Volume 76 Number 2

Federal PROBATION
a journal of correctional philosophy and practice

Pretrial Services along the Border: A District of Arizona Perspective

David Martin
Chief U.S. Pretrial Services Officer, District of Arizona
Honorable James F. Metcalf
United States Magistrate Judge, District of Arizona, Yuma Division

PART ONE: The Pretrial Services Perspective
David Martin

WORKING IN A BORDER district, especially the district with the highest number of activations (bail investigations) in the country, provides some bragging rights. For example, someone from another pretrial services office might share how "busy" their office has been, having 100 bail investigations in the past month. My mental response runs: Only 100 investigations? We had that too —yesterday, in Tucson, and it was a slow day. Fortunately, my better judgment usually prevents me from making such a comment. This and the fear that they will retort by citing our overall detention rates, also the highest (by far) in the country, due to the high number of non-citizens prosecuted in this district.

I have had the honor of working in the federal pretrial services system since 1989. The first 14 years were spent in the Middle District of Florida, and now I have spent close to nine years in the District of Arizona. So, I have some perspective on the differences between Border and non-Border districts. I realize there are dedicated, highly skilled, and hard-working probation and pretrial services staff throughout the country dealing with the unique challenges posed in each of their districts. In the District of Arizona, I am particularly proud of our staff, who carry heavy workloads and yet perform pretrial services investigations and supervision work strongly grounded in pretrial services principles. This is evidenced by our release rates for U.S. citizens, which are well above the national average. Nevertheless, routine pretrial services activities common to most districts will not be the focus of this article. Instead, I will identify the specific challenges and business practices of managing the high volume of pretrial services investigations in the District of Arizona, and share some unique functions we perform to aid in the fair administration of justice.

In Part Two of this article, Magistrate Judge James Metcalf offers a judicial officer's perspective on the use of pretrial services reports in the sentencing process, as well as an explanation of Operation Streamline (OSL), a Border Patrol initiative responsible for significantly increasing workload in our two Border offices: Tucson and Yuma.

Workload
Due to the emphasis on Border enforcement, pretrial activations (investigations) have increased 195 percent over the past three years, leaping from 7,424 in fiscal year 2008 to 21,879 in fiscal year

2011. In fiscal year 2011, pretrial activations in Arizona accounted for more than 19 percent of the nation's investigations.

In fiscal year 2011, 91 percent of the investigations were abbreviated, "modified" reports on non-citizens. These reports contain the defendant's basic identifying information, charges, immigration status, criminal history, assessments of nonappearance and danger, and a recommendation. The other 9 percent are full investigations that also include the defendant's personal history, obtained from a defendant interview, and verifications made by collateral sources. The bulk of the charges, as you might imagine, involve immigration (81 percent) and drugs (15 percent).

Staffing levels have risen from 59 full-time equivalents (FTEs) as of September 2008 to 69 FTEs in September 2011. Many factors contributed to a less than dramatic increase in the number of employees, but the primary cause was a downward workload measurement formula adjustment on modified reports as well as financial plan reductions absorbed by our entire probation and pretrial services system.

Staffing levels are currently at 75 percent of full workload formula requirements, meaning staff are working tremendously hard to accomplish our mission.

