

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

10613 UNITED STATES COURTHOUSE

601 MARKET STREET

PHILADELPHIA, PENNSYLVANIA 19106-1705

STEWART DALZELL
JUDGE

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November 15, 2005

05-CR- 006

Honorable Susan C. Bucklew, Chair
Advisory Committee on
Federal Rules of Criminal Procedure
Administrative Office of United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Report of the Advisory Committee on Criminal Rules

Dear Judge Bucklew:

I write to express my strong opposition to the proposed amendment to Fed. R. Crim. P. 32(h) regarding notice as to "intent to consider other sentencing factors."

In the first place, the proposal fundamentally rewrites Justice Breyer's opinion for the remedial majority in Booker. That opinion not only gives the parties "notice" of "other sentencing factors," it obliges all sentencing judges in every case to consider all the § 3553(a) factors. The premise of the proposed amendment is that looking to these factors is somehow a "surprise" to the parties. To the contrary, it is nothing less than the sentencing judge's legal duty, no more, no less.


Secondly, the proposal assures that many, if not most, sentencing hearings will have to take place at least twice, with consequent costs to the parties, victims, and public, who all have a right to attend such important proceedings. In many cases, the sentencing judge does not have all the grounds to apply the § 3553(a) factors until the very end of the hearing. Indeed, the judge cannot discern the defendant's remorse, if any, until after the allocution, which must come as the last event before the imposition of sentence. As the proposal is written, the judge would, after the allocution, have to give notice of lack of remorse (with its powerful effect on the judge's appraisal of the need "to protect the public from further crimes of the defendant"), and then recess for a "reasonable" time . . . but to what end? Could any criminal law practitioner in federal court be "surprised" at a harsher sentence because the defendant remains indifferent to his crimes and victims?

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Federal Rules of Criminal Procedure
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Page -2-

Of course, we all know that many in the judiciary fear retribution from Congress if we really take Booker at its word. But surely our duty is exclusively to the law as the Supreme Court of the United States interprets it. Thus, Justice Breyer's remedial majority opinion in Booker constitutes sufficient "notice" of what sentencing judges must do.

Please withdraw this misbegotten and mischievous idea.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Stewart Dalzell", with a stylized flourish at the end.

Stewart Dalzell

SD:jt