

ANNOTATED SENTENCING LITANY

Judge James P. Jones

1. Now is the time scheduled for the sentencing of the defendant. *Ask the defendant:*

Have you and your lawyer read and discussed the presentence report?¹

2. *Ask counsel:* Are there any objections to the report?²

3. *Ask counsel:* Does counsel desire to put on any evidence as to the objections?³

4. *Hear evidence and argument as to controverted issues.*

5. The following are the court's findings on each matter controverted.⁴

The [first] matter controverted is [*describe*].

The court finds [*describe*].

[The remaining matter[s] controverted will not be taken into account in or affect

¹ Required by Fed. R. Crim. P. 32(c)(3)(A). The presentence report ("PSR") must be disclosed not later than 35 days prior to sentencing, *see* Fed. R. Crim. P. 32(b)(6)(A), but this period may be waived.

² Objections must be made to the probation officer within 14 days after receipt of the PSR. But, for good cause, the court may allow a late objection. *See* Fed. R. Crim. P. 32(b)(6)(B) and 32(b)(6)(D).

³ The court in its discretion may permit evidence. *See* Fed. R. Crim. P. 32(c)(1). Hearsay evidence may be received if it has "sufficient indicia of reliability to support its probable accuracy." USSG § 6A1.3. The defendant does not waive his Fifth Amendment right not to testify at a sentencing hearing by pleading guilty and his silence cannot be used to draw an adverse inference as to disputed sentencing factors, *see Mitchell v. United States*, 526 U.S. 314 (1999), except as to acceptance of responsibility. *See United States v. Goods*, 187 F.3d 631 (4th Cir. 1999).

⁴ Either findings or a determination that the matter need not be taken into account are required by Fed. R. Crim. P. 32(c)(1).

sentencing, and therefore no finding is necessary.]⁵

[It is not necessary for the court to determine this matter, since under either view of the dispute the guideline ranges overlap and the court intends to impose the same sentence under either of the applicable ranges.]⁶

[The response by the probation officer in the addendum to the presentence report adequately address the [remaining] matters controverted and the court expressly adopts those responses as its findings.]

*[If the government has filed notice before conviction of increased punishment for certain drug offenses based on prior drug convictions, i.e., doubling of mandatory minimums, say to defendant : Do you affirm or deny that you have been previously convicted as alleged in the information? I hereby inform you that any challenge to a prior conviction which is not made before sentence is imposed may not be thereafter raised to attack the sentence.]*⁷

Are there any other controverted matters on which the parties desire the court to make findings?

6. Except as otherwise set forth by the court, the court accepts the presentence report

⁵ See Fed. R. Crim. P. 32(c)(1). It should be noted, however, that a copy of the PSR is sent after sentencing to the Bureau of Prisons (“BOP”) and relied upon by it in determining the defendant’s security classification. Thus, errors in the PSR may preclude the defendant from receiving the benefits of a less restrictive facility. Any such errors should be brought to the attention of the probation officer or the court, so that a correction may be made in the PSR.

⁶ See *United States v. White*, 875 F.2d 427 (4th Cir. 1989).

⁷ See 21 U.S.C.A. § 851(b).

as its findings of fact [and overrules any objection inconsistent with these findings].⁸

7. Based on those findings, the proper calculation of the defendant's offense level is _____, with a criminal history category of _____, which produces a range of _____ to _____ months imprisonment and a fine range of \$_____ to \$_____, along with a supervised release range following imprisonment of _____ to _____ years.

8. [I accept the provisions of the plea agreement and upon the motion of the government, the following charges are dismissed: _____].⁹

[9. The government has filed a motion for downward departure for substantial assistance to authorities pursuant to section 5K1.1 of the Guidelines Manual [and/or pursuant to 18 U.S.C. § 3553(e)]. Will the government set forth the facts surrounding its motion?

10. I intend to depart downward in accord with the government's motion.]¹⁰

⁸ The court may accept the PSR as its findings. *See* Fed. R. Crim. P. 32(b)(6)(D).

