

Federal Presentence Investigation Report

BY ALAN ELLIS

The federal presentence investigation report (PSR) is crucial for two purposes: First, it is the document most heavily relied on by the judge in imposing sentence—particularly in those cases where a guilty plea has been entered and the court knows little about the defendant. Had the defendant gone to trial, the court would have more information about the individual—or at least his or her offense conduct. Second, and equally important, it is the document that the Federal Bureau of Prisons relies on in making designations and placements and many other decisions throughout an inmate’s period of incarceration, including, but not limited to, whether to grant early release through half-way house and, if so, for how much time.

After verdict by either trial or guilty plea, the court will order the preparation of a PSR. In most US district courts, the procedures are the same.

The initial step is a meeting with the US Probation Office shortly after sentencing, during which counsel and the defendant will be scheduled for an interview with a US probation officer (USPO) who will prepare the report. Typically, in most probation offices there are two divisions: PSR preparers and those officers who supervise people on probation or supervised release. Often, to facilitate the USPO’s task, counsel will be provided with a worksheet to be filled out and given to the USPO at or before the meeting. It is strongly advised that counsel meet with the client, fill out the report, and have it neatly typed and ready to present to the USPO along with the documents identified in the instructions on the worksheet (birth certificate, financial statements, income tax returns, etc.). This makes the USPO’s job easier.

Practice tip. By the time of the interview, the assistant US attorney or federal prosecutor assigned to the case will have provided to the USPO a prosecutorial memo outlining the government’s version of the offense. In most cases, this memo is neither flattering nor helpful to the client. Accordingly, our office prepares our own memo for the USPO that we submit



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along with the completed worksheet and the required documents. In addition to the memo, we provide the USPO with any favorable mental health reports and character letters. We also advise interested individuals how to prepare letters that reflect favorably on a defendant’s character.

The PSR worksheet will also have a section called “Acceptance of Responsibility” or “Defendant’s Version of the Offense.” It is our practice to leave that blank and submit our written version to the USPO at the interview or shortly thereafter.

In many cases, in order to qualify for a downward adjustment for acceptance of responsibility under the US Sentencing Guidelines (USSG), all that is required is an acknowledgement of guilt. The USPO is best able to advise during the interview what will be needed to satisfy this requirement. Often, the memo we submit along with the worksheet will provide our client’s acceptance of responsibility/version of the offense.

During the course of the interview, the defendant will be asked little other than to confirm or clarify what is on the worksheet. In short, the interview is mostly a demographic interview as opposed to interrogating the defendant as to the offense.

Federal Rule of Criminal Procedure 32(e)(2) requires that 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.” In some districts, the draft report will contain a sentencing recommendation by the USPO to the court. In some jurisdictions, the sentencing recommendation is left for the final PSR that is presented to the court and the parties. Please note that the draft report is not submitted to the court. In other districts, probation officers either do not make sentencing recommendations or, if they do, they are not made available to the parties.

Contents of Report

The PSR will start with the face sheet identifying the sentencing judge, prosecutor, defense counsel, sentencing date, offense counts in the indictment/information, arrest date, release status (identifying how much time, if any, the defendant has spent in custody), detainers, codefendants, any related cases, and date the draft report was prepared.

It will also contain the defendant’s identifying data such as his or her name, date of birth, age, race, national origin, sex, Social Security number, FBI number, and US Marshal number (this will become the Bureau of Prisons’ register number assigned to the defendant should he or she be incarcerated). It will also list any education, dependents, and citizenship (important because only a US citizen can be designated to a minimum security federal prison camp). If the defendant is a naturalized US citizen, that fact must be noted as verified along with, if possible, the

date of the naturalization. Without this information, an otherwise eligible offender may not be designated by the Bureau of Prisons to a minimum security federal prison camp. The face sheet will also contain the defendant's country of birth, place of birth, and, very important, legal address and residence address. This is crucial information because the Bureau of Prisons will attempt to designate a defendant to a facility as close to the individual's residence as possible—generally within 500 miles—should he or she be sentenced to a term of incarceration.

The body of the report will contain information regarding the offense, starting with the actual charges and convictions and then the actual offense conduct (generally as reported by the prosecution). Where there are multiple defendants, the defendant named on the PSR will often be identified in terms of relative culpability.

The PSR will next address a victim impact statement indicating to whom and how much restitution is owed, which is not necessarily the same as the total loss attributable to any economic crime scheme. This loss is governed by USSG § 2B1.1 and often includes intended loss rather than actual loss listed in the victim impact section.

The report will then move on to a section indicating whether the defendant has obstructed justice. Next, the PSR will outline the defendant's acceptance of responsibility—if the defendant indeed has accepted responsibility—which he or she must do in all cases in which a guilty plea was entered in order to obtain a downward adjustment under USSG § 3E1.1.

The offense conduct will then calculate preliminary advisory federal sentencing guidelines for the total offense level.

The next part of the PSR will be the defendant's criminal history. Here the defendant's prior criminal record will be discussed, including arrests not leading to convictions. The PSR often lists details regarding the offense. Based on these convictions, the defendant will receive a criminal history score that is used to calculate where the defendant will fall within the federal sentencing guidelines.

Practice tip. The Bureau of Prisons will look closely at the prior record section of the PSR. If there are any pending charges, the bureau may very well treat these as detainers or unresolved charges that may preclude placement in a minimum security federal prison camp. Prior convictions indicating violence or flight risk may have the same impact.

The offense characteristics part of the PSR will list personal and family data, physical condition, mental and emotional health, and substance abuse. Physical and mental health can be mitigating factors at sentencing, and substance abuse will be viewed by the Bureau of Prisons to determine eligibility for its Residential Drug and Alcohol Program (RDAP). Generally speaking, if the PSR reflects substance abuse that includes illicit and/or prescription drugs and/or alcohol use within one year prior to the offender's arrest, it will make the individual eligible for the program. Successful completion of the RDAP can lead to up to one year off the defendant's sentence and generally a six-month halfway house placement at the end of the sentence for transitional care in the community.

The offender part will then list educational, vocational, and special skills; employment record; financial condition; and ability to pay restitution. This financial condition section will be considered by the court in determining whether the defendant is able to pay a fine and, if so, how much and under what terms and conditions.

Finally, the report will indicate the calculated guideline range.

Objections to the PSR

Generally, within 14 days of the issuance of the draft PSR—which only goes to the concerned parties and not to the court—objections can be filed. Within seven days before sentencing, the final report will be issued and made available to the court. Generally, those objections not made during the 14-day window before the PSR is presented to the court cannot be raised for the first time at sentencing, so it is critical that all objections be raised when the report is in its draft version. ■