forfeiture provision of the Organized Crime Control Act of 1970, Title IX, §1963, and the Comprehensive Drug Abuse Prevention and Control Act of 1970, Title II, §408(a)(2).

The assumption of the draft is that the amount of the interest or property subject to criminal forfeiture is an element of the offense to be alleged and proved. See Advisory Committee Note to rule 7(c)(2).

Although special verdict provisions are rare in criminal cases, they are not unknown. See *United States v. Spock*, 416 F. 2d 165 (1st Cir. 1969), especially footnote 41 where authorities are listed.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The right of a party to have the jury polled is an ''undoubted right.'' *Humphries v. District of Columbia*, 174 U.S. 190, 194 (1899). Its purpose is to determine with certainty that ''each of the jurors approves of the verdict as returned; that no one has been coerced or induced to sign a verdict to which he does not fully assent.'' *Id.*

Currently, Rule 31(d) is silent on the precise method of polling the jury. Thus, a court in its discretion may conduct the poll collectively or individually. As one court has noted, although the prevailing view is that the method used is a matter within the discretion of the trial court, *United States v. Miller*, 59 F.3d 417, 420 (3d Cir. 1995) (citing cases), the preference, nonetheless of the appellate and trial courts, seems to favor individual polling. *Id.* (citing cases). That is the position taken in the American Bar Association Standards for Criminal Justice §15–4.5. Those sources favoring individual polling observe that conducting a poll of the jurors collectively saves little time and does not always adequately insure that an individual juror who has been forced to join the majority during deliberations will voice dissent from a collective response. On the other hand, an advantage to individual polling is the ''likelihood that it will discourage post-trial efforts to challenge the verdict on allegations of coercion on the part of some of the jurors.'' *Miller*, *Id.* at 420 (citing *Audette v. Isaksen Fishing Corp.*, 789 F.2d 956, 961, n. 6 (1st Cir. 1986)).

The Committee is persuaded by the authorities and practice that there are advantages of conducting an individual poll of the jurors. Thus, the rule requires that the jurors be polled individually when a polling is requested, or when polling is directed sua sponte by the court. The amendment, however, leaves to the court the discretion as to whether to conduct a separate poll for each defendant, each count of the indictment or complaint, or on other issues.

Changes Made to Rule 31 After Publication (''GAP Report''). The Committee changed the rule to require that any polling of the jury must be done before the jury is discharged and it incorporated suggested style changes submitted by the Style Subcommittee.

COMMITTEE NOTES ON RULES—2000 AMENDMENT

The rule is amended to reflect the creation of new Rule 32.2, which now governs criminal forfeiture procedures.

GAP Report—Rule 31. The Committee made no changes to the published draft amendment to Rule 31.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 31 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 31(b) has been amended to clarify that a jury may return partial verdicts, either as to multiple defendants or multiple counts, or both. *See, e.g., United States v. Cunningham*, 145 F.3d 1385, 1388–90 (D.C. Cir. 1998) (partial verdicts on multiple defendants and counts). No change in practice is intended.

TITLE VII. POST-CONVICTION PROCEDURES

Rule 32. Sentencing and Judgment

(a) [RESERVED.]

(b) TIME OF SENTENCING.

(1) *In General.* The court must impose sentence without unnecessary delay.

(2) *Changing Time Limits.* The court may, for good cause, change any time limits prescribed in this rule.

(c) PRESENTENCE INVESTIGATION.

(1) *Required Investigation.*

(A) *In General.* The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless:

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

(ii) 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.

(B) *Restitution.* If the law permits restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.

(2) *Interviewing the Defendant.* The probation officer who interviews a defendant as part of a presentence investigation must, on request, give the defendant's attorney notice and a reasonable opportunity to attend the interview.

(d) PRESENTENCE REPORT.

(1) *Applying the Advisory Sentencing Guidelines.* The presentence report must:

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

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

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

(D) identify any factor relevant to:

(i) the appropriate kind of sentence, or

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

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

(2) *Additional Information.* The presentence report must also contain the following:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

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

(B) information that assesses any financial, social, psychological, and medical impact on any victim;

(C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;

(D) when the law provides for restitution, information sufficient for a restitution order;

(E) if the court orders a study under 18 U.S.C. §3552(b), any resulting report and recommendation;

(F) a statement of whether the government seeks forfeiture under Rule 32.2 and any other law; and

(G) any other information that the court requires, including information relevant to the factors under 18 U.S.C. § 3553(a).

(3) *Exclusions*. The presentence report must exclude the following:

(A) any diagnoses that, if disclosed, might seriously disrupt a rehabilitation program;

(B) any sources of information obtained upon a promise of confidentiality; and

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

(e) DISCLOSING THE REPORT AND RECOMMENDATION.

(1) *Time to Disclose*. Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty.

(2) *Minimum Required Notice*. The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period.

(3) *Sentence Recommendation*. By local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence.

(f) OBJECTING TO THE REPORT.

(1) *Time to Object*. Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report.

(2) *Serving Objections*. An objecting party must provide a copy of its objections to the opposing party and to the probation officer.

(3) *Action on Objections*. After receiving objections, the probation officer may meet with the parties to discuss the objections. The probation officer may then investigate further and revise the presentence report as appropriate.

(g) SUBMITTING THE REPORT. At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them.

(h) NOTICE OF POSSIBLE DEPARTURE FROM SENTENCING GUIDELINES. 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.

(i) SENTENCING.

(1) *In General*. At sentencing, the court:

(A) must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report;

(B) must give to the defendant and an attorney for the government a written summary of—or summarize in camera—any information excluded from the presentence report under Rule 32(d)(3) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information;

(C) must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence; and

(D) may, for good cause, allow a party to make a new objection at any time before sentence is imposed.

(2) *Introducing Evidence; Producing a Statement*. The court may permit the parties to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)–(d) and (f) applies. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.

(3) *Court Determinations*. At sentencing, the court:

(A) may accept any undisputed portion of the presentence report as a finding of fact;

(B) must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and

(C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.

(4) *Opportunity to Speak*.

(A) *By a Party*. Before imposing sentence, the court must:

(i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;

(ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and

(iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

(B) *By a Victim*. Before imposing sentence, the court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard.

(C) *In Camera Proceedings*. Upon a party's motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).

(j) DEFENDANT'S RIGHT TO APPEAL.

(1) *Advice of a Right to Appeal*.

(A) *Appealing a Conviction*. If the defendant pleaded not guilty and was convicted, after sentencing the court must advise the defendant of the right to appeal the conviction.

(B) *Appealing a Sentence*. After sentencing—regardless of the defendant's plea—the court must advise the defendant of any right to appeal the sentence.

(C) *Appeal Costs*. The court must advise a defendant who is unable to pay appeal costs of the right to ask for permission to appeal in forma pauperis.

(2)*Clerk's Filing of Notice*. If the defendant so requests, the clerk must immediately prepare and file a notice of appeal on the defendant's behalf.

(k) JUDGMENT.

(1) *In General*. In the judgment of conviction, the court must set forth the plea, the jury verdict or the court's findings, the adjudication, and the sentence. If the defendant is found not guilty or is otherwise entitled to be discharged, the court must so order. The judge must sign the judgment, and the clerk must enter it.

(2) *Criminal Forfeiture*. Forfeiture procedures are governed by Rule 32.2.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 22, 1974, eff. Dec. 1, 1975; Pub. L. 94–64, §3(31)–(34), July 31, 1975, 89 Stat. 376; Apr. 30, 1979, eff. Aug. 1, 1979, and Dec. 1, 1980; Pub. L. 97–291, §3, Oct. 12, 1982, 96 Stat. 1249; Apr. 28, 1983, eff. Aug. 1, 1983; Pub. L. 98–473, title II, §215(a), Oct. 12, 1984, 98 Stat. 2014; Pub. L. 99–646, §25(a), Nov. 10, 1986, 100 Stat. 3597; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 1994, eff. Dec. 1, 1994; Pub. L. 103–322, title XXIII, §230101(b), Sept. 13, 1994, 108 Stat. 2078; Apr. 23, 1996, eff. Dec. 1, 1996; Pub. L. 104–132, title II, §207(a), Apr. 24, 1996, 110 Stat. 1236; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 30, 2007, eff. Dec. 1, 2007; Apr. 23, 2008, eff. Dec. 1, 2008; Mar. 26, 2009, eff. Dec. 1, 2009; Apr. 26, 2011, eff. Dec. 1, 2011.)

NOTES OF ADVISORY COMMITTEE ON RULES—1944

Note to Subdivision (a). This rule is substantially a restatement of existing procedure. Rule I of the Criminal Appeals Rules of 1933, 292 U.S. 661. See Rule 43 relating to the presence of the defendant.

Note to Subdivision (b). This rule is substantially a restatement of existing procedure. Rule I of the Criminal Appeals Rules of 1933, 292 U.S. 661.

Note to Subdivision (c). The purpose of this provision is to encourage and broaden the use of presentence investigations, which are now being utilized to good advantage in many cases. See, ''The Presentence Investigation'' published by Administrative Office of the United States Courts, Division of Probation.

Note to Subdivision (d). This rule modifies existing practice by abrogating the ten-day limitation on a motion for leave to withdraw a plea of guilty. See Rule II (4) of the Criminal Appeals Rules of 1933, 292 U.S. 661.

Note to Subdivision (e). See 18 U.S.C. 724 *et seq.* [now 3651 *et seq.*].

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

Subdivision (a)(1).—The amendment writes into the rule the holding of the Supreme Court that the court before imposing sentence must afford an opportunity to the defendant personally to speak in his own behalf. See *Green v. United States*, 365 U.S. 301 (1961); *Hill v. United States*, 368 U.S. 424 (1962). The amendment also provides an opportunity for counsel to speak on behalf of the defendant.

Subdivision (a)(2).—This amendment is a substantial revision and a relocation of the provision originally found in Rule 37(a)(2): ''When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant.'' The court is required to advise the defendant of his right to appeal in all cases which have gone to trial after plea of not guilty because situations arise in which a defendant represented by counsel at the trial is not adequately advised by such counsel of his right to appeal. Trial counsel may not regard his responsibility as extending beyond the time of imposition of sentence. The defendant may be removed from the courtroom immediately upon sentence and held in custody under circumstances which make it difficult for counsel to advise him. See, e.g., *Hodges v. United States*, 368 U.S. 139 (1961). Because indigent defendants are most likely to be without effective assistance of counsel at this point in the proceedings, it is also provided that defendants be notified of the right of a person without funds to apply for leave to appeal in forma pauperis. The provision is added here because this rule seems the most appropriate place to set forth a procedure to be followed by the court at the time of sentencing.

