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UNITED STATES PROBATION
Eastern District of New York

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

Re: Comments on Proposed Rule 32(h) of the
Federal Rules of Criminal Procedure

Dear Secretary:

Regarding proposed Rule 32(h), I note that the title of the proposed rule, "Notice of Intent to Consider Other Sentencing Factors" is in conflict with both 18 USC 3553(a) and *Booker*. The proposed rule requires a judge to give notice if he or she is contemplating imposing a sentence that is a departure within the guideline system or a non-guideline sentence. This proposal effectively gives primacy to the sentencing guidelines as a factor for the Court to consider in sentencing, but neither Section 3553(a) or *Booker* give the guidelines such primacy. Rather, *Booker* reiterates Section 3553(a)'s statement that the guidelines are one of seven factors that the judge is required to consider prior to imposing sentence. None of the seven factors at Section 3553(a) is statutorily, or via *Booker*, granted primacy.

Further, the title of the proposed rule is very misleading. It provides for the court to give notice that it is going to consider non-guideline factors for a pending sentence, but Section 3553(a) *mandates* that the Court consider at least six factors other than the sentencing guidelines in every case.

I also note that the term "departure" is outdated. *Booker excised* 18 USC 3553(b) in its entirety. That was the section that made the guidelines compulsory, but it also granted the court departure power. There is now no statutory departure power, as Section 3553(b) is no longer operative. One does not "depart" from something that is advisory, i.e., the guideline range after *Booker*. I note that *Crosby* in the Second Circuit recognizes this when it suggests the use of the term "non-guidelines sentence" instead of "departure".

Very truly yours,

Tony Garoppolo
Chief U.S. Probation Officer

P.S. I am also the author of *The Sentencing Reform Act, A Guide for Defense Counsel*, which has been published in three editions by the Federal Bar Council