⁹ If the plea agreement involves the dismissal of other charges, the court must defer acceptance of the agreement (i.e., the dismissal of the other charges) until there has been an opportunity to consider the PSR. *See* USSG § 6B1.1; Fed. R. Crim. P. 11(e)(2). If the court declines to accept the agreement and dismiss the other charges, the defendant is allowed to withdraw his plea. *See Id.*

¹⁰ USSG § 5K1.1 allows a downward departure below the guideline range, using enumerated factors. 18 U.S.C. § 3553(e) permits a sentence below the statutorily required minimum sentence using the same factors. *See Melendez v. United States*, 518 U.S. 120, 128 (1996). The five enumerated factors are:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

[11. A motion for downward departure has been made by the defendant on the following ground: _____.¹¹

[12. A motion for upward departure has been made by the government on the following ground: _____.¹²

[13. I recognize that I have the power to grant a departure on this ground, but I find

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.

USSG § 5K1.1(a)(1)-(5).

While the court has broad discretion as to the extent of the departure, it may only consider the 5K1.1 factors and the extent of any departure must be reasonable. *See United States v. Pearce*, 191 F.3d 488 (4th Cir. 1999). Compare the difference in the "safety valve" provision of 18 U.S.C. § 3553(f) which removes the statutorily required drug offense minimum under certain circumstances. No departure occurs here since the mandatory minimum is removed and the guideline range applies. In addition, no government motion is required, as with 5K1.1 and 18 U.S.C. § 3553(e).

¹¹ In order to ascertain whether a case is appropriate for departure, the court must first determine whether the potential basis for departure was forbidden, encouraged, discouraged, or unmentioned by the Sentencing Commission in the Guidelines. *See Koon v. United States*, 518 U.S. 81, 95-96 (1996). If a factor is one on which the Commission discourages departure, the factor must exist to such an uncommon degree that it is outside the heartland of circumstances embraced by the relevant guideline. *See id.* If unmentioned, the court must decide whether the factor is such that a sentence outside the applicable guideline "should result." *United States v. Wilson*, 114 F.3d 429, 433 (4th Cir. 1997). For a discussion of various possible downward departure factors, as well as the use of "cumulative" factors, *see United States v. Debeir*, 186 F.3d 561 (4th Cir. 1999).

¹² A common basis for upward departure is that the defendant's criminal history does not adequately reflect the seriousness of past criminal conduct or the likelihood that the defendant will commit other crimes. *See* USSG § 4A1.3. For a discussion of the approved method of departure on this ground, *see United States v. Cash*, 983 F.2d 558 (4th Cir. 1992), and *United States v. Rusher*, 966 F.2d 868 (4th Cir. 1992). The defendant must receive reasonable notice of the possibility of an upward departure and the grounds thereof. *See Burns v. United States*, 501 U.S. 129, 137 (1991).

insufficient evidence to convince me to exercise my discretion to grant a departure.]]¹³

14. Does defendant's counsel wish to speak on behalf of the defendant?¹⁴

15. Does the attorney for the government wish to make any remarks on behalf of the government?¹⁵

16. *Ask the defendant.* Please stand. Do you wish to make a statement to me and present any information in mitigation of sentence?¹⁶

[17. *If a crime of violence or sexual abuse, address victim and determine if victim wishes to make a statement and present any information in relation to the sentence.*]¹⁷

18. *State the intended sentence and the reasons therefor, and if the guideline range exceeds twenty-four months, the reason for imposing a sentence at a particular point within the range.*¹⁸

19. Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the court that the defendant is hereby committed to the custody of the Bureau of Prisons for a term of

¹³ So long as the court recognizes its authority to depart under the circumstances, its refusal to depart is not reviewable on appeal. *See United States v. Brock*, 108 F.3d 31, 33 (4th Cir. 1997).

¹⁴ Required by Fed. R. Crim. P. 32(c)(3)(B).

¹⁵ Required by Fed. R. Crim. P. 32(c)(3)(D).

¹⁶ Required by Fed. R. Crim. P. 32(c)(3)(C).

¹⁷ Required by Fed. R. Crim. P. 32(c)(3)(E).

