Recommendations for Improving The Use and Utility of Presentence Reports for North Dakota District Court Judges

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January 2010

This report was prepared under the auspices of the Bureau of Justice Assistance (BJA) Criminal Courts Technical Assistance Project at American University, Washington, D.C. This project was supported by Grant No. 2007-DD-BX-K094 awarded to American University by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, and the Office for Victims of Crime. Points of view or opinions in this document are those of the author and do not represent the official position or policies of the U.S. Department of Justice.
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IV. SUMMARY

1. Judges would benefit from programs to acquaint them with how best to make use of presentence investigation reports

2. Overall review by DOCR of the quality, timeliness, and utility of presentence investigations and reports should be followed by effecting needed improvements

3. The DOCR should consider launching a longer-term program to increase the number of PSI reports prepared

4. Consideration should also be given to expanding the use of PSIs through a pilot project entailing greater use of PSI's generally and potential use for pretrial release decision purposes

APPENDIX:

NORTH DAKOTA CRIMINAL RULE 32 (c) Presentence Investigation
I. INTRODUCTION

A. Study Background

The North Dakota District Court is a court of general jurisdiction with 42 judges who sit in seven districts encompassing the state's 53 counties. The District Court exercises exclusive criminal jurisdiction in the state. The judicial complement of the court is supported by 15 magistrates and eight referees. There are also 73 judges sitting in Municipal Courts who hear criminal cases involving local ordinance violations, with appeals going to the District Court. Probation services in North Dakota are provided by the state Department of Corrections and Rehabilitation (DOCR), which is responsible for conducting presentence investigations and preparing resulting reports at the direction of District Judges.

At the request of North Dakota State Court Administrator Sally Holewa, by letter dated April 8, 2009, to the Bureau of Justice Assistance (BJA) Criminal Courts Technical Assistance Project at American University, consultants Richard B. Hoffman, a judicial system specialist with extensive experience in addressing court operational issues, and Nicholas P. Muller, a former Chief U.S. Probation Officer and chair of Pennsylvania state parole and probation panels, were assigned to review the current practice for preparing presentence reports and, specifically, to address inconsistencies in their use by judges in the state, as detailed in Administrator Holewa’s technical assistance request:

"...Use of the presentence investigation report is not consistent throughout the state. Some districts require the report in most criminal cases and also may require a pre-plea report in more serious cases. In other areas of the state, the pre-sentence investigation report is requested only in those cases where it is mandated by statute. ...informal attempts by court administrators and DOCR staff to address the value and utilization of the report have failed to produce any clear direction on why the report is valued in some areas and disregarded in others or to elicit any clear standards on the format or content that is most desired by the majority of the judges..."

In 2008, approximately 492 presentence investigations were completed in North Dakota, down from 607 in 2007—this figure fell to 483 in 2009; in 2008, 27, 201 criminal cases were filed and 39,712 disposed of in the District Court statewide. Filings fell slightly

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1 District Court figures are relevant in that all major criminal cases likely to result in presentence investigations and reports are brought in that court.
more than eight percent from 2007, and dispositions also declined by 1.17%. In 2008, 2,654 juvenile cases were filed and 4,554 cases were closed (separate figures for juvenile PSIs were not obtainable). Those filings showed a 9.4 percent rise from 2007, while dispositions rose 12.14 percent.

B. Study Approach and Site Schedule

Mr. Hoffman and Mr. Muller visited the Bismarck office of the State Court Administrator on November 8-10, 2009 to assess the views of judges from all parts of the state as to the present usefulness and other issues regarding the preparation of presentence investigation reports by the DOCR and obtain the perspective of DOCR officials responsible for managing this function on these issues. In advance of the site visit, Ms. Holewa made arrangements for the consultants to interview District Court presiding judges or other available judges either in the State Court Administrative Office in Bismarck or by telephone conference call. During the site visit, they met in person or via teleconference or telephone conference call with South Central District Presiding Judge Gail Hagerty, East Central District Judge Steven L. Marquardt, Northeast Central District Presiding Judge Joel D. Medd, Northwest District Judge David W. Nelson, Southeast District Presiding Judge John T. Paulson, and Southwest District Judge William Herauf; District Court Administrators Dennis Herbeck (Unit 1), Rodney Olson (Unit 2), Donna Wunderlich (Unit 3), and Carolyn Woolf (Unit 4); State Court Administrator Sally A. Holewa and Assistant State Court Administrator for Trial Courts Louie Hentzen; Department of Corrections and Rehabilitation Executive Director Leann Bertsch, and staff members Charles Placek, Barney Tomanek, and Richard Schuchard. In addition, several staff members of the DOCR were interviewed, as well as the Executive Director of the DOCR. The consultants also reviewed statistical data provided by the Office of the State Court Administrator and the Department of Corrections and Rehabilitation.

This report summarizes the results of this review and the observations developed during the course of the site visit, including the interviews conducted.