TABLE 1.
Pretrial Services Investigations Completed

FY	INVESTIGATIONS COMPLETED
FY2008	7,424
FY2009	13,055
FY2010	18,292
FY2011	21,879

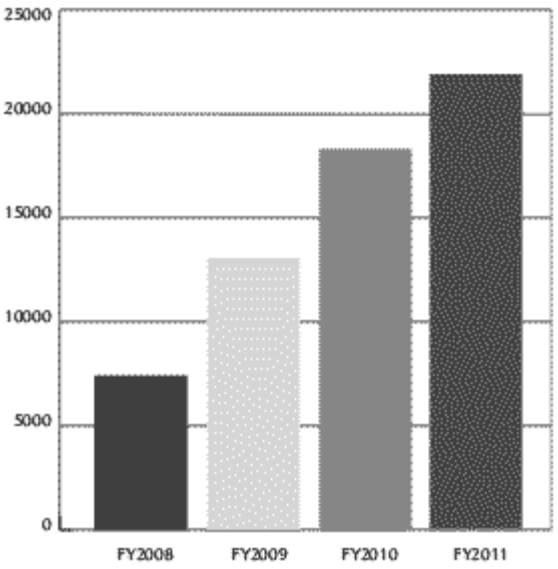
Flip Flops

Throughout this article you will hear the term *flip flops*. In Arizona, this does not just refer to beach shoes; flip flops are a type of prosecution that appears to be unique to the District of Arizona. They are also referred to as "mixed complaints," where a defendant is charged with a felony and misdemeanor. If the defendant rejects the plea offer, he is prosecuted for the felony. If the defendant pleads guilty to the misdemeanor, the felony is dismissed, and the magistrate judge sentences the defendant without a presentence report either at the initial appearance or some 5 days (Tucson) or 10 days (Yuma) later, during the detention/change of plea/sentencing hearing.

The types of flip flop charges generally seen in the District of Arizona are:

- Immigration: Illegal Reentry (8 U.S.C. § 1326)/Illegal Entry (8 U.S.C. § 1325)
- Identity Theft: Fraud and Misuse of Visas, Permits, and Other Documents (18 U.S.C. § 1546)/Fraud and Related Activity in Connection with Identification Documents (18 U.S.C. § 1028)
- Marijuana: Possession with Intent to Distribute (21 U.S.C. § 841)/Simple Possession (21 U.S.C. § 844)

Table 2.
Pretrial Services Investigations



In the flip flop cases, the pretrial services officer prepares a modified report pursuant to the *Guide to Judiciary Policy's (Guide)* national policy guidance on modified reports, and (more importantly) in accordance with his or her statutory responsibility in 18 U.S.C. § 3154(1) to "*collect, verify and report to the judicial officer, prior to the pretrial release hearing, information pertaining to the pretrial release of each individual charged with an offense...except that a district court may direct that information not be collected, verified, or reported under this paragraph on*

individuals charged with a Class A misdemeanor..."

Flow of Work:
Tucson:
In Tucson, Arizona, a typical workday begins with supervisors compiling "agent referral forms" provided by e-mail or fax from an assortment of federal law enforcement agencies. In addition, a large number of referrals appear on a list provided by the Border Patrol. Once these documents are reviewed, officers and officer assistants (who are anxiously wondering, "How many will it be today?") receive their investigation assignments.

On a busy day, the officer assistants can expect 8 to 10 modified reports, while the officers may receive a few modified reports along with an interview case. Overall, the total number of investigations may reach 160, with about 10 of them being full investigations.

In the District of Arizona, pretrial services officer assistants are highly valued and well utilized, tackling the bulk of the modified reports. In addition, they manage a small low-risk supervision caseload, collect and test urine specimens, cover court hearings, conduct some full pretrial services investigations, and accompany officers in the field.

After getting a handle on the workload for the day, the duty supervisor makes investigation assignments. Officers are deployed to the Border Patrol Station to interview those defendants who are U.S. citizens or juveniles and have been arrested by Border Patrol agents. This requires a 15-minute road trip (30 minutes round trip) to the station—a time drain that is considered acceptable, as it offers the earliest access to interview the defendant. It also affords the officer more time to conduct a thorough investigation and prepare a written report for the initial appearance.

While this is occurring, officers are waiting for all other (non-Border Patrol) agents to transport their "status" defendants (those with a legal immigration status) to the courthouse for an interview. After the interview, written reports on the status defendants are generally provided to the magistrate judges for initial appearance so that a release decision can be made, if appropriate.

Due to the overwhelming number of newly arrested defendants and limited cell space, these status defendants are not interviewed in the Marshals Service interview rooms. The arresting agents must move these prisoners through the public corridors in belly chains and leg irons to the second-floor jury deliberation room where pretrial interviews are conducted. This unusual prisoner movement process was not always the norm. In 2004 the pretrial services office remodeled 720 square feet of office space to install 8 interview stations. When staffing levels increased, this office space was needed to house staff. The court then authorized pretrial services to use the jury deliberation room (645 square feet) to conduct defendant interviews. This room was remodeled to replicate the interview stations previously used. Although this prisoner movement process is not ideal for agents, defendants, or court personnel, it has proven to be effective.

