:** U.S.S.G. §1B1.1, background. **See also:** *Irizarry v. United States,* 553 U.S. 708, 709–16 (2008).

(3) This section is designed to:

(A) identify each factor that may warrant a variance before making a sentencing recommendation;

(B) allow the court to independently consider and analyze each factor.

§ 220.40 Disclosure to the Parties, Objections, and Revisions

§ 220.40.10 Overview of Disclosure of the Presentence Report to the Parties

(a) Fed.R.Crim.P. 32 requires that the presentence investigation report be disclosed to:

- the defendant;
- the defendant's counsel; and
- the attorney for the government.

(b) The requirements of Fed.R.Crim.P. 32 create a framework to:

(1) provide for resolution of disputed material facts and guideline applications before the sentencing hearing; and

(2) ensure that disagreements that cannot be resolved are identified for the sentencing judge.

Note: For information about disclosure of the presentence report to additional parties, **see:** Guide, Vol. 8D, Ch. 5.

§ 220.40.20 Disclosure Timeline

(a) Under Fed.R.Crim.P. 32, the presentence investigation report must be given to the defendant, defendant's attorney, and the government at least 35 days before sentence is imposed, unless the defendant waves this minimum period.

(b) Within 14 days after receiving the report, the parties must submit to the probation officer any written objections to the presentence report.

(c) No fewer than seven days before sentencing, the probation officer must submit the presentence report to the court, the defendant, the defendant's counsel, and the attorney for the government.

(d) Under Fed.R.Crim.P. 32(b)(2), the court may, for good cause, change any time limits prescribed in the rule.

(e) A presentence investigation report initiated before entry of a guilty plea or nolo contendere or before the establishment of guilt, may **not** be disclosed to the court, the defendant, the attorney for the defendant, or the attorney for the government, **unless** the defendant consents in writing to the report's disclosure to the court before conviction under Rule 32. Forms PROB 13-A and PROB 13-B are used to obtain the defendant's consent.

§ 220.50 Addendum to the Presentence Report

(a) Before the sentencing hearing, the probation officer may:

(1) modify the presentence report as often as necessary to make any revisions identified by the probation officer or supervising probation officer to improve the report; and

(2) revise the report as part of the addendum process.

(b) The officer will draft an addendum to be submitted to the court with the presentence report. The addendum alerts the court to the issues that will have to be resolved at sentencing.

(c) The addendum is not designed to replace sentencing memoranda from counsel.

(d) The addendum should include:

(1) a synopsis of the unresolved objections by counsel and the officer's position as to each objection; and

(2) an explanation of any factual information, guideline provision, or case law that the officer relied upon in making a determination.

(e) If the parties object to facts in the presentence report that do not impact the guideline calculation or the court's analysis of the factors found in 18 U.S.C. § 3553(a), the officer should identify whether the facts are those upon which the BOP may rely to make classification, designation, and programming decisions or which may assist in post-conviction supervision.

§ 220.60 Nonstandard Presentence Reports

(a) Most reports prepared by officers are standard guideline presentence reports, as outlined above. However, officers may be called upon to prepare other types of presentence (or post-sentence) reports, including:

(1) non-guideline presentence reports;

(2) modified presentence reports;

(3) expedited presentence reports;

(4) pre-plea presentence reports;

(5) presentence reports for organizational defendants;

(6) juvenile predisposition reports;

(7) supplemental reports to the BOP; and

(8) treaty transfer post-sentence reports.

(b) Guidance on nonstandard presentence investigations and reports is in the *Presentence Investigation and Report Procedures Manual* (law enforcement sensitive).

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§ 310 Overview of Sentencing Analysis and Recommendation

(a) As part of the presentence process, the officer makes a sentencing recommendation to the court under Fed.R.Crim.P. 32. The sentencing analysis and recommendation is a critical component of the presentence report that assists the court in determining what sentence is sufficient but not greater than necessary to achieve the purposes of sentencing found in 18 U.S.C. § 3553.

(b) Fed.R.Crim.P. 32 presumes that the officer's recommendation will be disclosed to the parties but allows for the court to limit such disclosure through local rule or an order in a specific case.

(c) The process of making a recommendation begins with a careful analysis of all facts relating to the defendant and the case, followed by a determination, based on the applicable statutes and guidelines, of what the officer believes to be an appropriate sentence. The justification outlines the legal basis and factual considerations that shaped the recommendation.

