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Peter G. McCabe
Committee on Rules of Practice and Procedure
Of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Re: Fed. R. Crim. P. 32

Dear Mr. McCabe:

I understand that the Rules Advisory Committee has withdrawn a proposed amendment of Fed. R. 32(h) that would require courts to give reasonable notice when contemplating a sentence outside the guideline range, whether or not based on a guideline "departure." In my capacity as Chair of the Federal Defender Sentencing Guideline Committee, I write to urge the Rules Advisory Committee to reconsider.

As you may know, seven courts of appeals have now held that the Guidelines are presumptively reasonable. While we believe that this is a return to the presumptive guideline system the Supreme Court struck down in *United States v. Booker*, 543 U.S. 220 (2005), that nonetheless is the system currently operating in seven circuits. In the five other circuits, the guidelines must be calculated first, must be calculated correctly, and must be taken into account. Of all of the statutory factors courts must now consider, only the guideline range has a number attached to it. Thus, whether treated as advisory or presumptive, the guidelines continue to be the single most determinative factor of a defendant's sentence length. Further, Rule 32 continues not to require information relevant to statutory factors other than the guidelines to be included in the pre-sentence report.

This is all to say that the purely discretionary and indeterminate sentencing system that existed twenty years ago does not exist and will never exist as long as we have sentencing guidelines with numbers attached. What this means is that the defendant, defense counsel, and the prosecutor rely first and foremost on the guidelines in making critical decisions, such as whether or not to plead guilty and if so, on what terms. Most importantly, the defendant, and the government as well, prepare for sentencing (and can only prepare) based on the facts and reasons of which they have reasonable notice.

When sentence is imposed without reasonable notice of the facts or reasons, the proceeding is unfair, unreliable, and undermines respect for the law. For example, in a recent case in the Northern District of Texas, where the guidelines are presumptive, the defendant pled guilty to illegal re-entry after deportation. The guideline range was 21-27 months. According to the PSR, the defendant had several prior DWI convictions and one arrest for sexual assault of a minor that had been dismissed, and there were no known mitigating or aggravating factors to support a departure. At sentencing, without notice, the judge imposed a 120 month sentence because, according to the judge, the defendant would have been convicted of sexual assault of a minor but that the victim moved back to Mexico. There was nothing in the PSR about the circumstances of the sexual assault charge, the alleged victim moving back to Mexico, or why the charge was dismissed. The judge did not say where he got this information, and, of course the defendant had no opportunity to challenge it.

In another recent case in Alabama, the court sentenced a mentally retarded young man to life in prison where the guideline sentence was a term of years. This was based on the government's introduction, without notice, of a disciplinary report from the local jail and statement of a guard there regarding an altercation between the defendant and the guard. Defense counsel objected to the lack of notice, and sought a continuance in order to obtain and present evidence to refute the guard's version of events. The objection was overruled

In *Burns v. United States*, 501 U.S. 129 (1991), the Supreme Court interpreted a prior version of Fed. R. Crim. P. 32 to require that "before a district court can depart upward on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the Government," the district court must "give the parties reasonable notice that it is contemplating such a ruling," and "must specifically identify the ground on which the district court is contemplating an upward departure." *Id.* at 138-39. The *Burns* holding was then incorporated into Rule 32 as subsection (h).

The Court interpreted Rule 32 to require notice to ensure that it complied with the Due Process Clause. The Court noted that the guidelines place no limit on the number of grounds for a sentence outside the guideline range, a due process concern that is more pronounced after *Booker*, not less. The Court emphasized the due process need to test the facts, which cannot be done without notice. Efficiency was also a concern, for reasons just as applicable to sentencing under § 3553(a). The Court said:

> Th[e] right to be heard has little reality or worth unless one is informed" that a decision is contemplated. . . . Because the Guidelines place essentially no limit on the number of potential factors that may warrant a departure, no one is in a position to guess when or on what grounds a district court might depart, much less to "comment" on such a possibility in a coherent way. . . . At best, under the Government's rendering of Rule 32, parties will address possible *sua sponte* departures in a random and

> wasteful way by trying to anticipate and negate every conceivable ground on which the district court might choose to depart on its own initiative. At worst, and more likely, the parties will not even try to anticipate such a development; where neither the presentence report nor the attorney for the Government has suggested a ground for upward departure, defense counsel might be reluctant to suggest such a possibility to the district court, even for the purpose of rebutting it. In every case in which the parties fail to anticipate an unannounced and uninvited departure by the district court, a critical sentencing determination will go untested by the adversarial process contemplated by Rule 32 and the Guidelines. . . . Notwithstanding the absence of express statutory language, this Court has readily construed statutes that authorize deprivations of liberty or property to require that the Government give affected individuals *both* notice *and* a meaningful opportunity to be heard. . . . The Court has likewise inferred other statutory protections essential to assuring procedural fairness. . . . In this case, were we to read Rule 32 to dispense with notice, we would then have to confront the serious question whether notice in this setting is mandated by the Due Process Clause.

