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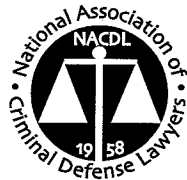
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NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

February 15, 2006
Via E-Mail

Peter G. McCabe, Secretary
Standing Committee on Rules of Prac. and Proc.
Judicial Conference of the United States
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Bldg.
One Columbus Circle, N.E., suite 4-170
Washington, DC 20002

Re: Proposed Changes in Federal Rules
of Criminal and Appellate Procedure:
Request for Comments Issued August 2005

Dear Mr. McCabe:

The National Association of Criminal Defense Lawyers is pleased to submit our comments with respect to the proposed changes in the Federal Rules of Criminal and Appellate Procedure. Our organization consists of more than 12,600 members; in addition, NACDL's 79 state and local affiliates, in all 50 states, comprise a combined membership of more than 28,000 private and public defenders.

COMMENTS ON FEDERAL RULE OF APPELLATE PROCEDURE

Rule 25. Filing and Service (Privacy Protection).

The National Association of Criminal Defense Lawyers agrees that the Appellate Rules should make clear when materials filed with the courts of appeals (particularly appendices and exhibits to motions) must be redacted to remove personal identifiers which may facilitate identify theft and other invasions of privacy. Proposed Rule 25 is helpful in that regard, but the Advisory Committee Note needs further clarification with respect to appellate filings in habeas corpus and 2255 matters. As presently drafted, filings in such cases (which are governed in the district courts by special sets of federal rules and only in the court's discretion by the civil or criminal rules), are exempt from the redaction rules at the district court level. See proposed Fed.R.Civ.P. 5.2 (b)(6); Fed.R.Crim.P. 49.1(b)(6), (7).

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On appeal, the drafting of proposed FRAP 25 makes the question more convoluted, as the rule would appear to say that habeas appeals (not being otherwise mentioned) are subject to proposed Fed.R.Civ.P. 5.2, and yet that rule by its own terms excludes filings in such cases. As discussed in our comment to Criminal Rule 49.1, we do not see why counseled habeas (including 2255) filings, at least, should not be subject to the privacy rules. However that point is resolved, the appellate rule should be made clear by adding either to the Rule or to the Committee Note a proviso which states whether the exemptions of Civil Rule 5.2(b) continue to apply in appeals from decisions in matters that were subject to those exemptions in the district court.

COMMENTS ON FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11. Pleas.

We agree that Rule 11 must be amended in light of United States v. Booker, 543 U.S. 220 (2005). However, the committee proposal does more than is required, and thus more than is appropriate. There is no need to have the district court, while taking a change of plea, try to explain the sentencing process to the defendant. The purpose of the Rule 11 colloquy is to ensure that the guilty plea, which entails a wide array of constitutional waivers, is voluntary and intelligent. Part of that process is to ensure that the defendant understands the potential penalties s/he faces as a result of the conviction which the plea generates. The reason advice about the Guidelines was added after 1987 to the previous versions of Rule 11, which had required that the defendant be advised of the statutory maximum punishment and any mandatory minimum, was that sentencing within the guideline range was then, by virtue of 18 U.S.C. § 3553(b), virtually mandatory. In effect, the Rule recognized what the Supreme Court later held in Booker -- that the top of the Guideline range constituted, for all intents and purposes, a sort of statutory maximum.

With § 3553(b) stricken and excised from the statute for precisely that reason, however, the purposes of the Rule no longer mandate any discussion of the Guidelines at all. (Defense counsel, on the other hand, has a duty to discuss the significance of the Guidelines with the defendant in every case.) The purpose of Rule 11 is not to have the judge conduct a seminar on federal criminal procedure for the defendant, but rather to ensure that the plea is voluntary. The Rule should now revert to its pre-Guidelines terminology, and require that the judge advise the defendant of the maximum possible penalties which the plea would authorize at sentencing, whether imposition of any or all of that potential maximum is mandatory, and that the actual

sentence cannot be predicted or promised. No more should be attempted, and any more is likely to be confusing.

Moreover, the proposed language is a misleading rendition of 18 U.S.C. § 3553(a), the law which governs the district court at sentencing after Booker. The proposed language would inappropriately single out the "sentencing guideline range" and "possible departures under the Sentencing Guidelines" as factors the court at sentencing must consider, plainly implying that these are of greater importance. Yet the Guidelines and the policy statements governing departure are listed at § 3553(a)(4) and (a)(5) under a statutory provision with seven subsections, many of them containing more than one factor. The language would then reference as a seeming afterthought all the other considerations, almost a dozen in number, identified in § 3553(a)(1), (a)(2)(A)-(D), (a)(3), (a)(6) and (a)(7), with the single opaque phrase, "other sentencing factors under 18 U.S.C. § 3553(a)." This would not fairly inform anyone of what § 3553(a) actually says. See United States v. Kikumura, 918 F.2d 1084, 1111 (3d Cir. 1990) (per Becker, J.: § 3553(a) does not elevate any one factor over the others mentioned). If anything, all the court should tell the defendant after advising him or her of the statutory maximum(s) and any mandatory minimum is that the sentence imposed will be that which seems "sufficient, but not greater than necessary," 18 U.S.C. § 3553(a), after the court has considered all pertinent factors.

