Vermont Rules of Criminal Procedure, Rule 32

RULE 32. SENTENCE AND JUDGMENT

Effective: July 6, 2020
Currentness

(a) Sentence.

(1) *Imposition of Sentence.* Sentence shall be imposed or deferred without unreasonable delay. Pending imposition or deferment of sentence the court may commit the defendant or continue or alter the conditions of release. Before imposing sentence the court shall:

(A) determine that the defendant and defense counsel have had the opportunity to read and discuss the presentence investigation report made available pursuant to subdivision (c)(3);

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

(C) address the defendant personally to determine if the defendant wishes to make a statement in his or her own behalf and to present any information relevant to sentencing.

The attorney for the state shall have an equivalent opportunity to speak to the court and to present any information relevant to sentencing.

(2) *Notification of Right to Appeal.* After imposing or deferring sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the right to appeal and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed or deferred following a plea of guilty or nolo contendere. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

(b) Judgment. A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence or conditions of deferment thereof. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge, except that if the judge makes a ruling from the bench on the record, the clerk may sign a judgment that reflects the judge's ruling. The judgment shall then be entered by the clerk forthwith. Such entry by the clerk shall be the entry of judgment for all purposes under these rules and the Rules of Appellate Procedure.

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(c) Sentencing Information.

(1) *Presentence Investigation, When Made.* A presentence investigation shall not be initiated until there has been an adjudication of guilt, unless the defendant consents to such action. The commissioner of corrections shall make the presentence investigation. The probation officer who interviews a defendant as part of a presentence investigation shall, on request, give the defendant's attorney notice and a reasonable opportunity to attend the interview. The commissioner of corrections shall report to the court before the imposition or deferment of sentence or the granting of probation, except that the court, in its discretion, may dispense with the report, in the following situations:

(A) if the offense is a misdemeanor;

(B) if the defendant has two or more felony convictions;

(C) if the defendant refuses to be interviewed by a probation officer or requests that disposition be made without a presentence report;

(D) if it is impractical to verify the background of the defendant.

A report made prior to an adjudication of guilt shall not be submitted to the court or its contents disclosed to anyone until after such adjudication, except that a judge may, with the written consent of the defendant, inspect a presentence report at any time and may, if the defendant's consent expressly so states, permit the defendant's attorney, or a defendant appearing pro se, and the attorney for the state to inspect the report.

(2) *Presentence Investigation Report.* The report of the presentence investigation shall contain any prior criminal record of the defendant and such information on his characteristics, his financial condition, and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court.

(3) *Disclosure.* The sentencing court shall disclose to the defendant, his attorney, and the prosecution, all information submitted to it for consideration at sentencing. The presentence investigation report shall be available for inspection by the defendant, his attorney, and the prosecution at least fourteen (14) days prior to sentencing. The report shall also be sent by the court within the same time limit to the defendant's attorney and the prosecution. Any other information submitted to the court for consideration at sentencing shall be disclosed sufficiently prior to the imposition of sentence as to afford reasonable opportunity for the parties to decide what information, if any, the parties intend to controvert by the production of evidence.

(4) *Right to Comment and Offer Evidence.*

(A) Prior to imposing sentence, the court shall afford the state, the defendant and his or her attorney an opportunity to comment upon any and all information submitted to the court for sentencing. Any objection to facts contained in the presentence investigation report or to any recommended probation conditions contained therein, shall be submitted, in writing, to the court at least 7 days prior to the sentencing hearing, unless good cause is shown for later objection. A copy of any objections must be provided to the opposing party.

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(B) Either party may offer evidence, including hearsay, specifically on any disputed factual issues in open court with full rights of cross-examination, confrontation, and representation. When a defendant objects to factual information submitted to the court or otherwise taken into account by the court in connection with sentencing, the court shall not consider such information unless, after hearing, the court makes a specific finding as to each fact objected to that the fact has been shown to be reliable by a preponderance of the evidence, including reliable hearsay. If the court does not find the alleged fact to be reliable, the court shall either make a finding that the allegation is unreliable or make 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 or other controverted document thereafter made available by the court to the Department of Corrections.

(C) Prior to concluding the hearing and before imposing a sentence, the court must provide opportunity for comment and objection to any probation conditions that it intends to impose that have not been previously noticed in the presentence investigation report or in the written or oral record requests of the parties, or the court's own statements in the course of the sentencing hearing.

(D) Prior to the sentencing proceeding, the prosecutor shall give notice to the victim by the method provided in Rule 49(a)(2). At sentencing, the court shall ask if the victim is present and, if so, whether the victim would like to be heard regarding sentencing. In imposing sentence, the court shall consider any views offered at the hearing by the victim. If the victim is not present, the court shall ask whether the victim has expressed, either orally or in writing, views regarding sentencing. If so, the state may present such views through oral or written statements attributed to the victim, and the court shall take those views into consideration in imposing sentence. Upon request of the prosecutor or defendant, for good cause shown, the court may permit the victim to appear by telephone with safeguards appropriate to preserve the record and assure full participation by interested parties. The defendant, the defendant's attorney and the state may comment on the information provided by or on behalf of the victim. In this subparagraph, if the victim is a minor, incapacitated, incompetent, or deceased, “victim” means family members of the victim as defined in 13 V.S.A. § 5301(2) and, if necessary, designated by the court as provided in 13 V.S.A. § 5318.

(5) *Return of Reports.* Any copies of the presentence investigation report made available to the defendant or his attorney and the attorney for the state shall be returned to the probation officer immediately following the imposition or deferment of sentence or the granting of probation. Copies of the presentence investigation report shall not be made by the defendant, his counsel, or the attorney for the state.

(d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of nolo contendere may be made only by a defendant who is not in custody under sentence. The motion must be made prior to or within 30 days after the date of entry of judgment, except that a defendant whose sentence does not include a term of imprisonment may make the motion at any time. If the motion is made before sentence is imposed or deferred, the court may permit withdrawal of the plea if the defendant shows any fair and just reason and that reason substantially outweighs any prejudice which would result to the state from the withdrawal of the plea. If the motion is made after sentence, the court may set aside the judgment of conviction and permit withdrawal of the plea only to correct manifest injustice.

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

(f) Revocation of Probation. The court shall not revoke probation except after hearing as provided in Rule 32.1.

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(g) Restitution. In every case in which a victim has suffered a material loss, the court must determine the amount of restitution, if any, which the defendant must pay.

(1) *Hearing; General Procedures.* Unless the amount of restitution is agreed to by the parties, a restitution hearing must be held. The court must issue findings either on the record or in writing as to any matters of factual dispute in the determination of the amount of restitution or the defendant's current ability to pay restitution. The state has the burden of establishing the amount of restitution and a defendant's ability to pay by a preponderance of the evidence. The court must enter a restitution judgment order establishing the defendant's restitution obligation. The provisions of subparagraph (c)(4)(A) apply in the conduct of restitution hearings.

