05-CR-B

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February 1, 2005

The Honorable Susan Bucklew
Judge, Middle District
United States District Court
801 North Florida Avenue
Tampa, Florida 33602

Dear Judge Bucklew:

Please find enclosed a memo I have written regarding two amendments to the Federal Rules of Criminal Procedure that I believe should be made. I am really not sure how the Federal Rules of Criminal Procedure Advisory Committee works, but I suppose I would like this to serve as the initiation of whatever process I can cause to be initiated. I would welcome any opportunity to discuss these issues with you further or to appear before your committee to discuss these proposals should the time allow. Either way, I would welcome your thoughts, even if provided informally. You may feel free to email me with any thoughts if that is a more convenient format. My email address is jfelman@kmf-law.com.

Thank you for your consideration of my proposal. I look forward to hearing from you at your convenience as to what my next step, if any, may be on this issue.

Sincerely,

James E. Felman

JEF/lh
Enclosure

THE NEED FOR PROCEDURAL REFORM IN FEDERAL CRIMINAL CASES

James E. Felman

The bulk of the written rules governing federal criminal cases apply only to the three percent or so of the cases involving trials.[1] Even in the few cases that proceed to trial, the vast majority of the rules apply only to the guilt phase of the case. I believe the Federal Rules of Criminal Procedure applicable to sentencing proceedings – which 97% of the time is all that happens – are in need of at least two specific reforms:

1. Rule 32 of the Federal Rules of Criminal Procedure should be amended to require that any party wishing to provide information to the Court regarding a sentencing proceeding, whether directly or indirectly through the Probation Office, must, absent good cause shown, provide that information to the other party.

2. Rule 16 of the Federal Rules of Criminal Procedure should be amended to require the government to produce to the defendant, upon request, all documents and tangible objects material to or which it intends to use regarding the application of the sentencing guidelines or other factors enumerated under 18 U.S.C. § 3553(a). Such a request by the defendant would trigger a reciprocal obligation.

Both of these proposals seem fairly simple and straightforward to me. I do not think they would be difficult to draft, to understand, or to follow. Indeed, they seem to me to be so fundamentally fair and reasonable that I find it difficult to imagine any reasonable argument against them.

I would like to state the case for these two proposals by considering how I would attempt to describe to a civil practitioner the current procedures which do not include these simple rules. Imagine the following conversation between a federal criminal defense attorney (Criminal Attorney) and a civil attorney (Civil Attorney):

Criminal Attorney: We resolve most of our cases by settlement. The plaintiff's attorney will generally try to convince the defendant that he should admit liability without a trial because if he does not the plaintiff will seek a greater penalty later.

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[1]United States Sentencing Commission 2002 Sourcebook of Federal Sentencing Statistics, p.20 (Figure C). The rate of guilty pleas has been steadily increasing:

1997 – 93.2%
1998 – 93.6%
1999 – 94.6%
2000 – 95.5%
2001 – 96.6%
2002 – 97.1%

Data from 2003 to the present is not yet available.

Civil Attorney: That happens in civil cases too. Does the plaintiff specify what the penalty will be if the defendant admits liability at the beginning of the case?

Criminal Attorney: Sometimes the plaintiff will agree to make a recommendation regarding the penalty, but they do not have to. Most Courts will not accept a settlement agreement which includes a firm agreement on the penalty. Instead, the penalty is determined by the Court at a special hearing that only takes place after the defendant has admitted liability.

Civil Attorney: So if the defendant refuses to admit liability right away, I take it the damages or penalties issues get fleshed out through depositions, interrogatories, and requests for admissions?

Criminal Attorney: No. We don't bother with any of those things.

Civil Attorney: Wow. So does the plaintiff have to provide the defendant with the documentary or other evidence it will present at the penalty hearing before the defendant decides whether or not to admit liability?

Criminal Attorney: No.

Civil Attorney: If the defendant refuses to admit liability and insists on a trial, does the plaintiff have to provide the defendant with the documents it will use to prove damages before the trial?

