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05-CR- 009

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Peter G. McCabe
Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Dear Secretary McCabe:

I would like to testify at the hearing on January 9, 2006 on the proposed amendments to the Federal Rules of Criminal Procedure on behalf of the nearly one hundred Federal Public and Community Defender organizations across the country.

The proposed amendments to Rules 11, 32 and 35 seek to implement the Supreme Court's decision in United States v. Booker, 543 U.S. 220 (2005). In my capacity as Chair of the Federal Defender Sentencing Guidelines Committee, I have closely followed developments in the caselaw and the practical aspects of sentencing under Booker, and believe I can provide valuable insight and comments for your Committee.

Please let me know if I may testify, and if so, if you would like to receive written testimony in advance of the hearing.

Thank you for your consideration.

Very truly yours,

Jon M. Sands by ABC

JON M. SANDS
Federal Public Defender
Chair, Federal Defender Sentencing Guidelines Committee

05-CR-009-1
Testimony

TESTIMONY OF JON SANDS
CHAIR, FEDERAL DEFENDER SENTENCING GUIDELINES COMMITTEE
BEFORE THE
ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE
JANUARY 6, 2006

I wish to thank the Advisory Committee for this opportunity to testify regarding the proposed amendments to the Federal Rules of Criminal Procedure on behalf of the Federal Public and Community Defenders. I will address the proposed changes to Rules 11, 32 and 35, which seek to implement the Supreme Court's decision in United States v. Booker, 543 U.S. 220, 125 S. Ct. 738 (2005).

I. The *Booker* Opinion

The first question presented in Booker was whether the Federal Sentencing Guidelines violated the Sixth Amendment. Booker, 125 S. Ct. at 746, 747 n.1, 756. In an opinion authored by Justice Stevens, the merits majority held that they did. Id. at 746, 748-50. The Court explained that "the Guidelines as written . . . are not advisory; they are mandatory and binding on all judges. While subsection (a) of § 3553 of the sentencing statute lists the Sentencing Guidelines as one factor to be considered in imposing a sentence, subsection (b) directs that the court '*shall* impose a sentence of the kind, and within the range' established by the Guidelines, subject to departures in specific, limited cases. . . . The availability of a departure in specified circumstances does not avoid the constitutional issue, just as it did not in Blakely itself." Id. at 750 (emphasis in original).

The second question presented was, if the Guidelines do violate the Sixth Amendment, whether or to what extent the Guidelines were inapplicable as a matter of severability analysis. Id. at 747 n.1, 756. In an opinion authored by Justice Breyer, the remedial majority concluded that had Congress known that mandatory Guidelines would violate the Sixth Amendment, it would have enacted a non-mandatory system. To effectuate congressional intent, the Court "severed and excised" 18 U.S.C. § 3553(b)(1), which made the Guidelines mandatory, as well as 18 U.S.C. § 3742(e), the appellate review section that assumed the Guidelines' mandatory nature, id. at 756-57, thus leaving 18 U.S.C. § 3553(a) as the governing sentencing law. Id. at 764-66.

II. Rule 11

The objective of Rule 11(b) is to ensure that a plea of guilty or *nolo contendere* is voluntary and intelligent. To that end, subsections (H) through (M) direct the court to inform the defendant of the potential penalties s/he faces.

In 1989, following enactment of the Guidelines, the rule was amended to mandate that the district court inform the defendant of its obligation to apply the Guidelines and its discretion to depart in some circumstances. The objective was not to generally describe sentencing procedure, but to inform the defendant of the existence of the Guidelines and the importance they played in sentencing, as well as the possibility of a departure. See

Fed. R. Crim. P. 11, 1989 advisory committee's note. Since the Guidelines had the force of law, this was meaningful information in addition to the statutory maximum and any applicable mandatory minimum, i.e., in all likelihood, the outer limits of the sentence would be set by the Guidelines.

After Booker's excision of section 3553(b), "Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing." Booker, 125 S. Ct. at 766. The first two sentences of section 3553(a) set forth the sentencing rules that remain mandatory: The court "*shall* impose a sentence that is sufficient, but not greater than necessary" to satisfy the purposes listed in subsection (a)(2), and in determining that particular sentence, the court "*shall* consider" the list of purposes and factors listed in subsections (1) through (7).[1] See also Booker at 764-65 (directing courts to consider the statutory factors and to impose sentences that reflect the purposes of punishment).