The agents bring these status defendants in small groups around 11:30 a.m., which does not afford our officers much time to conduct interviews, verify information, explore release options, and prepare a written report for the initial appearances at 2:00 p.m. Straight felony non-status cases are also heard at this time.

Meanwhile, Border Patrol provides a list of Operation Streamline (OSL) cases, consisting of immigration flip flop charges. Officers and officer assistants hustle to complete these modified investigations so that defendants can be sentenced during the initial appearance at 1:30 p.m. If there is a juvenile, the hearing is held separately at 1:15 p.m.

At the conclusion of a busy day, a duty supervisor may have made 160 investigation assignments—almost a miraculous accomplishment!

Yuma:
In the Yuma office, the challenges are similar to those in Tucson. Staff work at a very fast pace almost every morning and into the afternoon, conducting criminal record investigations and writing bail reports to be submitted within a few hours. Magistrate judges almost always sentence defendants

charged with 18 U.S.C. § 1325 (illegal entry) or 18 U.S.C. § 1325/1326 (illegal entry/illegal re-entry after deportation) the same day they are brought to court. They rely on criminal history information provided by our officers to help determine different sentence lengths for each defendant. Due to the reliance on the accuracy of our criminal histories, our office also prepares criminal histories on those defendants charged with illegal entry, even though we receive no workload credit (funding) for this work. In fiscal year 2011, there were 5,311 investigations conducted on these petty offenses.

The normal court schedule is slightly different from the one in Tucson. New felony initial appearances are held at 1:30 p.m. and new misdemeanor Initial Appearances/Plea/Sentencing are held at 2:00 p.m. On Mondays, because of the additional arrests from the weekend, an additional group of 28 cases are brought in at 11:00 a.m. for Initial Appearance/Plea/Sentencing. (The Marshals Service can only safely manage 28 defendants in the courtroom at a time.) These are all one-count illegal entry (8 U.S.C. § 1325) defendants with little or no criminal history. For now, the great majority of straight misdemeanor and flip flop cases are sentenced the same day they are initially brought to court.

However, at times a defendant charged with illegal entry does not speak Spanish well and needs a special interpreter, usually for an indigenous language like Mixteco or Zapoteco. In these cases, the hearing will be rescheduled a couple of days later so the interpreter can assist telephonically. In addition, some flip flop cases involving citizens or Legal Permanent Residents (LPRs) charged with alien smuggling (8 U.S.C. § 1324) and aiding and abetting illegal entry (18 U.S.C. § 2) will also involve hearings held at a later date. On the other hand, flip flop cases charged with fraud or possession of false documents (18 U.S.C. § 1546 or § 1028) and illegal entry are treated the same as illegal reentry/legal entry flip flop cases.

Felony drug cases and other felonies are also brought in with felony illegal reentry cases for initial appearance and the detention hearing is usually continued until a few days later. Some of these cases stay in Yuma for further hearings, until sentencing, and some are transferred to a Phoenix judge. There are no Article III district judges in Yuma, so straight felony offenses are transferred to the Phoenix division for adjudication.

At the end of a busy day, the Yuma supervisor may have assigned 20 modified investigations, 40 petty offense investigations, and one or two U.S. citizen cases to three officer assistants and one officer. Even higher numbers have sometimes been seen during winter months when border crossings are encouraged by the mild desert weather.

Technology Aids in Flow of Work:
The Probation and Pretrial Services Automated Case Tracking System (PACTS) database has enabled our agency to share the workload throughout the district on the high number of modified reports generated in Tucson and Yuma. Although Yuma staff normally can manage their own workload, at times they will send some modified investigation assignments to Flagstaff. Flagstaff and Yuma staff also assist the Tucson office during the week, especially on busy Mondays, but the primary assistance to Tucson comes from Phoenix staff. On a busy Monday, the Tucson office may send 20 modified report assignments to Phoenix and up to 12 to Flagstaff and Yuma.

PACTS allows the officer or officer assistant to conduct the criminal records check and prepare a modified bail report so that it is accessible to any of the offices in the district. Before the ability to prepare the pretrial services report in PACTS, there were many faxes and paper files being sent to Tucson and Yuma. Now, the supervisor in the office where the modified report is prepared reviews and finalizes the report and then sends it to the duty e-mail box of the location where the hearing will take place, either Yuma or Tucson. The report also remains accessible in PACTS. The support staff prints these reports and scrambles to organize them for the duty officer assistant, who rushes to the initial appearance and distributes them.