C. Scope and Focus of Technical Assistance Provided

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The primary focus of the technical assistance site visit has been upon gathering information from judges, administrators, and DOCR staff members that would permit the consultants to formulate observations and recommendations aimed at improving the utilization of presentence investigations and reports in criminal and juvenile cases in the District Court. During the course of this review, the consultants examined a number of PSI reports provided by the courts and also considered how changes in current pretrial practice in North Dakota might affect, probably indirectly, the uses of PSI reports.
II. ANALYSIS OF EXISTING SITUATION

A. Overview

Presentence investigations (PSIs) and resulting reports to the court are relatively infrequently requested in the District Court of North Dakota. Moreover, usage varies dramatically in the seven districts: judges in the Northeast Central District based in Grand Forks, a major urban area where the University of North Dakota is located, order PSIs in every felony case; however, judges in the East Central District, where Fargo, the state’s largest city, is located, only order PSIs if one of the attorneys in a case requests one; judges in the South Central District based in Bismarck, the state capital and second-largest city, order PSIs often, generally when they feel the report will aid them in sentencing; and judges in the Northwest and Southwest Districts of the state, based in Williston, Minot, and Dickinson, rarely order PSIs.

Preparation of PSIs in general is governed by North Dakota Criminal Rule 32 (c), which leaves the issue of whether to request a PSI in the judge’s discretion. (See Appendix A for text of Rule 32 (c).) PSIs are only required by statute in specified sex-offender cases; in those cases, in which the reports tend to be lengthy and detailed, the judges overall expressed the view that the PSI assists them greatly in sentencing.

Some judges, especially those who had served for several years or more, reported that the DOCR had sent conflicting messages over the years regarding its policy on PSIs. They said that the policy conveyed a decade ago and reaffirmed as recently as four years ago was one that discouraged use of PSIs except in truly appropriate cases; later, in contrast, the DOCR apparently suggested to judges that PSIs should be ordered in every case. Today, the DOCR recognizes that its corrections staff will need the information gathered to prepare a PSI for use in classifying inmates upon their arrival at a custodial institution. Consequently, the Department itself would likely benefit from preparing more PSI reports rather than the

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2 N.D. CENTURY CODE § 12.1-32-02 (11) requires PSIs in several categories of sexual offense cases; in gross sexual imposition cases, a risk assessment is also required. Id., § 12.1-32-09 (5) specifies that PSIs must be obtained before the sentencing hearing is held (“except in the most extraordinary cases”) in dangerous special offender cases.

relatively modest number now completed, especially if this benefit can be attributed to meeting the needs of another branch of government, viz., the judiciary.

Other judges offered as reasons for not ordering PSIs the likelihood that waiting for a PSI will lengthen the time until a defendant can be sentenced and/or the milieu in many rural parts of the state that makes it likely the judge has significant knowledge of the criminal background of most local defendants without the need for a PSI. In general, most judges do not order many PSIs—with a few outstanding exceptions—because (1) the judges feel that the PSIs take too long to complete, (2) many judges appear to feel the value of the reports is unclear at best, for which the judges blame the use of “contract” writers rather than full-time probation officers, and (3) many judges feel that, with the criminal record, the testimony offered by both the state’s attorney and defense counsel, and the possibility that the victim will be heard either directly or through the Victims’ Advocate, the need for a PSI is diminished.

B. Frequency of PSIs Compared With Criminal Caseload

Over the past three years, the number of PSIs requested has declined.

Table 1. North Dakota Presentence Reports Requested and Completed

<table>
<thead>
<tr>
<th>Year</th>
<th>PSIs Requested</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007</td>
<td>607</td>
</tr>
<tr>
<td>2008</td>
<td>492</td>
</tr>
<tr>
<td>2009</td>
<td>483</td>
</tr>
</tbody>
</table>

Source: North Dakota Office of the State Court Administrator

The total criminal case filings and dispositions have also declined over the past three years, as reflected in the Table 1 on the following page.
Table 2. Criminal Case Filings and Dispositions, N.D. Dist. Ct., 2005-2008

<table>
<thead>
<tr>
<th>Calendar Year</th>
<th>Filings</th>
<th>Dispositions</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005 — Total Criminal</td>
<td>31,461</td>
<td>39,360</td>
</tr>
<tr>
<td>Felony</td>
<td>4,859</td>
<td></td>
</tr>
<tr>
<td>Misdemeanor</td>
<td>23,370</td>
<td></td>
</tr>
<tr>
<td>Infraction</td>
<td>3,232</td>
<td></td>
</tr>
<tr>
<td>2006</td>
<td>30,930</td>
<td>41,258</td>
</tr>
<tr>
<td>Felony</td>
<td>4,075</td>
<td></td>
</tr>
<tr>
<td>Misdemeanor</td>
<td>24,028</td>
<td></td>
</tr>
<tr>
<td>Infraction</td>
<td>2,827</td>
<td></td>
</tr>
<tr>
<td>2007</td>
<td>29,588</td>
<td>40,181</td>
</tr>
<tr>
<td>Felony</td>
<td>4,049</td>
<td></td>
</tr>
<tr>
<td>Misdemeanor</td>
<td>23,052</td>
<td></td>
</tr>
<tr>
<td>Infraction</td>
<td>2,487</td>
<td></td>
</tr>
<tr>
<td>2008</td>
<td>27,201</td>
<td>39,712</td>
</tr>
<tr>
<td>Felony</td>
<td>3,833</td>
<td></td>
</tr>
<tr>
<td>Misdemeanor</td>
<td>21,231</td>
<td></td>
</tr>
<tr>
<td>Infraction</td>
<td>2,137</td>
<td></td>
</tr>
</tbody>
</table>