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[1] **(a) Factors to be considered in imposing a sentence.**--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress

The proposed amendment to Rule 11(b)(1)(M) would direct the courts to very strongly indicate that the Guidelines are the primary sentencing principle, i.e., describing court's obligation as "to calculate the applicable sentencing guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a)." Under the sentencing framework described in the preceding paragraph and which the courts are in fact applying,[2] the Guidelines do not have the force of law. For that reason, the number of sentences both below and above the guideline range has increased after Booker.[3] The proposed amendment would not provide meaningful or accurate information to defendants about the potential penalties they face.

We offer two alternative recommendations, depending on what the Committee wishes to accomplish.

(regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

[2] Most courts of appeal, as well as district courts too numerous to mention, have explicitly recognized that after Booker, the sentencing court must impose a sentence sufficient but not greater than necessary to achieve the goals of sentencing after considering all pertinent statutory factors. E.g., United States v. Young, 2005 WL 3508315 (7th Cir. Dec. 22, 2005); United States v. Glover, 2005 WL 3159228 **6-8 (11th Cir. Nov. 29, 2005) (Tjoflat, J., specially concurring); United States v. Neufeld, 2005 WL 3055204 *9 (11th Cir. Nov. 16, 2005); United States v. Soto, 2005 WL 281178 (3d Cir. Oct. 27, 2005); United States v. Simkanin, 420 F.3d 397, 416 & n. 20 (5th Cir. 2005); United States v. Spigner, 416 F.3d 708, 711 (8th Cir. 2005); United States v. Ameline, 409 F.3d 1073, 1098 (9th Cir. 2005); United States v. McDaniel, 398 F.3d 540 (6th Cir. 2005); United States v. Crosby, 397 F.3d 103, 107-08 (2d Cir. 2005); United States v. Acosta-Luna, 2005 WL 1415565 (10th Cir. June 17, 2005). While some courts are giving the guidelines presumptive weight or a presumption of reasonableness, this is a constitutionally dangerous position, as a review of the Booker majority opinions as well as Justice Scalia's dissenting opinion makes clear. Booker, 125 S. Ct. at 794 (Scalia, J.). Even Judge Cassell, the initial proponent of giving the guideline range presumptive weight, wrote in a case applying advisory guidelines before Booker was decided: "In imposing sentences in criminal cases, the court is required by the governing statute-the Sentencing Reform Act -to 'impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in [the Act].'" United States v. Angelos, 345 F.Supp.2d 1227, 1240 (D. Utah Nov. 16, 2004).

[3] See U.S. Sentencing Commission Special Post-Booker Coding Project (prepared December 1, 2005), http://www.ussc.gov/Blakely/PostBooker_120105.pdf.

If the objective is to describe what the court is obligated to consider in sentencing the defendant between the statutory minimum and maximum, the Rule should state the following:

> **(M)** the court's obligation to impose a sentence that is sufficient, but not greater than necessary, to satisfy the need to
>
> **(i)** provide just punishment in light of the seriousness of the offense,
>
> **(ii)** promote respect for the law,
>
> **(iii)** afford adequate deterrence to the defendant and others,
>
> **(iv)** incapacitate the defendant to the extent necessary to protect the public from further crimes of the defendant, and
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> **(v)** provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and
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> to determine that particular sentence after considering, in addition to the purposes just described,
>
> **(vi)** the nature and circumstances of the offense,
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> **(vii)** the history and characteristics of the defendant,
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> **(viii)** the kinds of sentences available,
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> **(ix)** the advisory guideline range,
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> **(x)** possible departures and any other relevant policy statements under the Sentencing Guidelines,
>
> **(xi)** the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct, and
>
> **(xii)** the need to provide restitution to any victims of the offense.

If the objective is only to ensure that pleas are knowing and voluntary, subsection (M) should be stricken. The Committee Note should then be revised to strike the last sentence and to explain that because the Guidelines are no longer mandatory, it would not be accurate to inform the defendant of the court's obligation to "apply the Sentencing Guidelines" or its "discretion to depart from those guidelines under some circumstances." The Note should state that while the purpose of Rule 11(b) is to ensure a knowing and voluntary plea, sentencing procedures are described in Rule 32 and 18 U.S.C. § 3553(a).

III. Rule 32

Information Relevant to § 3553(a)

The proposed amendment would revise Rule 32(d)(2)(F) to require that the presentence report contain "any other information that the court requires, including information relevant to the factors under 18 U.S.C. § 3553(a)." The Committee Note

states that the rule contemplates that a request can be made by the court as a whole in all or a class of cases, or by an individual judge in a particular case.