This process allows border offices to share the “wealth” so the workload is more evenly distributed, eliminating any forced staff transfers to Tucson or Yuma.

Well-Oiled Machine

The heavy workload burden carried by the border courts is felt by all members of the court family. I find remarkable the camaraderie and team spirit demonstrated by all of the stakeholders. This includes the court staff, Clerk's Office, Probation Office, Public Defender's Office, U.S. Marshals Service and our agency, all performing our respective missions, but helping each other where and when we can. Out of necessity these offices have worked together to create a sleek, well-oiled machine, as streamlined and efficient as possible, continuously seeking further efficiency refinements, yet never losing focus on the fair administration of justice. Some ways that pretrial services in Arizona helps other members of the court family fulfill their responsibilities follow:

- *Send Referral List to Federal Public Defenders' Office:* Our office sends the daily referral list by e-mail to the duty assistant federal public defender (AFPD) by 11:00 a.m. so AFPDs and Criminal Justice Act appointed counsel can be assigned to represent defendants for the initial appearance. This ensures that during the initial appearance defendants have attorney representation who can advocate for release.
- *Send E-mail Message to Duty Magistrate Judge, Duty Assistant Federal Public Defender, and Duty Assistant U.S. Attorney:* The duty pretrial services supervisor provides a summary e-mail message of the defendants with legal immigration status and whether pretrial services is seeking detention or release. This prepares the court and attorneys to focus on those defendants whose release is being recommended.
- *Identify Defendants on Federal Supervision for "All in One Plea Agreements":* There is a section in the pretrial services report labeled "Federal Supervision." Information pertaining to the defendant's current federal probation or supervised release is contained in this section. It was created to identify those cases where an "All in One" plea agreement and "Related Case" issue would apply, as described below. In addition, the information in this section is sent by e-mail to the Clerk's Office, Public Defender's Office, and Probation Office.
- *Related Cases:* It is common for defendants who have been deported to Mexico to return to the United States. When a defendant who was previously deported and placed on probation or supervised release illegally reenters the United States, a violation report is filed with the court. A judge, or multiple judges, must adjudicate the new illegal reentry charge as well as the supervised release violation for the new offense. To prevent the involvement of two judges, pretrial services notifies the court of the "related case," which allows the Clerk's Office to assign both cases to one judicial officer. This also permits only one defense attorney to be appointed to handle both cases. This is a tremendous savings of judicial resources, and the court relies heavily on pretrial services to identify these cases at the initial stage of prosecution.

In the District of Arizona, a procedure entitled the "All in One" plea agreement has been developed to further address the "related cases" issue. In the "All in One" process, the defendant is permitted to plead guilty to the illegal reentry charge under the agreement to receive an enhanced sentence due to the supervised release violation. The period of supervised release or probation is then terminated. The pretrial services report is the best way of early identification of these types of cases. This is a huge time saver for the courts and a reduction of pretrial detention costs for the Marshals Service.

- *Upload Pretrial Services Reports into SECRIS for distribution to Attorneys:* Pretrial Services uploads certain pretrial services reports on flip flop cases into SECRIS—a secured court website that allows attorneys access to the reports prepared on their clients. This process is followed on flip flop cases in which detention/change of plea/sentencing is scheduled five days after the initial appearance. Attorneys value these reports because they help to ensure that defendants are sentenced appropriately based upon accurate criminal history.

You may be wondering why attorneys are permitted to retain pretrial services reports. In the District of Arizona, defense and prosecuting attorneys are permitted to retain pretrial services reports under local rule 57.1. This pertains to bail reports prepared on all defendants, not just those charged with flip flop offenses. This has been a longstanding practice authorized by our court in 2003. It is not consistent with the *Confidentiality Regulations* in the *Guide*, which require the pretrial services report to be returned to the pretrial services officer at the conclusion of the hearing. Nevertheless, this decision has proven to be beneficial to attorneys as they have more time to review the information in the report. There is also no longer a need for pretrial services officers to chase down

attorneys like they are shoplifters when they mistakenly scoop up the pretrial services report with their other case file documents and walk out of the courtroom.