(2) *Prehearing Disclosures.* At least 14 days prior to the restitution hearing, the prosecuting attorney must provide to the defendant a written statement of the amount of restitution claimed and copies of any documents that the state intends to offer in evidence to establish a victim's material loss and support the claim for restitution. The prosecuting attorney must disclose in writing to the defendant the existence and terms, if known after reasonable inquiry, of any policy of insurance for the losses in issue that would serve to compensate the victim for all or any portion of material loss held by the victim or a party other than the defendant. The disclosure must include uninsured motorist coverage, if applicable, and it must be made to the defendant at least 14 days prior to the restitution hearing. If the defendant claims that a victim's losses are not uninsured by reason of the existence of defendant's own or a third party's insurance coverage for the losses in issue, he or she must disclose to the prosecuting attorney in writing the existence and terms of this liability insurance coverage, if known after reasonable inquiry, at least 14 days prior to the restitution hearing.

(3) *Ability to Pay.* If the defendant intends to raise the issue of inability to pay the amount claimed, either at the time of the restitution hearing or in a restitution payment schedule or both, he or she must disclose such intent in writing to the court and prosecuting attorney at least 14 days prior to the restitution hearing.

Credits

[Amended February 24, 2010, effective April 26, 2010; September 22, 2010, effective November 22, 2010; July 14, 2017, effective September 18, 2017; September 20, 2017, effective January 1, 2018; May 4, 2020, effective July 6, 2020.]

Editors' Notes

REPORTER'S NOTES--2020 AMENDMENT

Rule 32(c)(4) is amended consistent with the decisions in *State v. Lumumba*, 2018 VT 40, 207 Vt. 254, 187 A.3d 353, *State v. Bostwick*, 2014 VT 97, 197 Vt. 345, 103 A.3d 476, and *State v. Cornell*, 2014 VT 82, 197 Vt. 294, 103 A.3d 469. These decisions address the necessity for procedures requiring parties to object to recommended probation conditions in presentence investigation reports, in addition to factual assertions pertinent to sentence, on grounds that the conditions are not reasonably related to the offense of conviction and thus overly harsh or excessive. The amendment is consistent with, yet not as expansive as, the provisions of Federal Rule of Criminal Procedure 32(f)(1), which requires specific written objection not only to factual assertions pertinent to sentence, but to all material information, sentencing guideline ranges, and policy statements in presentence investigation reports.

In *Lumumba*, 2018 VT 40, ¶ 28, the Court requested the Criminal Rules Committee to

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> propose rules to regularize the procedures for considering probation conditions at sentencing. Proposed rules should set forth how the State and defendants must raise and preserve issues. Our recent decisions have required evidence to support specific conditions to show the condition is related to the crime for which a defendant is convicted and necessary for rehabilitation. If a defendant objects to a condition because it does not meet that standard or for another reason that will require evidentiary support for the condition, then the defendant should have to state this position prior to sentencing to enable the State to obtain the necessary evidence.

Subparagraph (c)(4)(A) is amended, consistent with the Court's direction in *Lumumba*, to require advance written objection to any recommendations for probation conditions set forth in the presentence investigation report. As reflected in the existing rule, the amendment is intended to provide advance notice of any such objections to enable the parties to secure and present any evidence that would serve to provide record basis either for inclusion of the recommended conditions in the sentence given, or rejection of them by the court.

Subparagraph (c)(4)(A) is also amended to require that written objections to PSI content be submitted to the court at least 7 days prior to sentencing (unless good cause is shown for later objection), rather than the 5 days prescribed by the existing rule. This amendment is intended to render the rule consistent with the "day is a day" method of calculation of time periods of V.R.Cr.P. 45.

Finally, the subparagraph is amended to include an express requirement that copies of any written objections be provided to the opposing party. Timely notice of any objections enables the party opponent to secure and present any evidence necessary to support inclusion or rejection of any factual assertion or recommended probation condition set forth in the PSI.

Part of former (c)(4)(A) has been made into new subparagraph (B).

New subparagraph (c)(4)(C) requires that before pronouncing sentence and concluding the sentencing hearing, the sentencing court must provide opportunity for comment and objection to what are in effect any "unnoticed" conditions of probation. This includes conditions not included in a signed plea agreement acknowledged by the defendant or the subject of request or argument by the parties, that the court, in its discretion, nonetheless determines to be warranted on the sentencing record. This amendment is intended to expressly provide a defendant with an opportunity to articulate objection to conditions of probation that may not have reasonably featured at all in the course of the sentencing record, and thus to preserve claims of error as to purportedly unnoticed or "surprise" conditions, without the necessity of filing a motion for correction of sentence under V.R.Cr.P. 35.

Existing subparagraph (B) is relettered as subparagraph (D).

REPORTER'S NOTES--2018 AMENDMENT

Rule 32(c)(4)(A) is amended to conform its 3-day time period to the contemporaneously amendment of V.R.Cr.P. 45, which adopts the "day is a day" standard for the computation of the running of time periods in criminal cases.

REPORTER'S NOTES--2017 AMENDMENT

Subdivision 32(g) is added in response to the Court's decision in State v. Morse, 2014 VT 84, 197 Vt. 495, 106 A.3d 902, to provide specific procedures for conduct of restitution hearings convened pursuant to 13 V.S.A. § 7043. Paragraph 32(g)(1) prescribes the procedure in restitution hearings generally, including allocation of the burden of proof in establishing restitution claims payable to a victim of crime. The paragraph also adopts by reference the provisions of subparagraph 32(c)(4)(A), specifying procedural due process in restitution hearings, and evidentiary standards therein, including admission of hearsay evidence determined by the court to be reliable. As in sentencing proceedings, the Rules of Evidence do not apply. V.R.E. 1101(b)(3); Morse, 2014 VT 84, ¶¶ 13-19.

Paragraph 32(g)(2) specifies written prehearing disclosures that are required to be made to the defendant by the prosecuting attorney, and by the defendant to the prosecuting attorney. The disclosures to be made by the prosecuting attorney include a

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written statement of the amount of restitution claimed, copies of documents intended to be introduced in evidence to support claims of a victim's material loss and restitution to be ordered, as well as the existence and terms, if known after reasonable inquiry, of any policy of liability insurance of the victim or a third party which would serve to independently compensate the victim apart from an order of restitution. In cases in which a defendant claims that a victim's material losses are not "uninsured," 13 V.S.A. § 7043(a)(2), and thus not compensable in restitution by reason of the defendant's own, or a third party's liability insurance that would serve to cover the loss, he or she must make such written prehearing disclosure to the prosecuting attorney as well. The existence of liability insurance coverage held personally by the victim or the defendant is uniquely and reasonably within their direct knowledge, and the rule contemplates that this information would be routinely subject to disclosure. Information about other insurance coverage for the losses in issue held by third parties such as family members, friends, or other property owners involved in the losses may not be so readily available. The rule imposes an obligation of reasonable inquiry as to the existence and terms of such other insurance, anticipating disclosure of such information as is reasonably known, to enable the court to render a fully informed decision on the issue of material loss as the term is defined by 13 V.S.A. § 7043(a)(2).

In restitution proceedings, the Court must make findings and orders as to two distinct issues: (1) the amount of the restitution for the victim's uninsured material losses sustained in consequence of the defendant's offense; and (2) whether the defendant has the present financial ability to pay the established restitution obligation, either in full, or on a schedule of prospective payments until the obligation is paid in full. 13 V.S.A. § 7043(d). These are two separate issues. A defendant's financial inability to make restitution payment goes to the second, and has no bearing upon the court's determination of the amount of uninsured loss that is subject to a restitution obligation. Paragraph 32(g)(3) requires that if a defendant intends to raise the issue of inability to pay restitution, he or she must provide written notice to this effect to the court and prosecuting attorney at least 14 days prior to the restitution hearing. This disclosure requirement is intended to enable the prosecuting attorney and the court to know that evidence may be required on the issue of ability to pay from the defendant or other sources. See 13 V.S.A. § 7043(d)(2); State v. Vezina, 2015 VT 56, 199 Vt. 175, 121 A.3d 1195. The amended rule contemplates that a defendant's failure to provide timely notice may not be construed as a waiver of the right to be heard or to present evidence as to alleged inability to pay restitution. However, an untimely interposed assertion of inability to pay may provide grounds for continuance or such other orders as the court deems just under the circumstances.