¹⁸ Required by 18 U.S.C.A. § 3553(c).

_____ months.¹⁹ Such term consists of [*break down among counts of conviction*].

20. The term of imprisonment imposed by this judgment shall run consecutively with any other undischarged term of imprisonment. The term of imprisonment imposed by this judgment shall run concurrently with the defendant's term of imprisonment pursuant to the judgment in Case No. _____, District of _____. The court recommends that the Bureau of Prisons designate a facility of the State of _____ to be the place of service of this sentence, thereby making this sentence concurrent with the defendant's imprisonment pursuant to the judgment in Case No. _____, State of _____.²⁰

21. *Probation.* Pursuant to the Sentencing Reform Act of 1984, the defendant is

¹⁹ While parole has been abolished, a prisoner may still receive good time credit from the BOP of up to 15% of the sentence. *See* 18 U.S.C.A. § 3624(b). In order to receive good time credit, the prisoner must have a sentence of over one year, so a defendant sentenced to 12 months does not receive credit while a defendant sentenced to 12 months and one day does. A defendant is automatically given credit by the BOP for time spent in official detention prior to sentence. *See* 18 U.S.C.A. § 3585(b). Home detention as a condition of bail is not considered official detention. *See United States v. Insley*, 927 F.2d 185, 186-87 (4th Cir. 1991). Where a defendant has been in state custody under a state sentence prior to going into federal custody, the BOP normally cooperatively arranges with the state for the defendant to be credited with all appropriate time, either on the state or the succeeding federal sentence.

²⁰ The options available in the imposition of a sentence on a defendant subject to an undischarged term of imprisonment (whether state or federal) are set forth in USSG § 5G1.3. Note that where the conduct of the undischarged term was fully taken into account in the determination of the offense level for the instant offense, a concurrent term is required, and that in addition to a concurrent term, the instant sentence may be required to be adjusted downward to give the defendant credit for any time served on the prior sentence. *See* USSG § 5G1.3, comment. (n.2). When otherwise sentencing a defendant subject to an undischarged term under the current version of the Guidelines Manual, the court need not calculate a hypothetical combined guideline range but need only consider the factors directed by USSG § 5G1.3(c). *See United States v. Mosley*, No. 97-4901, 2000 WL 1285 (4th Cir. Dec. 30, 1999). Note that a state court's direction that a state sentence run concurrently with a federal sentence may be ineffectual, since the BOP ordinarily declines to accept state prisoners under such circumstances. *See Del Guzzi v. United States*, 980 F.2d 1269 (9th Cir. 1992).

placed on probation for a term of _____ years.²¹ While on probation [*refer to conditions of supervised release*].²²

22. *Supervised Release.* Upon release from imprisonment, the defendant is placed on supervised release for a term of _____ years.²³ This term consists of terms [*break down among counts of conviction*]. While on supervised release, the defendant must not commit another federal, state, or local crime, must not illegally possess or use a controlled substance, and must comply with the standard conditions that have been adopted by this court.²⁴ The defendant must submit to one drug test within fifteen days of placement on supervised release and at least two periodic drug tests thereafter, as directed by the probation officer. [The court suspends the mandatory drug testing provision because the defendant poses a low risk of future substance abuse.]²⁵ The defendant must pay any monetary penalty imposed by this judgment that remains unpaid at the commencement of supervised release or adhere to a court-established payment schedule. The defendant must not possess a

²¹ Probation is permitted under certain circumstances if the appropriate guideline range is in Zone A or B and probation is not prohibited by statute. *See* USSG § 5B1.1. The length of probation is one to five years. *See* USSG § 5B1.2.

²² *See* USSG § 5B1.3 for permitted conditions of probation, which are similar to those of supervised release.

²³ Supervised release is required for sentences of more than one year, or if required by specific statute. *See* USSG § 5D1.1. The length of supervised release depends on the classification of the crime. *See* USSG § 5D1.2.

²⁴ *See* USSG § 5D1.3(c) for a list of the standard conditions and § 5D1.3(d) for possible special conditions.