Sentencing
As you will learn from Magistrate Judge Metcalf's section of this article below, the quality of the pretrial services report is especially important in appropriately sentencing defendants charged in flip flop cases in the Yuma office. In the Tucson division, the judicial officers rely upon the recommended sentence in the plea agreement and rarely review the pretrial services reports on flip flop cases. However, defense attorneys and prosecutors use them for quality control to ensure the accuracy of the criminal history records provided by the agents used to determine the recommended sentence in the plea agreement. When there are inaccuracies, the attorneys work to resolve the matter to ensure that the defendant is appropriately charged and sentenced. This process preserves the fair administration of justice while conserving judicial resources, by avoiding a more time-consuming and costly presentence report.

The next section of this article provides a judicial officer's perspective on the value of modified pretrial services reports in the sentencing process.

PART TWO: A Judicial Perspective on Sentencing

Honorable James F. Metcalf
United States Magistrate Judge,
District of Arizona, Yuma Division

The use of pretrial reports in sentencing has taken on a critical and somewhat unique application in sentencing for the tidal wave of petty offense cases arising out of illegal border crossings. In Yuma, Arizona, home of one of the busiest border courts in the country, the prosecuting agencies and the United States Attorney's Office have increased their filings in these cases dramatically over the last few years.

Operation Streamline
In December 2005, the then head of the Department of Homeland Security, Secretary Michael Chertoff, announced that U.S. Customs and Border Protection's Del Rio Border Patrol Sector would lead a multi-agency law enforcement initiative called Operation Streamline II that would target those who enter the United States in violation of law. The stated purpose of Operation Streamline was to focus on aliens who enter illegally and to prosecute all illegal aliens not released for humanitarian reasons. Additionally, each illegal alien undergoing criminal proceedings would also be processed for removal from the United States. The concept of the operation, as stated by the Department of Homeland Security, was to provide a comprehensive plan that would secure the border and reduce illegal immigration and that could be expanded or modified as operationally needed.

By 2008 Operation Streamline had been expanded to include all of the Yuma, Laredo, and Tucson sectors, and the Department of Homeland Security was reporting that 723,825 illegal aliens had been arrested in fiscal year 2008 and that more than 74,000 illegal aliens had been prosecuted under Operation Streamline.

As the sole court in the Yuma Sector, the United States District Court in Yuma, Arizona, receives a high volume of filings resulting from Operation Streamline. Table 3 demonstrates both the overall numbers and the recent increases at the Yuma court.

Court statistics indicate that the Yuma magistrate court processed 774 petty offense dispositions in March 2012, with 1,977 for the year to date. Those cases are currently processed with a single U.S. magistrate judge on duty in Yuma.

Procedures
The primary prosecuting agency for illegal border crossings is U.S. Customs and Border Protection, and the vast majority of cases are generated through apprehensions made by the United States Border Patrol. This is true in the Yuma Border Patrol Sector, which consists of an area along the Colorado River which is part of the international border with Mexico, continuing south and east

through an area of the border dividing the town of San Luis, Arizona from San Luis Rio Colorado, Sonora, Mexico; and then transitioning further east into an extremely rugged and remote desert region.

Individuals apprehended by agents of the United States Border Patrol in the Yuma area are initially screened at the Border Patrol station nearest to the area of apprehension. At the station, prosecution agents screen the apprehended individuals and prepare the initial complaints under various guidelines and with the cooperation with the United States Attorney's Office. Typically, the prosecutions department of the Yuma Border Patrol Sector will email the day's complaints to chambers and the Assistant U.S. Attorney's Office.