Source: Annual Reports of the North Dakota Supreme Court: 2005-2008

Table 3 indicates that, while PSIs are ordered by judges with the expectation of completion within five to six weeks, the reports are actually filed in an average span of almost two months. While this timeframe may not appear to be a lengthy delay within the context of courts and probation offices nationally, the delay has been sufficient in a small-caseload and population state such as North Dakota to reinforce judicial skepticism about the value of the PSI.
Table 3. Time Between Ordering and Completing PSIs: mid-2007 to mid-2009

<table>
<thead>
<tr>
<th>Difference in Days Between Date Ordered and Date Due</th>
<th>Difference in Days Between Date Ordered and Date Completed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Average</td>
<td>44.6</td>
</tr>
<tr>
<td>Median</td>
<td>37</td>
</tr>
<tr>
<td>Average</td>
<td>56.8</td>
</tr>
<tr>
<td>Median</td>
<td>50.5</td>
</tr>
</tbody>
</table>

Source: Information on PSI requests, due dates, and completions provided by North Dakota State Court Administrative Office.

C. Issues Raised by Judges Regarding PSIs and DOCR Position

1. Timeliness of PSI

The length of time from acceptance of the plea to the availability of the PSI report was a major factor, according to the judges interviewed, in their decisions as to whether to order the PSI. Judges are keenly aware of the time that proceedings require and strive to control any delays that are within their purview. The judges with whom we spoke, with one exception, all raised lack of timeliness as an issue that inhibited their use of PSIs. Even the judge whose district orders PSIs for all felony convictions expressed dissatisfaction with timeliness, noting that the investigations and report preparation take at least 30 days. The judge who found the time acceptable allows six weeks for completion of the report.

In one district—where the court only orders PSIs when the lawyers request them—the judges do not set a sentencing date until the report is completed. Though the state is rural and has homogeneity in areas, it encompasses a great deal of land area, with long distances between courts; these distances require probation officers to travel from site to site, thus contributing to the delay. It also increases the detachment of the report writer from the court and the parties when the writer is based at a distant location from the court.

2. Perceived Need for PSIs

Plea agreements are the norm in most courts in North Dakota. Grand Jury indictments are rare. Statistics reflect few trials. A typical sentencing hearing features presentation of the plea agreement and involves the normal court personnel, the prosecutor, and the defendant and defense counsel. The prosecutor provides information on the offense characteristics and the defendant’s prior record. The defense attorney provides information in mitigation of the

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offense and factors that the court might take into account in favor of the defendant. It appears that seldom is there any surprise information that would reflect negatively on the plea agreement, which, accordingly, is typically accepted.

When judges were asked about whether additional information might be helpful, two responses reflect what might be described as the general philosophy of the judges:

First, the judges believe that the attorneys for both sides have been proven to be effective advocates of their respective interests, and if there are additional evaluations, such as drug/alcohol issues or mental health problems, appropriate tests or evaluations are ordered with apparent agreement of both sides.

The second response reflects a recurring scenario suggestive of the rural nature of North Dakota. Most of the venues are in areas where most of the parties and counsel, as well as the judges, know each other and, consequently, the judges feel that little additional information is necessary. Interestingly, this is an area where judicial intent to send out a message to the community through sentencing can have the desired impact due to the apparent closeness of the population. If the court and the prosecutors are knowledgeable as to the lifestyle and background of the defendants and their families and associates, then a case could be made that the public, including potential offenders, may well be aware of potential consequences of their actions.

When the judges were describing their assessment of the efficacy and success of routine acceptance of plea agreements, they clearly saw no down side to this practice. Their position could well be summarized as a case of “if it’s not broken, don’t fix it.” While the adversarial role of the parties is maintained, both prosecution and defense reach agreements that are almost always accepted by the judge in passing sentence.

In contrast, all of the judges complimented the mandated presentence reports that were prepared on sex offenders. These reports were necessarily long and complex, but judges totally accepted that the information was germane to the sentencing of such offenders, and said that the reports were very helpful in their determining a final sentence. Some judges would like more information in certain parts of these reports and expressed interest in discussing the particulars of effecting those improvements. It appeared that the judges expect

the PSI in these cases—since it is mandated by statute—and thus they believe they must review it and that plea agreements must be reflective of its terms.

3. Issues Regarding Usefulness of PSI Reports and Changes Sought

Some judges wanted slightly different formats for reports, mainly to reduce the volume of data presented. One judge indicated that he had to read the report carefully because information that would not be particularly salient in his sentencing could be brought up during a hearing and he did not want to have to field surprise issues that would require after-the-fact reading of the report to be able to handle the discussion.

