

JUDICIAL CONFERENCE OF THE UNITED STATES  
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
ADVISORY COMMITTEE ON CRIMINAL RULES

TESTIMONY OF JON SANDS  
ON BEHALF OF THE FEDERAL  
PUBLIC COMMUNITY DEFENDERS

Friday, January 6, 2005

Phoenix, Arizona

[TRANSCRIPT PREPARED FROM A TAPE RECORDING.]

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## PRESENT:

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P R O C E E D I N G S

JUDGE BUCKLEW: Let me begin by letting us introduce ourselves and then we will let you introduce yourself.

My name is Susan Bucklew and I am the Chair of the Criminal Rules Advisory Committee. This is Professor Sara Beale. She is the reporter to that committee. This is Judge David Levi, the chair of the standing committee.

I think what I will do is just let everybody introduce themselves, so you will know who is here.

MR. DORHOFFER: Alan Dorhoffer, U.S. Sentencing Commission.

MR. MCCALLUM: Robert McCallum.

MR. RABIEJ: John Rabiej, administrative office.

MR. COQUILLETTE: Dan Coquillette. I am reporter to the standing committee.

MR. MCCABE: I am Peter McCabe, with the committee.

MR. SANDS: I am Jon Sands. I am the federal defender for the District of Arizona, which is one of the largest districts both in terms of size and in terms of cases. We are doing upwards of eight to 9,000 criminal sentencings a year.

I am also Chair of the Federal Defenders Sentencing Committee, which is Congressionally mandated to work with the Sentencing Commission, advising them on policy.

I have been a federal defender for upwards of 20 years, both pre-Guidelines, Guidelines during the interregnum when we didn't have the Guidelines, and then for the past 15 years, and I have appeared before both the Commission and other committees.

I want to thank you very much for allowing me to meet with you and to testify. It is an opportunity for the federal defenders who handle the vast bulk of cases to have input into this important process which this committee is doing.

The committee, obviously, wants to be accurate, wants to be neutral and fair in its rules of procedure, and Booker and the sentencing

revolution has placed tremendous burden on the committee in trying to conform to rules, to what the Supreme Court has stated.

I have submitted testimony in advance, which goes through some of our concerns. I don't think it makes sense for me to just read it, especially in this informal setting.

So I wish to just highlight certain things and then answer questions from a practical standpoint of what it is like to practice and what our concerns might be.

Turning, first, to the Rule 11 amendment, we note that the committee is recommending that the Guidelines be given a place of prominence in the Rule of Evidence colloquy, in which the judge basically says, "We need to consider the Guidelines and other sentencing factors."

We are troubled by this, because our reading of Booker indicates that Justice Breyer, in his remedial majority, indicates that the Guidelines are nonmandatory, of course, are advisory, and are but one of the seven factors under 3553.

The Rule 11 colloquy is not to inform a defendant exactly what he or she is going to get, but to inform them of the possible penalties.

So we feel that the committee shouldn't embark upon the Orwellian way of saying that the Guidelines are--that all the factors are equal, but some are more equal than others, but should, rather, either state all the factors under 3553 or none of them.

We recognize that the courts may be concerned that they don't want to read the whole Criminal Code in a Rule 11, especially in this district, when you are doing 8,000 pleas a year, but I timed our proposal, which is reading the seven factors, and it comes in at about 40 seconds.

Admittedly, I was going fast, but our magistrate judges are practiced at this. The advantage of that is that it takes Congress' words and informs the defendant what the sentencing factors are. The 3553 is Congressionally mandated. It is what the Supreme Court recognizes and it is an alternative to the committee.

It also, as I stated previously, doesn't highlight what the guidelines are, and the issue that you may get is you have a defendant who says, "My cell mate," who, of course, is getting the better deal, "tells me that the Guidelines are not mandatory, but the judge said that that is part of sentencing."

Well, the judge is just saying that it is advisory, so he didn't talk about the other factors. Well, trust me, he or she is just saying that now because they are looking at it. Well, are they following it? Well, it is advisory.

So you get into this dialogue with the defendant if you are highlighting the Guidelines.

So from a legal standpoint, under Booker, once again, as we stated in our testimony, we feel that you should do all seven factors or none of them.

Turning to the Rule 32 issue, in terms of the pre-sentence report, the committee had recommended that it state that the pre-sentence report allows the court to ask for whatever evidence

or information is necessary, and in compliance with the 3553 factors.

We feel that, once again, putting in the sentencing factors would help the pre-sentence report and the probation officer. A probation officer, in doing the pre-sentence report, is going to look at the case file, the interview with the defendant, and information that defense counsel or the prosecutor provides him or her, and having the structure of the sentencing factors provides for a better pre-sentence report and does structure what the probation officer has to do, and it follows, once again, the sentencing factors.

Another concern that we had is the public statement or the public record of the statement of the sentence.

Some of you are shaking your heads.

JUDGE BUCKLEW: Yes. Let me tell you that we have, meaning the Rules Committee, also recognized this. This, as you suggested in your comments, was inadvertent.