Subdivision (c)(2).—It is not a denial of due process of law for a court in sentencing to rely on a report of a presentence investigation without disclosing such report to the defendant or giving him an opportunity to rebut it. *Williams v. New York*, 337 U.S. 241 (1949); *Williams v. Oklahoma*, 358 U.S. 576 (1959). However, the question whether as a matter of policy the defendant should be accorded some opportunity to see and refute allegations made in such reports has been the subject of heated controversy. For arguments favoring disclosure, see Tappan, Crime, Justice, and Correction, 558 (1960); Model Penal Code, 54–55 (Tent. Draft No. 2, 1954); Thomsen, Confidentiality of the Presentence Report: A Middle Position, 28 Fed.Prob., March 1964, p. 8; Wyzanski, A Trial Judge's Freedom and Responsibility, 65 Harv.L.Rev. 1281, 1291–2 (1952); Note, Employment of Social Investigation Reports in Criminal and Juvenile Proceedings, 58 Colum.L.Rev. 702 (1958); cf. Kadish, The Advocate and the Expert: Counsel in the Peno-Correctional Process, 45 Minn.L.Rev. 803, 806, (1961). For arguments opposing disclosure, see Barnett and Gronewold, Confidentiality of the Presentence Report, 26 Fed.Prob. March 1962, p. 26; Judicial Conference Committee on Administration of the Probation System, Judicial Opinion on Proposed Change in Rule 32(c) of the Federal Rules of Criminal Procedure—a Survey (1964); Keve, The Probation Officer Investigates, 6–15 (1960); Parsons, The Presentence Investigation Report Must be Preserved as a Confidential Document, 28 Fed.Prob. March 1964, p. 3; Sharp, The Confidential Nature of Presentence Reports, 5 Cath.U.L.Rev. 127 (1955); Wilson, A New Arena is Emerging to Test the Confidentiality of Presentence Reports, 25 Fed.Prob. Dec. 1961, p. 6; Federal Judge's Views on Probation Practices, 24 Fed.Prob. March 1960, p. 10.

In a few jurisdictions the defendant is given a right of access to the presentence report. In England and California a copy of the report is given to the defendant in every case. English Criminal Justice Act of 1948, 11 & 12 Geo. 6, c. 58, §43; Cal.Pen.C. §1203. In Alabama the defendant has a right to inspect the report. Ala. Code, Title 42, §23. In Ohio and Virginia the probation officer reports in open court and the defendant is given the right to examine him on his report. Ohio Rev. Code, §2947.06; Va. Code, §53–278.1. The Minnesota Criminal Code of 1963, §609.115(4), provides that any presentence report ''shall be open for inspection by the prosecuting attorney and the defendant's attorney prior to sentence and on the request of either of them a summary hearing in chambers shall be held on any matter brought in issue, but confidential sources of information shall not be disclosed unless the court otherwise directs.'' Cf. Model Penal Code §7.07(5) (P.O.D. 1962): ''Before imposing sentence, the Court shall advise the defendant or

his counsel of the factual contents and the conclusions of any presentence investigation or psychiatric examination and afford fair opportunity, if the defendant so requests, to controvert them. The sources of confidential information need not, however, be disclosed.''

Practice in the federal courts is mixed, with a substantial minority of judges permitting disclosure while most deny it. See the recent survey prepared for the Judicial Conference of the District of Columbia by the Junior Bar Section of the Bar Association of the District of Columbia, reported in Conference Papers on Discovery in Federal Criminal Cases, 33 F.R.D. 101, 125–127 (1963). See also Gronewold, Presentence Investigation Practices in the Federal Probation System, Fed.Prob. Sept. 1958, pp. 27, 31. For divergent judicial opinions see *Smith v. United States*, 223 F.2d 750, 754 (5th Cir. 1955) (supporting disclosure); *United States v. Durham*, 181 F.Supp. 503 (D.D.C. 1960) (supporting secrecy).

Substantial objections to compelling disclosure in every case have been advanced by federal judges, including many who in practice often disclose all or parts of presentence reports. See Judicial Conference Committee on the Administration of the Probation System, Judicial Opinion on Proposed Change in Rule 32(c) of the Federal Rules of Criminal Procedure—A Survey (1964). Hence, the amendment goes no further than to make it clear that courts may disclose all or part of the presentence report to the defendant or to his counsel. It is hoped that courts will make increasing use of their discretion to disclose so that defendants generally may be given full opportunity to rebut or explain facts in presentence reports which will be material factors in determining sentences. For a description of such a practice in one district, see Thomsen, Confidentiality of the Presentence Report: A Middle Position, 28 Fed.Prob., March 1964, p. 8.

It is also provided that any material disclosed to the defendant or his counsel shall be disclosed to the attorney for the government. Such disclosure will permit the government to participate in the resolution of any factual questions raised by the defendant.

Subdivision (f).—This new subdivision writes into the rule the procedure which the cases have derived from the provision in 18 U.S.C. §3653 that a person arrested for violation of probation ''shall be taken before the court'' and that thereupon the court may revoke the probation. See *Escoe v. Zerbst*, 295 U.S. 490 (1935); *Brown v. United States*, 236 F.2d 253 (9th Cir. 1956) certiorari denied 356 U.S. 922 (1958). Compare Model Penal Code §301.4 (P.O.D. 1962); Hink, The Application of Constitutional Standards of Protection to Probation, 29 U.Chi.L.Rev. 483 (1962).

NOTES OF ADVISORY COMMITTEE ON RULES—1972 AMENDMENT

Subdivision (b)(2) is new. It is intended to provide procedural implementation of the recently enacted criminal forfeiture provisions of the Organized Crime Control Act of 1970, Title IX, §1963, and the Comprehensive Drug Abuse Prevention and Control Act of 1970, Title II, §408(a)(2).

18 U.S.C. §1963(c) provides for property seizure and disposition. In part it states:

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper.

Although not specifically provided for in the Comprehensive Drug Abuse Prevention and Control Act of 1970, the provision of Title II, §408(a)(2) forfeiting ''profits'' or ''interest'' will need to be implemented procedurally, and therefore new rule 32(b)(2) will be applicable also to that legislation.

For a brief discussion of the procedural implications of a criminal forfeiture, see Advisory Committee Note to rule 7(c)(2).

NOTES OF ADVISORY COMMITTEE ON RULES—1974 AMENDMENT

Subdivision (a)(1) is amended by deleting the reference to commitment or release pending sentencing. This issue is dealt with explicitly in the proposed revision of rule 46(c).

Subdivision (a)(2) is amended to make clear that there is no duty on the court to advise the defendant of the right to appeal after sentence is imposed following a plea of guilty or nolo contendere.

To require the court to advise the defendant of a right to appeal after a plea of guilty, accepted pursuant to the increasingly stringent requirements of rule 11, is likely to be confusing to the defendant. See American Bar Association Standards Relating to Criminal Appeals §2.1(b) (Approved Draft, 1970), limiting the court's duty to advice to ''contested cases.''

The Advisory Committee is of the opinion that such advice, following a sentence imposed after a plea of guilty, will merely tend to build false hopes and encourage frivolous appeals, with the attendant expense to the defendant or the taxpayers.

Former rule 32(a)(2) imposes a duty only upon conviction after ''trial on a plea of not guilty.'' The few federal cases dealing with the question have interpreted rule 32(a)(2) to say that the court has no duty to advise defendant of his right to appeal after conviction following a guilty plea. *Burton v. United States*, 307 F.Supp. 448, 450 (D.Ariz. 1970); *Alaway v. United States*, 280 F.Supp. 326, 336 (C.D.Calif. 1968); *Crow v. United States*, 397 F.2d 284, 285 (10th Cir. 1968).

Prior to the 1966 amendment of rule 32, the court's duty was even more limited. At that time [rule 37(a)(2)] the court's duty to advise was limited to those situations in which sentence was imposed after trial upon a not guilty plea of a defendant not represented by counsel. 8A J. Moore, Federal Practice ¶32.01[3] (2d ed. Cipes 1969); C. Wright, Federal Practice and Procedure: Criminal §528 (1969); 5 L. Orfield, Criminal Procedure Under the Federal Rules §32:11 (1967).

With respect to appeals in forma pauperis, see appellate rule 24.

Subdivision (c)(1) makes clear that a presentence report is required except when the court otherwise directs for reasons stated of record. The requirement of reasons on the record for not having a presentence report is intended to make clear that such a report ought to be routinely required except in cases where there is a reason for not doing so. The presentence report is of great value for correctional purposes and will serve as a valuable aid in reviewing sentences to the extent that sentence review may be authorized by future rule change. For an analysis of the current rule as it relates to the situation in which a presentence investigation is required, see C. Wright, Federal Practice and Procedure: Criminal §522 (1969); 8A J. Moore, Federal Practice ¶ 32.03[1] (2d ed. Cipes 1969).

Subdivision (c)(1) is also changed to permit the judge, after obtaining defendant's consent, to see the presentence report in order to decide whether to accept a plea agreement, and also to expedite the imposition of sentence in a case in which the defendant has indicated that he may plead guilty or nolo contendere.

Former subdivision (c)(1) provides that ''The report shall not be submitted to the court * * * unless the defendant has pleaded guilty * * *.'' This precludes a judge from seeing a presentence report prior to the acceptance of the plea of guilty. L. Orfield, Criminal Procedure Under the Federal Rules §32:35 (1967); 8A J. Moore, Federal Practice ¶32.03[2], p. 32–22 (2d ed. Cipes 1969); C. Wright, Federal Practice and Procedure: Criminal §523, p. 392 (1969); *Gregg v. United States*, 394 U.S. 489, 89 S.Ct. 1134, 22 L.Ed.2d 442 (1969).

Because many plea agreements will deal with the sentence to be imposed, it will be important, under rule 11, for the judge to have access to sentencing information as a basis for deciding whether the plea agreement is an appropriate one.

It has been suggested that the problem be dealt with by allowing the judge to indicate approval of the plea

agreement subject to the condition that the information in the presentence report is consistent with what he has been told about the case by counsel. See American Bar Association, Standards Relating to Pleas of Guilty §3.3 (Approved Draft, 1963); President's Commission on Law Enforcement and Administration of Justice. The Challenge of Crime in a Free Society 136 (1967).

Allowing the judge to see the presentence report prior to his decision as to whether to accept the plea agreement is, in the view of the Advisory Committee, preferable to a conditional acceptance of the plea. See Enker, Perspectives on Plea Bargaining, Appendix A of President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts at 117 (1967). It enables the judge to have all of the information available to him at the time he is called upon to decide whether or not to accept the plea of guilty and thus avoids the necessity of a subsequent appearance whenever the information is such that the judge decides to reject the plea agreement.

There is presently authority to have a presentence report *prepared* prior to the acceptance of the plea of guilty. In *Gregg v. United States*, 394 U.S. 489, 491, 89 S.Ct. 1134 22 L.Ed.2d 442 (1969), the court said that the ''language [of rule 32] clearly permits the preparation of a presentence report before guilty plea or conviction * * *.'' In footnote 3 the court said:

The history of the rule confirms this interpretation. The first Preliminary Draft of the rule would have required the consent of the defendant or his attorney to commence the investigation before the determination of guilt. Advisory Committee on Rules of Criminal Procedure, Fed.Rules Crim.Proc., Preliminary Draft 130, 133 (1943). The Second Preliminary Draft omitted this requirement and imposed no limitation on the time when the report could be made and submitted to the court. Advisory Committee on Rules of Criminal Procedure, Fed.Rules Crim.Proc. Second Preliminary Draft 126–128 (1944). The third and final draft, which was adopted as Rule 32, was evidently a compromise between those who opposed any time limitation, and those who preferred that the entire investigation be conducted after determination of guilt. See 5 L. Orfield, Criminal Procedure Under the Federal Rules §32.2 (1967).