(d) The analysis and recommendation should include:

(1) a sentencing chart that displays the statutory, guideline, plea agreement provisions, and the probation officer's recommendation for:

- custody;
- probation;
- supervised release;
- fines;
- restitution; and
- special assessments;

(2) an assessment for the suitability of voluntary surrender;

(3) an individualized assessment of the appropriate conditions of supervision; and

(4) an analysis of the factors considered and reasons for the recommended sentence, including:

(A) a summary of the officer's consideration of the defendant's personal history and characteristics and the offense conduct; and

(B) an explanation of how the recommended sentence satisfies the statutory purposes of sentencing found in 18 U.S.C. § 3553.

§ 320 Sentencing Chart

The sentencing chart is designed for ease of comparison among the statutory, guideline, and, if applicable, plea agreement provisions and the officer's recommended sentence. In this manner, the court can easily:

(a) compare these provisions;

(b) determine whether there is any conflict among them; and

(c) identify any grounds for a departure or variance, if necessary.

§ 330 The Officer's Analysis and Justification

§ 330.10 Overview

The sentencing recommendation includes a written analysis and justification of the officer's recommended sentence. This analysis should be guided by:

(a) the law;

(b) the circumstances surrounding each offense; and

(c) the circumstances of each defendant.

§ 330.20 Factors to be Considered in Making a Sentencing Recommendation

(a) Under 18 U.S.C. § 3553, a court is required to "impose a sentence sufficient, but not greater than necessary to comply with the purposes" identified in that statute.

(b) When recommending a sentence, the officer should keep in mind the factors identified in 18 U.S.C. § 3553 that the court considers when imposing a sentence:

(1) The nature and circumstances of the offense and the defendant's history and characteristics;

(2) The need for the sentence imposed:

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further criminal conduct; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other corrective treatment in the most effective manner;

(3) The types of sentences available;

(4) The types of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant, as provided in the guidelines issued by the Commission under 28 U.S.C. § 994(a)(1) that are in effect on the date the defendant is sentenced;

(5) Any relevant policy statement issued by the Commission under 28 U.S.C. § 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) The need to avoid unwarranted sentence disparities among defendants with similar records who were found guilty of similar conduct; and

(7) The need to provide restitution to any victims of the offense.

(c) Information that is excluded from the presentence report under Fed.R.Crim.P. 32(d)(3) should be used with caution. If information is not disclosed to the defendant or the government in sufficient detail to permit response, it should not be used in establishing a sentencing recommendation.

§ 340 The Officer's Recommendation

§ 340.10 Term of Custody

The officer's recommendation includes whether the defendant should serve a term of custody and, if so, how long that term should be. An appropriate term of custody is one that is permitted by statute and is "sufficient, but not greater than necessary" to satisfy the statutory purposes of sentencing. **See:** 18 U.S.C. §§ 3553(a), 3582(a).

§ 340.10.10 Mandatory Custody

(a) In certain cases, a minimum term of imprisonment or a consecutive sentence is required by statute.

(b) 18 U.S.C. § 3553(f), commonly called the "Safety Valve," allows a district court to sentence a criminal defendant below the mandatory minimum sentence for certain drug offenses if the defendant meets the criteria in § 3553(f)(1)-(f)(5). **See:** U.S.S.G. §5C1.2.

(c) 18 U.S.C. § 3553(e) allows a district court to sentence a criminal defendant below the mandatory minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. **See:** U.S.S.G. §5K1.1.

§ 340.10.20 Discretionary Custody

(a) In other cases, the court may choose from alternatives to imprisonment.

(b) The factors described in 18 U.S.C. § 3553(a) should be considered:

(1) in determining whether to recommend an alternative to imprisonment or a term of imprisonment; and

(2) if recommending a term of imprisonment, in determining the length of the recommended term.

(c) Under 18 U.S.C. § 3582, "imprisonment is not an appropriate means of promoting correction and rehabilitation."

(d) If a custodial sentence is recommended, it may not exceed the maximum sentence permitted by law.

§ 340.20 Term and Conditions of Supervision

(a) The sentencing recommendation includes a recommendation regarding the appropriate term of supervision and special conditions of supervision.

(b) There are two types of post-conviction supervision: probation and supervised release. **See:** 18 U.S.C. § 3561 and 18 U.S.C. § 3583. Probation is generally in lieu of additional custody time while supervised release follows a term of imprisonment.

(c) Under 18 U.S.C. § 3553(a), an appropriate term of supervision is one that is "sufficient, but not greater than necessary" to satisfy the statutory purposes of sentencing. **See:** 18 U.S.C. § 3583(c).

§ 340.20.10 Term of Probation

(a) Under 18 U.S.C. § 3561, a defendant who has been found guilty of an offense may be sentenced to a term of probation unless:

(1) the offense is a Class A or B felony and the defendant is an individual;

(2) the offense is an offense for which probation has been expressly precluded; or

(3) the defendant is sentenced to a term of imprisonment at the same time for the same or a different offense that is not a petty offense.