²⁵ *See* 18 U.S.C.A. § 3583(d).

firearm as defined in 18 U.S.C. § 921 and must reside in a residence free of the same. The defendant must submit to warrantless search and seizure of person and property as directed by the probation officer, to determine whether the defendant is in possession of forbidden items. The defendant must participate in a program of testing and treatment for substance abuse and/or a program of mental health treatment, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer. The defendant must provide the probation officer with access to any requested financial information and must not incur new credit charges or obtain additional lines of credit without the permission of the probation officer. The defendant is placed on home detention for a period of _____ months.²⁶ The defendant must pay the cost of home detention on a monthly basis. The defendant must provide _____ hours of community service as approved by the probation officer.²⁷

23. *Fine.* The court orders that the defendant pay the United States a fine of \$_____.²⁸ The fine is waived or is below the guideline range because of the defendant's

²⁶ Electronic monitoring should ordinarily be used in connection with home detention. *See* USSG § 5F1.2, comment. (n.1).

²⁷ Community service generally should not be imposed in excess of 400 hours. *See* USSG § 5F1.3, comment. (n.1). Other conditions of supervised release include community confinement and occupational restrictions. *See* USSG §§ 5F1.1, 5F1.5.

²⁸ A fine must be imposed unless the defendant establishes that he or she is unable to pay and is unlikely to become able to pay the fine. *See* USSG § 5E1.2(a). The factors to be considered in imposing a fine are set forth at 18 U.S.C.A. § 3572(a) and USSG § 5E1.2(d) and include the defendant's income, earning capacity, and financial resources, the burden a fine will impose on the defendant and others financially dependent on the defendant, and whether restitution is payable. The court must also consider the expected costs to the government of the punishment imposed. *See*

inability to pay. Based on the evidence, the defendant can pay a fine below the guideline range by participating in the Inmate Financial Responsibility Program administered by the Bureau of Prisons.²⁹ The court determines that the defendant does not have the ability to pay interest and the interest requirement is waived.³⁰ The fine shall be paid in monthly installments of \$_____ beginning _____.³¹ The installment schedule is subject to adjustment by the court at any time and the defendant must notify the court of any change in the defendant's economic circumstances that might affect the defendant's ability to pay the fine.³²

24. *Restitution.* The defendant must make restitution as follows: [*list names of payees and amounts*].³³ The court determines that the defendant does not have the ability

USSG § 5E1.2(d)(7). Some criminal statutes, such as income tax evasion, require separate imposition of the costs of prosecution. *See* USSG § 5E1.5. If both a fine and restitution are imposed, the court must order restitution paid first. *See* USSG § 5E1.1(c).

²⁹ The Inmate Financial Responsibility Program (“IFRP”) requires an inmate to agree to satisfy financial obligations by periodic payments from amounts earned or received while in prison. The failure to participate makes the inmate ineligible for certain benefits and privileges in prison.

³⁰ Fines and restitution of more than \$2500 bear interest if not paid within 15 days. *See* 18 U.S.C.A. § 3612(f)(1). If the court finds that the defendant does not have the ability to pay interest, it may be waived or modified as to amount or period. *See id.* at (3).

³¹ A fine is payable immediately unless the defendant establishes that a lump sum payment would have an unduly severe impact on the defendant or the defendant's dependants. *See* USSG § 5E1.2(f). If a fine is allowed to be paid in installments, the defendant should be required to pay a substantial installment at sentencing and the installment length should generally not exceed 12 months. *See id.*

³² As required by 18 U.S.C.A. § 3572(d)(3).