Where the judge rejects the plea agreement after seeing the presentence report, he should be free to recuse himself from later presiding over the trial of the case. This is left to the discretion of the judge. There are instances involving prior convictions where a judge may have seen a presentence report, yet can properly try a case on a plea of not guilty. *Webster v. United States*, 330 F.Supp. 1080 (D.C., 1971). Unlike the situation in *Gregg v. United States*, subdivision (e)(3) provides for disclosure of the presentence report to the defendant, and this will enable counsel to know whether the information thus made available to the judge is likely to be prejudicial. Presently trial judges who decide pretrial motions to suppress illegally obtained evidence are not, for that reason alone, precluded from presiding at a later trial.

Subdivision (c)(3)(A) requires disclosure of presentence information to the defense, exclusive of any recommendation of sentence. The court is required to disclose the report to defendant or his counsel unless the court is of the opinion that disclosure would seriously interfere with rehabilitation, compromise confidentiality, or create risk of harm to the defendant or others.

Any recommendation as to sentence should not be disclosed as it may impair the effectiveness of the probation officer if the defendant is under supervision on probation or parole.

The issue of disclosure of presentence information to the defense has been the subject of recommendations from the Advisory Committee in 1944, 1962, 1964, and 1966. The history is dealt with in considerable detail in C. Wright, Federal Practice and Procedure: Criminal §524 (1969), and 8A J. Moore, Federal Practice ¶32.03[4] (2d ed. Cipes 1969).

In recent years, three prestigious organizations have recommended that the report be disclosed to the defense. See American Bar Association, Standards Relating to Sentencing Alternatives and Procedures §4.4 (Approved Draft, 1968); American Law Institute Model Penal Code §7.07(5) (P.O.D. 1962); National Council on Crime and Delinquency, Model Sentencing Act §4 (1963). This is also the recommendation of the President's Commission on Law Enforcement and Administration of Justice. The Challenge of Crime in a Free Society (1967) at p. 145.

In the absence of compelling reasons for nondisclosure of special information, the defendant and his counsel should be permitted to examine the entire presentence report.

The arguments for and against disclosure are well known and are effectively set forth in American Bar Association Standards Relating to Sentencing Alternatives and Procedures, §4.4 Commentary at pp. 214–225 (Approved Draft, 1968). See also Lehrich, The Use and Disclosure of Presentence Reports in the United States, 47 F.R.D. 225 (1969).

A careful account of existing practices in Detroit, Michigan and Milwaukee, Wisconsin is found in R. Dawson, Sentencing (1969).

Most members of the federal judiciary have, in the past, opposed compulsory disclosure. See the view of District Judge Edwin M. Stanley, American Bar Association Standards Relating to Sentencing Alternatives and Procedures. Appendix A. (Appendix A also contains the results of a survey of all federal judges showing that the clear majority opposed disclosure.)

The Advisory Committee is of the view that accuracy of sentencing information is important not only to the defendant but also to effective correctional treatment of a convicted offender. The best way of insuring accuracy is disclosure with an opportunity for the defendant and counsel to point out to the court information thought by the defense to be inaccurate, incomplete, or otherwise misleading. Experience in jurisdictions which require disclosure does not lend support to the argument that disclosure will result in less complete presentence reports or the argument that sentencing procedures will become unnecessarily protracted. It is not intended that the probation officer would be subjected to any rigorous examination by defense counsel, or that he will even be sworn to testify. The proceedings may be very informal in nature unless the court orders a full hearing.

Subdivision (c)(3)(B) provides for situations in which the sentencing judge believes that disclosure should not be made under the criteria set forth in subdivision (c)(3)(A). He may disclose only a summary of that factual information ''to be relied on in determining sentence.'' This is similar to the proposal of the American Bar Association Standards Relating to Sentencing Alternatives and Procedures §4.4(b) and Commentary at pp. 216–224.

Subdivision (c)(3)(D) provides for the return of disclosed presentence reports to insure that they do not become available to unauthorized persons. See National Council on Crime and Delinquency, Model Sentencing Act §4 (1963): ''Such reports shall be part of the record but shall be sealed and opened only on order of the court.''

Subdivision (c)(3)(E) makes clear that diagnostic studies under 18 U.S.C. §§4208(b), 5010(c), or 5034 are covered by this rule and also that 18 U.S.C. §4252 is included within the disclosure provisions of subdivision (c). Section 4252 provides for the presentence examination of an ''eligible offender'' who is believed to be an addict to determine whether ''he is an addict and is likely to be rehabilitated through treatment.''

Both the Organized Crime Control Act of 1970 [§3775(b)] and the Comprehensive Drug Abuse Prevention and Control Act of 1970 [§409(b)] have special provisions for presentence investigation in the implementation of the dangerous special offender provision. It is however, unnecessary to incorporate them by reference in rule 32 because each contains a specific provision re-

quiring disclosure of the presentence report. The judge does have authority to withhold some information ''in extraordinary cases'' provided notice is given the parties and the court's reasons for withholding information are made part of the record.

Subdivision (e) is amended to clarify the meaning.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 94–247; 1975 AMENDMENT

A. Amendments Proposed by the Supreme Court Rule 32 of the Federal Rules of Criminal Procedure deals with sentencing matters.

Proposed subdivision (a)(2) provides that the court is not dutybound to advise the defendant of a right to appeal when the sentence is imposed following a plea of guilty or nolo contendere.

Proposed subdivision (e) provides that the probation service must make a presentence investigation and report unless the court orders otherwise ''for reasons stated on the record.'' The presentence report will not be submitted to the court until after the defendant pleads nolo contendere or guilty, or is found guilty, unless the defendant consents in writing. Upon the defendant's request, the court must permit the defendant to read the presentence report, except for the recommendation as to sentence. However, the court may decline to let the defendant read the report if it contains (a) diagnostic opinion that might seriously disrupt a rehabilitation program, (b) sources of information obtained upon a promise of confidentiality, or (c) any other information that, if disclosed, might result in harm to the defendant or other persons. The court must give the defendant an opportunity to comment upon the presentence report. If the court decides that the defendant should not see the report, then it must provide the defendant, orally or in writing, a summary of the factual information in the report upon which it is relying in determining sentence. No party may keep the report or make copies of it.

B. Committee Action. The Committee added language to subdivision (a)(1) to provide that the attorney for the government may speak to the court at the time of sentencing. The language does not require that the attorney for the government speak but permits him to do so if he wishes.

The Committee recast the language of subdivision (c)(1), which defines when presentence reports must be obtained. The Committee's provision makes it more difficult to dispense with a presentence report. It requires that a presentence report be made unless (a) the defendant waives it, or (b) the court finds that the record contains sufficient information to enable the meaningful exercise of sentencing discretion and explains this finding on the record. The Committee believes that presentence reports are important aids to sentencing and should not be dispensed with easily.

The Committee added language to subdivision (c)(3)(A) that permits a defendant to offer testimony or information to rebut alleged factual inaccuracies in the presentence report. Since the presentence report is to be used by the court in imposing sentence and since the consequence of any significant inaccuracy can be very serious to the defendant, the Committee believes that it is essential that the presentence report be completely accurate in every material respect. The Committee's addition to subdivision (c)(3)(A) will help insure the accuracy of the presentence report.

The Committee added language to subdivision (c)(3)(D) that gives the court the discretion to permit either the prosecutor or the defense counsel to retain a copy of the presentence report. There may be situations when it would be appropriate for either or both of the parties to retain the presentence report. The Committee believes that the rule should give the court the discretion in such situations to permit the parties to retain their copies.

NOTES OF ADVISORY COMMITTEE ON RULES—1979 AMENDMENT

Note to Subdivision (c)(3)(E). The amendment to rule 32(c)(3)(E) is necessary in light of recent changes in the applicable statutes.

Note to Subdivision (f). This subdivision is abrogated. The subject matter is now dealt with in greater detail in proposed new rule 32.1.

NOTES OF ADVISORY COMMITTEE ON RULES—1983 AMENDMENT

Note to Subdivision (a)(1). Subdivision (a)(1) has been amended so as to impose upon the sentencing court the additional obligation of determining that the defendant and his counsel have had an opportunity to read the presentence investigation report or summary thereof. This change is consistent with the amendment of subdivision (c)(3), discussed below, providing for disclosure of the report (or, in the circumstances indicated, a summary thereof) to *both* defendant *and* his counsel *without request*. This amendment is also consistent with the findings of a recent empirical study that under present rule 32 meaningful disclosure is often lacking and ''that some form of judicial prodding is necessary to achieve full disclosure.'' Fennell & Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 Harv.L.Rev. 1613, 1651 (1980):

> The defendant's interest in an accurate and reliable presentence report does not cease with the imposition of sentence. Rather, these interests are implicated at later stages in the correctional process by the continued use of the presentence report as a basic source of information in the handling of the defendant. If the defendant is incarcerated, the presentence report accompanies him to the correctional institution and provides background information for the Bureau of Prisons' classification summary, which, in turn, determines the defendant's classification within the facility, his ability to obtain furloughs, and the choice of treatment programs. The presentence report also plays a crucial role during parole determination. Section 4207 of the Parole Commission and Reorganization Act directs the parole hearing examiner to consider, if available, the presentence report as well as other records concerning the prisoner. In addition to its general use as background at the parole hearing, the presentence report serves as the primary source of information for calculating the inmate's parole guideline score.

Though it is thus important that the defendant be aware *now* of all these potential uses, the Advisory Committee has considered but not adopted a requirement that the trial judge specifically advise the defendant of these matters. The Committee believes that this additional burden should not be placed upon the trial judge, and that the problem is best dealt with by a form attached to the presentence report, to be signed by the defendant, advising of these potential uses of the report. This suggestion has been forwarded to the Probation Committee of the Judicial Conference.

Note to Subdivision (c)(3)(A), (B) & (C). Three important changes are made in subdivision (c)(3): disclosure of the presentence report is no longer limited to those situations in which a request is made; disclosure is now provided to both defendant and his counsel; and disclosure is now required a reasonable time before sentencing. These changes have been prompted by findings in a recent empirical study that the extent and nature of disclosure of the presentence investigation report in federal courts under current rule 32 is insufficient to ensure accuracy of sentencing information. In 14 districts, disclosure is made only on request, and such requests are received in fewer than 50% of the cases. Forty-two of 92 probation offices do not provide automatic notice to defendant or counsel of the availability of the report; in 18 districts, a majority of the judges do not provide any notice of the availability of the re-

port, and in 20 districts such notice is given only on the day of sentencing. In 28 districts, the report itself is not disclosed until the day of sentencing in a majority of cases. Thirty-one courts generally disclose the report only to counsel and not to the defendant, unless the defendant makes a specific request. Only 13 districts disclose the presentence report to both defendant and counsel prior to the day of sentencing in 90% or more of the cases. Fennell & Hall, supra, at 1640–49.