(b) The statutorily authorized terms of probation are:

- not less than 1 year nor more than 5 years for a felony;
- not more than 5 years for a misdemeanor; and
- not more than 1 year for an infraction. 18 U.S.C. § 3561(c).

(c) In determining whether to impose a term of probation and the length of such a term, the court considers the factors provided in 18 U.S.C. § 3553(a) to the extent applicable. Under this provision, to "provide just punishment" is a purpose of a probationary sentence.

(d) A recommendation on the imposition of and the length of a term of probation should be based on:

(1) the law;

(2) the circumstances surrounding each offense; and

(3) the circumstances of each defendant.

(e) Special probation, also referred to as prejudgment probation or a form of diversion, is available to certain persons convicted of personal possession of controlled substances. 18 U.S.C. § 3607. If a person who is found guilty of an offense described in section 404 of the Controlled Substances Act (21 U.S.C. § 844):

(1) has not, before commission of this offense, been convicted of violating a federal or state law relating to controlled substances; and

(2) has not previously been the subject of a disposition under this section;

then the court may, with the person's consent, place the person on probation for a term of not more than 1 year without entering a judgment of conviction.

§ 340.20.20 Term of Supervised Release

(a) Under 18 U.S.C. § 3583, in imposing a sentence, the court may include a term of supervised release after imprisonment. In certain cases, a minimum term of supervised release is required by statute.

(b) A recommendation on the length of a term of supervised release should be based on:

(1) applicable law; and

(2) a careful evaluation of all circumstances in the individual case.

(c) Under 18 U.S.C. § 3583(c), to "provide just punishment" is **not** a purpose of supervised release. As such, punishment is not an appropriate basis

for recommending a term of supervised release that exceeds the minimum provided in statute or the guidelines.

§ 340.20.30 Conditions of Supervision

(a) Defendants sentenced to probation or supervised release are subject to mandatory conditions of supervision, standard conditions of supervision, and special conditions of supervision.

(1) Mandatory conditions of probation are found at 18 U.S.C. § 3563(a).

(2) Mandatory conditions of supervised release are found at 18 U.S.C. § 3583(d).

(3) Standard conditions are described at U.S.S.G. §5B1.3 and listed in the AO 245B judgment form and apply to both probation and supervised release.

(b) If an officer recommends a term of probation or supervised release, the next step is to determine what, if any, special conditions are necessary.

(1) Before recommending special conditions, officers should consider all mandatory and standard conditions that may already address a particular risk or need.

(2) If the officer determines that the mandatory and standard conditions do not adequately address the defendant's risk and needs, the officer should consider recommending special conditions that are narrowly tailored to:

(A) the defendant's individual needs, and

(B) the case's specific facts and circumstances.

(c) In determining the appropriate term and conditions of supervision to recommend, officers should keep in mind that over-supervision of people in the community may:

(1) inhibit their chance of success in the community; and

(2) make success less likely by disrupting the person's prosocial networks.

(d) Officers should keep in mind the distinctions between a sentence of probation and a term of supervised release. Under 18 U.S.C. § 3583(c), to "provide just punishment" is not a purpose of supervised release. As

such, punishment is not an appropriate basis for recommending a term of supervised release that exceeds the minimum provided in statute or the guidelines. However, under 18 U.S.C § 3562(a), to "provide just punishment" is a purpose of a probationary sentence.

(e) Under 18 U.S.C. § 3583(d), special conditions of supervised release must:

(1) be reasonably related to:

(A) the nature and circumstances of the offense;

(B) the defendant's history and characteristics; and

(C) applicable statutory sentencing purposes;

(2) involve only such deprivations of liberty or property as are reasonably necessary for the applicable statutory sentencing purposes; and

(3) be consistent with any pertinent policy statements issued by the United States Sentencing Commission (Commission).

(f) Under 18 U.S.C § 3562(a), in determining the conditions of probation, the court must consider the factors provided in 18 U.S.C. § 3553(a) to the extent applicable.

(g) When considering special conditions, officers should:

(1) avoid presumptions or the use of set packages of conditions for groups of defendants, and keep in mind that the purposes vary, depending on the type of supervision.

(2) determine whether the circumstances in the case require such a deprivation of liberty or property to accomplish the relevant sentencing purposes at this time.

(3) consider whether the risk and needs present at the time of sentencing will be present when the defendant returns to the community, particularly for a defendant who is facing a lengthy term of imprisonment.

(4) determine whether it is appropriate to avoid recommending special conditions until the defendant is preparing to reenter the community from prison.

(A) For example, if a person under supervision begins contacting the victim of the crime for which the person was

convicted during the period of supervision, the officer may consider recommending a special condition that prohibits contact with the victim.