REPORTER'S NOTES--2010 AMENDMENT

Rule 32(c)(4) is divided into subparagraphs (A) and (B) to make clear the differences between victim testimony at a presentencing hearing on disputed factual assertions and victim statements of views regarding sentencing at the hearing. The text of prior Rule 32(c)(4) covering the opportunity of the state and the defendant to offer evidence on disputed factual issues in the presentence report or other information submitted to the court prior to sentencing under Rule 32(c)(3) is now designated subparagraph (A). Subparagraph (B) amends the provisions of prior paragraph (4) relating to victim statements, in light of 13 V.S.A. § 5321 added in 1999 to clarify the statutory rights of victims.

The prior rule required that all statements by victims at sentencing be made under oath and subject to cross-examination. Under what is now paragraph (A), as under the prior rule, factual assertions in the presentence investigation report or other information submitted to the court prior to sentencing may be objected to. If the defendant objects to such assertions, the court may not rely on them unless, after hearing, the court finds that each assertion has been shown to be reliable. As with any other witness, if the victim testifies as to these disputed assertions at the hearing, that testimony must be under oath and subject to cross-examination.

The amendments embraced in subparagraph (B) track 13 V.S.A. § 5321(c) by requiring the court to give the victim an opportunity to make a statement regarding sentencing--more fully defined in § 5321(a)(2) as a reasonable expression of "his or her views concerning the crime, the person convicted, and the need for restitution." The amendments also eliminate the requirement of the prior rule that the statement be given under oath, as well as a limitation to statements by victims of felonies. They also provide for notice to the victim pursuant to V.R.Cr.P. 49(a)(2) and 13 V.S.A. 5321(a)(1). If the victim is absent, the state may present oral or written statements of the victim expressing the victim's views. Pursuant to 13 V.S.A. § 5318, such statements may be presented by family members or, in the absence of family members, by a representative such as a victim's advocate. The

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rule also provides that, at the request of either party and for good cause, the victim may appear by telephone with appropriate safeguards. (For examples of safeguards, see V.R.F.P. 17 and Emergency Amendment of A.O. No. 38, promulgated January 14, 2010.) The victim's views, whether presented personally or through statements offered by the state, are subject to comment by the state or the defendant.

The final sentence of the rule makes clear, pursuant to the definition of "victim" in 13 V.S.A. § 5301(4), that "victim" as used in the amended rule means family members of a minor victim or of an incapacitated, incompetent, or deceased victim. ("Family member" is defined in 13 V.S.A. § 5301(2).) As provided in 13 V.S.A. § 5318, a family member may exercise the rights of such a victim under § 5321 (formerly § 7006). If more than one family member claims that right, the court may designate one of them "based on the best interest of the victim."

Rules 32(a) and (b) are amended to eliminate gender-specific references and to allow the clerk to sign a judgment when one is announced by the judge from the bench. In order to enforce and collect fines imposed by the District Court, including those for which deferred payment arrangements are made, it is currently necessary for there to be a judgment order signed by the judge. In practice, such judgment orders are seldom signed by the judge, but pronounced in court and subsequently issued by the clerk. In addition, quite often, deferred payment orders are arranged with the clerk's office to allow time for a defendant to pay off the fine. Given the large numbers of such orders and the desire to effectively collect fines agreed to and imposed as well as to permit time payments for these fines, the amendment regularizes the existing practice. The practice of taking pleas with fines by a waiver form would remain unchanged, since the judge currently signs those forms.

Rule 32(c)(1) is amended to adapt the language of Federal Rule of Criminal Procedure 32(c)(2) requiring a probation officer to give defendant's attorney notice and a reasonable opportunity to attend an interview of a defendant conducted as part of a presentence investigation. The presence of counsel at a presentence investigation is of great importance in view of developments such as mandatory minimum or indeterminate sentences for certain sex offenses. See, e.g., 13 V.S.A. §§ 2602(c), 3253(c), 3271. The courts of other states have recognized that presentence investigation interviews may implicate the Sixth Amendment right to counsel. See *State v. Everybodytalksabout*, 166 P.3d 693 (Wash. 2007) (PSI interview a "critical stage"; use in retrial of defendant's statements made without counsel violated Sixth Amendment); *Commonwealth v. Talbot*, 830 N.E.2d 177 (Mass. 2005) (right to counsel in PSI interviews).

REPORTER'S NOTES--1989 AMENDMENT

Rules 32(c)(3) and (4) are amended to lengthen the time period required for advance filing of presentence reports, incorporate into the rule procedures necessary to apply the holding of *State v. Ramsay,* 146 Vt. 70, 499 A.2d 15 (1985), and provide new procedures to address allegations found unreliable under *Ramsay.*

Subdivision (c)(3) requires that the presentence report be made available by the parties in advance of sentencing. The amendment changes, from seven to fourteen days, the period of advance disclosure. The purpose of the change is to accommodate the contemporaneous change being made to subdivision (c)(4), requiring the defendant to file written objections to the report at least three days prior to sentencing.

Subdivision (c)(4) responds to the *Ramsay* decision. In *Ramsay,* the Court held that allegations of criminal conduct, not resulting in convictions, may be considered at sentencing so long as the defendant is provided "full disclosure sufficiently in advance of sentencing to allow an adequate opportunity for rebuttal." 146 Vt. at 81, 499 A.2d at 22. *Ramsay* also held that "reliable" hearsay allegations may be used at sentencing. Id. The reference to reliability was not intended to restrict the allegations to the traditionally "reliable" hearsay exceptions, such as were spoken of in *Ohio v. Roberts,* 448 U.S. 56 [100 S.Ct. 2531] (1980). "Reliability" apparently was intended to describe the standard the court must use in deciding whether or not an alleged fact has been adequately proven. ("Factual reliability is sought through a process of disclosure and opportunity to rebut." *Ramsay,* 146 Vt. at 78, 499 A.2d at 20.)

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The amendment provides procedures for the defendant to object in advance of sentencing to any allegedly untrue allegation presented to the court, in the presentence investigation report or elsewhere. The rule requires an objection to be made at least three days in advance of the sentencing, unless good cause is shown. The sentencing court cannot utilize any information objected to unless the court finds, after hearing, that the fact alleged has been shown to be reliable. The three days' notice is designed to allow the state sufficient time to prepare affidavits, subpoena witnesses, or otherwise demonstrate the reliability of the alleged fact. The allegation could be of an unproven crime, as in *Ramsay,* or of any other relevant fact. Note that if the allegation is of an unproven crime, the defendant may have to be offered use immunity. *State v. Drake,* 150 Vt. 235, 552 A.2d 780 (1988). In any event, hearsay is admissible to prove the allegation. The rule is modeled upon F.R.Cr.P. 32(c)(3)(D) and the *Fatico* line of cases. *United States v. Fatico,* 579 F.2d 707 (2d Cir.1978) (*Fatico I*), and *United States v. Fatico,* 603 F.2d 1053 (2d Cir.1979) (*Fatico II*).