One issue noted by several judges was the DOCR's practice of using contract writers to prepare presentence reports. In the courts discussed above where judges tended to be familiar with all of the regular participants, including probation officers, the presence of signatures of contract writers concerned the judges. They expressed curiosity about the background and qualifications of such writers, with some judges under the impression the writers might be doctoral students fulfilling a course requirement. The judges uniformly expressed great appreciation for the work and professionalism of the probation officers, many of whom are located in proximity to the judges and appear routinely before them on other proceedings. The judges were not necessarily negative about the contract writers; rather, they knew they were not their usual probation officers and were less comfortable with accepting the reports they wrote.

A closely-related issue is the recommendation that may form part of the report. Many judges do not find recommendations, especially on the part of contract writers, to be particularly helpful. Even as the report in general may not be seen as useful to the sentencing process, some judges found inclusion of a recommendation even less helpful. Given the plea agreement that has been crafted by the attorneys and found acceptable by the defendant, a recommendation may appear at variance with the by-then accepted outlook shared by the parties and the judge in the case. On the other hand, the summary of the report may point out
areas for creating special conditions of supervision, as well as recommended programming for
the course of confinement if ordered.³

4. Views of the Department of Corrections and Rehabilitation (DOCR) Regarding
PSIs

The consultants met with DOCR officials to discuss the issues raised relating to the
usage of presentence reports. DOCR officials pointed out that they were in the middle of a
budget cycle so that changes in practice could pose challenges in terms of workload
management. In brief, if there were to be a significant increase in the ordering of reports, it
would be difficult—at least in the short-run—for the DOCR to provide personnel to meet the
demand for complete, factual reports, submitted in a timely manner. On a related issue, the
DOCR personnel also explained that whenever the court ordered special examinations or
evaluations, these were paid for by defendants on a sliding scale, and were not subject to
billing to either the courts or DOCR.

Department officials accept the court’s authority to decide whether to request a
presentence report. Further, they expressed the view that whenever requested, the reports
were complete and factual. One suggestion mentioned was a shift of emphasis from the
actual recommendation to a sentencing options section that would present the judge with
information that might bear upon needs to be addressed, special conditions to be imposed, and
programs that might be recommended. Since in some cases a sentence may be relatively
short, an early start in addressing such issues would make optimal use of available time.

During discussions with some judges the matter of risk and needs evaluations was
examined. Not all judges fully understood the impact of these evaluations and why they were
part of all reports. The DOCR’s tool is the Level of Services Inventory – Revised (LSI-R)
which is widely used to provide ranges of levels with which to look at a defendant’s risk if
released as well as needs that, if addressed, could render a defendant more ready to return to
society. The instrument has been normed for the state of North Dakota. Norming is an

³ The view judges nationally have regarding the inclusion of recommendations in PSI reports varies greatly
among judges and courts. Many judges express the position that they desire facts and that good PSI reports
focus on facts; these judges believe that they can reach an appropriate decision based on facts rather than by
reference to third-party recommendations.

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exact process that ensures that any scores that result are related to offenders from or returning to North Dakota. That is, North Dakotans are compared to North Dakotans.

The presentence report is also the seminal document that is used in programming for offenders in DOCR's custody as well as part of the decision making process for parole consideration. An additional side benefit of a presentence report to a court may occur when a judge is asked for input on the parole decision for an offender. If the sentencing judge is no longer on the bench, it could be helpful when the presiding judge assigns the query to a judge otherwise unfamiliar with the case for consideration. At present, the absence of PSIs in the vast majority of cases requires the DOCR to rely on what are likely less comprehensive background inquiries conducted during initial reception and classification at correctional institutions. The absence of a PSI to review is all the more problematic for judges when asked for input on parole decisions in cases they may have heard many years earlier or that may have been heard by a predecessor on the bench.

The DOCR officials were also asked about the use of contract presentence preparers. They indicated that there is a formal procedure for the vetting of writers applying to conduct presentence investigations as well as training for them. All such reports are also signed by a DOCR official.

In a pilot program ongoing in the Bismarck area, contract writers are under particular scrutiny for accuracy and completeness with the goal being identification of opportunities to improve the quality of the product. The recommendation, which is a standard part of existing reports, is written by the supervisor in cases in this program. This practice may be of more use to the judge, given the experience and standing of the supervisor.
III. OBSERVATIONS AND RECOMMENDATIONS

A. Overview

There appear several areas in which steps may be taken that would benefit the court and DOCR with regard to preparing and using PSI reports. These are:

1. Judges would likely benefit from orientation to acquaint them with how best to make use of presentence investigation reports

In view of the unfamiliarity many judges appear to have with the general procedure employed by DOCR in preparing PSI reports, whenever possible the presentence report should be part of judicial training. Presentations by DOCR officials would be able to present information on innovations and refinements that might prove helpful in the sentencing process. Of special importance is the LSI-R and other instruments or routine evaluations that, upon reflection, could prove helpful to judges once they have been informed about the general aims and tools for risk assessment.

