



05-CR- 017

February 15, 2006

Secretary of the Committee on Rules of Practice and Procedure  
Administrative Office of the U.S. Courts  
Washington, D.C. 20544

*In re: Proposed Revisions to the Federal Rules of Criminal Procedure*

Dear Chairman Levi and Committee Members:

The United States Sentencing Commission commends the Committee on Rules of Practice and Procedure for its work on the proposed amendments to the Federal Rules of Criminal Procedure in light of the United States Supreme Court's decisions in the companion cases *United States v. Booker* and *United States v. Fanfan*<sup>1</sup> (hereinafter "Booker"). The Commission respectfully submits the following comments on the proposed amendments. Overall, the Commission believes the proposed amendments are in keeping with the spirit and intent of the Sentencing Reform Act, as that Act has been modified by the remedial *Booker* opinion. With the suggestions noted below, the Commission supports the adoption of these rules.

### **Specific Comments**

#### **(1) Proposed Changes to Rule 11 (Pleas)**

The Committee proposes to amend Rule 11(M) to read:

in determining a sentence, the court's obligation 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);.

The proposed amendment tracks the three-step approach to sentencing that the

<sup>1</sup> \_\_\_\_\_ U.S. \_\_\_\_\_, 125 S.Ct. 738 (2005).

Commission believes is implicit in *Booker* and that has been more fully described by a number of appellate courts in post-*Booker* decisions.<sup>2</sup> We suggest changing the word “calculate” to “determine and calculate” to better reflect the careful and multi-faceted factual and legal determinations made by a sentencing judge before arriving at the applicable guideline range. The word “calculate”, standing alone, suggests an overly mathematical approach to guideline application and depreciates the nuanced weighing of facts and legal judgments that a judge must employ in order to properly determine the applicable guideline range.

## **(2) Proposed Changes to Rule 32(h) (Notice of Possible Departures from Sentencing Guidelines)**

The Commission supports the principle of fair notice before imposition of a sentence outside the applicable guideline range, whether that sentence is reached through traditional departures or post-*Booker*, 18 U.S.C. § 3553(a) variances. Rule 32(h) currently requires that a court give parties “reasonable notice” when it is contemplating a departure from the guidelines on a ground not identified in the presentence report or in a party’s prehearing submission. The proposed amendment would expand the rule’s coverage to require such notice also when a court is considering a “non-guideline sentence” based on its authority under 18 U.S.C. § 3553(a). The Committee defines a “non-guideline sentence” as one “not based exclusively on the guidelines”.

The purpose of Rule 32(h) is to avoid unfair surprise and aid full development of the record in a case in which a court proposes to impose sentence outside the applicable guideline sentencing range based on a ground not previously noticed in the presentence documents.<sup>3</sup> This principle of fair notice is all the more important in view of *Booker*’s authority for sentencing outside the guideline range. The Commission is concerned, however, that the proposed language may be overly broad and not fully comport with the spirit and intent of Rule 32. The Commission is concerned that, as presently drafted, the rule would allow for consideration of matters mentioned in the presentence report but not identified as grounds for departure or variance (*i.e.*, a non-guideline sentence) to then be considered for a departure or a variance (*i.e.*, a non-guideline sentence).

The Commission suggests that the language be modified to read substantially as follows:

Notice of Intent to Consider Other Sentencing Factors. Before the court may rely on a ground not identified *for departure or a non-guidelines sentence* either in the presentence report or in a party’s prehearing submission, the court must give the parties reasonable notice that it is contemplating either departing from the applicable guideline range or imposing a non-guideline sentence. *The notice must specify any ground not earlier identified for departing or imposing a non-guideline sentence on which the court is*

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<sup>2</sup> See, e.g., *United States v. Crosby*, 397 F.3d 107, 113 (2<sup>nd</sup> Cir. 2005); *United States v. Hughes*, 401 F.3d 540 (4<sup>th</sup> Cir. 2005); *United States v. Haack*, 403 F.3d 997 (8<sup>th</sup> Cir. 2005).