The rule differs in one major respect from *Ramsay* and from *State v. Chambers,* 144 Vt. 377, 477 A.2d 974 (1984), on which *Ramsay* relied. The rule prevents use of challenged information unless it is shown to be reliable. See *Fatico II,* 603 F.2d at 1056-57 (affirming sentence because trial judge found hearsay to be reliable). *Chambers* and *Ramsay* affirmed lower court decisions in part because the defendant had not shown the information to be unreliable. Because the prosecution can meet its burden by a preponderance of the evidence and because that evidence may include affidavits or other hearsay, the rule strikes a fair and workable balance. See W. LaFave and J. Israel, Criminal Procedure § 25.1 (West, 1988 Supp. at 33) (many jurisdictions authorize use of affidavits to prove contested facts at sentencing).

The rule goes beyond *Fatico I* and *Fatico II* in making automatic the requirement of a hearing and findings upon objection by the defendant. *Fatico II,* 603 F.2d at 1057 n. 9 (hearing not required every time defendant files an objection). The federal rule, as amended in 1983, does require a hearing and findings upon objection. *United States v. O'Neill,* 767 F.2d 780, 787 (11th Cir.1985); *United States v. Petitto,* 767 F.2d 607, 610 (9th Cir.1985); *United States v. Rone,* 743 F.2d 1169, 1174 n. 3 (7th Cir.1984).

As under prior Vermont case law, if the judge determines that the matter challenged will not be utilized in sentencing, the point is moot and no findings or hearings are required. *State v. Rathburn,* 140 Vt. 382, 388, 442 A.2d 452, 455 (1981). This is the federal rule. F.R.Cr.P. 32(c)(3)(D). However, a written record of this determination must be made.

The rule generally follows the federal rule in establishing procedures for the sentencing court to follow if it does not find a contested allegation to be reliable. The court has two choices. It can make a finding that the matter is "unreliable"--which includes finding that the state has not shown the allegation to be reliable. Or it can make a determination that the allegation will not be utilized in sentencing, as noted above. In either case the finding or determination must be made part of a written record, and that record must be attached to the presentence investigation report or other contested document. When the Department of Corrections later utilizes these documents, which were prepared for the court, the department will have the benefit of the court's findings or determinations. See 28 V.S.A. §§ 204, 501 (use of presentence reports by Department of Corrections and its Parole Board).

REPORTER'S NOTE--1985 EMERGENCY AMENDMENT

Rule 32(c) is amended pursuant to 12 V.S.A. App. VIII, A.O. 11, § 9. The amendment deletes the requirement that the presentence investigation report be sent directly to the defendant. The rule retains the requirement that the report be sent directly to the defendant's attorney and the prosecution. The amendment is intended to insure that the defendant reviews the report for the first time in the presence of counsel. Defense counsel should inform the defendant of his or her rights under Rule 32(c)(4) and *State v. Ramsay,* 146 Vt. 70, 499 A.2d 15 (1985). The amendment does not limit the defendant's right of access to the report. Where the defendant appears pro se, the court should make alternate arrangements to guarantee that the report is made available.

REPORTER'S NOTES--1985 AMENDMENT

Rule 32 is amended in three respects. Subdivision (a) is amended to adopt a 1983 amendment to Federal Rule 32(a). See 97 F.R.D. 245, 301-02 (1983). The amendment requires the court, before imposing sentence, to determine that the defendant and

defendant's counsel have had an opportunity to read and discuss the presentence investigation report. The federal amendment was premised on a finding that some "form of judicial prodding" is necessary to insure full disclosure. See 97 F.R.D. 305-06 (1983).

The first amendment to subdivision (c) is also intended to insure that the defendant and defendant's counsel have read the presentence investigation report and prepared a response if one is warranted. The 1982 amendment to the subdivision required that the report be available at least seven days prior to sentencing but did not require that the defendant, the defendant's attorney or the prosecution receive a copy for fear of unauthorized access to the report. The notes to the 1982 amendments suggested ways to make the report available to incarcerated defendants.

Although it is important to protect against unauthorized disclosure of reports, the risk does not outweigh the need to insure that the report is read and digested by the parties. The most convenient method of access is to receive a copy of the report. The amendment requires the court to send one to the defendant, his attorney and the prosecution at least seven days before the sentencing. Note that the time limit is on the sending of the report, not the receipt, so that counsel may still have to read the report at the court in order to have adequate opportunity to prepare for sentencing. Copies sent pursuant to this amendment must be returned to the probation officer after sentencing. The copies may not be duplicated. See Rule 32(c)(5).

The second amendment is intended to implement the recent victims bill of rights act which added 13 V.S.A. § 7006. See Act No. 229 of 1983 (Adj.Sess.). The statute provides that the victim of a felony, or the next of kin of the victim, may appear at sentencing and "reasonably express his views concerning the crime, the person convicted, and the need for restitution." 13 V.S.A. § 7006(a)(2). The court must consider statements made by a victim or the victim's next of kin. 13 V.S.A. § 7006(c).

The Vermont Supreme Court has been in the forefront in protecting due process rights of defendants in sentencing. In *State v. Williams,* 137 Vt. 360, 406 A.2d 375 (1979), the Court held that the trial judge could not rely upon hearsay information about criminal activities for which the defendant has never been charged. *Williams* imposes limits on the kind of information that the victim can provide and the manner of presentation. These kinds of issues have been raised with respect to the federal Victim and Witness Protection Act of 1982. See Project, Congress Opens a Pandora's Box--The Restitution Provisions of the Victim and Witness Protection Act of 1982, 52 Fordham L.Rev. 507, 544-63 (1984).

To ensure the victim's statement is presented consistent with the defendant's due process rights, the statement must be presented under oath subject to cross-examination by the parties and the right of the parties to comment on the statement presented. Any party can offer evidence to rebut disputed factual assertions in the victim's statement.

REPORTER'S NOTES--1982 EMERGENCY AMENDMENT

Rule 32(c)(2) is amended to conform to Act No. 223, 1981 Adj.Sess., effective July 1, 1982. See Reporter's Notes--1982 Emergency Amendments to Rule 11. That Act added subsection (c) to 28 V.S.A. § 204 to require that the presentence report include comments of the victim, or the victim's representative, where the victim so chooses. The statutory language is added to Rule 32(c)(2) (coverage of presentence investigation report) without change.

REPORTER'S NOTES--1982 AMENDMENT

Rule 32 is amended in two respects. Subdivisions (c)(3) and (4) are amended, along with the title of subdivision (c) to expand the obligation to disclose information used in sentencing. The original version of Rule 32(c), adopted in 1973, put Vermont at the forefront of those state and federal courts committed to offering to the parties the right to see, to comment upon, and to challenge, if necessary, information used by the court in determining the sentence to be imposed. That policy was based in part on statute. See 28 V.S.A. § 204(d). As the Reporter's Notes indicate, disclosure is justified by the "demands of fundamental fairness" since the defendant should be able to ensure the sentence is based on accurate and fair information.