2. Overall review by the DOCR of the quality, timeliness, and utility of presentence investigations and reports would make improvements possible

Judges have indicated several areas in which they would like to see changes in the existing manner in which PSI reports are prepared, such as less emphasis on family and educational background, and more focus on risk assessment and likelihood of rehabilitation. These concerns should be reviewed by a joint panel or panels of judges and senior DOCR personnel coordinated by the DOCR and the state courts administrative office. In addition to using the recommended orientation of judges to provide an opportunity for judges to inform the DOCR of the issues the judges have expressed about the usefulness of the reports, the DOCR should conduct regional meetings with judges to further address these issues. The meetings will also enable the DOCR to explain to the judges exactly how the PSIs are being conducted and by whom the reports are written. Based on these comments and suggestions, the DOCR should undertake a comprehensive review of its process for preparing PSI reports.

3. Benefits for the DOCR of increasing the number of PSI reports prepared

In the past, the DOCR has sought to have courts request PSI reports in all cases; however, limited resources and other demands on DOCR staff have resulted in the elimination
of this goal on the part of the DOCR. As already noted, at present, the DOCR conducts investigations and prepares presentence reports in a relatively small number of criminal cases. The DOCR, however, has indicated that if it had adequate resources, it would be useful to prepare these reports for all cases, with the added benefit of having them available for other purposes, including DOCR’s use in classifying convicted defendants upon their arrival at correctional institutions. This practice would also conform with national standards calling for PSI reports to be prepared in all cases.

4. Potential benefit of expanding the use of PSIs through a pilot test to (a) produce an increased number of PSIs and (b) determine their value for pretrial release decisions

If greater use of PSIs is to occur in the North Dakota District Courts, a piloting system would appear the appropriate route to test out the ability of the DOCR to conduct an increased number of PSIs and produce more reports that meet the needs and satisfy the requirements of the courts. The capacity to produce more reports might also support their use for pretrial release decisions with some investigations conducted prior to the plea. It would then be possible for the pretrial report (with inadmissible material removed) to be transmitted to the staff preparing the PSI, with needed updating occurring after sentencing.

These issues are discussed further below.

B. Discussion

1. Need for Judicial Education Programs on Use of PSI Reports

Because PSIs are conducted relatively infrequently in North Dakota, many judges, especially those outside the few regions of the state in which it has been common for judges to order PSIs, are generally unfamiliar with both the content and usefulness of these investigations and reports. We discerned a number of misconceptions about the provenance of the reports. For example, as noted earlier, judges suggested to us that graduate students at universities were contracted to prepare the reports; in actual practice, the DOCR stated that it most frequently contracts with former probation officers to undertake this work.

In terms of organizing judicial education opportunities, it will be more effective if judicial education on using PSI reports is conducted on a regional basis, consistent with the
districts into which the District Court is organized in North Dakota for several reasons. First, statewide judicial educational opportunities are limited by the need to close courts statewide and the costs of assembling all judges in one location. Second, judges are likely to be more receptive to training conducted in their own area with their regular colleagues in attendance and, preferably, with staff, such as probation officers in their districts, taking a significant role in the educational programs.

2. DOCR Needs to Review the Quality, Timeliness, and Utility of PSI Reports

As noted earlier, significant criticisms have been raised by judges about the quality, timeliness, and utility of PSI reports as these are now prepared. It will be important for the DOCR to review the entire process of conducting the investigations and preparing the reports in order to generate a product that the courts will be more willing to request and employ in sentencing. The following observations are based on the consultants’ site meetings and review of sample reports.

Judges have stated that there is normally too much background information about defendants’ childhoods, friends, and education. Moreover, judges have also complained that PSI reports are not completed in a timely fashion. The average time periods reported in Table 3, supra, indicate that both the average and median time periods for preparation of PSI reports are less than 60 days. Although there are some lengthy outliers—as long as 682 days—the average and median times fall within what generally would appear to be an acceptable range. In the North Dakota context, however, where sentencing frequently occurs very shortly after conviction—and PSIs remain a rarity—this time span for PSIs appears longer in relation to the overall length of the criminal process.

It will be important that any program in which PSIs and reports are strengthened so that their use may be expanded to more cases be designed so as to provide the report to the judges in the most expedited span of time, possibly through use of information gathered earlier in the criminal process (see discussion under section 4, below, calling for piloting of improved PSIs and possible use of pretrial reports to gather information earlier.)

It seems likely that a principal reason why judges display less confidence in the...
contents of presentence reports is the practice of contracting this work out, even if it does go
to former probation officers and not, as assumed by some judges, to students in criminal
justice or similar university programs. When the locally-assigned probation officer prepares
the report, the judge knows the individual personally and, in a state where courts operate in
many small population centers, increased trust in the reports is likely to occur.