These findings make it clear that rule 32 in its present form is failing to fulfill its purpose. Unless disclosure is made sufficiently in advance of sentencing to permit the assertion and resolution of claims of inaccuracy prior to the sentencing hearing, the submission of additional information by the defendant when appropriate, and informed comment on the presentence report, the purpose of promoting accuracy by permitting the defendant to contest erroneous information is defeated. Similarly, if the report is not made available to the defendant and his counsel in a timely fashion, and if disclosure is only made on request, their opportunity to review the report may be inadequate. Finally, the failure to disclose the report to the defendant, or to require counsel to review the report with the defendant, significantly reduces the likelihood that false statements will be discovered, as much of the content of the presentence report will ordinarily be outside the knowledge of counsel.

The additional change to subdivision (c)(3)(C) is intended to make it clear that the government's right to disclosure does not depend upon whether the defendant elects to exercise his right to disclosure.

Note to Subdivision (c)(3)(D). Subdivision (c)(3)(D) is entirely new. It requires the sentencing court, as to each matter controverted, either to make a finding as to the accuracy of the challenged factual proposition or to determine that no reliance will be placed on that proposition at the time of sentencing. This new provision also requires that a record of this action accompany any copy of the report later made available to the Bureau of Prisons or Parole Commission.

As noted above, the Bureau of Prisons and the Parole Commission make substantial use of the presentence investigation report. Under current practice, this can result in reliance upon assertions of fact in the report in the making of critical determinations relating to custody or parole. For example, it is possible that the Bureau or Commission, in the course of reaching a decision on such matters as institution assignment, eligibility for programs, or computation of salient factors, will place great reliance upon factual assertions in the report which are in fact untrue and which remained unchallenged at the time of the sentencing because defendant or his counsel deemed the error unimportant in the sentencing context (e.g., where the sentence was expected to conform to an earlier plea agreement, or where the judge said he would disregard certain controverted matter in setting the sentence).

The first sentence of new subdivision (c)(3)(D) is intended to ensure that a record is made as to exactly what resolution occurred as to controverted matter. The second sentence is intended to ensure that this record comes to the attention of the Bureau or Commission when these agencies utilize the presentence investigation report. In current practice, ''less than one-fourth of the district courts (twenty of ninety-two) communicate to the correctional agencies the defendant's challenges to information in the presentence report and the resolution of these challenges.'' Fennell & Hall, supra, at 1680.

New subdivision (c)(3)(D) does not impose an onerous burden. It does not even require the preparation of a transcript. As is now the practice in some courts, these findings and determinations can be simply entered onto a form which is then appended to the report.

Note to Subdivision (c)(3)(E) & (F). Former subdivisions (c)(3)(D) and (E) have been renumbered as (c)(3)(E) and (F). The only change is in the former, necessitated because disclosure is now to defendant and his counsel.

The issue of access to the presentence report at the institution was discussed by the Advisory Committee, but no action was taken on that matter because it was believed to be beyond the scope of the rule-making power. Rule 32 in its present form does not speak to this issue, and thus the Bureau of Prisons and the Parole Commission are free to make provision for disclosure to inmates and their counsel.

Note to Subdivision (d). The amendment to Rule 32(d) is intended to clarify (i) the standard applicable to plea withdrawal under this rule, and (ii) the circumstances under which the appropriate avenue of relief is other than a withdrawal motion under this rule. Both of these matters have been the source of considerable confusion under the present rule. In its present form, the rule declares that a motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed, but then states the standard for permitting withdrawal after sentence. In fact, ''there is no limitation upon the time within which relief thereunder may, after sentencing, be sought.'' *United States v. Watson*, 548 F.2d 1058 (D.C.Cir. 1977). It has been critically stated that ''the Rule offers little guidance as to the applicable standard for a pre-sentence withdrawal of plea,'' *United States v. Michaelson*, 552 F.2d 472 (2d Cir. 1977), and that as a result ''the contours of [the presentence] standard are not easily defined.'' *Bruce v. United States*, 379 F.2d 113 (D.C.Cir. 1967).

By replacing the ''manifest injustice'' standard with a requirement that, in cases to which it applied, the defendant must (unless taking a direct appeal) proceed under 28 U.S.C. §2255, the amendment avoids language which has been a cause of unnecessary confusion. Under the amendment, a defendant who proceeds too late to come under the more generous ''fair and just reason'' standard must seek relief under §2255, meaning the applicable standard is that stated in *Hill v. United States*, 368 U.S. 424 (1962): ''a fundamental defect which inherently results in a complete miscarriage of justice'' or ''an omission inconsistent with the rudimentary demands of fair procedure.''

Some authority is to be found to the effect that the rule 32(d) ''manifest injustice'' standard is indistinguishable from the §2255 standard. In *United States v. Hamilton*, 553 F.2d 63 (10th Cir. 1977), for example, the court, after first concluding defendant was not entitled to relief under the §2255 ''miscarriage of justice'' test, then held that ''[n]othing is to be gained by the invocation of Rule 32(d)'' and its manifest injustice'' standard. Some courts, however, have indicated that the rule 32(d) standard provides a somewhat broader basis for relief than §2255. *United States v. Dabdoub-Diaz*, 599 F.2d 96 (5th Cir. 1979); *United States v. Watson*, 548 F.2d 1058 (D.C.Cir. 1977): *Meyer v. United States*, 424 F.2d 1181 (8th Cir.1970); *United States v. Kent*, 397 F.2d 446 (7th Cir. 1968). It is noteworthy, however, that in *Dabdoub-Diaz, Meyer* and *Kent* the defendant did not prevail under either §2255 or Rule 32(d), and that in *Watson*, though the §2255 case was remanded for consideration as a 32(d) motion, defendant's complaint (that he was not advised of the special parole term, though the sentence he received did not exceed that he was warned about by the court) was one as to which relief had been denied even upon direct appeal from the conviction. *United States v. Peters*, No. 77–1700 (4th Cir. Dec. 22, 1978).

Indeed, it may more generally be said that the results in §2255 and 32(d) guilty plea cases have been for the most part the same. Relief has often been granted or recognized as available via either of these routes for essentially the same reasons: that there exists a complete constitutional bar to conviction on the offense charged, *Brooks v. United States*, 424 F.2d 425 (5th Cir. 1970) (§2255), *United States v. Bluso*, 519 F.2d 473 (4th Cir. 1975) (Rule 32); that the defendant was incompetent at the time of his plea, *United States v. Masthers*, 539 F.2d 721 (D.C.Cir. 1976) (§2255), *Kienlen v. United States*, 379 F.2d 20 (10th Cir. 1967) (Rule 32); and that the bargain the prosecutor made with defendant was not kept, *Walters v. Harris*, 460 F.2d 988 (4th Cir. 1972) (§2255), *United States v. Hawthorne*, 502 F.2d 1183 (3rd Cir. 1974) (Rule 32). Perhaps even more significant is the fact that relief has often been denied under like circumstances which-

ever of the two procedures was used: a mere technical violation of Rule 11, *United States v. Timmreck*, 441 U.S. 780 (1979) (§2255), *United States v. Saft*, 558 F.2d 1073 (2d Cir. 1977) (Rule 32); the mere fact defendants expected a lower sentence, *United States v. White*, 572 F.2d 1007 (4th Cir. 1978) (§2255), *Masciola v. United States*, 469 F.2d 1057 (3rd Cir. 1972) (Rule 32); or mere familial coercion, *Wojtowicz v. United States*, 550 F.2d 786 (2d Cir. 1977) (§2255), *United States v. Bartoli*, 572 F.2d 188 (8th Cir. 1978) (Rule 32).

The one clear instance in which a Rule 32(d) attack might prevail when a §2255 challenge would not is present in those circuits which have reached the questionable result that post-sentence relief under 32(d) is available not merely upon a showing of a ''manifest injustice'' but also for any deviation from literal compliance with Rule 11. *United States v. Cantor*, 469 F.2d 435 (3d Cir. 1972). See Advisory Committee Note to Rule 11(h), noting the unsoundness of that position.

The change in Rule 32(d), therefore, is at best a minor one in terms of how post-sentence motions to withdraw pleas will be decided. It avoids the confusion which now obtains as to whether a §2255 petition must be assumed to also be a 32(d) motion and, if so, whether this bears significantly upon how the matter should be decided. See, e.g., *United States v. Watson*, supra. It also avoids the present undesirable situation in which the mere selection of one of two highly similar avenues of relief, rule 32(d) or §2255, may have significant procedural consequences, such as whether the government can take an appeal from the district court's adverse ruling (possible under §2255 only). Moreover, because §2255 and Rule 32(d) are properly characterized as the ''two principal procedures for collateral attack of a federal plea conviction,'' Borman, *The Hidden Right to Direct Appeal From a Federal Conviction*, 64 Cornell L.Rev. 319, 327 (1979), this amendment is also in keeping with the proposition underlying the Supreme Court's decision in *United States v. Timmreck*, supra, namely, that ''the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas.'' The amendment is likewise consistent with ALI Code of Pre-Arraignment Procedure §350.9 (1975) (''Allegations of noncompliance with the procedures provided in Article 350 shall not be a basis for review of a conviction after the appeal period for such conviction has expired, unless such review is required by the Constitution of the United States or of this State or otherwise by the law of this State other than Article 350''); ABA Standards Relating to the Administration of Criminal Justice §14–2.1 (2d ed. 1978) (using ''manifest injustice'' standard, but listing six specific illustrations each of which would be basis for relief under §2255); Unif.R.Crim.P. 444(e) (Approved Draft, 1974) (using ''interest of justice'' test, but listing five specific illustrations each of which would be basis for relief under §2255).

The first sentence of the amended rule incorporates the ''fair and just'' standard which the federal courts, relying upon dictum in *Kercheval v. United States*, 274 U.S. 220 (1927), have consistently applied to presentence motions. See, e.g., *United States v. Strauss*, 563 F.2d 127 (4th Cir. 1977); *United States v. Bradin*, 535 F.2d 1039 (8th Cir. 1976); *United States v. Barker*, 514 F.2d 208 (D.C.Cir. 1975). Under the rule as amended, it is made clear that the defendant has the burden of showing a ''fair and just'' reason for withdrawal of the plea. This is consistent with the prevailing view, which is that ''the defendant has the burden of satisfying the trial judge that there are valid grounds for withdrawal,'' see *United States v. Michaelson*, supra, and cases cited therein. (Illustrative of a reason which would meet this test but would likely fall short of the §2255 test is where the defendant now wants to pursue a certain defense which he for good reason did not put forward earlier, *United States v. Barker*, supra.)

Although ''the terms 'fair and just' lack any pretense of scientific exactness,'' *United States v. Barker*, supra, guidelines have emerged in the appellate cases for applying this standard. Whether the movant has asserted his legal innocence is an important factor to be weighed, *United States v. Joslin*, 434 F.2d 526 (D.C.Cir. 1970), as is the reason why the defenses were not put forward at the time of original pleading. *United States v. Needles*, 472 F.2d 652 (2d Cir. 1973). The amount of time which has passed between the plea and the motion must also be taken into account.