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There were, however, limitations on the disclosure obligation. In "extraordinary circumstances," the court could withhold the report from a defendant who appears pro se, substituting a summary of the relevant information. The trial court used this authorization to require counsel for the defendant to withhold the report from the defendant. The Reporter's Notes indicate that counsel for a defendant is expected to use "discretion" to withhold information from his client under the same circumstances that would lead the court to withhold the report from a pro se defendant. Presumably, counsel would have the obligation to prepare a summary of withheld information.

For a number of reasons, it is now appropriate to remove the restrictions. First, there have been developments in the law relating to sentencing fairness. In *Gardner v. Florida,* 430 U.S. 349 [97 S.Ct. 1197] (1977), the Court held that sentencing procedure must comport with due process of law and reversed a criminal conviction because the trial judge relied upon an undisclosed presentence report. Although *Gardner* is a capital case, it is likely the Court will impose similar requirements in noncapital cases. In *State v. Williams,* 137 Vt. 360, 406 A.2d 375 (1979), the Court required resentencing where the trial judge had relied upon hearsay information about criminal activities for which the defendant had never been charged. The court felt such misuse of information at sentencing violated "basic concerns of criminal justice." See also *United States v. Woody,* 567 F.2d 1353 (5th Cir.1978). The logical conclusion of these holdings is that there must be full and open disclosure to ensure the fairness of sentencing.

Second, the possible problems with disclosure of sentencing information have not generally materialized. The court has received the relevant information, necessary for an informed sentencing decision, even with disclosure to the parties. See Fennell & Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of the Presentence Reports in Federal Courts,* 93 Harv.L.Rev. 1613 (1980).

Third, there have been problems in implementing the former rule. The failure of the rule to specify the right of a represented defendant to see the presentence report put defendant's counsel in an untenable position. Often, the trial court conditioned counsel's access to the report on withholding it from the defendant. However, disclosure to the defendant is usually necessary to evaluate and determine the accuracy of the information contained in the report. Thus, defense counsel was required to risk adverse consequences to the client to protect other interests.

Another problem has been the timeliness of access to the report. Often, the parties see it for the first time at sentencing. An incarcerated defendant often cannot get to the court to see the report prior to sentencing. Such limited access prevents any effective challenge to the accuracy of information contained in the report.

The amended rule makes four major changes in subdivision (c)(3). First, it applies the disclosure obligation to all sentencing information, not just the presentence report. Second, it expands the list of those to whom disclosure is made to include the represented defendant. Third, it eliminates the disclosure exceptions. Fourth, it requires that the presentence report be available a specified time before sentencing.

The first change puts all information used at sentencing on the same footing. Any information submitted to the court for use at sentencing must be disclosed. This will enable the parties to have the opportunity to comment upon and offer evidence with respect to any information used at sentencing. The rule is not intended to cover general statements--for example, a newspaper editorial on a judge's sentencing practices--not intended to relate to a specific defendant or to sentencing of that defendant.

The addition of the represented defendant to the list of those who receive sentencing information is discussed above. The rule no longer authorizes the disclosure of more information to defendant's counsel than to defendant.

The elimination of the disclosure exceptions in (c)(3) is not intended to limit the information available to the court. At worst, it may mean that the presentence report may include the kind of summary that the original rule required the court to prepare for the parties. See, e.g., *United States v. Fatico,* 579 F.2d 707 (2d Cir.1978).

Under the amended subdivision (c)(3), disclosure must occur a sufficient time prior to sentencing to allow the parties to comment upon and controvert any part of the information. The presentence report must be available for inspection at least seven days prior to sentencing. It is, of course, the parties' obligation to make use of the rule to read the report. It may, however, be the court's responsibility to arrange for inspection of the report by an incarcerated defendant. Whether by authorizing transportation of the defendant to the court or by authorizing an agent of the Commissioner of Corrections to allow the defendant to inspect the report, the court must ensure the report is actually “available” to the incarcerated defendant within the time limit. See 28 V.S.A. § 204(d).

Subdivision (c)(4) has been redrafted to move into (c)(3) that part that more logically fits there. The remainder of (c)(4) is in substance the same as what was in the former subdivision. Note that this subdivision is not intended to authorize a second trial, with a broad range of inquiry. See *United States v. Barnett,* 587 F.2d 252 (5th Cir.1979). Also note that the right under subdivision (c)(4) is in addition to the right under subdivision (a)(1) to present “information relevant to sentencing.”

The second general change in the rule--in subdivision (f)--is to specify that the probation revocation hearing is now covered in Rule 32.1, as added at the same time as this amendment.

REPORTER'S NOTES--1980 AMENDMENT

Rule 32(a)(1) is amended to achieve a result similar to that reached by the July 1975 amendment of Federal Rule 32(a)(1), P.L. 94-64, 89 Stat. 370. The amendment makes clear the right of the prosecution to be heard prior to the imposition of sentence and goes a step beyond the federal rule in making clear that both parties may offer “information relevant to sentencing.” While there may have been little doubt of the right of the prosecution to speak, to spell it out avoids any negative implication that might otherwise arise from a discrepancy with the Federal Rule.

“Information relevant to sentencing” is not limited to evidence relevant or otherwise admissible at trial. The Supreme Court of the United States has made clear that the sentencing judge must have “the fullest information possible concerning the defendant's life and characteristics.” Williams v. New York, 337 U.S. 241, 247 [69 S.Ct. 1079, 1083] (1949). Thus, the court may consider unsworn information from a variety of sources, including the presentence report and in-court or out-of-court statements of counsel, friends or relatives of the defendant, or officials who have had contact with him. The information must be true, however. See 2 Wright, Federal Practice and Procedure § 526 (1969); cf. 18 U.S.C. § 3577.

The Vermont Court has generally cited and followed Williams v. New York, supra. See State v. Morrill, 129 Vt. 460, 282 A.2d 811 (1971); State v. Cabrera, 127 Vt. 193, 243 A.2d 784 (1968); State v. Morse, 126 Vt. 314, 229 A.2d 232 (1967). Recently, in State v. Williams, 137 Vt. 360, 406 A.2d 375 (1979), the Court imposed a further stringent limitation upon the use of unsworn information, holding that “consistency with the basic concerns of criminal justice compels us to prohibit, even in sentencing proceedings, the use of mere assertions of criminal activities in any way in aid of determining disposition.” Defendant, convicted of lewd and lascivious conduct, had claimed that “hearsay information about criminal activities of a sexually deviant nature ... for which he had never been charged, tried or convicted” had been relied upon by the trial court in sentencing. The Court vacated the sentence and remanded the defendant for resentencing. Id. at 364-65; cf. In re Morrill, supra. This amendment does not affect the holding in State v. Williams, supra.

Rule 32(b) is amended to change the effect of the Court's decision in State v. Savo, 136 Vt. 330, 388 A.2d 391 (1978). See also State v. Hohman, 137 Vt. 102, 400 A.2d 979 (1979); State v. Wisell, 136 Vt. 541, 394 A.2d 1144 (1978).

The rule provides for the entry by the clerk of a formal “judgment of conviction” after the sentencing of the defendant. The form of that judgment is set out as Form 34 in the Appendix of Forms to the Rules. See also Rules 55(a), 56(d). In practice, however, the term “judgment of conviction” has been used to denote a judgment of guilt entered on a plea or verdict, ordinarily before sentencing. Savo held that entry of the latter judgment on the verdict was the “entry of the judgment or order appealed from” from which the 30-day time for appeal begins to run under Appellate Rule 4. The present amendment is intended to make clear for the future that entry of the Rule 32(b) judgment is the time from which the time for appeal and all other time periods

under the Criminal and Appellate Rules that are tied to entry of judgment run. As the following analysis of applicable rules illustrates, the Rules, with one exception, were drafted on this assumption; "adjudication" or some other form of words was used when the intention was to refer to the judgment on the verdict.