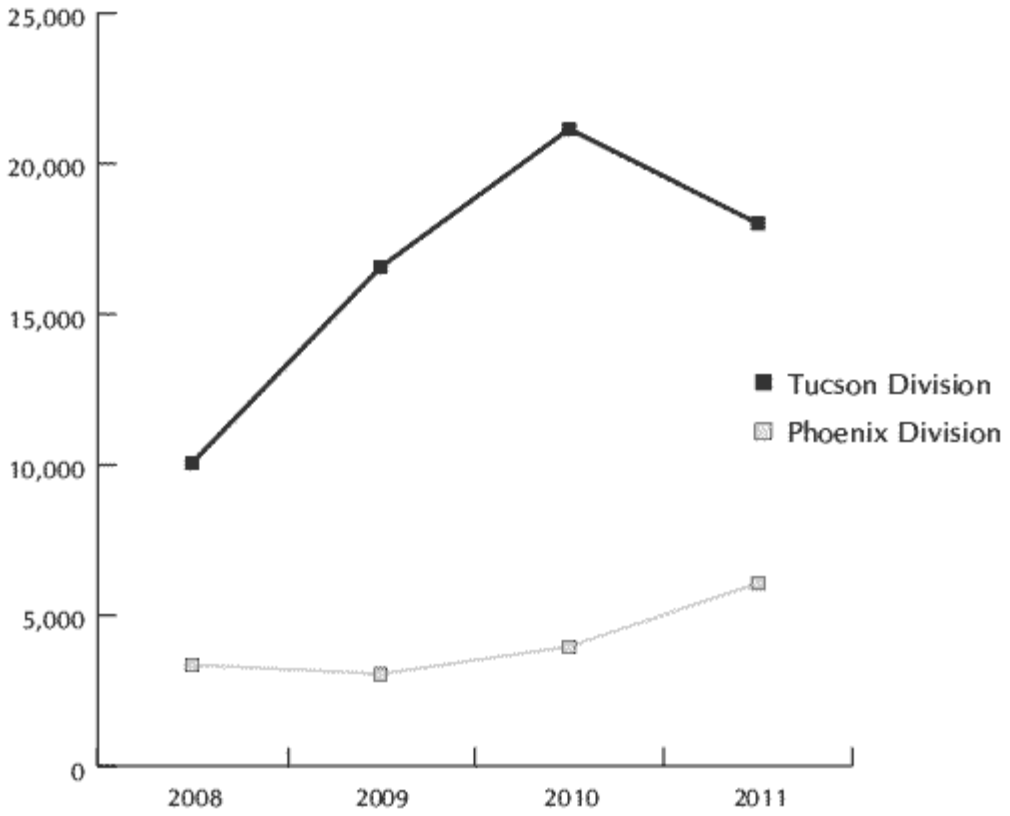
Table 3
Petty Disposition Information

Petty Disposition Information FY 2008 through FY 2011

	2008	2009	2010	2011	Percent Increase '10 to '11
Phoenix Division Total	3,356	3,052	3,958	6,065	53%
Phoenix	75	45	65	27	-58%
Flagstaff	227	221	232	190	-18%
Yuma	3,054	2,786	3,661	5,848	60%
Tucson Division Total	10,059	16,565	21,149	18,015	-15%
District Total	**13,415**	**19,617**	**25,107**	**24,080**	**-4%**

Defendants found to be eligible for felony prosecution are typically charged under 8 U.S.C. § 1326, reentry after removal. Other, lower-level defendants who are eligible for felony prosecution are charged under a mixed complaint alleging 8 U.S.C. § 1326 and 8 U.S.C. § 1325. The vast majority of defendants are charged under 8 U.S.C. § 1325, the petty offense involving illegal entry to the United States. Defendants charged with both the mixed complaints and the single count 8 U.S.C. § 1325 complaints are processed under the Streamline program.

FIGURE 1.
Petty Dispositions FY08-FY11



The assistant U.S. attorney will review and approve the complaints. After all complaints have been approved, an assigned Border Patrol agent will upload the complaints to the Operation Streamline program developed jointly between the Border Patrol and the U.S. Courts. The complaints include an attached statement of facts that will list any prior criminal immigration history obtained by the Border Patrol at the time of the screening process. The agent will advise chambers that complaints have been successfully uploaded. Next, the case agents will report to the judge's chambers at an appointed time to swear-in the complaints.

The Yuma Pretrial Services Officers then conduct an abbreviated investigation consisting primarily of criminal history research of court databases. No interview is conducted by Pretrial Services. The officers prepare "Reports" in cases of defendants charged with mixed complaints involving both felony and misdemeanor charges and "Memoranda" for the defendants charged with the single petty offense. Defendants are interviewed by defense counsel in the morning before appearing in court.