> A swift change of heart is itself strong indication that the plea was entered in haste and confusion * * *. By contrast, if the defendant has long delayed his withdrawal motion, and has had the full benefit of competent counsel at all times, the reasons given to support withdrawal must have considerably more force.

United States v. Barker, supra.

If the defendant establishes such a reason, it is then appropriate to consider whether the government would be prejudiced by withdrawal of the plea. Substantial prejudice may be present for a variety of reasons. See *United States v. Jerry*, 487 F.2d 600 (3d Cir. 1973) (physical evidence had been discarded); *United States v. Vasquez-Velasco*, 471 F.2d 294 (9th Cir. 1973) (death of chief government witness); *United States v. Lombardozzi*, 436 F.2d 878 (2d Cir. 1971) (other defendants with whom defendant had been joined for trial had already been tried in a lengthy trial); *Farnsworth v. Sanford*, 115 F.2d 375 (5th Cir. 1940) (prosecution had dismissed 52 witnesses who had come from all over the country and from overseas bases).

There is currently some disparity in the manner in which presentence motions to withdraw a guilty plea are dealt with. Some courts proceed as if any desire to withdraw the plea before sentence is ''fair and just'' so long as the government fails to establish that it would be prejudiced by the withdrawal. Illustrative is *United States v. Savage*, 561 F.2d 554 (4th Cir. 1977), where the defendant pleaded guilty pursuant to a plea agreement that the government would recommend a sentence of 5 years. At the sentencing hearing, the trial judge indicated his unwillingness to follow the government's recommendation, so the defendant moved to withdraw his plea. That motion was denied. On appeal, the court held that there had been no violation of Rule 11, in that refusal to accept the government's recommendation does not constitute a rejection of the plea agreement. But the court then proceeded to hold that absent any showing of prejudice by the government, ''the defendant should be allowed to withdraw his plea''; only upon such a showing by the government must the court ''weigh the defendant's reasons for seeking to withdraw his plea against the prejudice which the government will suffer.'' The other view is that there is no occasion to inquire into the matter of prejudice unless the defendant first shows a good reason for being allowed to withdraw his plea. As stated in *United States v. Saft*, 558 F.2d 1073 (2d Cir. 1977): ''The Government is not required to show prejudice when a defendant has shown no sufficient grounds for permitting withdrawal of a guilty plea, although such prejudice may be considered by the district court in exercising its discretion.'' The second sentence of the amended rule, by requiring that the defendant show a ''fair and just'' reason, adopts the *Saft* position and rejects that taken in *Savage*.

The *Savage* position, as later articulated in *United States v. Strauss*, supra, is that the ''sounder view, supported by both the language of the rule and by the reasons for it, would be to allow withdrawal of the plea prior to sentencing unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea.'' (Quoting 2 C. Wright, Federal Practice and Procedure §538, at 474–75 (1969). Although that position may once have been sound, this is no longer the case in light of the recent revisions of Rule 11. Rule 11 now provides for the placing of plea agreements on the record, for full inquiry into the voluntariness of the plea, for detailed advice to the defendant concerning his rights and the consequences of his plea and a determination that the defendant understands these matters, and for a determination of the accuracy of the plea. Given the great care with which pleas are taken under this re-

vised Rule 11, there is no reason to view pleas so taken as merely ''tentative,'' subject to withdrawal before sentence whenever the government cannot establish prejudice.

> Were withdrawal automatic in every case where the defendant decided to alter his tactics and present his theory of the case to the jury, the guilty plea would become a mere gesture, a temporary and meaningless formality reversible at the defendant's whim. In fact, however, a guilty plea is no such trifle, but ''a grave and solemn act,'' which is ''accepted only with care and discernment.''

United States v. Barker, supra, quoting from *Brady v. United States*, 397 U.S. 742 (1970).

The facts of the *Savage* case reflect the wisdom of this position. In *Savage*, the defendant had entered into a plea agreement whereby he agreed to plead guilty in exchange for the government's promise to recommend a sentence of 5 years, which the defendant knew was not binding on the court. Yet, under the approach taken in *Savage*, the defendant remains free to renege on his plea bargain, notwithstanding full compliance therewith by the attorney for the government, if it later appears to him from the presentence report or the comments of the trial judge or any other source that the court will not follow the government's recommendation. Having bargained for a recommendation pursuant to Rule 11(e)(1)(B), the defendant should not be entitled, in effect, to unilaterally convert the plea agreement into a Rule 11(e)(1)(C) type of agreement (i.e., one with a guarantee of a specific sentence which, if not given, permits withdrawal of the plea).

The first sentence of subdivision (d) provides that the motion, to be judged under the more liberal ''fair and just reason'' test, must have been made before sentence is imposed, imposition of sentence is suspended, or disposition is had under 18 U.S.C. §4205(c). The latter of these has been added to the rule to make it clear that the lesser standard also governs prior to the second stage of sentencing when the judge, pursuant to that statute, has committed the defendant to the custody of the Attorney General for study pending final disposition. Several circuits have left this issue open, e.g., *United States v. McCoy*, 477 F.2d 550 (5th Cir. 1973); *Callaway v. United States*, 367 F.2d 140 (10th Cir. 1966); while some have held that a withdrawal motion filed between tentative and final sentencing should be judged against the presentence standard, *United States v. Barker*, 514 F.2d 208 (D.C.Cir. 1975); *United States v. Thomas*, 415 F.2d 1216 (9th Cir. 1969).

Inclusion of the §4205(c) situation under the presentence standard is appropriate. As explained in *Barker:*

> Two reasons of policy have been advanced to explain the near-presumption which Rule 32(d) erects against post-sentence withdrawal motions. The first is that post-sentence withdrawal subverts the ''stability'' of ''final judgments.'' * * * The second reason is that the post-sentence withdrawal motion often constitutes a veiled attack on the judge's sentencing decision; to grant such motions in lenient fashion might
>
> > undermine respect for the courts and fritter away the time and painstaking effort devoted to the sentence process.
>
> * * * Concern for the ''stability of final judgments'' has little application to withdrawal motions filed between tentative and final sentencing under Section 4208(b) [now 4205(c)]. The point at which a defendant's judgment of conviction becomes ''final'' for purposes of appeal—whether at tentative or at final sentencing—is wholly within the defendant's discretion. * * * Concern for the integrity of the sentencing process is, however, another matter. The major point, in our view, is that tentative sentencing under Section 4208(b) [now 4205(c)] leaves the defendant ignorant of his final sentence. He will therefore be unlikely to use a withdrawal motion as an oblique attack on the judge's sentencing policy. The relative leniency of the ''fair and just'' standard is consequently not out of place.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1989 AMENDMENT

The amendment to subdivision (a)(1) is intended to clarify that the court is expected to proceed without unnecessary delay, and that it may be necessary to delay sentencing when an applicable sentencing factor cannot be resolved at the time set for sentencing. Often, the factor will relate to a defendant's agreement to cooperate with the government. But, other factors may be capable of resolution if the court delays sentencing while additional information is generated. As currently written, the rule might imply that a delay requested by one party or suggested by the court *sua sponte* might be unreasonable. The amendment rids the rule of any such implication and provides the sentencing court with desirable discretion to assure that relevant factors are considered and accurately resolved. In exercising this discretion, the court retains under the amendment the authority to refuse to delay sentencing when a delay is inappropriate under the circumstances.

In amending subdivision (c)(1), the Committee conformed the rule to the current practice in some courts: i.e., to permit the defendant and the prosecutor to see a presentence report prior to a plea of guilty if the court, with the written consent of the defendant, receives the report at that time. The amendment permits, but does not require, disclosure of the report with the written consent of the defendant.

The amendment to change the ''reasonable time'' language in subdivision (c)(3)(A) to at least 10 days prior to sentencing, unless the defendant waives the minimum period, conforms the rule to 18 U.S.C. 3552(d). Nothing in the statue [sic] or the rule prohibits a court from requiring disclosure at an earlier time before sentencing. The inclusion of a specific waiver provision is intended to conform the rule to the statute and is not intended to suggest that waiver of other rights is precluded when no specific waiver provision is set forth in a rule or portion thereof.

The language requiring the court to provide the defendant and defense counsel with a copy of the presentence report complements the abrogation of subdivision (E), which had required the defense to return the probation report. Because a defendant or the government may seek to appeal a sentence, an option that is permitted under some circumstances, there will be cases in which the defendant has a need for the presentence report during the preparation of, or the response to, an appeal. This is one reason why the Committee decided that the defendant should not be required to return the nonconfidential portions of the presentence report that have been disclosed. Another reason is that district courts may find it desirable to adopt portions of the presentence report when making findings of fact under the guidelines. They would be inhibited unnecessarily from relying on careful, accurate presentence reports if such reports could not be retained by defendants. A third reason why defendant should be able to retain the reports disclosed to them is that the Supreme Court's decision in *United States Department of Justice v. Julian*, 486 U.S. 1 (1988), 108 S.Ct. 1606 (1988), suggests that defendants will routinely be able to secure their reports through Freedom of Information Act suits. No public interest is served by continuing to require the return of reports, and unnecessary FOIA litigation should be avoided as a result of the amendment to Rule 32.

The amended rule does not direct whether the defendant or the defendant's lawyer should retain the presentence report. In exceptional cases where retention of a report in a local detention facility might pose a danger to persons housed there, the district judge may direct that the defendant not personally retain a copy

of the report until the defendant has been transferred to the facility where the sentence will be served.

Because the parties need not return the presentence report to the probation officer, the Solicitor General should be able to review the report in deciding whether to permit the United States to appeal a sentence under the Sentencing Reform Act of 1984, 18 U.S.C. §3551 et seq.

Although the Committee was concerned about the potential unfairness of having confidential or diagnostic material included in presentence reports but not disclosed to a defendant who might be adversely affected by such material, it decided not to recommend at this time a change in the rule which would require complete disclosure. Some diagnostic material might be particularly useful when a court imposes probation, and might well be harmful to the defendant if disclosed. Moreover, some of this material might assist correctional officials in prescribing treatment programs for an incarcerated defendant. Information provided by confidential sources and information posing a possible threat of harm to third parties was particularly troubling to the Committee, since this information is often extremely negative and thus potentially harmful to a defendant. The Committee concluded, however, that it was preferable to permit the probation officer to include this information in a report so that the sentencing court may determine whether is [it] ought to be disclosed to the defendant. If the court determines that it should not be disclosed, it will have to decide whether to summarize the contents of the information or to hold that no finding as to the undisclosed information will be made because such information will not be taken into account in sentencing. Substantial due process problems may arise if a court attempts to summarize information in a presentence report, the defendant challenges the information, and the court attempts to make a finding as to the accuracy of the information without disclosing to the defendant the source of the information or the details placed before the court. In deciding not to require disclosure of everything in a presentence report, the Committee made no judgment that findings could validly be made based upon nondisclosed information.