We strongly object to the proposal as written. In order to save the Guidelines from unconstitutionality, the Supreme Court held that 18 U.S.C. § 3553(a) is the sentencing law. To implement that law, information made relevant by it must be included in the presentence report as a matter of course and not on a haphazard, optional basis.

We think that the concern (noted in the Memorandum dated May 17, 2005) about the difficulty Probation Officers may have in determining the scope of relevant information is unfounded. As with information relevant to guideline calculations and departures, information relevant under § 3553(a) will come to the Probation Officer's attention through the presentence interview, the Officer's own follow-up investigation, the parties' submissions, and the parties' objections. We understand that a change to Monograph 107 has been drafted that would add a section to the presentence report for information relevant under § 3553(a), which presumably provides guidance as to the scope of relevant information. The Rule, too, should provide guidance.

We recommend that Rule 32(d)(2) be amended to include a separate subsection (preferably subsection (A)) as follows:

> **(A)** any information which comes to the Probation Officer's attention through the presentence interview, the Officer's own investigation, or submissions or objections by the parties which is relevant under the statutory purposes and considerations listed in 18 U.S.C. § 3553(a), including **(i)** the nature and circumstances of the offense, **(ii)** the history and characteristics of the defendant, **(iii)** information concerning sentences actually imposed upon defendants with similar records who have been found guilty of similar conduct and factors which may have contributed to any apparent disparities among those sentences, **(iv)** losses by any victims of the offense that may be subject to restitution, **(v)** the relative seriousness of the offense, **(vi)** the need to promote respect for the law, **(vii)** information concerning the achievement and efficacy of deterrence of the defendant and of others in similar cases, **(viii)** information concerning the defendant's relative dangerousness and risk of recidivism as these factors may bear upon the need to protect the public from further crimes of the defendant, and **(ix)** any needs the defendant may have for educational or vocational training, medical care, or other correctional treatment, and information concerning the most effective manner of providing such treatment.

We believe that the statutory goals and factors should be spelled out so that their importance is understood. This is particularly important given the detailed instructions regarding the Guidelines in subsection (d)(1).

To facilitate the Probation Officer's collection of the relevant information, we recommend that Rule 32(f)(1) be amended as follows:

(1) Time to Object. Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to information relevant to factors under § 3553(a), such as the calculation of sentencing guideline ranges and the identification of pertinent policy statements, and other material information contained in or omitted from the report.

Deleted: material information,

We also recommend that the heading of subsection (d)(1) be changed from "Applying the Sentencing Guidelines," to "Calculating the Advisory Sentencing Guidelines." This would better conform to Booker.

Judgment/Statement of Reasons

Rule 32(k) would be amended to require the courts to use the judgment form prescribed by the Judicial Conference (which has been modified after Booker to include a detailed Statement of Reasons), and to specifically require the statement of reasons required by 18 U.S.C. § 3553(c) to be included on that form, to be entered in the public record.

Perhaps this was inadvertent, as the Committee Note to proposed Rule 49.1 states that the statement of reasons shall not be made available to the public at the courthouse or via remote electronic access. In any event, because of the safety and privacy issues this would raise for defendants and others, as noted in Rule 32(d)(3), the Statement of Reasons should not be a public document. Nor would a provision for sealing on a case by case basis be appropriate, as it would flag cooperators, would impose a burden on the courts and counsel, and may not be effectively carried out because of inattention or mistake.

We wholly support accurate and consistent data collection by the Sentencing Commission through the use of a standardized form. However, we recommend that the Committee make clear in Rule 32(k) that the Statement of Reasons is not to be made part of the public record. As always, it would still go to the Sentencing Commission, the Probation Office, and to the Bureau of Prisons if a term of imprisonment is imposed. See 18 U.S.C. § 3553(c).

IV. Committee Notes to Rules 11, 32 and 35

Our final recommendation is to correct a misstatement in a sentence that appears in the Committee Notes to Rules 11, 32 and 35, which is that Booker held that the provision of the federal sentencing statute that made the Guidelines mandatory violates "the Fifth Amendment requirement of proof beyond a reasonable doubt." The questions presented were stated solely in terms of the Sixth Amendment, Booker, 125 S. Ct. at 747 n.1, as were the holdings, id. at 746, 748-50, 756, 769. To avoid giving a misimpression that the Court addressed what standard of proof the Fifth Amendment requires, we suggest replacing that sentence with the following:

Booker held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) (Supp. 2004), violates the Sixth Amendment.

Thank you again for this opportunity to provide our views on these important proposals.