Criminal Attorney: No. In fact, there is no trial on the penalty. We bifurcate the proceedings and the trial is only on the issue of liability. Then we have a separate penalty hearing before the judge. The only right a defendant has to documents before trial are those which go to the issue of liability.

Civil Attorney: So if the defendant either agrees to admit liability or gets found liable at the trial, does the plaintiff at *that* point have to provide the defendant with the evidence it will present at the penalty hearing?

Criminal Attorney: No.

Civil Attorney: Does the defendant have to provide the plaintiff with the evidence it will present at the penalty hearing?

Criminal Attorney: No.

Civil Attorney: So what happens next?

Criminal Attorney: After the defendant either admits liability or is found liable at a trial, the Court appoints a special investigator – called a probation officer – to

determine the facts relating to penalties as well as additional theories of liability that were not necessarily at issue in the trial or even that were rejected by the jury at trial.

Civil Attorney: So how does the Court's Investigator learn what the facts relating to the penalty are?

Criminal Attorney: The Investigator starts by meeting *ex parte* with the plaintiff and reviews the plaintiffs' penalty evidence *in camera*.

Civil Attorney: Is that how the Court learns the facts on which to base its penalty decision?

Criminal Attorney: Usually.

Civil Attorney: Does the defendant get to look at the evidence provided by the plaintiff to the Judicial Investigator?

Criminal Attorney: No.

Civil Attorney: Then what happens?

Criminal Attorney: Then the Investigator will sometimes meet *ex parte* with the defendant. And no, the plaintiff does not get to look at the evidence provided by the defendant to the Court's Investigator. All submissions to the Judicial Investigator are generally made on an *ex parte* basis.

Civil Attorney: That seems like a strange way to have an adversarial process. Then what happens?

Criminal Attorney: After the Investigator is done meeting separately with the parties, the Investigator prepares draft findings of fact and conclusions of law and circulates them to the parties to see if there are any objections.

Civil Attorney: Are the proposed findings of fact accompanied by citations to the materials on which they are based?

Criminal Attorney: No.

Civil Attorney: So how does the defendant know what is objectionable?

Criminal Attorney: Sometimes they don't. Oh, by the way, if the defendant objects to things without a sufficient basis, the Court can penalize the defendant for doing so by increasing the penalty.

Civil Attorney: So assuming the defendant goes forward and objects anyway, then what

happens?

Criminal Attorney: At that point the defendant might get to meet with the Court's Investigator and the plaintiff, but such meetings are not required if the plaintiff does not agree to come. In any event, there are no rules governing such meetings and the plaintiff is still not required to disclose anything there.

Civil Attorney: So then how does the dispute get resolved?

Criminal Attorney: At the penalty hearing before the Court.

Civil Attorney: How does the Court go about doing that?

Criminal Attorney: Well, the Rules of Evidence do not apply so, for example, hearsay is admissible. The Court decides what the facts are by a preponderance of the evidence.

Civil Attorney: Does the plaintiff in advance of the penalty hearing have to provide the defendant with the evidence it has previously submitted *ex parte* to the Court's Investigator?

Criminal Attorney: No.

Civil Attorney: What about during the penalty hearing itself?

Criminal Attorney: No.

Civil Attorney: I understand there is now some controversy about Courts making the penalty findings by a preponderance of the evidence rather than juries making the findings on a standard of beyond a reasonable doubt?

Criminal Attorney: That's the big issue of the day. Personally I don't think Courts are any less reliable than juries. I also think both Courts and juries try to do whatever they think is right, and the different standard of proof likely doesn't change much very often. If the defendant were entitled to discovery of the plaintiff's evidence, either before or after the plaintiff submits it to the Court's Investigator, *that* might really make a difference. And, of course, most of us think the Rules of Evidence are generally pretty sensible, so going ahead and using them might be helpful as well.

Civil Attorney: Well I sure am glad we don't use your system to figure out disputes over money.

Criminal Attorney: Me too.