The DOCR provided seven presentence reports for review by the consultants; the
reports came from different locations in the state. One report related to a sexual offense and,
consistent with the earlier positive comments of the judges, this report contained comparably
more verified information on various aspects of the offense as well as the offender than did
the other reports. Overall, lack of verification appeared to be a significant shortcoming of the
sampled report. This finding supports the views of the judges with whom we spoke regarding
PSIs with the exception of those for sexual offenses, which appear to be prepared according to
a stricter protocol because the PSI is mandated by statute in these cases.

The perceived unreliability of the reports noted by some judges appeared to account
for practices of not relying on the presentence reports for sentencing considerations. In
reviewing the sample reports, some were comprised largely of information supplied by the
defendant, without obvious verification. For example, included were instances where high
school completion (or General Education Diploma) was not verified for defendants who
might otherwise be candidates for GED in an institutional setting, so as to enhance chances
for employability. In a decision to impose probation, or later parole, employability may make
a significant difference to a decision maker.

Possibly inadequate training of writers was suggested by some reports that included
references to a defendant by first name only, as well as references to the presentence writer in
the first person (e.g., “I think Mr. ___ should be sentenced appropriately through the court ...
...”). There also were instances where writers seemed to be making observations that would
be more properly made by mental health professionals. For example, one report included a
statement about a defendant that “his thought processes seem to be all over the place”.

Some reports made good use of the LSI-R instrument by incorporating findings in the
rationale for sentencing recommendations. The recommendation was enhanced by thoughtful
consideration as to how findings could give the judge alternatives in a sentencing decision. Conversely, some reports included recommendation language that appeared to be based solely on the writer’s opinion. The results of the consultants’ review of the reports and the comments made by the judges during the site visit suggest inconsistency in the practices followed by DOCR in preparing the reports and in meeting the stated needs expressed by the judges.

The body of each report also does not uniformly contain information from victims. There is often a reference that such information was requested and will be attached if or when received. Given the placement of victim programs in the offices of the prosecutors, it might be expected that this information is presented by the prosecutor during a plea hearing or sentencing. If that is the case, then the judges may well be getting the information that they require. However, because it is not contained in the PSI report, or because in most cases, there is now no PSI report, it may not be available in a form that is available for subsequent use, such as for a parole hearing, possibly years into the future.

3. A Committee of DOCR Representatives and Experienced Trial Judges Should be Established to Address Current and Potential Increased Use of PSIs

The DOCR officials indicated that they take their presentence report services seriously and want to produce a quality product. This orientation can set the stage for productive discussions between the DOCR and a committee of experienced trial judges to determine the most likely cases appropriate for increased use of improved PSIs and reports. The joint committee can also recommend specific improvements in the current PSI. In terms of increasing communication and dispelling misimpressions, the DOCR should also conduct regional meetings with judges. If there were to be discussions about the content and use of reports, then perhaps both parties might be happier with the reports themselves and the frequency with which they are ordered.

One issue that was raised is that judges frequently request additional information prior to sentencing. If the additional information requested would materially affect the sentence, it is not uncommon for an admonition to be made that certain information would reopen the plea agreement for consideration. Often, however, the information entails verification of a bit of data or information to guide the ordering of special conditions during incarceration. Given
the proactive success in crafting plea agreements acceptable to the parties, totally new data to incorporate into the PSI would be unlikely.

4. Consideration Should be Given to the Advantages of Preparing PSI Reports in All Cases

As noted earlier, the DOCR has previously sought to expand the number of PSI reports prepared so as to have available a report for each defendant. This report would be useful to the correctional part of the DOCR when defendants arrive at correctional institutions and are classified in terms of correctional needs, as well as housing and activity programs.

Expansion of the DOCR’s capacity to generate PSI reports clearly stands as a longer-term objective. As noted earlier, at present, these reports are regularly ordered in only one of seven districts, and somewhat frequently ordered in one other district. In several districts, the reports are ordered only when attorneys request them, a relatively infrequent occurrence.

Nevertheless, the goal is a reasonable one, provided that the DOCR, in collaboration with the judges and the judicial administrative staff of the courts, make strong efforts to improve the quality of the reports and to conform their contents to the expressed needs of the judges. In general the most important upgrades needed in these needs, as stated by the judges, were for more information as to risk assessment, more validation of information contained in the report, less information on the personal background of defendants, and, in the view of some judges, a strong preference for validated information rather than recommendations.

The American Bar Association Standards Relating to Sentencing call for presentence investigations and reports to be prepared in virtually all cases, with only a few exceptions:

**Standard 18-5.2 Requirement of report**

(a) The rules of procedure should authorize sentencing courts, upon their own motion or upon request of either party, to call for a presentence investigation and a written report of its results.

(b) The rules of procedure should require such investigation and report in all cases except that:

(i) The investigation and report may be omitted in a case if the offender waives them, with the consent of the prosecutor, and the court finds that it has sufficient information to sentence the offender.

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(ii) The rules of procedure may provide exceptions for sentencing in cases where the costs of investigations and reports exceed possible benefits in the sentencing process.

Any sentencing court that lacks sufficient information to perform its sentencing responsibilities should have the power to order a presentence investigation and report.