³³ For most non-drug offenses, the court must impose full restitution for harm caused to identifiable victims of the offenses of conviction, without consideration of the defendant's ability to

to pay interest and the interest requirement is waived.³⁴ If the defendant makes a partial payment, each payee is to receive an approximately proportional payment.³⁵ This restitution obligation is joint and several with any other defendants obligated therefor.³⁶ This restitution is due immediately. Restitution must be paid in monthly installments of _____ beginning _____. The installment schedule is subject to adjustment by the court at any time and the defendant must notify the court and the Attorney General of any change in the defendant's economic circumstances that might affect the defendant's ability to pay the

pay. *See* 18 U.S.C.A. § 3663A(a)(1); USSG § 5E1.1. It has been held that such mandatory restitution may violate the Ex Post Facto Clause where the crime occurred prior to the enactment date of the Mandatory Victims Restitution Act ("MVRA") of April 24, 1996. *See United States v. Williams*, 128 F.3d 1239 (8th Cir. 1997). In addition, there are a few unusual offenses not covered under the MVRA, in which restitution is discretionary or may be imposed only as a condition of supervision. Note that the harm must be directly caused by the offense of conviction, *see* 18 U.S.C.A. § 3663A, but the obligation to pay restitution may be broadened by the plea agreement. *See* 18 U.S.C.A. §§ 3663, 3663A. Even where full restitution must be ordered, the court still must specify the manner and schedule of payment, after taking into account the defendant's financial resources, projected income, and financial obligations. *See* 18 U.S.C.A. § 3664(f)(1)(B)(2). Restitution may be ordered paid in a lump sum, installments, in kind payments, or a combination. *See* 18 U.S.C.A. § 3664(f)(3)(a). It is usual with indigent defendants facing incarceration to order minimal installments (such as \$25.00 per month) which may be paid under the IFRP. After release, the installment schedule may be modified when financial conditions change. The court must make factual findings which support any restitution schedule imposed. *See United States v. Dawkins*, No. 99-4240, 2000 WL 132656 (4th Cir. Feb. 4, 2000).

³⁴ Fines and restitution of more than \$2500 bear interest if not paid within 15 days. *See* 18 U.S.C.A. § 3612(f)(1). If the court finds that the defendant does not have the ability to pay interest, it may be waived or modified as to amount or period. *See id.* at (3).

³⁵ The court may provide a different payment schedule for each victim. *See* 18 U.S.C.A. § 3664(i).

³⁶ The court may apportion liability among the defendants. *See* 18 U.S.C.A. § 3664(h).

restitution.³⁷

25. It is ordered that the defendant pay to the United States a special assessment of \$_____.³⁸

26. It is ordered that the defendant must notify the United States Attorney for this district within thirty days of any change of name, residence, or mailing address while any monetary penalties imposed by this judgment remain unpaid.³⁹

27. Forfeiture of the property described in count ___ of the indictment [or information] is hereby ordered.⁴⁰

28. *Recommendations to the Bureau of Prisons.* I recommend that the Bureau of Prisons designate for service of sentence the least restrictive facility for which the defendant qualifies within reasonable proximity to the defendant's release residence. I recommend that the Bureau of Prisons designate for service of sentence the following facility:

³⁷ See 18 U.S.C.A. § 3664(k).

³⁸ There is a mandatory assessment of \$100 per count of conviction for felony crimes committed after April 24, 1996, and \$50 for crimes committed before that date. See 18 U.S.C.A. § 3013.

³⁹ See 18 U.S.C.A. § 3612(b)(1)(F). Other possible sentencing penalties include an order to give notice of the conviction to all of the victims of fraud or other deceptive practices at the cost of the defendant, see 18 U.S.C.A. § 3555, and denial of certain federal benefits to drug traffickers and possessors. See 21 U.S.C.A. § 862.

⁴⁰ A criminal judgment of forfeiture may be entered only if the indictment or information alleges the forfeiture. See Fed. R. Crim. P. 7(c)(2). A judgment of conviction for certain offenses perpetrated in whole or part by the use of firearms may order the confiscation and disposal of any firearms and ammunition found in the possession of the defendant at the time of his arrest. See 18 U.S.C.A. § 3665.

_____.⁴¹ I recommend that the defendant be confined in a halfway house.⁴² I recommend that the defendant receive residential substance abuse treatment pursuant to the provisions of 18 U.S.C. § 3621(b).⁴³ I recommend that the defendant be placed in an Intensive Confinement Center.⁴⁴ I recommend that the defendant receive appropriate [substance abuse/medical/mental health] treatment.

