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MEMORANDUM

TO: Criminal Rules Committee
FROM: Robin Whitley
SUBJECT: Modification of Crim. P. 32(a) regarding timing of PSIR, and issues stemming from that work
DATE: 10/8/2014

With this memo is a revised proposal for amendments to Crim. P. 32. At its meeting in April of 2014, the Committee voted on several aspects of changes to the rule, and this latest proposal incorporates and reflects those decisions.

The Committee also sent the matter back for Mr. McGreevy and me to meet. We were asked to work on proposals or counter-proposals concerning language addressing waiver of the presentence-report requirement, and provisos or exceptions to waiver. We were able to reach agreement on language, and this proposal reflects that agreement.

I offer the following explanations:

- The shading in the proposal designates areas where text differs from the draft the Committee worked from in April. This may include:
 - additions or indicated deletions to comport with the Committee's April actions;
 - language added or deleted to address the specific waiver issue that had been referred back to Messrs. Whitley and McGreevy;
 - other changes that became necessary due to either of the above.
- The double-underlining and strikeouts indicate some, but not all, of the proposed changes to the current rule:

- One of the Committee's April decisions was to reformat the rule. Textual changes that facilitated the improved layout but did not change the essence of the rule, and that were before the Committee in the draft considered in April, are not marked with underlining or strikeout. On the other hand, proposed modifications that have not before been seen by the Committee—even ones that involve the mere moving of clauses (and hence make no substantive change)—are marked with underlining or strikeout so as not to be overlooked.
- Modifications that substantively change the rule are marked with underlining or strikeouts even if they were already presented to the Committee. Hence, no substantive change is unmarked.
- The proposed 32(a)(2) concerns the court's authority to order a physical or mental examination. This authority is found both in statute and in the current rule (at 32(a)(1)). In the draft previously before the Committee, which embodied all the content requirements for a report, expression of this authority was interwoven into the content specification. But now that the Committee has voted to delete the content specifications, this examination-authority clause needs to be returned into the rule.
- The topic of a court's need to address restitution at every sentencing was the main focus of the efforts of Mr. McGreevy and me. At previous meetings, the Committee had discussed the fact that the statute (16-11-102(4)) attaches its proviso to the waiver-of-PSIR clause, thus putting in one place both the availability of waiver and the point that even a waiver of PSIR does not relieve the court of the need to receive restitution information. This statutory addition had never been added to the rule. The Committee discussed concerns that the absence of the proviso in the rule leaves the incorrect intimation that a court may proceed to immediate sentencing, once a PSIR is waived, without addressing restitution. The discussion led the Committee to ask the two of us to address the issue. Our agreed resolution is to add text, not in the waiver paragraph (32(a)(1)(B)), but in the portions of the rule addressing sentencing (32(b)(1)) and judgments (32(b)(2)), where we think it belongs. Our reasoning:

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- The restitution information doesn't come from, and normally isn't in, the PSIR; it comes from the prosecuting attorney per statute, so putting reference to it in the PSIR portion of the rule would be misguided. *See* 18-1.3-603(2) ("The court shall base its order for restitution upon information presented to the court by the prosecuting attorney, who shall compile such information through victim impact statements or other means to determine the amount of restitution and the identities of the victims.").
- The concern the Committee encountered over not having any reference to this information in the rule was the suggestion that a court can proceed to immediate sentencing without dealing with restitution if a PSIR is waived. It's only that tacit (and incorrect) sentencing suggestion that remains a concern now that content specification for PSIRs is gone. So the best approach is to directly articulate the restitution requirement at the point in the rule that addresses sentence and judgment.

Rule 32. Sentence and Judgment

(a) Presentence or Probation Investigation.

(1) When Investigation and Report Required.

- (A) **In General.** The probation officer must make a presentence investigation and written report to the court before the imposition of sentence or granting of probation:
- (i) in any case in which the defendant is to be sentenced for a felony and the court has discretion as to the punishment, or
 - (ii) when the court so orders in any case in which the defendant is to be sentenced for a misdemeanor.
- (B) **Waiver.** The court, with the concurrence of the defendant and the prosecuting attorney, may dispense with the presentence investigation and report unless a presentence report is required by statute, including but not limited to the requirements of section 16-11-102(1)(b).

[provisions regarding applications for probation deleted per Committee's 4-18-2014 vote]

[provisions regarding content of report deleted per Committee's 4-18-2014 vote]

(2) **Court May Order Examination.** The court, upon its own motion or upon the petition of the probation officer, may order any defendant who is subject to presentence investigation or who has made application for probation to submit to a mental and physical examination.

(3) **Delivery of Report Copies.** The probation officer must provide copies of the presentence report, including any recommendations as to probation, to the prosecuting attorney and to defense counsel or the defendant if unrepresented. The copies must be provided:

(A) at least 72 hours before the sentencing hearing, or

(B) at least 7 days before the sentencing hearing if either the prosecuting attorney, defense counsel, or the defendant if unrepresented, so requests of the court within 7 days of the time the court sets the date for the sentencing hearing. If the probation department informs the court it cannot provide the report copies at least 7 days before the sentencing hearing, the court must grant the probation department additional time to complete the report and must reset the sentencing hearing so that it is held at least 7 days after the probation department provides the report copies.

(b) Sentence and judgment.

(1) Sentence shall be imposed without unreasonable delay. Before imposing sentence, the court shall afford the defendant an opportunity to make a statement in his or her own behalf, and to present any information in mitigation of punishment. The state also shall be given an opportunity to be heard on any matter material to the imposition of sentence. Alternatives in

sentencing shall be as provided by law. When imposing sentence, the court shall make an order or finding regarding restitution as specified in section 18-1.3-603(1), C.R.S., except when imposing a sentence for a state traffic misdemeanor offense charged in a county court in which the prosecuting attorney is acting as a special deputy district attorney pursuant to an agreement with the district attorney's office.

(2) [No change.]

(3) **Judgment.**

(A) A judgment of conviction shall consist of a recital of the plea, the verdict or findings, the sentence, ~~the finding of the amount of presentence confinement,~~ and costs, if any are assessed against the defendant, ~~defendant.~~ The following shall accompany the signed judgment of conviction, and may be included in the judgment of conviction document: an order or finding regarding restitution where required by paragraph (b)(1) of this Rule; a finding of the amount of presentence confinement; ~~the a~~ finding of the amount of earned time credit if the defendant had previously been placed in a community corrections ~~program, program;~~ and a statement that the defendant is required to register as a sex offender, if applicable.

(B) If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly.

(C) All judgments shall be signed by the trial judge and entered by the clerk in the register of actions.

(c) **Advisement.**

(1) Where judgment of conviction has been entered following a trial, the court shall, after passing sentence, inform the defendant of the right to seek review of the conviction and sentence, and the time limits for filing a notice of appeal. The court shall at that time make a determination whether the defendant is indigent, and if so, the court shall inform the defendant of the right to the assistance of appointed counsel upon review of the defendant's conviction and sentence, and of the defendant's right to obtain a record on appeal without payment of costs. In addition, the court shall, after passing sentence, inform the defendant of the right to seek postconviction reduction of sentence in the trial court under the provisions of Rule 35(b).

~~If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. All judgments shall be signed by the trial judge and entered by the clerk in the register of actions.~~

(2) Where judgment of conviction has been entered following a plea of guilty or nolo contendere, the court shall, after passing sentence, inform the defendant that the defendant may in certain circumstances have the right to appellate review of the sentence, of the time limits for filing a notice of appeal, and that the defendant may have a right to seek postconviction reduction of sentence in the trial court under the provisions of Rule 35(b).