The desire expressed by many of the judges interviewed to limit the reports to validated facts and to have the writer, preferably a local probation officer, available in court at the sentencing to respond to questions from the court, is reflected in the ABA standards as well:

**Standard 18-5.3 Substantiation of information**

The rules of procedure should provide that:

(i) Information in the presentence report should be limited to material facts which the preparer of the report, upon diligent inquiry, believes to be accurate and which, if challenged, can be substantiated;

(ii) The preparer of the report should be available to answer questions concerning the content of the report and the sources of information at a presentence conference and at the sentencing hearing;

(iii) If any material information in the report is challenged by either the prosecution or the defense, the preparer of the report is responsible to assist in determining whether the information can be sufficiently substantiated.

PSIs should also be available for all inmates, especially for parole consideration. Because the DOCR is responsible for producing reports, whether presentence or postsentence, they can simply have their officers prepare such reports, perhaps while the person is still in local custody after sentencing. Given that the DOCR is now at the end of a budget preparation cycle, it could, with the support of the AOC, make a strong case for adequate personnel to provide the reports.

5. Consideration Should Also Be Given to Expanding the Use of PSIs Through a Pilot Project and Possible Application for Preliminary Use

As already noted, currently, PSIs are ordered and prepared in a very small number of cases. Very limited review of the content of a small number of PSI reports disclosed significant shortcomings in both subject and form of the reports. Even if the North Dakota District Court judges were agreed that it would be useful for them to receive PSIs in any significant increased number of criminal cases -- which they do not appear to be -- it is not clear that the DOCR is at present in a position to provide these investigations and reports.
The expanded use of PSIs in North Dakota’s District Courts could best proceed by adopting two approaches: first, the courts and the DOCR should consider selecting two Districts to pilot test increased use of PSIs and reports; second, the courts and the DOCR should consider selecting two districts—not necessarily the same ones—for initiating use of PSIs for pretrial release purposes. In the federal courts and many state courts, information is compiled shortly after arrest to be used for decisions regarding pretrial status, including conditions of release. The goal of compiling this information is to investigate and verify information about defendants at the earliest possible stage in criminal proceedings so as to suggest to the courts appropriate combinations of conditions of release, including, for example, electronic monitoring in appropriate cases, that will allow more defendants to be released prior to trial. This in turn relieves pressure on jails and prisons to hold unconvicted defendants who can be released back into the community under conditions that will prevent either their flight or their becoming a danger to the community.\(^5\)

Whether or not the actual development of a pretrial service component itself is contemplated, compiling information about defendants as soon as possible after arrest would increase the ability of the courts to receive important, verified information relating to the accused at the first appearance, thereby also potentially expediting many cases. As with expanding preparation of PSIs, however, this function should be introduced through piloting in one or two districts at the start. The standard relating to first appearance of the National Association of Pretrial Service Agencies conveys some of the added benefits the courts would gain from implementing this approach\(^6\):

**Standard 3.2 Essential functions to be performed in connection with the defendant’s first court appearance**

Prior to the first appearance in court of persons who have been arrested and charged with a crime, the pretrial services agency or program should:

(a) collect, verify, and document information about the defendant’s background and current circumstances that are pertinent to the court’s decision concerning release or detention of the defendant;

\(^5\) An ancillary effect of providing a pretrial release agency is the decreased need to rely on bondsmen to support the release process, as the agency will suggest appropriate conditions of release.


(b) present written, accurate information to the judicial officer relating to
the risk a defendant may pose of failing to appear in court or of threatening the
safety of the community or any other person, and recommend conditions that could
be imposed to respond to the risk;

(c) identify members of special populations that may be in need of
additional screening and specialized services;

(d) provide staff representatives in court to answer questions concerning the pretrial services
investigation report, to explain conditions of release and sanctions for non-compliance to the
defendant, and to facilitate the speedy release of defendants whose release has been ordered by the
court; and

(e) develop supervision strategies that respond appropriately to the risks
and needs posed by released defendants.

The information gathered during this post arrest period about charged defendants
could also be used later to prepare PSI reports more speedily and efficiently. Emphasis on the
information gathered during the pretrial period may also be shifted as well in directions that
the judges recommend, including far greater reliance on verification of information included
in the reports. Although some information gathered for use in pretrial release hearings may
not be appropriate for transmittal to those preparing PSIs at any point in the process—in some
jurisdictions, for example, drug tests are administered to all defendants awaiting first
appearance—this information is gathered only for use in determining eligibility or conditions
for pretrial release and accordingly will not be admissible at trial or other subsequent
proceedings.