(B) Similarly, if the officer is considering a special condition that limits, filters, or monitors the defendant's use of computers and the internet, it may be appropriate to avoid recommending such a special condition until the defendant is preparing to reenter the community because monitoring and filtering technology may change or become obsolete during the period of imprisonment.

(h) Each district should fashion special conditions that comport with circuit case law requirements.

(i) An individualized assessment of the need for and appropriateness of each recommended special condition should be included in the sentencing recommendation.

Note: A court may determine that modification of conditions is necessary to reflect new or reduced risk and needs, new evidence-based research and methods of rehabilitation, or other changed circumstances. New information or changes in post-sentence conduct are not required to modify conditions. There is no specified quantum of evidentiary proof required to justify a modification. The court is required to consider only the relevant sentencing factors in 18 U.S.C. § 3553 and comply with the provisions of the Federal Rules of Criminal Procedure. **See:** 18 U.S.C. §§ 3563(c), 3583(e)(1), Fed.R.Crim.P. 32.1(c).

§ 340.30 Criminal Monetary Penalties

(a) Recommendations on the type and amount of criminal monetary penalties should be guided by:

(1) the law;

(2) the circumstances surrounding each offense; and

(3) each defendant's circumstances.

(b) The presentence report's presentation of the statutory and guideline provisions governing criminal monetary penalties and information concerning losses sustained by victims provide essential information about the circumstances of each particular offense.

(c) The findings contained in the presentence report on the defendant's financial condition and ability to pay are also critical for developing recommendations for criminal monetary penalties.

(d) The officer's logic and rationale for recommending criminal monetary penalties must stem from facts and evidence contained in the body of the presentence report. **See:** Guide, Vol. 8G (Criminal Monetary Penalties (Monograph 114)).

(e) If the victim's losses cannot be determined at least 10 days before the sentencing date, 18 U.S.C. § 3664(d)(5) requires the attorney for the government or the probation officer to notify the court, and the court should set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. In certain circumstances, the victim may petition the court for an amended restitution order if the victim discovers additional losses.

§ 340.30.10 Mandatory Monetary Penalties

(a) Special Assessment

Under 18 U.S.C. § 3013, special assessments are mandatory and are imposed for every count of conviction, except forfeiture counts.

(b) Additional Special Assessment

Under 18 U.S.C. § 3014, in addition to the special assessment under § 3013, the court must impose a special assessment of $5,000 on any non-indigent defendant convicted of an offense under:

(1) chapter 77 (relating to peonage, slavery, and trafficking in persons);

(2) chapter 109A (relating to sexual abuse);

(3) chapter 110 (relating to sexual exploitation and other abuse of children);

(4) chapter 117 (relating to transportation for illegal sexual activity and related crimes; or

(5) section 274 of the Immigration and Nationality Act (8 U.S.C. § 1324) (relating to human smuggling), unless the person induced, assisted, abetted, or aided only an individual who at the time of such action was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(c) Mandatory Victims Restitution

With limited exceptions, when there is a victim of the offense, the imposition of full restitution is mandatory, without consideration of a defendant's ability to pay, for the following offenses:

(1) Offenses Listed in 18 U.S.C. § 3663A(c):

(A) Crimes of violence (defined in 18 U.S.C. § 16);

(B) All property offenses under Title 18;

(C) Controlled substance manufacturing offenses (21 U.S.C. § 856(a)); and

(D) Tampering with consumer products (18 U.S.C. § 1365).

Note: Exceptions include cases in which the court finds that:

- the number of identifiable victims is so large as to make restitution impracticable, or
- the issues of fact are complex and would unduly prolong the sentencing process.

See: 18 U.S.C. § 3663A(c)(3).

Unless a different amount is agreed to in the plea agreement, the amount of restitution is limited to the losses resulting from the conviction offense(s).

(2) Specific Title 18 Provisions

(A) Sexual abuse (§§ 2241–2245, restitution at § 2248);

(B) Sexual exploitation of children (§§ 2251–2258, restitution at § 2259);

(C) Domestic violence (§§ 2261–2262, restitution at § 2264);

(D) Child Support Recovery Act (§ 228);

(E) Human trafficking (§ 1591), restitution at § 1593); and

(F) Cleanup of clandestine laboratory sites (21 U.S.C. § 853(q)).

Unless a different amount is agreed to in the plea agreement, the restitution amount is limited to the losses resulting from the conviction offense(s).

(3) Trafficking in Child Pornography Offenses Under 18 U.S.C. § 2259

(A) Under the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018 (AVAA), if the defendant was convicted of "trafficking in child pornography" as defined in 18 U.S.C. § 2259(c)(3), the court must order restitution under 18 U.S.C. § 2259(b)(2) in an amount:

- that reflects the defendant's relative role in the causal process that underlies the victim's losses, but
- that is no less than $3,000.