We did not mean to change the status quo of the statement of reasons not being filed. With that said, some districts do make it a matter of public record, but it was never our intention to change what went on or to mandate that it be a public record.

That was inadvertent and we need to correct that.

MR. SANDS: Just for the record, this court and the practitioners here are very much aware that whoever is helping the government is or can be at risk and even if we seal it, that itself is a red flag.

But putting aside just cooperators, which are a sizeable number, you also, even with defendants that have convictions which would put them at risk, sexual offenders, which are a very high number in this district and in the southwest, with the Native Americans, the child pornography, and the great range of people in prison, they are, unfortunately, at the bottom and are at risk.

So everything that we can do to protect them we are interested in.

The final point is the committee mentioned in its commentary about Booker, that it was based on the Sixth and Fifth Amendments, and we believe that Booker rests solely on the Sixth Amendment; that the Fifth Amendment issue goes to the reasonable doubt and was not part of the analysis of Justice Stevens nor of Justice Breyer, and really shouldn't be in the commentary and we would recommend changing that to reflect it is the Sixth Amendment.

JUDGE BUCKLEW: Thank you. I do want to tell you that most, if not all of us, Mr. Sands, have read your comments and we appreciate not only your supplying us with written comments, but being here today.

MR. SANDS: Oh, sure.

JUDGE BUCKLEW: Could you tell us, you have stated that you are Chair of the Federal Defender Sentencing Guidelines Committee, and for those of us that are really unfamiliar with exactly what that means.

Is what you are saying the position of the Federal Defenders Association or the committee?

MR. SANDS: No. The National Association of Federal Defenders is a private organization. Congress, when they did the Sentencing Reform Act, stated that the federal defenders should advise and consult with the Sentencing Committee in the formation of sentencing policy.

As a result, the Administrative Office arranges for a federal defender committee to be selected. The chair is recommended by the head of the Defender Services Advisory Group and is basically ratified by the Defenders Services Division. All of this is sort of AOS, but basically it means that--

MR. : [Off microphone.]

MR. SANDS: It means that Alan and I have seen each other quite a bit and the most exciting thing each year is when the guideline covers come out, because then I can buy my car to match it.

So that is as much of a sentencing guideline geek that I am.

But what that does mean is that I, as chair, work with defenders from across the country to comment on amendments and because of Booker, we have been doing a lot of commenting recently about what is the extent of it, what is a reasonable sentence, as the commission has reached out for us.

Basically, what we have done is worked with the commission on the coding, on issues that are coming up, like immigration is one of the matters that the commission is struggling with now, how to deal with immigration guidelines, whether they should go up or they should go down. So we have had input with that.

The Department of Justice has an ex officio member on the commission and their own committee.

MS. BEALE: [Off microphone.] Do you speak for the committee or do you--

MR. SANDS: Individually.

MS. BEALE: Right. With the backup that you have been describing.

MR. SANDS: Yes.

MS. BEALE: But come before us as an individual. I am not sure it makes a difference, but I was curious.

MR. SANDS: I am speaking on behalf of the Guidelines Committee, which means, in effect, I am speaking on behalf of the federal defenders. I have run this by various committees. So it is not like it is a secret.

I have also worked with Tom Hillier, who is Chair of the Federal Defender Legislative Committee. Many times, in sentencing, sentencing and legislation go hand in hand, and so he is aware of this, too.

JUDGE BUCKLEW: I did have one question, and then I will open it up to see if there are any other questions.

With respect to your suggestion regarding listing the factors in Rule 11 and, I guess, in Rule 32, as well, 3553, when we drafted this amendment, we tried to actually draft it to reflect what was going on, essentially, and I am not sure that we highlight any factors under 3553.

You said if we do one factor, we ought to do all factors.

Is your concern more that in Rule 11, by the way we had drafted in determining a sentence and so on, that we tell the court to first calculate the applicable guidelines?

MR. SANDS: The court is going to have to calculate the guidelines. Our concern is the court is singling out that factor and saying the court, in considering sentencing, will do the guidelines calculation, will consider the guidelines, and, by the way, other factors.

So basically what you are doing is downplaying the disparity or the other factors in 3553. Practically, many judges go to the guidelines first. That is the way that the practice has been doing, but I don't think Booker says that you can actually single out the guidelines as being the most important factor.

As all the courts are aware, there are some--there is a line of cases with the judge, to tell our position, that says the guidelines

encapsulate the 3553 factors and is the human wisdom in sentencing. One position, at an extreme.

The other position articulated by Judge Adelman in the Ranum case is that the guidelines are but one factor, an important factor, as they are, but one, and shouldn't be considered as necessarily taking in the other six factors and having its expression.

I don't know if the committee wishes to weigh into this debate at this time.

And given the future of the guidelines and what Congress might do, it may make sense to look at 3553 and just go with what is mandatory, the seven factors, or the beginning language of 3553, which is the sentence shall be as long as it is necessary to meet the goals, but not any longer, and shall consider the factors listed.