At best, the proposed language would have the Standing Committee inappropriately take sides in a developing controversy over the role the Guidelines should and do play in a post-Booker sentencing system. Compare, e.g., United States v. Mykytiuk, 415 F.3d 606, 607 (7th Cir. 2005), with United States v. Cooper, -- F.3d --, 2006 WL 330324, *5 (3d Cir., filed Feb. 14, 2006) (per Scirica, Ch.J.) (declining, contrary to Mykytiuk, to adopt any presumption of reasonableness for within-Guidelines sentences). This is a substantive, not a procedural question, and so should not be addressed by a Rules amendment. For all these reasons, NACDL strongly opposes the proposed formulation for changing the sentencing-related advice to be given at a change of plea.

Rule 32(d). Presentence Report.

We agree that Rule 32(d) must be amended in light of Booker, supra. The proposed amendment, however, falls far short of what is necessary to bring the rule into conformity with Booker. The significance of Booker lies both in dramatically reducing the previous importance of the guidelines by making them advisory only -- that is, by bringing them in to the sentencing decision through § 3553(a)(4) -- and in requiring the court to consider equally the other factors listed in § 3553(a). Booker thus

commands a fundamental change in federal sentencing with respect to the information the court must consider in determining the sentence, and the importance of that information. Given that the court's primary source of information is the presentence report, and given that Rule 32(d) specifies the information that must be included in the report, Rule 32(d) needs to be comprehensively revised to reflect and conform with the change in federal sentencing that Booker requires. The proposed amendment, in contrast, seeks to bring the rule into conformity with Booker merely by adding an arguably redundant phrase at the end of subparagraph (d)(2), and otherwise maintaining the existing rule in its entirety without any change whatsoever. The proposed amendment thus falls short on two fronts -- it fails to make the changes that are needed to elevate the importance of the non-guideline § 3553(a) factors to reflect their post-Booker significance, and it fails to make the changes that are needed to diminish the importance that the rule presently requires the guidelines be given. In order to accomplish the Committee's objective of bringing the rule into conformity with Booker, both the structure and the content of the rule must be changed.

The structure of the existing rule reflects the primacy the guidelines had prior to Booker, as it divides the information that must be included in the presentence report into two categories -- information about the sentencing guidelines (Rule 32(d)(1)), and all other information (Rule 32(d)(2)). In order to conform with the spirit and letter of Booker -- that in determining the sentence, a court comply not with the unconstitutional § 3553(b) but with the controlling, post-severance terms of § 3553(a) -- the existing structure of the rule needs to be changed so that it no longer gives prominence to the guidelines. Unless the present structure of the rule is changed, it will continue to misleadingly convey and wrongly encourage the continued primacy of the guidelines, risking replication of the constitutional flaw which led to Booker itself.

The change in the structure of the rule is necessary but not sufficient to bring it into conformity with Booker. The text of the rule must be amended to require that the composition of the presentence report be changed to be in conformity with the Sentencing Reform Act, as it stands after severance as directed in Booker. The rule thus must be amended to require that the report address individually all of the factors specified in § 3553(a), and provide any additional information needed for the factors to be considered adequately by the court. For example, the rule should specify that the report must include statistical data on the sentences actually imposed by courts (locally and nationally, both state and federal) in cases involving "similar" (not necessarily identical) criminal behavior, so the court may give adequate consideration to its statutory obligation to "avoid unwarranted sentence disparities among defendants with similar

records who have been found guilty of similar conduct." 18
U.S.C. § 3553(a)(6).

The content of the rule also must be amended to eliminate provisions or terminology that require or encourage that special consideration be given to the sentencing guidelines over other statutory factors. For example, existing subparagraph (d)(1)(E) requires the report "identify any basis for departing from the applicable sentencing ranges," which incorrectly suggests the court ought not deviate from the guideline range unless a recognized departure ground is found to exist. That provision should either be stricken in its entirety, or amended so that it no longer refers to the act of "departing." Of course, Commission "policy statements," including those which define, recommend or disapprove grounds for "departure," should be covered, so that these, too, may be "considered," as required by law. 18 U.S.C. § 3553(a)(5). Alternative terminology might include referring to the "sentencing range" as the "Guideline sentence" and referring to a sentence that does not fall within that range as an "individualized sentence."

Rule 32(h). Notice of Intent to Consider Other Sentencing Factors.

We agree that Rule 32(h) also must be amended in light of Booker, supra. We also agree with the proposed change in the subheading of the rule from "Notice of Possible Departure From Sentencing Guidelines" to "Notice of Intent to Consider Other Sentencing Factors," as it accomplishes the intended objective of bringing the rule into conformity with Booker by both removing the language that (now) incorrectly gives exclusive focus to the guidelines, and by substituting new language that conveys accurately the equal importance of all sentencing factors.