(B) Subject to limitations, a victim of a trafficking in child pornography offense may elect to receive a one-time $35,000 (indexed for inflation) defined monetary assistance payment from the Child Pornography Victims Reserve established under § 1402(d)(6) of the Victims of Crime Act of 1984 (34 U.S.C. § 20101(d)).

(d) Assessment Under 18 U.S.C. § 2259A

In addition to any other criminal penalty, restitution, or special assessment authorized by the law, the court must assess:

(1) not more than $17,000 on any person convicted of an offense under 18 U.S.C. § 2252(a)(4) or § 2252A(a)(5);

(2) not more than $35,000 on any person convicted of any other offense for trafficking in child pornography; and

(3) not more than $50,000 on any person convicted of a child pornography production offense.

Note: The court must consider the factors in 18 U.S.C. § 3553(a) and § 3572 when ordering this assessment. 18 U.S.C. § 2259A. This assessment applies only to defendants who committed the offense on or after Dec. 7, 2018.

§ 340.30.20 Discretionary Monetary Penalties

(a) Discretionary Restitution

(1) Under 18 U.S.C. § 3663, restitution is discretionary for certain offenses under Title 18 and air piracy offenses that are not covered by any mandatory restitution provision.

(2) Discretionary community restitution for victimless drug offenses is also authorized under 18 U.S.C. § 3663(c) based on the amount of public harm caused by the offense. However, the amount of community restitution cannot exceed the amount of a fine imposed.

(3) For offenses prosecuted under titles other than Title 18 that do not fall under restitution categories provided in 18 U.S.C. § 3663A or § 3663, restitution can be ordered to a victim as a discretionary condition of probation or supervised release.

(4) When recommending discretionary restitution, it is appropriate to consider:

(A) the amount of loss sustained by each victim harmed by the offense;

(B) the defendant's financial resources; and

(C) the defendant's financial needs and earning ability and the defendant's dependents.

(b) Fines

(1) Statutory maximums for most Title 18 offenses are found in 18 U.S.C. § 3571. However, some offenses, such as Title 21 offenses, denote the maximum fines within the penalty provisions sections of the statute.

(2) Recommendations for the imposition of a fine should always be based on the defendant's ability to pay. However, 18 U.S.C. § 3572 notes that a fine should never impair a defendant's ability to make restitution. **See also:** U.S.S.G. §5E1.2(d).

§ 340.30.30 Repayment Terms

(a) When considering repayment terms of criminal monetary penalties, officers should recommend lump-sum payments or payment schedules designed to collect the maximum amount of money reasonably possible in the shortest period of time, as provided at 18 U.S.C. § 3572(d)(2). However, for a defendant of limited means, payment may only be possible in nominal form. **See:** 18 U.S.C. § 3664(f)(3)(B).

(b) Unless otherwise specified by the court, payments received for outstanding criminal monetary penalties are applied in the following order:

(1) Special assessments;

(2) Restitution:

(A) to private victims (individuals, organizations, corporations), including interest;

(B) to third-party compensators (e.g., insurance companies), including interest; and

(C) to the United States as a victim, including interest;

(3) Assessment under 18 U.S.C. § 2259A;

(4) Other orders under any other section of Title 18;

(5) Fine, including both principal and interest;

(6) Community restitution; and

(7) Penalties and other costs (including costs of prosecution and court costs).

See: 18 U.S.C. §§ 3612(c); 2259A(2); 3663(c)(5); 3611.

(c) Under 18 U.S.C. § 3664(h), when more than one defendant is liable for restitution, courts may make each defendant liable for payment of the full amount of restitution (jointly and severally).

(1) This section also allows courts to apportion restitution among defendants according to varying levels of culpability or economic circumstances of each defendant, so long as the maximum likelihood of the victim being fully compensated is ensured.

(2) Where multiple victims are to receive restitution, courts may order restitution to be distributed proportionally:

(A) according to a predetermined order of priority; or

(B) based on a percentage formula.

(3) However, under 18 U.S.C. § 3664(i), other victims should always be fully compensated before the United States when the United States is a victim.

(d) Once an officer has assessed ability to pay and identified the applicable criminal monetary penalties, the officer recommends the manner in which, and the schedule according to which, criminal monetary penalties will be due. The order of payment options listed under 18 U.S.C. § 3612(c) forms the basis of how the payment options appear in the Judgment in a Criminal Case (Form AO 245B).

Note: In some circuits, courts have held that restitution repayment schedules cannot be delegated to the probation office. **See:** *United States v. Prouty*, 303 F.3d 1249 (11th Cir. 2002).