Single Petty Offense Cases - Defendants charged with the single petty offense counts are typically initialed, have counsel appointed, plead guilty, and are sentenced on the same day. Sentencing of the defendants who plead guilty to the single petty offense is left completely to the discretion of the judge and sentences range from time served to six months imprisonment. In those cases, the pretrial reports and memoranda are of particular importance to the parties and the court, because the input from the pretrial services officer will likely form the basis for the presentations by the parties as well as for the court's determination of the appropriate sentence.

Flip Flop Cases - Defendants charged with mixed felony/misdemeanor charges are initialed, have counsel appointed, and typically submit to a determination on the record on the issue of detention due to their lack of legal immigration status and lack of ties to the United States. These defendants will generally waive a preliminary hearing at the initial appearance and return to court within 10 days for either a change of plea or status hearing regarding further proceedings.

In flip flop cases, the government will make a written plea offer that will include dismissal of the felony count in exchange for a guilty plea to the petty offense, along with a stipulated term of imprisonment, depending upon the defendant's criminal and immigration history.

The reports and memoranda prepared by the pretrial services officers are relied upon by the court, defense counsel, and the government at the time of sentencing, and are also relied upon by the court in determining whether or not to accept the plea agreements from flip flop defendants.

At the time of sentencing, defendants presented to the Yuma court under Operation Streamline waive a presentence report. These defendants are not interviewed by pretrial services, and they agree to proceed with the court relying on the pretrial report, waiving any confidentiality attached to the use of pretrial reports at sentencing. The obvious incentive for these waivers is the fact that the vast majority of defendants receive a greatly reduced sentence and likely one that is less than the time they would remain in custody awaiting preparation of a presentence report.

Requirement for Presentence Investigations: The avoidance of a presentence investigation is generally disafavored. Federal Rule of Criminal Procedure 32(c)(1)(A) requires that a presentence investigation and report be completed before sentencing unless:

> (i) 18 U.S.C. § 3593(c) or another statute requires otherwise; or
> (ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.

Similarly, 18 U.S.C. § 3552(a) references the mandate to probation officers to provide presentence reports as "required pursuant to the provision of Rule 32(c) of the Federal Rules of Criminal Procedure."

Thus, the general rule is that a presentence report is required. The Advisory Committee Notes to the 1966 Amendments observed:

> The requirement of reasons on the record for not having a presentence report is intended to make clear that such a report ought to be routinely required except in cases where there is a reason for not doing so. The presentence report is of great value for correctional purposes and will serve as a valuable aid in reviewing sentences to the extent that sentence review may be authorized by future rule change.

There is an exception to this general rule provided in Federal Rule of Criminal Procedure 58(c) for a "petty offense for which no sentence of imprisonment will be imposed," in which case the court is directed to "give the defendant an opportunity to be heard in mitigation and then proceed immediately to sentencing." Fed.R.Crim.P. 58(c)(3). "The court may, however, postpone sentencing to allow the probation service to investigate or to permit either party to submit additional information." *Id*. It is rare, however, for illegal entry cases to not result in a prison sentence.

The history of presentence reports reflects an increasing pressure for their usage. Prior to the adoption of the Federal Criminal Rules, presentence reports were made only upon request of the court. Then, Rule 32 was adopted to encourage the use of presentence investigations and reports. The 1975 Amendments modified the rule to "make[] it more difficult to dispense with a presentence report" and authorized the court to do so only in cases of waiver or a finding that it was not necessary. 18 U.S.C. § 3552, Advisory Committee Notes to 1975 Amendments. See Pub. L. 94-64, § 2 (1975).

Then, in the Sentencing Reform Act of 1984, the rule was again modified to remove the authorization to dispense with the report in cases of waiver. See Pub. L. 98-473, § 215(a)(4) (1984). The Policy Statement of the Sentencing Guidelines explicitly declares that "[t]he defendant may not waive preparation of the presentence report." U.S.S.G. § 6A1.1(b). *But see* U.S.S.G. § 1B1.9 ("The sentencing guidelines do not apply to any count of conviction that is a Class B or C misdemeanor or an infraction.").

In recognition of these policies, the Ninth Circuit has held that a defendant may not waive the preparation of a presentence report in violation of the rule and the Guidelines. "Because of the importance Congress and the Sentencing Commission have attached to the preparation of presentence reports, we hold that strict compliance with § 6A1.1 and Rule 32(c)(1) is required." *U.S. v. Turner*, 905 F.2d 300, 301 (9th Cir. 1990).