Appellate Rule 3(b). The last paragraph of this rule provides that upon a sentence of death or life imprisonment, "the date of entry of judgment shall be treated as the date of filing of notice of appeal." Plainly, the "judgment" contemplated here must be the Rule 32(b) judgment if the provision is to be effective. For example, under Appellate Rule 10(b)(2) in such a case the clerk is to order a transcript within 30 days after entry of judgment. If "judgment" referred to the judgment on the verdict, the 30 days might pass before the sentence of death or life imprisonment which triggers this provision was handed down.

Appellate Rule 4. As the Reporter's Notes to Rule 32(b) as originally promulgated make clear, "the entry of the judgment" which commences the running of the time for appeal under Appellate Rule 4 must be in a criminal case the entry of the formal judgment provided by Rule 32(b). This is the unquestioned interpretation of the identically worded Federal Criminal Rule 32(b)(1) and Federal Appellate Rule 4(b). See 2 Wright, Federal Practice and Procedure § 534 (1969). In support of this interpretation is the distinction between "announcement" and "entry" in the second sentence of Appellate Rule 4. A contrary interpretation would result in the anomaly that if more than 30 days were to elapse between verdict and sentence, a defendant would have to decide whether to appeal without knowing what sentence will be imposed. Note also that under Criminal Rule 32(a)(2) the court is to advise defendant of his appeal rights after imposing or deferring sentence. This provision can be effective only if the time for appeal begins to run from the Rule 32(b) judgment entered after sentence.

Criminal Rules 29(c), 33, 34. The various rules governing post-trial motions use different forms of words to achieve different results. These rules, too, are consistent with the use of "entry of judgment" to mean the Rule 32(b) judgment. Thus, the time for a motion of judgment of acquittal under Rule 29(c) runs from the time "the jury is discharged." Motions for new trial on grounds other than newly discovered evidence under Rule 33 and for arrest of judgment under Rule 34 must be made within a stated period "after verdict or finding of guilty." By contrast, the new trial motion for newly discovered evidence under Rule 33 may be made before or within two years after "final judgment." There would have been no need to use these varying formulations if the time of judgment had been the time at which the verdict is received. The post-trial motions are all tied to the time of verdict (except that for newly discovered evidence), because they involve trial errors that should be considered and disposed of while the trial is still fresh in mind. The time for appeal, on the other hand, is tied to the time of sentencing, because an appeal embraces all matters that were before the court, including the proper conduct of the sentencing procedure and any legal error in the imposition of sentence.

Criminal Rule 32(c)(1). This rule provides that the presentence report is ordinarily to be made after "an adjudication of guilt." This term is used instead of "judgment" because the Rule 32(b) judgment includes the sentence.

Criminal Rule 32(d). In a simultaneous amendment, this rule is being amended to implement the holding of State v. Cooley, 135 Vt. 409, 377 A.2d 1386 (1977), that a motion for withdrawal of plea by a defendant who is sentenced to imprisonment but not yet in custody under that sentence must be made within 30 days after "the date of entry of judgment." The term in this context must mean the Rule 32(b) judgment. Otherwise, the 30-day limit will make the provision for post-sentence plea withdrawal a nullity in most cases involving imprisonment, because the 30 days will have run before sentence is imposed. See Reporter's Notes to amended Rule 32(d).

Criminal Rule 46(c). As originally drafted, this rule provided for review of release conditions by the trial judge "upon a judgment of conviction." This use of the term is the previously mentioned exception to the proposition that "judgment of conviction" refers to the Rule 32(b) judgment. For consistency with the present amendment of Rule 32(b), a simultaneous amendment of Rule 46(c) substituting the term "adjudication of guilt" is being proposed. See Reporter's Notes to amended Rule 46(c).

Appellate Rule 9(b). This rule provides that after "notice of appeal from a judgment of conviction" release is within the jurisdiction of the Supreme Court. Consistent with Appellate Rule 4, discussed above, the term in this rule must refer to the

Rule 32(b) judgment. This interpretation is consistent with Rule 46(c) as proposed to be amended, because under both rules, the notice of appeal terminates the trial court's power over release. Rule 46(c) deals with the inception of that power.

Rule 32(c)(1) is amended to provide that a presentence report made prior to an adjudication of guilt may, if the defendant expressly consents, be disclosed to the parties. By virtue of the reference to Rule 32(c)(3), the court retains discretion to withhold all or part of the presentence report from a defendant appearing pro se "in extraordinary circumstances." Also, as under that rule, reliance is placed on the discretion of counsel to withhold from his client those portions of the report which the court might be expected to withhold from a pro se defendant. See Reporter's Notes to Rule 32(c)(3).

The amendment is intended to further the goals of the pre-adjudication presentence report, the primary purpose of which is to bring out matters concerning the defendant that may be useful in framing an appropriate plea agreement under Rule 11. If the report cannot be revealed to the parties, this purpose is totally frustrated. The Reporter's Notes to original Rule 32(c)(1) indicate that the restrictions in the rule were intended to prevent prejudice to the defendant that might arise from premature preparation of a report. That problem is avoided when defendant has expressly consented both to preparation and to disclosure.

Rule 32(d) is amended to embody the decision in State v. Cooley, 135 Vt. 409, 377 A.2d 1386 (1977), and to clarify the operation of the rule along lines proposed in the February 1978 and November 1979 Preliminary Drafts of Proposed Amendments to the Federal Rules of Criminal Procedure. See 77 F.R.D. 507, 548 (1978); 85 F.R.D. 379, 403 (1979).

Cooley held that a District Court was without jurisdiction to entertain a motion for withdrawal of a plea under Rule 32(d) when the defendant was in custody under sentence, because the post-conviction relief procedure of 13 V.S.A. §§ 7131-7137 was the exclusive means for collateral attack by one in custody. The Court further noted that, in any event, defendant's motion came too late because the 30-day time for appeal had run. Such motions were to be brought within 30 days so that their denial could be subject to appellate review in the normal course. The usual post-conviction remedies were defendant's recourse after the time for appeal had run.

The amendment incorporates both aspects of the Cooley ruling. It provides that the motion may be made only by a defendant "not in custody under sentence." The phrase "in custody under sentence" is the language of 13 V.S.A. § 7131. Its use makes clear that the procedure of the rule applies only when the statutory relief procedure is inapplicable. Thus, only defendants whose sentence does not include a term of imprisonment or who have not yet begun to serve a sentence of imprisonment that has been imposed may move for withdrawal of plea. The amendment also carries forward the Cooley 30-day limit on the motion, with an exception to take care of a situation not expressly dealt with in that case. Under the amended rule, a defendant whose sentence does not provide for a term of imprisonment may move to withdraw his plea at any time. This exception is necessary, because the remedies of post-conviction relief under the statute and of habeas corpus, which Cooley relies on as alternatives to the motion, cannot be resorted to by the defendant who is sentenced only to pay a fine. Cf. State v. Wisell, 137 Vt. 182, 400 A.2d 998 (1979). Note that under the simultaneous amendment of Rule 32(b), it is the entry of the formal judgment required by that rule from which the time for making the motion runs.