(e) Special conditions, such as financial disclosure and prohibitions against incurring new credit, may be recommended when necessary to help the officer:

(1) set appropriate collection parameters for monetary conditions;

(2) deter and detect economic crimes;

(3) verify and monitor self-employment; or

(4) assist disorganized, impulsive persons under supervision in gaining control of their financial situations.

§ 340.30.40 Inmate Financial Responsibility Program

(a) When recommending the imposition of a prison term, officers should also consider that, unless a court expressly orders otherwise, payment of criminal monetary penalties is due during imprisonment.

(b) The Federal Bureau of Prisons' (BOP) Inmate Financial Responsibility Program (IFRP) assists inmates in developing financial plans to meet financial obligations.

§ 340.40 Voluntary Surrender

(a) The sentencing recommendation also includes an assessment of the defendant's suitability for voluntary surrender.

(b) Under 18 U.S.C. § 3143(a)(1), a person awaiting execution of a sentence may be permitted to voluntarily surrender if the court finds, by clear and convincing evidence, that the person is not likely to flee or pose a risk of danger to the another person or the community.

(c) 18 U.S.C. § 3143(b)(2) requires defendants to be detained when they:

(1) are found guilty of certain offenses provided in 18 U.S.C. § 3142(f)(1)(A), (B), and (C);

(2) are sentenced to a term of imprisonment; and

(3) have filed an appeal or a petition for writ of certiorari.

However, the judge may release defendants who are subject to mandatory detention under appropriate conditions if it is clearly shown that there are exceptional reasons why detention would not be appropriate. **See:** 18 U.S.C. § 3145(c).

(d) Analysis of a defendant's suitability for a recommendation of voluntary surrender includes:

(1) an evaluation of the defendant's adjustment in the community during the pretrial stage of the criminal proceedings; and

(2) consideration of the facts of the offense and harm to victims.

(e) While the recommendation regarding suitability for voluntary surrender is contained in the presentence report as part of the sentencing recommendation, the voluntary surrender recommendation is a joint responsibility between the probation officer and pretrial services officer assigned to the case.

§ 350 Disclosure of the Officer's Recommendations

§ 350.10 Disclosure of the Officer's Sentencing Recommendation

Fed.R.Crim.P. 32(e)(3) grants the court discretion to determine whether the sentencing recommendation is disclosed to the parties in individual cases or consistent with a local rule.

§ 350.20 Disclosure of the Officer's Recommended Special Conditions

When the presentence report is initially disclosed to the parties, the probation officer should attach any recommended special conditions and the reasons for the recommendations. The recommended conditions should also be attached to the final report.

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Pt. D: Presentence Investigation and Report

Ch. 4: Court-Ordered Amendments and Other Post-Sentence Issues

§ 410 Court-Ordered Amendments to the Presentence Report

§ 420 Statement of Reasons

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§ 410 Court-Ordered Amendments to the Presentence Report

(a) Before the sentencing hearing, the probation officer may:

(1) modify the presentence report as often as necessary to make any revisions identified by the probation officer or supervising probation officer to improve the report; and

(2) revise the report as part of the addendum process.

(b) Once the report has been submitted for the sentencing hearing, it should not be altered, except as ordered by the court during the sentencing hearing.

(c) The presentence report becomes part of the record. If the case should be appealed, the presentence report remains part of the record.

(d) Findings made by the court on contested issues or changes ordered to the presentence report may be documented using the Statement of Reasons.

(e) In limited cases, the court may direct that the presentence report be changed to reflect the court's findings on contested issues, particularly if the court has not adopted a process, to ensure that all findings — both guideline and non-guideline related — are routinely transmitted to the Federal Bureau of Prisons (BOP) using the Statement of Reasons. If the presentence report is changed, the probation officer can handwrite the changes in the original report or revise the sections in the report resolved by the court and label the report "Amended by Order of the Court."

§ 420 Statement of Reasons

(a) Judges are required to provide a Statement of Reasons for imposing a sentence.

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Last revised (minor technical changes) July 18, 2025

(b) The Statement of Reasons form was first introduced as a stand-alone form in 1988 (i.e., AO 247 (Report of Statement of Reasons for Imposing a Guideline Sentence)) to meet the guideline sentencing requirements of 18 U.S.C. § 3553(c).

(c) Courts are required to state the reasons for a sentence in open court.

(1) If the sentence is within a guideline range that exceeds 24 months, the statement must include the reason for choosing a particular point within the guideline.

(2) If the sentence departs from the sentencing guidelines, the statement must include the reason(s) for departure.

(3) If restitution is not ordered or only partial restitution is ordered, the statement must include an explanation.