The proposed amendment in the text of the rule, however, does neither. Instead, the proposed amendment simply substitutes new language that perpetuates the primacy of the guidelines and wrongly limits the circumstances in which notice is required to those in which a court is contemplating "departing from the applicable guideline range" or imposing a "non-guideline sentence." Again, we emphasize that at the very least the weight to be given the Guidelines at this time is a substantive and controversial question, on which a Rules amendment should not opine. 28 U.S.C. § 2072(b). The Rule, in our view, should simply require a court to give notice whenever it is contemplating imposing a sentence based on a factor or ground not identified either in the presentence report or in a party's prehearing submission. References to a court's engaging in the act of "departing," and references to "the applicable guideline range" and to a "non-guideline sentence," should be eliminated,

both because they are unnecessary for the rule to accomplish its objective, and because to continue to use those terms impedes the transformation to the post-Booker sentencing system built around a direct application of all the commands of § 3553(a). Alternatively, to the extent it might be deemed necessary or desirable to make reference to sentences with relation to whether they are within or outside an applicable guideline range, different terms should be used to identify them. As noted above, alternative terminology might include "Guideline sentence" for a sentence that is within a guideline range, and an "individualized sentence" for one that is not.

Rule 32(k). Judgment.

We support the adoption of a uniform judgment form, and the express requirement that the court include in that judgment "the statement of reasons required by 18 U.S.C. § 3553(c)." In order for the judgment to be consistent with and aid in the transformation to post-Booker federal sentencing, it is important that the judgment form and statement of reasons not use or make reference to terms such as "guideline sentence" or "non-guideline sentence."

Rule 35. Correcting or Reducing a Sentence.

For the reasons expressed in our comment on the proposed amendment to Rule 11, NACDL believes that the Committee's proposed change to Rule 35(b) is largely right. The Guidelines are no longer mandatory. It is therefore no longer appropriate to require that any Rule 35 reduction take them into account. However, for the same reason, it is no longer appropriate that the Rule require that the motion be made by an attorney for the government. That requirement was written into the Rule by Congress in the Sentencing Reform Act of 1984 (effective in 1987), as amended by the Anti-Drug Abuse Act of 1986 (effective in 1986), at the same time that Congress added the reference to the Commission's Guidelines and policy statements. As the Committee implicitly recognizes, by implementing this concept by the direct amendment of a Rule of Procedure, Congress left the question of later amendments in the hands of the Committee pursuant to the Rules Enabling Act process. Just as the Committee can remove the Guidelines reference, so (and for the same reasons) it can eliminate the government motion requirement.

It is only by virtue of USSG § 5K1.1 (p.s.), that a government motion is "required" before a downward departure from the guideline range can be granted at the time of sentencing on account of "substantial assistance." But now (at least where

there is no mandatory minimum sentence), after Booker, a judge may sentence outside and below the Guideline range to recognize a defendant's favorable change of attitude toward society, even without a government motion. See generally Roberts v. United States, 445 U.S. 552 (1980). The words "the government's" in the introductory sentence of Rule 35(b)(1) are a relic of the pre-Booker mandatory guidelines system, and should be stricken as well. District judges can surely be trusted to evaluate the soundness of any motion for sentence reduction presented by either party, after taking into account the views and evidence offered by the other side, and to exercise their discretion appropriately.

A sincere effort at cooperation with the authorities may constitute new and powerful evidence of rehabilitation, and thus a reduced need to protect the public from further crimes, that justifies a lower sentence. What the district court must do when reducing a sentence on account of post-sentence cooperation, rather than depend upon the "guidelines and policy statements," is comply with 18 U.S.C. § 3553(a) -- which remains mandatory. That means that the judge must adjust the sentence, if at all, to the extent that it will become or remain "sufficient, but not greater than necessary" to achieve the purposes of the criminal justice system.

Rule 45. Computing and Extending Time.

NACDL thanks the committee for clarifying (correctly, in our view) the operation of a rule which has occasionally vexed and confused the most dedicated practitioner.

Rule 49.1. Privacy Protection for Filings.

The committee note explains that the exclusion of habeas corpus and 2255 papers from the salutary operation of proposed Rule 49.1 is due to the pro se nature of such filings. The exclusion is thus revealed as both under- and over-inclusive. Many habeas corpus and 2255 petitioners are represented by counsel (either retained or appointed under the Criminal Justice Act) and some criminal defendants act pro se in ordinary criminal cases. The categorical exclusion of such filings should be deleted. It should be replaced with a provision stating that pro se litigants are encouraged but not required to abide by the provisions of this rule. (Alternatively, the committee might revise the draft to provide only that pro se litigants in habeas corpus and 2255 cases are so encouraged but not required; the committee may think that it would be better to attempt to require compliance by pro se criminal defendants, just as they are gener-

To: Judicial Conf. Standing Committee on Rules

February 2006


Re: NACDL Comments on Proposed Crim. & App. Rules Amendments

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ally required to comply with the rest of the Rules). This comment applies equally to proposed revised Fed.R.Civ.P. 5.2.

As always, NACDL appreciates the opportunity to offer our comments on the Advisory Committees' proposals. We look forward to working with you further on these important matters.

Very truly yours,


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Co-Chairs, National Association
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