The remainder of the amendment addresses a problem common to both the Federal and Vermont rules. As originally promulgated, the language of both rules provided a standard for granting the motion after sentencing but was unclear as to the standard to be applied to a presentence motion. The federal courts have granted such motions liberally before sentence, but have applied a strict standard of "manifest injustice" after sentence. See Reporter's Notes to Rule 32(d); see also Advisory Committee's Notes to February 1978 proposed amendment to Federal Rule 32(d), 77 F.R.D., supra, at 553-59; November 1979 proposed amendment to Federal Rule 32(d), 85 F.R.D., supra, at 403. The present amendment follows the pattern of both federal amendment proposals, which retain a "manifest injustice" standard after sentence, but articulate the standard as actually applied in practice for presentence motions.

REPORTER'S NOTES

This rule is based on Federal Rule 32 and the January 1970 and April 1971 proposed amendments thereto, 48 F.R.D. 553, 612 (1970), 52 F.R.D. 409, 451 (1971), submitted to the Supreme Court with modifications in November 1972 Proposed Amendments to the Federal Rules of Criminal Procedure (Mimeograph, Admin. Ofc. U.S. Courts, 1972). The rule also draws from ABA Minimum Standards (Sentencing Alternatives and Procedures) §§ 4.1-4.5 and prior Vermont practice. All applicable provisions of the rule reflect the availability of the deferred sentence procedure of 13 V.S.A. § 7042.

Rule 32(a)(1) does not contain a detailed code of sentencing procedure. For procedural guidelines that may be followed in sentencing, see ABA Minimum Standards §§ 5.1-5.8. The rule also does not affect the three options given the sentencing court by prior law: (1) Sentence of imprisonment or fine under 13 V.S.A. §§ 7031-7032, 7171-7178; (2) deferral of sentence under 13 V.S.A. § 7042; and (3) suspension of sentence and probation under 28 V.S.A. §§ 201-255. The requirement of Rule 32(a)(1) that sentence be imposed or deferred "without unreasonable delay" has been deemed violated in the federal courts only when the delay is affirmatively shown to have been deliberate and oppressive. 2 Wright, Federal Practice and Procedure § 521 (1969). The provision for commitment or release pending sentence must be read with Rule 46(c), which makes review of release conditions mandatory upon conviction and incorporates statutory standards for the review.

The final sentence of Rule 32(a)(1) expands the traditional common-law right of allocution by allowing defendant not only to present a statement, personally or through counsel, offering legal reasons barring sentence but also to present a plea for leniency or to offer mitigating circumstances. See 2 Wright, supra, § 525; ABA Minimum Standards § 5.4(a)(iii), Commentary. Although the United States Supreme Court has emphasized the importance of allowing the defendant to speak with his own "halting eloquence," the Court has also held that failure to accord the defendant this right is not a ground for post-conviction relief from sentence in the absence of aggravating circumstances, such as the failure to notify defendant or his counsel of the sentencing proceeding. Green v. United States, 365 U.S. 301 [81 S.Ct. 653] (1961); Hill v. United States, 368 U.S. 424 [82 S.Ct. 468] (1962); see United States v. Johnson, 315 F.2d 714 (2d Cir.1963) cert. denied, 375 U.S. 971 [84 S.Ct. 477] (1964). Noncompliance with the rule may, however, be raised on direct appeal and will result in a remand for resentencing. See Grabina v. United States, 369 U.S. 426 [82 S.Ct. 880] (1962).

Rule 32(a)(2) is designed to insure that a convicted defendant knows of his right to appeal and is able to perfect his appeal even if trial counsel does not continue to assist him. See Federal Advisory Committee's Notes to 1966 Amendment, 3 Wright, supra, at 486. The rule follows the proposed amendment to the federal rule in expressly providing that the duty to notify the defendant does not apply after conviction on a guilty or nolo plea. The intent is to avoid the creation of false hopes and the encouragement of frivolous appeals. Federal Advisory Committee's Notes, 52 F.R.D. 409 at 454 (1971). The provision may be superfluous, since prior Vermont practice was to deny direct review in such circumstances. A 1973 amendment of 13 V.S.A. § 7401 may lead to an opening up of direct review, however, thus making the provision meaningful. See Reporter's Notes to Rule 11(e)(6).

Rule 32(b) establishes the requirement of a formal written judgment. Cf. 13 V.S.A. § 7004. Under the federal rule, failure to include the required recitals in a judgment of conviction is not a ground of attack if the required procedural steps were actually taken. See 2 Wright, supra, § 534. Note that the time of entry of judgment commences the running of the time for appeal under Appellate Rule 4. For the form of judgment and commitment, see Official Form 34.

Rule 32(c) is based in part on ABA Minimum Standards §§ 4.1-4.5 and the 1970 federal amendment proposal, 48 F.R.D. 553, 614 (1970). The rule must be read in connection with 28 V.S.A. § 204, which remains in effect, except as superseded by the rule. Under the statute a presentence report was to be made upon order of the court. Such an order was discretionary in misdemeanors and mandatory in felony cases, except as the Supreme Court might provide by rule. Rule 32(c)(1) shifts the burden by providing that a report shall be made in every case unless the court in its discretion dispenses with the report. Although the rule does not expressly so provide, the court should trigger the report procedure by routinely notifying the Commissioner of Corrections of an adjudication of guilt (or an earlier grant of consent by defendant), unless the report is to be dispensed with. As under the statute, the report may be dispensed with if the offense was a misdemeanor. In addition, the court has discretion to dispense with a report in specific cases where the information is already available or difficult to obtain, or where defendant so requests. This provision, taken from the 1970 federal amendment proposal, 48 F.R.D. 553 at 614, is more restrictive than ABA Minimum

Standards § 4.1 and the November 1972 proposed amendment to Federal Rule 32(c)(1), which impose no express limits upon the court's discretion. The provision of 28 V.S.A. § 204(b), permitting the court to accept a copy of a report made in another proceeding concerning the same individual within the previous two years, remains in effect under the rule.

Rule 32(c)(1) is more restrictive than the statute as to the time at which a presentence report may be ordered. Under 28 V.S.A. § 204(a), the court was empowered to order a report at any time during the prosecution. Compare 28 V.S.A. § 1208, repealed by Act No. 199 of 1971, § 22. The rule provides that an investigation and report may be made only after an adjudication of guilt unless the defendant consents. This restriction is intended to protect the defendant from unnecessary intrusion and possible prejudice through untimely disclosure of his position or inadvertent presentation to the judge of evidence inadmissible on the question of guilt. In addition, the restriction avoids what may prove to be an unnecessary expense. See ABA Minimum Standards § 4.2(a), Commentary. The defendant, however, by his consent may have the investigation initiated sooner if he intends to plead guilty or for some other reason wishes to expedite proceedings. In such a situation, possible prejudice to the defendant is forestalled by the final sentence of the paragraph, which prohibits submission or disclosure of the report prior to an adjudication of guilt without consent of the defendant. The defendant may give his written consent for court inspection of the report, which ordinarily would be for the purpose of facilitating the court's consideration of a plea agreement under Rule 11(e)(2), (3). See Reporter's Notes to Rule 11(e); ABA Minimum Standards § 4.2(b), Commentary.