Finally, portions of the rule were gender-neutralized.

NOTES OF ADVISORY COMMITTEE ON RULES—1991 AMENDMENT

The amendments are technical. No substantive changes are intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

The original subdivision (e) has been deleted due to statutory changes affecting the authority of a court to grant probation. *See* 18 U.S.C. 3561(a). Its replacement is one of a number of contemporaneous amendments extending Rule 26.2 to hearings and proceedings other than the trial itself. The amendment to Rule 32 specifically codifies the result in cases such as *United States v. Rosa*, 891 F.2d 1074 (3d. Cir. 1989). In that case the defendant pleaded guilty to a drug offense. During sentencing the defendant unsuccessfully attempted to obtain Jencks Act materials relating to a co-accused who testified as a government witness at sentencing. In concluding that the trial court erred in not ordering the government to produce its witness's statement, the court stated:

> We believe the sentence imposed on a defendant is the most critical stage of criminal proceedings, and is, in effect, the ''bottom-line'' for the defendant, particularly where the defendant has pled guilty. This being so, we can perceive no purpose in denying the defendant the ability to effectively cross-examine a government witness where such testimony may, if accepted, and substantially to the defendant's sentence. In such a setting, we believe that the rationale of *Jencks v. United States* . . . and the purpose of the Jencks Act would be disserved if the government at such a grave stage of a criminal proceeding could deprive the accused of material valuable not only to the defense but to his very liberty. *Id*. at 1079.

The court added that the defendant had not been sentenced under the new Sentencing Guidelines and that its decision could take on greater importance under those rules. Under Guideline sentencing, said the court, the trial judge has less discretion to moderate a sentence and is required to impose a sentence based upon specific factual findings which need not be established beyond a reasonable doubt. *Id* at n. 3.

Although the *Rosa* decision decided only the issue of access by the defendant to Jencks material, the amendment parallels Rules 26.2 (applying Jencks Act to trial) and 12(i) (applying Jencks Act to suppression hearing) in that both the defense and the prosecution are entitled to Jencks material.

Production of a statement is triggered by the witness's oral testimony. The sanction provision rests on the assumption that the proponent of the witness's testimony has deliberately elected to withhold relevant material.

NOTES OF ADVISORY COMMITTEE ON RULES—1994 AMENDMENT

The amendments to Rule 32 are intended to accomplish two primary objectives. First, the amendments incorporate elements of a ''Model Local Rule for Guideline Sentencing'' which was proposed by the Judicial Conference Committee on Probation Administration in 1987. That model rule and the accompanying report were prepared to assist trial judges in implementing guideline sentencing mandated by the Sentencing Reform Act of 1984. *See* Committee on the Admin. of the Probation Sys., Judicial Conference of the U.S., Recommended Procedures for Guideline Sentencing and Commentary: Model Local Rule for Guideline Sentencing, Reprinted in T. Hutchinson & D. Yellen, *Federal Sentencing Law and Practice*, app. 8, at 431 (1989). It was anticipated that sentencing hearings would become more complex due to the new fact finding requirements imposed by guideline sentencing methodology. *See* U.S.S.G. §6A1.2. Accordingly, the model rule focused on preparation of the presentence report as a means of identifying and narrowing the issues to be decided at the sentencing hearing.

Second, in the process of effecting those amendments, the rule was reorganized. Over time, numerous amendments to the rule had created a sort of hodge podge; the reorganization represents an attempt to reflect an appropriate sequential order in the sentencing procedures.

Subdivision (a). Subdivision (a) retains the general mandate that sentence be imposed without unnecessary delay thereby permitting the court to regulate the time to be allowed for the probation officer to complete the presentence investigation and submit the report. The only requirement is that sufficient time be allowed for completion of the process prescribed by subdivision (b)(6) unless the time periods established in the subdivision are shortened or lengthened by the court for good cause. Such limits are not intended to create any new substantive right for the defendant or the Government which would entitle either to relief if a time limit prescribed in the rule is not kept.

The remainder of subdivision (a), which addressed the sentencing hearing, is now located in subdivision (c).

Subdivision (b). Subdivision (b) (formerly subdivision (c)), which addresses the presentence investigation, has been modified in several respects.

First, subdivision (b)(2) is a new provision which provides that, on request, defense counsel is entitled to notice and a reasonable opportunity to be present at any interview of the defendant conducted by the probation officer. Although the courts have not held that presentence interviews are a critical stage of the trial for purposes of the Sixth Amendment right to counsel, the amendment reflects case law which has indicated that requests for counsel to be present should be honored. *See*, e.g., *United States v. Herrera-Figueroa*, 918 F.2d 1430,

1437 (9th Cir. 1990) (court relied on its supervisory power to hold that probation officers must honor request for counsel's presence); *United States v. Tisdale*, 952 F.2d 934, 940 (6th Cir. 1992) (court agreed with rule requiring probation officers to honor defendant's request for attorney or request from attorney not to interview defendant in absence of counsel). The Committee believes that permitting counsel to be present during such interviews may avoid unnecessary misunderstandings between the probation officer and the defendant. The rule does not further define the term ''interview.'' The Committee intended for the provision to apply to any communication initiated by the probation officer where he or she is asking the defendant to provide information which will be used in preparation of the presentence investigation. Spontaneous or unplanned encounters between the defendant and the probation officer would normally not fall within the purview of the rule. The Committee also believed that the burden should rest on defense counsel, having received notice, to respond as promptly as possible to enable timely completion of the presentence report.

Subdivision (b)(6), formerly (c)(3), includes several changes which recognize the key role the presentence report is playing under guideline sentencing. The major thrust of these changes is to address the problem of resolving objections by the parties to the probation officer's presentence report. Subdivision (b)(6)(A) now provides that the probation officer must present the presentence report to the parties not later than 35 days before the sentencing hearing (rather than 10 days before imposition of the sentence) in order to provide some additional time to the parties and the probation officer to attempt to resolve objections to the report. There has been a slight change in the practice of deleting from the copy of the report given to the parties certain information specified in (b)(6)(A). Under that new provision (changing former subdivision (c)(3)(A)), the court has the discretion (in an individual case or in accordance with a local rule) to direct the probation officer to withhold any final recommendation concerning the sentence. Otherwise, the recommendation, if any, is subject to disclosure. The prior practice of not disclosing confidential information, or other information which might result in harm to the defendant or other persons, is retained in (b)(5).

New subdivisions (b)(6)(B), (C), and (D) now provide explicit deadlines and guidance on resolving disputes about the contents of the presentence report. The amendments are intended to provide early resolution of such disputes by (1) requiring the parties to provide the probation officer with a written list of objections to the report within 14 days of receiving the report; (2) permitting the probation officer to meet with the defendant, the defendant's counsel, and the attorney for the Government to discuss objections to the report, conduct an additional investigation, and to make revisions to the report as deemed appropriate; (3) requiring the probation officer to submit the report to the court and the parties not later than 7 days before the sentencing hearing, noting any unresolved disputes; and (4) permitting the court to treat the report as its findings of fact, except for the parties' unresolved objections. Although the rule does not explicitly address the question of whether counsel's objections to the report are to be filed with the court, there is nothing in the rule which would prohibit a court from requiring the parties to file their original objections or have them included as an addendum to the presentence report.

This procedure, which generally mirrors the approach in the Model Local Rule for Guideline Sentencing, supra, is intended to maximize judicial economy by providing for more orderly sentencing hearings while also providing fair opportunity for both parties to review, object to, and comment upon, the probation officer's report in advance of the sentencing hearing. Under the amendment, the parties would still be free at the sentencing hearing to comment on the presentence report, and in the discretion of the court, to introduce evidence concerning their objections to the report.

Subdivision (c). Subdivision (c) addresses the imposition of sentence and makes no major changes in current practice. The provision consists largely of material formerly located in subdivision (a). Language formerly in (a)(1) referring to the court's disclosure to the parties of the probation officer's determination of the sentencing classifications and sentencing guideline range is now located in subdivisions (b)(4)(B) and (c)(1). Likewise, the brief reference in former (a)(1) to the ability of the parties to comment on the probation officer's determination of sentencing classifications and sentencing guideline range is now located in (c)(1) and (c)(3).

Subdivision (c)(1) is not intended to require that resolution of objections and imposition of the sentence occur at the same time or during the same hearing. It requires only that the court rule on any objections before sentence is imposed. In considering objections during the sentencing hearing, the court may in its discretion, permit the parties to introduce evidence. The rule speaks in terms of the court's discretion, but the Sentencing Guidelines specifically provide that the court must provide the parties with a reasonable opportunity to offer information concerning a sentencing factor reasonably in dispute. *See* U.S.S.G. §6A1.3(a). Thus, it may be an abuse of discretion not to permit the introduction of additional evidence. Although the rules of evidence do not apply to sentencing proceedings, *see* Fed. R. Evid. 1101(d)(3), the court clearly has discretion in determining the mode, timing, and extent of the evidence offered. *See, e.g., United States v. Zuleta-Alvarez*, 922 F.2d 33, 36 (1st Cir. 1990) (trial court did not err in denying defendant's late request to introduce rebuttal evidence by way of cross-examination).

Subdivision (c)(1) (formerly subdivision (c)(3)(D)) indicates that the court need not resolve controverted matters which will ''not be taken into account in, or will not affect, sentencing.'' The words ''will not affect'' did not exist in the former provision but were added in the revision in recognition that there might be situations, due to overlaps in the sentencing ranges, where a controverted matter would not alter the sentence even if the sentencing range were changed.

The provision for disclosure of a witness' statements, which was recently proposed as an amendment to Rule 32 as new subdivision (e), is now located in subdivision (c)(2).

Subdivision (c)(3) includes minor changes. First, if the court intends to rely on information otherwise excluded from the presentence report under subdivision (b)(5), that information is to be summarized in writing and submitted to the defendant and the defendant's counsel. Under the former provision in (c)(3)(A), such information could be summarized orally. Once the information is presented, the defendant and the defendant's counsel are to be given a reasonable opportunity to comment; in appropriate cases, that may require a continuance of the sentencing proceedings.

Subdivision (c)(5), concerning notification of the right to appeal, was formerly included in subdivision (a)(2). Although the provision has been rewritten, the Committee intends no substantive change in practice. That is, the court may, but is not required to, advise a defendant who has entered a guilty plea, nolo contendere plea or a conditional guilty plea of any right to appeal (such as an appeal challenging jurisdiction). However, the duty to advise the defendant in such cases extends only to advice on the right to appeal any sentence imposed.

Subdivision (d). Subdivision (d), dealing with entry of the court's judgment, is former subdivision (b).

Subdivision (e). Subdivision (e), which addresses the topic of withdrawing pleas, was formerly subdivision (d). Both provisions remain the same except for minor stylistic changes.

Under present practice, the court may permit, but is not required to hear, victim allocution before imposing sentence. The Committee considered, but rejected, a provision which would have required the court to hear victim allocution at sentencing.