(d) In many districts, the Statement of Reasons also includes:

(1) findings of disputed issues required by Fed.R.Crim.P. 32;

(2) reasons for departures or variances resulting in sentences outside the advisory guidelines system;

(3) findings that may not be required for sentencing purposes but may be very relevant for other post-sentencing purposes; and

(4) court-ordered changes or corrections to the presentence report.

(e) Since the Statement of Reasons is included in the judgment, it is routinely received by the BOP and the United States Sentencing Commission (Commission) when the judgment is received.

(1) BOP staff rely upon the Statement of Reasons and presentence report in making inmate classification, designation, and programming decisions.

(2) BOP staff look to the Statement of Reasons for court findings that differ from the tentative findings in presentence reports as they relate to controverted guideline applications (e.g., specific offense characteristics or other adjustments) and non-guideline-related issues (e.g., prior history of sexual misconduct, escapes, violence, immigration status, threats against government officials).

(f) Under 28 U.S.C. § 994(w), the written Statement of Reasons must be provided to the Commission, along with the presentence report, judgment,

written plea agreement, and the indictment or information, within 30 days of entry of the judgment.

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§ 510 General Overview

(a) The presentence report is a confidential document.

(b) Fed.R.Crim.P. 32 requires disclosure of the presentence report to the attorney for the government, the defendant, and the defendant's attorney at least 35 days before the sentencing hearing, unless the defendant waives this minimum period.

(1) The attorneys may retain copies of the presentence report.

(2) Under 18 U.S.C. § 3552(d), the attorney for the government may also retain the presentence report for use in collecting financial penalties.

(c) Fed.R.Crim.P. 32 does not provide guidance on the disclosure of presentence reports to third parties.

(d) The confidentiality of presentence reports "derives from judicial practice, reflecting 'powerful policy considerations' supporting a presumption against disclosure." **See:** *U.S. v. Iqbal*, 684 F.3d 507 (5th Cir. 2012), quoting *U.S. v. Huckaby*, 43 F.3d 135, 138 (5th Cir. 1995). **See also:** *In re Siler*, 571 F.3d 604 (6th Cir. 2009)*; U.S. v. Cianscewski*, 894 F.2d 74, 79 n. 17 (3d Cir. 1990); *U.S. v. Corbitt*, 879 F.2d 224, 228 (7th Cir. 1989); *U.S. v. McKnight*, 771 F.2d 388, 390 (8th Cir. 1985); *U.S. v. Santarelli*, 729 F.2d 1388, 1390 (11th Cir. 1984).

(e) A disclaimer about use and redisclosure of the presentence report should be included in each presentence report. The Judicial Conference-approved disclaimer language is below:

> "*Restrictions on Use and Redisclosure of Presentence Investigation Report.* Disclosure of this presentence investigation report to the Federal Bureau of Prisons and redisclosure by the Bureau of Prisons is authorized by the United States District Court solely to assist administering the offender's prison sentence (i.e., classification, designation, programming, sentence calculation, pre-release planning, escape apprehension, prison disturbance response, sentence commutation, or pardon) and other limited purposes, including deportation proceedings and federal investigations directly related to terrorist activities. If this presentence investigation report is redisclosed by the Federal Bureau of Prisons upon completion of its sentence administration function, the report must be returned to the Federal Bureau of Prisons or destroyed. It is the policy of the federal judiciary and the Department of Justice that further redisclosure of the presentence investigation report is prohibited without the consent of the sentencing judge."

See: JCUS-MAR 2004, p. 13.

(f) Under Fed.R.Crim.P. 32(e)(1), a presentence report or its contents should not be disclosed to anyone until the defendant has pled guilty or nolo contendere or has been found guilty, unless the defendant has consented in writing.

(g) For further guidance on disclosure of information regarding a defendant before pleading or being found guilty or pleading nolo contendere, **see:** Guide, Vol. 8A, Ch. 2 (Legal Framework and Principles).

§ 520 Disclosure to the Commission

Under 28 U.S.C. § 994(w), the presentence report must be provided to the U.S. Sentencing Commission (Commission), along with the statement of reasons, judgment, written plea agreement, and the indictment or information, within 30 days of entry of the judgment.

§ 530 Disclosure to Third Parties and Other Agencies

(a) Presentence information is confidential and may be disclosed to third parties or other agencies only if:

(1) the respective sentencing court has granted authorization to disclose such information at its discretion;

(2) the court determines that a compelling need for disclosure has been demonstrated; or

(3) there exists explicit authority to disclose such information.

See: AO Office of the General Counsel Opinion, April 25, 1996, Confidentiality of PSR.

(b) Investigative or prosecutorial use of the presentence report is incompatible with its purpose. In some cases, state prosecutors have sought to compel a presentence report's disclosure, and district courts have had to determine whether to allow it. When the court orders that court or probation records remain confidential and specifically directs the probation officer to decline to testify or produce any records if subpoenaed in a state hearing, the officer is precluded from disclosing such information.