[29. The defendant must surrender for service of his sentence at the facility designated by the Bureau of Prisons upon notification by the U.S. Marshals Service and shall remain subject to the prior conditions of release until surrender.]

⁴¹ The BOP is responsible for designation of the place of imprisonment. *See* 18 U.S.C. § 3621(b). The court's recommendation will be followed if possible. If the court allows self-reporting, the BOP takes that fact into favorable consideration in classifying the defendant's security level. The BOP's 90-plus facilities are grouped into five security levels: minimum, low, medium, high, and administrative. The nearest BOP facilities are Beckley, West Virginia (male, medium security with adjacent minimum security camp) and Alderson, West Virginia (female, minimum security). There is also a male low security facility in Ashland, Kentucky.

⁴² A halfway house is a form of community confinement which may be imposed as a condition of supervised release or probation. *See* USSG § 5F1.1, comment. (n.1). In addition, the BOP may designate a halfway house for service of short sentences. If the guideline range is in Zone C, the defendant may be sentenced to a "split sentence" in which at least one-half of the sentence is imprisonment and the balance is home confinement, with a recommendation that the imprisonment be in a halfway house. *See* USSG § 5C1.1(d). The Lebanon Community Corrections Center in Lebanon, Virginia, is an approved halfway house.

⁴³ An inmate accepted into this program may receive a sentence reduction of up to one year at the discretion of the BOP. *See* 18 U.S.C. § 3621(e). Sentence reduction is limited to those convicted of nonviolent offenses and the BOP's current regulations classify firearm possession as a violent offense.

⁴⁴ An inmate who is eligible may be placed in one of three "boot camps" operated by the BOP, two for males and one for females. Inmates successfully completing the six-month program may thereafter obtain sentence reduction at the discretion of the BOP. *See* USSG § 5F1.7; 18 U.S.C.A. §§ 3621(b)(4), 4046.

[30. I hereby advise the defendant of the right to appeal [the sentence] to the U.S. Court of Appeals for the Fourth Circuit, pursuant to the Federal Rules of Appellate Procedure. A notice of appeal must be filed within ten days of the judgment or of a notice of appeal by the government. If requested, the clerk will prepare and file a notice of appeal on behalf of the defendant. I also advise the defendant of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal without prepayment of such cost.]⁴⁵

[31. I hereby advise the defendant that [he or she] has waived the right to appeal the sentence to the extent set forth in the plea agreement and that waiver is binding unless the sentence exceeds the statutory maximum or is based on a constitutionally impermissible factor or the proceedings otherwise violated the defendant's constitutional rights.⁴⁶ To the extent a right of appeal does exist, a person who is unable to pay the cost may apply for leave to appeal without prepayment of such costs. Any notice of appeal must be filed within ten days of the entry of judgment or within ten days of the filing of a notice of appeal by the government. If requested, the clerk will prepare and file a notice of appeal on behalf of the

⁴⁵ Notification of the right of appeal is required by Fed. R. Crim. P. 32(c)(5). If the defendant pleaded guilty, the advice is of the right to appeal the sentence. *See id.* However, a defendant may plead guilty and reserve in a plea agreement his right to appeal specified pretrial motions. *See* Fed. R. Crim. P. 11(a). Otherwise, a guilty plea waives all nonjurisdictional defects in a conviction. *See United States v. Willis*, 992 F.2d 489, 490 (4th Cir. 1993). Bail pending appeal is governed by provisions of the Bail Reform Act and requires a certification by the court that the appeal raises a substantial question likely to result in reversal, a new trial, no imprisonment, or a reduced sentence. *See* 18 U.S.C.A. § 3143(b)(1)(B).

⁴⁶ Waiver of the right to appeal is permissible. *See United States v. Wiggins*, 905 F.2d 51, 52 (4th Cir. 1990). A challenge to the validity of the guilty plea is not precluded by the waiver of appeal concerning sentencing. *See id.* at 53.

defendant.]

32. *Ask counsel and probation officer:* Are there any other matters to resolve in this case?

33. *Adjourn.*