MS. BEALE: Could I just follow-up on that? I would sort of phrase differently what the draft or the proposal is doing, which is to identify sources. So, first, I think the courts have to look at the guidelines as advisory.

MR. SANDS: Sure.

MS. BEALE: And they have to think about whether to depart from the guidelines in any sort of circumstance [off microphone]. I wouldn't think that we would want to say "and under the guidelines, first, you have to do" [off microphone]. And I wouldn't think you would have to say one [off microphone] you have to look at this, you have to look at this, you have to look this.

So I am wondering, to keep it short, I think identifying these sources that the court has to look to to determine what the sentence will be, have to look at the advisory guidelines, have to look at 3553(a).

Is it your sense that the order in which those are mentioned in Rule 11 is very important? Given the fact that [off microphone].

MR. SANDS: But why are you saying the guidelines, and then lumping the others into 3553?

MS. BEALE: Because that is where Congress [off microphone] by 3553(a) and the advisory guidelines.



MR. SANDS: But you are separating them and it would be our position that the guidelines are but one of the various factors, and you are giving it more prominence. You are saying that the guidelines--you are naming that factor and then lumping in the other six or seven.

MS. BEALE: [Off microphone] look at that portion of the guidelines and then you look at that [off microphone].

MR. SANDS: But is that what Booker says? Booker says that you look at 3553 and this is basically just one of the 3553. So if I could, I would take this book and put it in the middle for a link.

MS. BEALE: Okay. That is helpful. And if the committee didn't go all the way to your proposal, would you not like to see the order changed so that it was necessary by 53(a) first?

I'm just trying to sort of tease out what you are--

MR. SANDS: Sure, and--

MS. BEALE: [Off microphone] and by the way, that federal order.

MR. SANDS: I am sticking with our position, but should the committee look at other alternatives, I think it is dangerous to start shuffling what is more important and what is not.

Congress, in 3553, for better or for worse, listed them in a certain order and I think that we are--I don't want to say stuck with it, but I think that we should follow it.

I don't think of 3553 as the Ten Commandments of sentencing, which actually is the first guideline system, but we don't say with the Ten Commandments that Commandment Six is more important than the others, though people do.

JUDGE BUCKLEW: Any other questions?

MR. : I have the sense that you are actually urging the change in the system, but, of course, what you wish [off microphone] is not to describe [off microphone] in current practice, but what you think it ought to be, whereas I think what the committee is trying to do here in Rule 11, which

is the practical way, is inform the defendant of what the defendant is likely to experience.

Since nine out of ten defendants are sentenced within the guidelines system, by the last statistics that I saw, you can correct me, but I think it is a fair statement, I think that it is fair that the rule says that the defendant is going to be sentenced under the guidelines and those guidelines [off microphone].

That is a pretty accurate shorthand for what most defendants are going to experience and to devise a rule for the one in ten and that would project that most defendants [off microphone] the guidelines, but don't think that that is particularly important in the case, because [off microphone] would be positively misleading as a description of what actually occurs in the courthouse, which would [off microphone].

MR. SANDS: That is a very good point, especially in this district with the immigration cases, where 99.9 percent of the immigration cases

plead. So you are talking 8,000 pleas to guideline sentences.

On the other hand, we have Booker and looking at both the merits, Justice Stevens, and the remedy, we don't see there anything saying you should say that nine out of ten of you are going to be sentenced under the guidelines.

They basically excise the mandatory nature and go back to 3553. So the Committee is really faced with do we follow what Booker seems to say or do we try to do what is in practice, and practices change.

Going back to Booker, you have Justice Scalia, in his term, saying that the guidelines are not guidelines light, they are not guidelines rosa, they are not guidelines camouflage. We really mean that sentencing cannot be mandatory, and I am sure that defendants are looking at the fact that if there are rules or practices that seem to say the guidelines are, wink-wink, presumptive, that that will be litigated. But then everything is litigated, of course.

MR. : [Off microphone.]

JUDGE BUCKLEW: Any other questions that anyone might have? Well, just--and you may know this, but for your information, Mr. Sands, what the Criminal Rules Advisory Committee will do is we will take your comments, testimony, as well as comments that you might have made today, back to the Committee.

We meet again in April and we will consider those comments, along with all of the comments we might have received on these rules that have gone out for publication, and discuss whether we need to make any amendments or changes.

MR. SANDS: Just because I am here and in this district, I noted that Chief Judge Stephen McNamee, of this district, has submitted a proposal or a comment on the forms and Judge McNamee has been in the forefront of dealing with high volume cases both here and in Tucson, and on a typical Monday, we are dealing with 20 or 30 sentences in a court and what he has done is put in sort of a clip-out way of statement of the reasons.

That has worked well, and we are very concerned about our clients that have to wait four or five months at the private detention center instead of getting to BOP.

So his comments I urge the Committee to read carefully, because he has really helped the system move. Everyone who is a stakeholder appreciates his efforts.

Thank you.

JUDGE BUCKLEW: Thank you very much.

[Whereupon, the testimony of Jon Sands was concluded.]  
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