(c) Federal Bureau of Prisons

(1) Disclosure of the presentence report to the Federal Bureau of Prisons (BOP) and redisclosure by BOP is authorized solely:

(A) to assist in administering the defendant's prison sentence (i.e., classification, designation, programming, sentence calculation, prerelease planning, escape apprehension, prison disturbance response, sentence commutation, or pardon); and

(B) for other limited purposes, including deportation proceedings and federal investigations directly related to terrorist activities.

(2) If BOP rediscloses the presentence report upon completion of its sentence administration function, the report must be returned to BOP or destroyed.

(d) Law Enforcement Agencies

A probation office's disclosure of information in response to law enforcement agency requests is determined under Guide, Vol. 20, Ch. 8 (Testimony and Production of Records).

(e) Pretrial Contracted Supportive Services

(1) Probation may disclose certain information from the presentence report to pretrial services, which may then provide that information to individuals or organizations that have contracted with pretrial services to provide supportive services described in 18 U.S.C. § 3154(4) for the custody or care of released individuals, to the extent necessary to assist in such care.

(2) Contracts with such people or organizations must include a nondisclosure agreement that recites the obligation of the people or organizations to adhere to the confidentiality provisions of 18 U.S.C. § 3153(c) and the confidentiality regulations established under that statute.

(f) Office of the Pardon Attorney

The presentence report should be provided to the Office of the Pardon Attorney upon a request received directly from or through the Federal Bureau of Investigation.

(g) Treatment Providers and Halfway Houses

(1) Unless local policy establishes prohibitions on disclosure, the presentence report or supervision information may be disclosed to a mental health or drug or alcohol treatment facility or halfway house. The disclosure of information relevant to a mental health or drug or alcohol treatment facility or halfway house is necessary to perform the function of facilitating the rehabilitation of a person under supervision and the protection of the public.

See: AO Office of the General Counsel Opinion, Jan. 5, 1995, Disclosing information to Treatment Programs. **See also:** AO Office of the General Counsel Opinion, Sept. 13, 1993, Presentence Report to Halfway House/Treatment Program.

(2) However, caution is warranted in cases where the presentence report contains information regarding cooperation plea agreements or other highly sensitive information. In such instances, the presentence report should not be disclosed in its entirety.

(h) It is the policy of the federal judiciary and the Department of Justice that further redisclosure of the presentence report is prohibited without the sentencing judge's consent. A non-exhaustive list of additional parties that may request the presentence report and require the sentencing judge's consent for disclosure, includes:

(1) immigration courts;

(2) government and defense counsel requesting access to old presentence reports; and

(3) the U.S. Marshals Service.

(i) Districts may issue local rules or administrative orders that provide for the disclosure of presentence and supervision information. These may:

(1) generally provide that the probation officer should seek instructions from the court when asked to disclose such information, or

(2) be more detailed and provide a process for seeking disclosure.

§ 540 Disclosure Under FOIA or the Privacy Act

(a) The Freedom of Information Act (FOIA) establishes a method for gaining access to government records. The Privacy Act provides a structure for safeguarding the privacy of individuals by restricting the dissemination of records or information contained in the records. These statutes limit the availability, use, and disclosure of federal records and documents. **See:** 5 U.S.C. § 552.

(b) FOIA and the Privacy Act do not apply to the federal judiciary, and FOIA requests may be denied. **See:** 5 U.S.C. § 551(1).

(c) FOIA and the Privacy Act do apply to the United States Parole Commission and BOP. Therefore, if a presentence report is in the possession of the Parole Commission or BOP, it can be disclosed. *United States Department of Justice v. Julian*, 486 U.S.1 (1988).

(d) However, Fed.R.Crim.P. 32(d)(3) specifically exempts from disclosure any information related to:

(1) confidential sources;

(2) diagnostic opinions; and

(3) other information that may cause harm to the person under supervision or third parties.

Therefore, such information is exempt from disclosure under FOIA. It also is likely that the sentencing recommendation is exempt from such disclosure.

(e) *U.S. Department of Justice v. Julian*, 486 U.S. 1 (1988), does not require the probation office or the court to furnish a copy of the presentence report to persons under supervision.

(f) If the request under FOIA or the Privacy Act relates to a parole case, the probation office should contact the Parole Commission's regional office.

§ 550 Further Guidance

- JNet's Disclosure page;
- AO Office of the General Counsel Opinion, Confidentiality of Pretrial Services, Presentence, and Supervision Release Information;
- Guide, Vol. 20, Ch. 8 (Testimony and Production of Records); and
- Guide, Vol. 8E, Ch. 5 (Records and Confidentiality).