<sup>3</sup> See, e.g., *Burns v. United States*, 501 U.S. 129 (1991) (Rule 32 contemplates full adversary testing of the issues relevant to a Guidelines sentence and mandates that the parties be given an opportunity to comment on matters relating to the appropriate sentence).

*contemplating imposing such a sentence.* (emphasis added to denote text as modified per this suggestion).

### **(3) Proposed Changes to Rule 32(k) (Judgment)**

The Committee recommends amending Rule 32(k) to state that a court “must use the judgment form prescribed by the Judicial Conference of the United States.” It further states that in a judgment of conviction, the court must set forth the sentence “including the statement of reasons required by 18 U.S.C. § 3553(c).” The Commission appreciates efforts made by the Committee and the Judicial Conference to ensure that a uniform statement of reasons form is included with the courts’ sentencing documentation. Use of the newly revised statement of reasons form, and inclusion of the statement of reasons form with the judgment and commitment order, will assist the Commission in its data collection and analysis efforts and ensure that Commission data remains timely, accurate, complete, and of the highest quality. We note that this proposed rules amendment appears consistent with pending legislation (Sec. 735 of H.R. 3199, Patriot Act Reauthorization).

### **(4) Proposed Changes to Rule 35(b)(1)(B)**

Currently, Rule 35(b) permits a court to reduce a sentence for a defendant’s substantial assistance based on motion of the government. That assistance must have resulted in the investigation or prosecution of another person, and the reduction must accord with the federal sentencing guidelines and accompanying policy statements. U.S.S.G. §5K1.1 sets forth a list of factors that the sentencing court should consider before granting a Rule 35(b) motion. Application notes accompanying §5K1.1 also advise courts to give “substantial weight” to the government’s evaluation of the extent and value of the defendant’ assistance. The proposed rule would eliminate the requirement that the sentence reduction “accords with the Sentencing Commission’s guidelines and policy statements.”

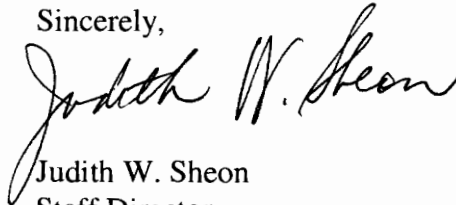
The Commission recognizes that the purpose of this amendment is to remove any Rules text that refers to mandatory application of the guidelines. While it may be somewhat anomalous to retain binding authority of the guidelines and policy statements in this Rule, there is a substantial legal question about whether the *Booker* remedial opinion requires this result in post-sentencing context. Because the Rule 35(b) determination involves no judicial finding of fact that would increase the sentence, it would not appear that a defendant’s Sixth Amendment rights are jeopardized by, or that *Booker* requires modification of, the mandatory nature of the current rule.

This legal issue aside, the Commission is concerned that the amendment is overly broad and may result in consideration of factors other than the value of the defendant’s substantial assistance or post-sentence cooperation. The Commission believes that Rule 35(b) should retain its pre-*Booker* focus on the substantial assistance offered by the defendant, as exemplified through consideration of the factors set forth in U.S.S.G. §5K1.1. We note that *Booker*’s remedial opinion requires court consideration of applicable Commission policy statements.

Thus, at a minimum, the Commission believes that an amended Rule 35(b) should reflect the continued requirement that courts consult and consider the guidelines and policy statements before making any such sentence reduction. Furthermore, the Committee note accompanying the proposed amendment should clarify that the changes are not intended to enlarge the bases of what a court may consider before imposing a post-sentence reduction.

The Commission thanks the Committee for considering its comments on the proposed rules changes. The Commission appreciates the Committee's efforts and believes that overall these changes successfully incorporate *Booker* requirements into the sentencing process. The Commission looks forward to continuing to work with the Committee, the Judiciary, Congress, and other interested groups in crafting a federal sentencing system that remains fair and just.

Sincerely,

A handwritten signature in black ink, reading "Judith W. Sheon". The signature is written in a cursive style with a large initial "J".

Judith W. Sheon  
Staff Director