NOTES OF ADVISORY COMMITTEE ON RULES—1996 AMENDMENT

Subdivision (d)(2). A provision for including a verdict of criminal forfeiture as a part of the sentence was added in 1972 to Rule 32. Since then, the rule has been interpreted to mean that any forfeiture order is a part of the judgment of conviction and cannot be entered before sentencing. *See, e.g., United States v. Alexander*, 772 F.Supp. 440 (D. Minn. 1990).

Delaying forfeiture proceedings, however, can pose real problems, especially in light of the implementation of the Sentencing Reform Act in 1987 and the resulting delays between verdict and sentencing in complex cases. First, the government's statutory right to discover the location of property subject to forfeiture is triggered by entry of an order of forfeiture. *See* 18 U.S.C. §1963(k) and 21 U.S.C. §853(m). If that order is delayed until sentencing, valuable time may be lost in locating assets which may have become unavailable or unusable. Second, third persons with an interest in the property subject to forfeiture must also wait to petition the court to begin ancillary proceedings until the forfeiture order has been entered. *See* 18 U.S.C. §1963(*l*) and 21 U.S.C. §853(m). And third, because the government cannot actually seize the property until an order of forfeiture is entered, it may be necessary for the court to enter restraining orders to maintain the status quo.

The amendment to Rule 32 is intended to address these concerns by specifically recognizing the authority of the court to enter a preliminary forfeiture order before sentencing. Entry of an order of forfeiture before sentencing rests within the discretion of the court, which may take into account anticipated delays in sentencing, the nature of the property, and the interests of the defendant, the government, and third persons.

The amendment permits the court to enter its order of forfeiture at any time before sentencing. Before entering the order of forfeiture, however, the court must provide notice to the defendant and a reasonable opportunity to be heard on the question of timing and form of any order of forfeiture.

The rule specifies that the order, which must ultimately be made a part of the sentence and included in the judgment, must contain authorization for the Attorney General to seize the property in question and to conduct appropriate discovery and to begin any necessary ancillary proceedings to protect third parties who have an interest in the property.

CONGRESSIONAL MODIFICATION OF PROPOSED 1994 AMENDMENT

Section 230101(a) of Pub. L. 103–322 [set out as a note under section 2074 of Title 28, Judiciary and Judicial Procedure] provided that the amendment proposed by the Supreme Court [in its order of Apr. 29, 1994] affecting rule 32 of the Federal Rules of Criminal Procedure [this rule] would take effect on Dec. 1, 1994, as otherwise provided by law, and as amended by section 230101(b) of Pub. L. 103–322. See 1994 Amendment note below.

COMMITTEE NOTES ON RULES—2000 AMENDMENT

The rule is amended to reflect the creation of new Rule 32.2, which now governs criminal forfeiture procedures.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 32 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The rule has been completely reorganized to make it easier to follow and apply. For example, the definitions in the rule have been moved to the first section and the sequencing of the sections generally follows the procedure for presentencing and sentencing procedures.

Revised Rule 32(a) contains definitions that currently appear in Rule 32(f). One substantive change was made in Rule 32(a)(2). The Committee expanded the definition of victims of crimes of violence or sexual abuse to include victims of child pornography under 18 U.S.C. §§2251–2257 (child pornography and related offenses). The Committee considered those victims to be similar to victims of sexual offenses under 18 U.S.C. §§2241–2248, who already possess that right.

Revised Rule 32(d) has been amended to more clearly set out the contents of the presentence report concerning the application of the Sentencing Guidelines.

Current Rule 32(e), which addresses the ability of a defendant to withdraw a guilty plea, has been moved to Rule 11(e).

Rule 32(h) is a new provision that reflects *Burns v. United States*, 501 U.S. 129, 138–39 (1991). In *Burns*, the Court held that, before a sentencing court could depart upward on a ground not previously identified in the presentence report as a ground for departure, Rule 32 requires the court to give the parties reasonable notice that it is contemplating such a ruling and to identify the specific ground for the departure. The Court also indicated that because the procedural entitlements in Rule 32 apply equally to both parties, it was equally appropriate to frame the issue as whether notice is required before the sentencing court departs either upward or downward. *Id.* at 135, n.4.

Revised Rule 32(i)(3) addresses changes to current Rule 32(c)(1). Under the current rule, the court is required to ''rule on any unresolved objections to the presentence report.'' The rule does not specify, however, whether that provision should be read literally to mean every objection that might have been made to the report or only on those objections that might in some way actually affect the sentence. The Committee believed that a broad reading of the current rule might place an unreasonable burden on the court without providing any real benefit to the sentencing process. Revised Rule 32(i)(3) narrows the requirement for court findings to those instances when the objection addresses a ''controverted matter.'' If the objection satisfies that criterion, the court must either make a finding on the objection or decide that a finding is not required because the matter will not affect sentencing or that the matter will not be considered at all in sentencing.

Revised Rule 32(i)(4)(B) provides for the right of certain victims to address the court during sentencing. As noted, *supra*, revised Rule 32(a)(2) expands the definition of victims to include victims of crimes under 18 U.S.C. §§2251–57 (child pornography and related offenses). Thus, they too will now be permitted to address the court.

Revised Rule 32(i)(1)(B) is intended to clarify language that currently exists in Rule 32(h)(3), that the court must inform both parties that the court will rely on information not in the presentence report and provide them with an opportunity to comment on the information.

Rule 32(i)(4)(C) includes a change concerning who may request an in camera proceeding. Under current Rule 32(c)(4), the parties must file a joint motion for an in camera proceeding to hear the statements by defense counsel, the defendant, the attorney for the government, or any victim. Under the revised rule, any party may move (for good cause) that the court hear in camera any statement—by a party or a victim—made under revised Rule 32(i)(4).

Finally, the Committee considered, but did not adopt, an amendment that would have required the court to rule on any ''unresolved objection to a material matter'' in the presentence report, whether or not the court will consider it in imposing an appropriate sentence. The amendment was considered because an unresolved objection that has no impact on determining a sentence under the Sentencing Guidelines may affect other important post-sentencing decisions. For example, the Bureau of Prisons consults the presentence report in deciding where a defendant will actually serve his or her sentence of confinement. *See A Judicial Guide*

to the Federal Bureau of Prisons, 11 (United States Department of Justice, Federal Bureau of Prisons 1995) (noting that the ''Bureau relies primarily on the Presentence Investigator Report . . .''). And as some courts have recognized, Rule 32 was intended to guard against adverse consequences of a statement in the presentence report that the court may have been found to be false. *United States v. Velasquez*, 748 F.2d 972, 974 (8th Cir. 1984) (rule designed to protect against evil that false allegation that defendant was notorious alien smuggler would affect defendant for years to come); *see also United States v. Brown*, 715 F.2d 387, 389 n.2 (5th Cir. 1983) (sentencing report affects ''place of incarceration, chances for parole, and relationships with social service and correctional agencies after release from prison'').

To avoid unduly burdening the court, the Committee elected not to require resolution of objections that go only to service of sentence. However, because of the presentence report's critical role in post-sentence administration, counsel may wish to point out to the court those matters that are typically considered by the Bureau of Prisons in designating the place of confinement. For example, the Bureau considers:

> the type of offense, the length of sentence, the defendant's age, the defendant's release residence, the need for medical or other special treatment, and any placement recommendation made by the court.

A Judicial Guide to the Federal Bureau of Prisons, *supra*, at 11. Further, a question as to whether or not the defendant has a ''drug problem'' could have an impact on whether the defendant would be eligible for prison drug abuse treatment programs. 18 U.S.C. §3621(e) (Substance abuse treatment).

If counsel objects to material in the presentence report that could affect the defendant's service of sentence, the court may resolve the objection, but is not required to do so.

COMMITTEE NOTES ON RULES—2007 AMENDMENT

Subdivision (d). The amendment conforms Rule 32(d) to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). *Booker* held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. §3553(b)(1), violates the Sixth Amendment right to jury trial. With this provision severed and excised, the Court held, the Sentencing Reform Act ''makes the Guidelines effectively advisory,'' and ''requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. §3553(a)(4) (Supp. 2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see §3553(a) (Supp. 2004).'' *Id*. at 245–46. Amended subdivision (d)(2)(F) makes clear that the court can instruct the probation office to gather and include in the presentence report any information relevant to the factors articulated in §3553(a). The rule contemplates that a request can be made either by the court as a whole requiring information affecting all cases or a class of cases, or by an individual judge in a particular case.

Changes Made to Proposed Amendment Released for Public Comment. The Committee revised the text of subdivision (d) in response to public comments. In subdivision (d), the Committee revised the title to include the word ''Advisory'' in order better to reflect the guidelines' role under the *Booker* decision. It withdrew proposed subdivisions (k) and (h).

Proposed subdivision (h) would have expanded the sentencing court's obligation to give notice to the parties when it intends to rely on grounds not identified in either the presentence report or the parties' submissions. The amendment was intended to respond to the courts' expanded discretion under *Booker*. In light of a number of recent decisions in the lower courts considering the proper scope of this obligation in light of *Booker*, the proposed amendment was withdrawn for further study.

Subdivision (k), which would have required that courts use a specified judgment and statement of reasons form, was withdrawn because of the passage of §735 of the USA Patriot Improvement and Reauthorization Act. This legislation amended 28 U.S.C. §994(w) to impose a statutory requirement that sentencing information for each case be provided on ''the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission.'' The Criminal Law Committee, which had previously requested that the uniform collection of sentencing information be addressed by an amendment to the rules, withdrew that request in light of the enactment of the statutory requirement.

Finally, here—as in the other *Booker* rules—the Committee deleted the reference in the Committee Note to the Fifth Amendment from the description of the Supreme Court's decision in *Booker*.

COMMITTEE NOTES ON RULES—2008 AMENDMENT

Subdivision (a). The Crime Victims' Rights Act, codified as 18 U.S.C. §3771(e), adopted a new definition of the term ''crime victim.'' The new statutory definition has been incorporated in an amendment to Rule 1, which supersedes the provisions that have been deleted here.

Subdivision (c)(1). This amendment implements the victim's statutory right under the Crime Victims' Rights Act to ''full and timely restitution as provided in law.'' *See* 18 U.S.C. §3771(a)(6). Whenever the law permits restitution, the presentence investigation report should contain information permitting the court to determine whether restitution is appropriate.

Subdivision (d)(2)(B). This amendment implements the Crime Victims' Rights Act, codified at 18 U.S.C. §3771. The amendment makes it clear that victim impact information should be treated in the same way as other information contained in the presentence report. It deletes language requiring victim impact information to be ''verified'' and ''stated in a nonargumentative style'' because that language does not appear in the other subparagraphs of Rule 32(d)(2).

Subdivision (i)(4). The deleted language, referring only to victims of crimes of violence or sexual abuse, has been superseded by the Crime Victims' Rights Act, 18 U.S.C. §3771(e). The act defines the term ''crime victim'' without limiting it to certain crimes, and provides that crime victims, so defined, have a right to be reasonably heard at all public court proceedings regarding sentencing. A companion amendment to Rule 1(b) adopts the statutory definition as the definition of the term ''victim'' for purposes of the Federal Rules of Criminal Procedure, and explains who may raise the rights of a victim, so the language in this subdivision is no longer needed.