Although information gathered during the post arrest/pretrial period would be
primarily used for the limited purview of pretrial release and other functions, the results of
activities performed pretrial would generally become available to probation officers after a
plea is taken and would further assist the court, and eventually the DOCR. It is therefore
suggested that, as a start, in the pilot districts where PSI reports are prepared in all or most
cases, the initial focus might be on preparing pre-plea PSI reports in appropriate cases rather
than pretrial release reports. A pre-plea PSI report is prepared in regard to a case in which it
is clear early on that disposition is going to occur through guilty plea.
IV. SUMMARY

The results of the study regarding the use of PSI reports conducted in response to the technical assistance request, documented in this report, can be summarized as follows:

1. Judges would benefit from programs to acquaint them with how best to make use of presentence investigation reports.

In view of the unfamiliarity many judges appear to have with the general procedure employed by DOCR in preparing PSI reports, whenever possible the presentence report should be part of judicial training. Presentations by DOCR officials would be able to present information on innovations and refinements that might prove helpful in the sentencing process. Of special importance is the LSI-R and other instruments or routine evaluations that, upon reflection, could prove helpful to judges once they have been informed about the general aims and tools for risk assessment.

2. Overall review by DOCR of the quality, timeliness, and utility of presentence investigations and reports should be followed by effecting needed improvements

Judges have indicated several areas discussed in this report in which they would prefer to see changes in the existing manner in which PSI reports are prepared. Based on these comments and suggestions, DOCR should undertake a comprehensive review of its process for preparing them.

3. The DOCR should consider launching a longer-term program to increase the number of PSI reports prepared

In the past, the DOCR has sought to have courts request PSI reports in all cases; however, limited resources and other demands on DOCR staff have resulted in the withdrawal of this request. At present, DOCR conducts investigations and prepares presentence reports in a relatively small number of criminal cases. DOCR, however, has indicated that, in addition to the value the PSI reports could provide for judges, if resources are available, it would be useful to prepare these reports for DOCR use in classifying convicted defendants upon their

arrival at correctional institutions. This practice would also conform with national standards calling for PSI reports to be prepared in all cases.

4. Consideration should also be given to expanding the use of PSIs through a pilot project entailing greater use of PSI’s generally and potential use for pretrial release decision purposes.

Rather than immediately expand use of PSIs statewide as the DOCR has previously suggested, the agency should work closely with the courts through the State Court Administrator’s Office to select a small number of districts for pilot testing the increased use of PSIs and reports. The DOCR should also work closely with the state court office to explore the feasibility of launching a pilot test for compiling verified defendant information following arrest that can also be used for pretrial release and other appropriate pretrial needs as well as be incorporated, as appropriate, into the post disposition PSI report.
APPENDIX

NORTH DAKOTA CRIMINAL RULE 32 (c)

(c) Presentence Investigation.

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

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

(3) Report.

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

(i) family, educational, and social history;

(ii) employment history and financial condition;

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

(iv) any information required by the court.

(B) Information Excluded from Report. The following types of information may not be included in a presentence report, but may be submitted to the court as an addendum to the report:

(i) any diagnostic or prognostic opinion that, if disclosed, might seriously disrupt a program of rehabilitation;

(ii) information or sources of information obtained confidentially, but subject to disclosure by the court as provided in Rule 32(c)(4)(A);

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

(iv) any victim impact statement; or

(v) any other information, including medical, psychiatric, or psychological information, information relating to the victim or victims, and other matters the court may consider.

confidential, that if disclosed, might result in harm, physical or otherwise, to the defendant, to a victim, or to other persons.


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

(B) Disclosure to Defendant. If the court allows the defendant to examine any part of the presentence report or any addendum, this disclosure must be made at least ten days before sentence is imposed, unless the defendant waives the ten-day requirement. The court must provide the defendant and the defendant's counsel a copy of the disclosed material and give them an opportunity to comment. The court may allow the defendant and the defendant's counsel to introduce testimony or other information relating to any alleged factual inaccuracy in the disclosed material. Any material disclosed to the defendant and the defendant's counsel must also be disclosed to the prosecuting attorney.

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

(D) Disclosure to Department of Corrections and Rehabilitation. The presentence report and any addendum is available to the Department of Corrections and Rehabilitation for use in providing assessment and treatment services to the person when in the Department's custody, on parole from the Department, or under the supervision and management of the Department. The Department may share the presentence report and any addendum with a public treatment or transition facility or licensed private treatment or transition facility providing assessment and treatment services to the person when in the Department's custody, on parole from the Department, or under the supervision and management of the Department. The Department may share the presentence report and any addendum with the compact administrator of a supervising state in accordance with the Interstate Compact for Adult Offender Supervision, N.D.C.C. ch. 12-65. A presentence report and any addendum disclosed under this provision must remain confidential and may not be read or copied by anyone else except as allowed by Rule 32(c) or federal law.

(E) Harmful Information. If the court finds there is information in the presentence report or any addendum that would be harmful to the defendant or to other persons if disclosed, the court must not permit the public or the parties to read or copy that portion of the report or the addendum. The court must give an oral or written summary of any non-disclosed information it will rely on in determining sentence and must give the defendant or the defendant's counsel an opportunity to comment. The court may give its summary to the parties in camera.
(F) Defendant's Comments. If the comments of the defendant and the defendant's counsel, or testimony or other information introduced by them, allege any factual inaccuracy in the presentence report or any addendum, or in any of the information summarized, the court, for each matter controverted, must:

(i) make a finding on the allegation, or

(ii) make a determination that no finding is necessary because the matter controverted will not be taken into account in sentencing.

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