There is a possible conflict between the prohibition against disclosure and the final sentence of 28 V.S.A. § 204(b), which provides that the commissioner of corrections shall upon request of a state's attorney furnish him a copy of a report in a case where sentence has passed. If the defendant in such a case is also the defendant in a still-pending case in which the prior report is to be submitted as the presentence report under 28 V.S.A. § 204(b), Rule 32(c)(1) would seem to bar compliance with a request for disclosure made by the prosecuting attorney until after an adjudication of guilt.

Rule 32(c)(1) provides that the report shall be made prior to sentencing. The provision of 28 V.S.A. § 204(c) that the report shall be made not less than one nor more than three weeks from the date of the order, subject to court extension, remains in force. The Supreme Court has recently held that the late filing of the report is not a ground for dismissal for lack of prosecution where the trial court delayed sentencing until it had the report, and defendant showed no prejudice from the delay. In re Shuttle, 131 Vt. 457, 306 A.2d 667 (1973).

Rule 32(c)(2), taken from the federal rule, is similar in effect to 28 V.S.A. § 204(a), which provides for “a written report as to the circumstances of the alleged offense and the character and previous record of the person, with recommendation.” For a more elaborate provision as to the content of the report, which might well serve as a guide in Vermont practice, see ABA Minimum Standards (Probation) § 2.3. The Standards recognize that “The primary purpose of the presentence report is to provide the sentencing court with succinct and precise information upon which to base a rational sentencing decision.” Id. § 2.2. Prior Vermont cases were to similar effect. See In re Shuttle, supra; State v. Cabrera, 127 Vt. 193, 243 A.2d 784 (1968); Baldwin v. Morse, 126 Vt. 442, 443, 234 A.2d 434 (1967). While the potential use of the report in the correctional or rehabilitative processes should not be ignored, this primary purpose should be looked to in determining the nature and scope of the information to be included in the report. See ABA Minimum Standards (Probation) § 2.2, Commentary.

Rule 32(c)(3) changes prior Vermont practice by requiring the court to allow defense counsel to inspect and comment upon the presentence report. If defendant is not represented by counsel, the court may withhold all or part of the report from him if “extraordinary circumstances” dictate. The prosecution is also entitled to see the report in order to have the opportunity to meet any challenge to the report under paragraph (4). See ABA Minimum Standards (Sentencing Alternatives and Procedures) § 4.4(b), Commentary. Under the prior practice disclosure to the defendant or his counsel or the state's attorney was entirely in the court's discretion. See 28 V.S.A. § 204(d); In re Shuttle, supra; State v. Morse, 126 Vt. 314, 229 A.2d 232 (1967). Mandatory disclosure is justified by the demands of fundamental fairness. The defendant must have the opportunity to ascertain that the sentence is based on accurate and adequate information and to respond to any accusation against him. See ABA Minimum Standards (Sentencing Alternatives and Procedures) § 4.4(a), Commentary.

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While the “extraordinary circumstances” sufficient to justify withholding the report from a defendant pro se are not defined in the rule, they presumably are situations such as those outlined in the November 1972 proposed amendment of Federal Rule 32(c)(3)(A) where “the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, 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.” See also ABA Minimum Standards (Sentencing Alternatives and Procedures) § 4.4(b). Note that in contrast to both the federal amendment proposal and the ABA recommendation, the rule makes the requirement of disclosure to counsel absolute, relying on the discretion of counsel to withhold from the defendant any portions of the report which the court might withhold from a defendant appearing pro se under the extraordinary circumstances test. To permit the defendant to challenge the basis for sentence, either in the trial court or on appeal, portions of the report not disclosed to him must be presented in summary form.

Rule 32(c)(4) is similar to ABA Minimum Standards (Sentencing Alternatives and Procedures) §§ 4.5, 5.4(b). The rule requires that sufficient time for verification and evaluation of the report be allowed to give the defendant a reasonable opportunity to decide which portions of the report he may wish to controvert. Although no express provision is made for the presentencing conference suggested by ABA Minimum Standards § 4.5 for the resolution of disputed issues in the report by stipulation under the court's supervision, the rule does not forbid such a procedure. If disputes cannot be resolved in advance, however, a full adversary hearing on them is required.

Rule 32(c)(5) provides for the return of all copies of the presentence report to the appropriate probation officer immediately upon the conclusion of proceedings. The purpose of this provision is to assure confidentiality of the report. See Federal Advisory Committee's Note, 48 F.R.D. 553, at 619. The rule speaks only to disclosure of the report during the criminal proceedings for which it was prepared. Subsequent disclosure to correction officials and others as permitted by law in the defendant's interest or otherwise is not precluded by the rule. See 28 V.S.A. §§ 204(b), (d); cf. discussion of Rule 32(c)(1) and disclosure above; see also ABA Minimum Standards (Sentencing Alternatives and Procedures) § 4.3; id. (Probation) § 2.2.

Rule 32(d) is taken from the federal rule. It is consistent with prior Vermont practice. See In re Newton, 125 Vt. 453, 218 A.2d 394 (1966); State v. Morse, supra. The rule distinguishes between motions to withdraw made prior to sentencing and those made after sentencing. In general, the federal courts have granted motions to withdraw before sentence with great liberality, allowing them where the reason is fair and just and the prosecution has not relied on the plea to its substantial prejudice. See 2 Wright, supra, § 538; ABA Minimum Standards (Pleas of Guilty) § 2.1(b); cf. In re Newton, supra. In view of the express provisions of Rule 11(e)(4) concerning withdrawal of a plea upon the rejection of a plea agreement, such liberality is clearly mandated under this rule prior to sentence. A more rigorous standard is embodied in the “manifest injustice” test to be applied after sentence. The state should not be subject to the expense and delay involved in the routine grant of a trial after sentencing. Where, however, there is evidence that the plea was not voluntary or not made with the advice of counsel, where the prosecution has breached a plea agreement, or where the requirements for taking the plea imposed under Rule 11 have not been complied with, the motion to withdraw should be allowed. See 2 Wright, supra, §§ 538, 539; ABA Minimum Standards § 2.1(a); cf. State v. Morse, supra. Most, if not all, grounds justifying withdrawal after sentence would also support a reversal on direct or collateral review. See Reporter's Notes to Rule 11(c), (d), (e)(6), (g). A guilty plea that is withdrawn is subsequently inadmissible against the defendant by virtue of Rule 11(e)(6) and the general law of evidence. See Reporter's Notes to Rule 11(e)(6).

Rule 32(e) incorporates the provisions of 28 V.S.A. §§ 201-255.

Rule 32(f) incorporates the provisions of 28 V.S.A. §§ 301-305. Those provisions would now appear to be constitutionally inadequate in light of their lack of a preliminary hearing to determine whether there is probable cause to believe that probation has been violated, as required by Gagnon v. Scarpelli, 411 U.S. 778 [93 S.Ct. 1756] (1973). Pending statutory amendment, constitutional difficulties might be mitigated by the use of the summons or arrest warrant provisions of Rule 4 if the probationer is to be apprehended under 28 V.S.A. § 301(1), or by treating the apprehension of the probationer under 28 V.S.A. § 301(2), (4), as an arrest without warrant, subject to the requirements of Rules 3 and 5.

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Rules Crim. Proc., Rule 32, VT R RCRP Rule 32
State court rules are current with amendments received through February 15, 2022.

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