Burns, 501 U.S. at 136-138 (internal citations omitted).

We understand that the Committee withdrew the notice provision based on recent caselaw on the issue. There is a circuit split regarding whether a defendant must receive notice of a district court's intent to impose a sentence above the guideline range for reasons other than a guideline departure.[1] The courts that have held no notice is required have said there is no "unfair surprise" because sentencing is discretionary, includes a review of the unlimited factors set forth in § 3553(a), and defendants are aware of that.[2] The position of the Seventh and Eighth Circuits that lack of notice does not offend due process because sentencing is discretionary is at odds with their position that the guidelines are presumptive.[3] The Eleventh Circuit has said that lack of notice is not plain error because there is no precedent establishing that Rule 32(h) survives *Booker*.[4]

The courts that have held that notice is required have relied on Rule 32(h) and due process of law.[5] In holding that notice is required after *Booker*, the Fourth Circuit

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[1] *Compare United States v. Vampire Nation*, 451 F.3d 189 (3d Cir. 2006) (no notice required); *United States v. Walker*, 447 F.3d 999 (7th Cir. 2006) (same); *United States v Egenberger*, 424 F.3d 803 (8th Cir. 2006) (same); *United States v Simmerer*, 156 Fed. Appx. 124 (11th Cir. 2005) (lack of notice was not plain error) *with United States v Evans-Martinez*, 448 F.3d 1163 (9th Cir. 2006) (lack of notice was plain error); *United States v. Davenport*, 445 F.3d 366 (4th Cir. 2006) (lack of notice was error); *United States v Dozier*, 444 F.3d 1215 (10th Cir. 2006) (same).

[2] *See Vampire Nation*, 451 F.3d at 196; *Walker*, 447 F.3d at 1006-07.

[3] *See Walker*, 447 F.3d at 1007 n 7; *Egenberger*, 424 F.3d at 805-06.

[4] *See Simmerer*, 156 Fed. Appx 124 at *3.

correctly recognized that notice ensures accuracy, and that a defendant may not be sentenced on the basis of materially false information.[6] As the Ninth Circuit correctly recognized, "the district court must correctly calculate the applicable range, which serves as a 'starting point' in sentencing. The district court then has the discretion to sentence both above and below the range suggested by the Guidelines. Parties must receive notice the court is contemplating such a possibility in order to ensure that issues with the potential to impact sentencing are fully aired."[7] Of note, the position of the Department of Justice is that due process requires notice.[8]

One of the rationales offered by the Third Circuit is that notice would be "unworkable" because *Booker* contemplates that sentence will be imposed after the court considers the advisory guidelines, the defendant's allocution, victim statements, other evidence, and the § 3553(a) factors.[9] Sentencing courts have always been required to impose sentence after considering the guidelines, the defendant's allocution, victim statements, any evidence produced at the hearing, and any grounds for departure. This did not make notice "unworkable." The Third Circuit's concern about the unpredictability of victim impact statements is especially troubling. As the Tenth Circuit recognized, if the judge forms an intent to increase the sentence based on a victim's statement, the defendant must be given an opportunity to respond.[10]

For these reasons, we urge the Committee to reconsider its decision to withdraw the notice provision.

Very truly yours,

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

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[5] *See Evans-Martinez*, 448 F.3d at 1166-67; *Davenport*, 445 F 3d at 371; *Dozier*, 444 F.3d at 1127-28.

[6] *Davenport*, 445 F 3d at 371 (citing *Townsend v. Burke*, 334 U.S. 736, 741 (1948)).

[7] *See Evans-Martinez*, 448 F.3d at 1167.

[8] *See Walker*, 447 F.3d at 1007 n 7.

[9] *Vampire Nation*, 451 F.3d at 197 & n 4.

[10] *Dozier*, 444 F.3d at 1127-28.