Thus, in its present form, Rule 32 provides for only two exceptions. The first exception in Rule 32(c) concerns sentencing under 18 U.S.C. § 3593(c), which governs death penalty cases. However, the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322 (1994), added 18 U.S.C. § 3593, which eliminated the requirement for presentence reports in death penalty cases. The second exception in Rule 32(c) applies where the court makes an explicit finding on the record that the case record already contains sufficient information to enable the court to "meaningfully exercise" its sentencing authority.

The rule mandates that the court "explains its finding on the record." Fed.R.Civ. Proc. 32(c)(1)(A)(ii). A conclusory finding does not suffice. In *U.S. v. Turner*, the Ninth Circuit found the district court's finding inadequate where it simply "indicated that it did not need a presentence report because Turner had been in confinement since the preparation of the previous report in 1983." 905 F.2d at 302. The court contrasted those findings with those approved of in *U.S. v. Whitworth*, 856 F.2d 1268 (9th Cir 1988), where:

> the district court made extensive findings regarding the value of a presentence report under the facts of that case, concluding:
>
> > It appears to the court that there is literally nothing a presentence investigation could turn up which has not already been well documented, nothing a presentence report could relate which is not presently known. The facts of Mr. Whitworth's life are, at this juncture, almost common knowledge.

Turner, 905 F.2d at 301-302 (quoting *Whitworth*, 856 F.2d at 1288).

Thus, despite any purported waiver, the court must still make a finding that there is sufficient information available to meaningfully exercise sentencing authority without a presentence report, including specific reasons that form the basis for the finding. In the Operation Streamline cases, those factors often include circumstances such as the defendant's lack of status in the United States, the likelihood that the defendant would serve more time awaiting a presentence report than if he or she proceeded directly to sentencing, and the unlikelihood that any further investigation would produce any additional information that would be dispositive as to the sentence.

In reliance upon these factors, in the normal flip flop case, the Yuma court will rely on Rule 32(c) and dispense with the preparation of a presentence report.

Consideration of Pretrial Reports at Sentencing: That does not mean the Yuma court proceeds to sentencing unaided. In place of a Presentence Investigation Report, the border court will rely upon the information provided in the Pretrial Report.

The authority for such reliance is clear. Broad discretion is granted to the district court in the types of information it can consider in imposing sentence.

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

18 U.S.C. § 3661.

> In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant,

unless otherwise prohibited by law.

U.S.S.G. § 1B1.4. Thus, barring other limitations, reliance upon the pretrial services report is within the discretion of the court.

Importance of the Pretrial Reports to Addressing Operation Streamline: In light of the foregoing, the single most important resource for the parties and the court at sentencing is the pretrial report, which reflects either the existence or lack of any prior criminal or immigration history. Moreover, the pretrial report is the most important resource available for the court's determination of whether or not to accept a plea agreement from flip flop defendants charged with mixed complaints and allowed to plead guilty to a petty offense. Indeed, from the perspective of a sentencing judge in petty offense cases, the importance of the pretrial reports to the overall process cannot be overemphasized.

The pretrial services officers are well aware of the importance placed upon their work product in these cases and make great efforts to provide thorough and accurate information in a timely manner under difficult circumstances involving a high volume of cases. The information they obtain through their investigations can form the basis for differences in sentences from time served to several months imprisonment.

Summary and Conclusion
David Martin

The District of Arizona has experienced rapid growth, tripling pretrial services case activations over the past four years due to the emphasis on Border enforcement. Our pretrial services office has developed many business practices to assist members of the court family in absorbing this heavy workload. The value of the pretrial services reports goes beyond just release purposes. Judge Metcalf clearly expresses a judicial officer's perspective on the sentencing value of these reports. The reader may believe we have blurred or even crossed lines in how pretrial services reports are distributed and used to accommodate the heavy workload demands. Without question, though, the dedicated staff of the District of Arizona remain firmly focused on the fair administration of justice and serving the court to the highest level possible.

back to top

References | Endnotes

Published by the Administrative Office of the United States Courts www.uscourts.gov
Publishing Information