Subdivision (i)(4) has also been amended to incorporate the statutory language of the Crime Victims' Rights Act, which provides that victims have the right ''to be reasonably heard'' in judicial proceedings regarding sentencing. *See* 18 U.S.C. §3771(a)(4). The amended rule provides that the judge must speak to any victim present in the courtroom at sentencing. Absent unusual circumstances, any victim who is present should be allowed a reasonable opportunity to speak directly to the judge.

Changes Made to Proposed Amendment Released for Public Comment. No changes were made in the text of the rule. In response to public comments, the Committee Note was amended to make it clear that absent unusual circumstances any victim who is in the courtroom should have a reasonable opportunity to speak directly to the judge.

COMMITTEE NOTES ON RULES—2009 AMENDMENT

Subdivision (d)(2)(G). Rule 32.2(a) requires that the indictment or information provide notice to the defendant of the government's intent to seek forfeiture as part of the sentence. The amendment provides that the same notice be provided as part of the presentence report to the court. This will ensure timely consideration of the issues concerning forfeiture as part of the sentencing process.

Changes Made to Proposed Amendment Released for Public Comment. No changes were made to the proposed amendment to Rule 32.

COMMITTEE NOTES ON RULES—2011 AMENDMENT

Subdivision (d)(2). This technical and conforming amendment reorders two subparagraphs describing the information that may be included in the presentence report so that the provision authorizing the inclusion of any other information the court requires appears at the end of the paragraph. It also rephrases renumbered subdivision (d)(2)(F) for stylistic purposes.

AMENDMENT BY PUBLIC LAW

1996—Subd. (b)(1). Pub. L. 104–132, §207(a)(1), inserted at end ''Notwithstanding the preceding sentence, a presentence investigation and report, or other report containing information sufficient for the court to enter an order of restitution, as the court may direct, shall be required in any case in which restitution is required to be ordered.''

Subd. (b)(4)(F) to (H). Pub. L. 104–132, §207(a)(2), added subd. (b)(4)(F), and redesignated former subds. (b)(4)(F) and (b)(4)(G) as (b)(4)(G) and (b)(4)(H), respectively.

1994—Subd. (c)(3)(D). Pub. L. 103–322, §230101(b)(4), substituted ''opportunity equivalent to that of the defendant's counsel'' for ''equivalent opportunity''.

Subd. (c)(3)(E). Pub. L. 103–322, §230101(b)(1)–(3), added subd. (c)(3)(E).

Subd. (c)(4). Pub. L. 103–322, §230101(b)(5), (6), substituted ''(D), and (E)'' for ''and (D)'' and inserted ''the victim,'' before ''or the attorney for the Government.''.

Subd. (f). Pub. L. 103–322, §230101(b)(7), added subd. (f).

1986—Subd. (c)(2)(B). Pub. L. 99–646 substituted ''from'' for ''than''.

1984—Subd. (a)(1). Pub. L. 98–473, §215(a)(1), substituted new subd. (a)(1) for former subd. (a)(1) which read as follows:

''(a) SENTENCE.

''(1) *Imposition of Sentence*. Sentence shall be imposed without unreasonable delay. Before imposing sentence the court shall

''(A) determine that the defendant and the defendant's counsel have had the opportunity to read and discuss the presentence investigation report made available pursuant to subdivision (c)(3)(A) or summary thereof made available pursuant to subdivision (c)(3)(B);

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

''(C) address the defendant personally and ask the defendant if the defendant wishes to make a statement in the defendant's own behalf and to present any information in mitigation of punishment.

The attorney for the government shall have an equivalent opportunity to speak to the court.''

Subd. (a)(2). Pub. L. 98–473, §215(a)(2), inserted '', including any right to appeal the sentence,'' after ''right to appeal'' in first sentence.

Pub. L. 98–473, §215(a)(3), inserted '', except that the court shall advise the defendant of any right to appeal his sentence'' after ''nolo contendere'' in second sentence.

Subd. (c)(1). Pub. L. 98–473, §215(a)(4), amended first sentence generally. Prior to amendment, first sentence read as follows: ''The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless, with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record.''

Subd. (c)(2). Pub. L. 98–473, §215(a)(5), amended subd. (c)(2) generally. Prior to amendment, subd. (c)(2) read as follows:

''(2) *Report*. The presentence report shall contain—

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

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

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

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

Subd. (c)(3)(A). Pub. L. 98–473, §215(a)(6), which directed the substitution of '', including the information required by subdivision (c)(2) but not including any final recommendation as to sentence,'' for ''exclusive of any recommendations as to sentence'', was executed by substituting the quotation for ''exclusive of any recommendation as to sentence'' to reflect the probable intent of Congress.

Subd. (c)(3)(D). Pub. L. 98–473, §215(a)(7), struck out ''or the Parole Commission'' before period at end.

Subd. (c)(3)(F). Pub. L. 98–473, §215(a)(8), substituted ''pursuant to 18 U.S.C. §3552(b)'' for ''or the Parole Commission pursuant to 18 U.S.C. §§4205(c), 4252, 5010(e), or 5037(c)''.

Subd. (d). Pub. L. 98–473, §215(a)(9), struck out ''imposition of sentence is suspended, or disposition is had under 18 U.S.C. §4205(c),'' after ''is imposed,''.

1982—Subdiv. (c)(2). Pub. L. 97–291 substituted provision directing that the presentence report contain any prior criminal record of the defendant, a statement of the circumstances of the commission of the offense and circumstances affecting the defendant's behavior, information concerning any harm, including financial, social, psychological, and physical harm, done to or loss suffered by any victim of the offense, and any other information that may aid the court in sentencing, including the restitution need of any victim of the offense, for provision requiring that the report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as might be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as might be required by the court.

1975—Pub. L. 94–64 amended subds. (a)(1) and (c)(1), (3)(A), (D) generally.

EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by Pub. L. 104–132 to be effective, to extent constitutionally permissible, for sentencing proceedings in cases in which defendant is convicted on or after Apr. 24, 1996, see section 211 of Pub. L. 104–132, set out as a note under section 2248 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–322 effective Dec. 1, 1994, see section 230101(c) of Pub. L. 103–322, set out as a Victim's Right of Allocution in Sentencing note under section 2074 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1986 AMENDMENT

Pub. L. 99–646, §25(b), Nov. 10, 1986, 100 Stat. 3597, provided that: ''The amendment made by subsection (a) shall take effect on the taking effect of the amendment made by section 215(a)(5) of the Comprehensive Crime Control Act of 1984 [§215(a)(5) of Pub. L. 98–473, effective Nov. 1, 1987].''

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–473 effective Nov. 1, 1987, and applicable only to offenses committed after the taking effect of such amendment, see section 235(a)(1) of Pub. L. 98–473, set out as an Effective Date note under section 3551 of this title.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97–291 effective Oct. 14, 1982, see section 9(a) of Pub. L. 97–291 set out as an Effective Date note under section 1512 of this title.

EFFECTIVE DATE OF 1979 AMENDMENT

Amendment of this rule by abrogation of subd. (f) by order of the United States Supreme Court of Apr. 30, 1979, effective Dec. 1, 1980, see section 1(1) of Pub. L. 96–42, July 31, 1979, 93 Stat. 326, set out as a note under section 2074 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF AMENDMENTS PROPOSED APRIL 22, 1974; EFFECTIVE DATE OF 1975 AMENDMENTS

Amendments of this rule embraced in the order of the United States Supreme Court on Apr. 22, 1974, and the amendments of this rule made by section 3 of Pub. L. 94–64, effective Dec. 1, 1975, see section 2 of Pub. L. 94–64, set out as a note under rule 4 of these rules.

Rule 32.1. Revoking or Modifying Probation or Supervised Release

(a) INITIAL APPEARANCE.

(1) *Person In Custody*. A person held in custody for violating probation or supervised release must be taken without unnecessary delay before a magistrate judge.

(A) If the person is held in custody in the district where an alleged violation occurred, the initial appearance must be in that district.

(B) If the person is held in custody in a district other than where an alleged violation occurred, the initial appearance must be in that district, or in an adjacent district if the appearance can occur more promptly there.

(2) *Upon a Summons*. When a person appears in response to a summons for violating probation or supervised release, a magistrate judge must proceed under this rule.

(3) *Advice*. The judge must inform the person of the following:

(A) the alleged violation of probation or supervised release;

(B) the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel; and

(C) the person's right, if held in custody, to a preliminary hearing under Rule 32.1(b)(1).

(4) *Appearance in the District With Jurisdiction*. If the person is arrested or appears in the district that has jurisdiction to conduct a revocation hearing—either originally or by transfer of jurisdiction—the court must proceed under Rule 32.1(b)–(e).

(5) *Appearance in a District Lacking Jurisdiction*. If the person is arrested or appears in a district that does not have jurisdiction to conduct a revocation hearing, the magistrate judge must:

(A) if the alleged violation occurred in the district of arrest, conduct a preliminary hearing under Rule 32.1(b) and either:

(i) transfer the person to the district that has jurisdiction, if the judge finds probable cause to believe that a violation occurred; or

(ii) dismiss the proceedings and so notify the court that has jurisdiction, if the judge finds no probable cause to believe that a violation occurred; or

(B) if the alleged violation did not occur in the district of arrest, transfer the person to the district that has jurisdiction if:

(i) the government produces certified copies of the judgment, warrant, and warrant application, or produces copies of those certified documents by reliable electronic means; and

(ii) the judge finds that the person is the same person named in the warrant.

(6) *Release or Detention*. The magistrate judge may release or detain the person under 18 U.S.C. §3143(a)(1) pending further proceedings. The burden of establishing by clear and convincing evidence that the person will not flee or pose a danger to any other person or to the community rests with the person.

(b) REVOCATION.

(1) *Preliminary Hearing*.

(A) *In General*. If a person is in custody for violating a condition of probation or supervised release, a magistrate judge must promptly conduct a hearing to determine whether there is probable cause to believe that a violation occurred. The person may waive the hearing.

(B) *Requirements*. The hearing must be recorded by a court reporter or by a suitable recording device. The judge must give the person:

(i) notice of the hearing and its purpose, the alleged violation, and the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel;

(ii) an opportunity to appear at the hearing and present evidence; and

(iii) upon request, an opportunity to question any adverse witness, unless the judge determines that the interest of justice does not require the witness to appear.

(C) *Referral*. If the judge finds probable cause, the judge must conduct a revocation hearing. If the judge does not find probable cause, the judge must dismiss the proceeding.

(2) *Revocation Hearing*. Unless waived by the person, the court must hold the revocation hearing within a reasonable time in the district having jurisdiction. The person is entitled to:

(A) written notice of the alleged violation;

(B) disclosure of the evidence against the person;

(C) an opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear;

(D) notice of the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel; and

(E) an opportunity to make a statement and present any information in mitigation.

(c) MODIFICATION.

(1) *In General*. Before modifying the conditions of probation or supervised release, the court must hold a hearing, at which the person has the right to counsel and an opportunity to make a statement and present any information in mitigation.