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# AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

## COMMUNICATION

FROM

## THE CHIEF JUSTICE, THE SUPREME COURT OF THE UNITED STATES

TRANSMITTING

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE THAT HAVE BEEN ADOPTED BY THE SUPREME COURT, PURSUANT TO 28 U.S.C. 2074

JUNE 3, 2008.—Referred to the Committee on the Judiciary and ordered to be printed

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## LETTER OF SUBMITTAL

SUPREME COURT OF THE UNITED STATES,
*Washington, DC, April 23, 2008.*

Hon. NANCY PELOSI,
*Speaker of the House of Representatives,*
*Washington, DC.*

DEAR MADAM SPEAKER: I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

JOHN G. ROBERTS, Jr.,
*Chief Justice.*

April 23, 2008

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein amendments to Criminal Rules 1, 12.1, 17, 18, 32, 41, 45, 60, and new Rule 61.

[See infra., pp. __ __ __.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2008, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That the CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

## AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

### Rule 1. Scope; Definitions

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**(b) Definitions.** The following definitions apply to these rules:

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**(11)** "Victim" means a "crime victim" as defined in 18 U.S.C. § 3771(e).

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### Rule 12.1. Notice of an Alibi Defense

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**(b) Disclosing Government Witnesses.**

**(1)** ***Disclosure.***

(A) *In General.* If the defendant serves a Rule 12.1(a)(2) notice, an attorney for the

government must disclose in writing to the defendant or the defendant's attorney:

(i) the name of each witness — and the address and telephone number of each witness other than a victim — that the government intends to rely on to establish that the defendant was present at the scene of the alleged offense; and

(ii) each government rebuttal witness to the defendant's alibi defense.

(B) *Victim's Address and Telephone Number.* If the government intends to rely on a victim's testimony to establish that the defendant was present at the scene of the alleged offense and the defendant

establishes a need for the victim's address and telephone number, the court may:

(i) order the government to provide the information in writing to the defendant or the defendant's attorney; or

(ii) fashion a reasonable procedure that allows preparation of the defense and also protects the victim's interests.

**(2)** ***Time to Disclose.*** Unless the court directs otherwise, an attorney for the government must give its Rule 12.1(b)(1) disclosure within 10 days after the defendant serves notice of an intended alibi defense under Rule 12.1(a)(2), but no later than 10 days before trial.

**(c) Continuing Duty to Disclose.**

**(1)** ***In General.*** Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name of each additional witness — and the address and telephone number of each additional witness other than a victim — if:

(A) the disclosing party learns of the witness before or during trial; and

(B) the witness should have been disclosed under Rule 12.1(a) or (b) if the disclosing party had known of the witness earlier.

**(2)** ***Address and Telephone Number of an Additional Victim Witness.*** The address and telephone number of an additional victim witness must not be disclosed except as provided in Rule 12.1 (b)(1)(B).

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**Rule 17. Subpoena**

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**(c) Producing Documents and Objects.**

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**(3)** ***Subpoena for Personal or Confidential Information About a Victim.*** After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order. Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object.

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**Rule 18. Place of Prosecution and Trial**

Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice.

**Rule 32. Sentencing and Judgment**

**(a) [Reserved.]**

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**(c) Presentence Investigation.**

**(1) *Required Investigation.***

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(B) *Restitution.* If the law permits restitution, the probation officer must conduct an

investigation and submit a report that contains sufficient information for the court to order restitution.

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**(d) Presentence Report.**

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**(2)** ***Additional Information.*** The presentence report must also contain the following:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) information that assesses any financial, social, psychological, and medical impact on any victim;

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**(i) Sentencing.**

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**(4) *Opportunity to Speak.***

(A) *By a Party.* Before imposing sentence, the court must:

(i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;

(ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and

(iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

(B) *By a Victim.* Before imposing sentence, the court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard.

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**Rule 41. Search and Seizure**

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**(b) Authority to Issue a Warrant.** At the request of a federal law enforcement officer or an attorney for the government:

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**(3)** a magistrate judge — in an investigation of domestic terrorism or international terrorism — with authority in any district in which activities related to the terrorism may have occurred has authority to issue a warrant for a person or property within or outside that district;

**(4)** a magistrate judge with authority in the district has authority to issue a warrant to install within the district a tracking device; the warrant may authorize use of the device to track the movement of a person or property located within the district, outside the district, or both; and

**(5)** a magistrate judge having authority in any district where activities related to the crime may have occurred, or in the District of

Columbia, may issue a warrant for property that is located outside the jurisdiction of any state or district, but within any of the following:

(A) a United States territory, possession, or commonwealth;

(B) the premises — no matter who owns them — of a United States diplomatic or consular mission in a foreign state, including any appurtenant building, part of a building, or land used for the mission's purposes; or

(C) a residence and any appurtenant land owned or leased by the United States and used by United States personnel assigned to a United States diplomatic or consular mission in a foreign state.

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**Rule 45. Computing and Extending Time**

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**(c) Additional Time After Certain Kinds of Service.** Whenever a party must or may act within a specified period after service and service is made in the manner provided under Federal Rule of Civil Procedure 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under subdivision (a).

**Rule 60. Victim's Rights**

**(a) In General.**

**(1)** ***Notice of a Proceeding.*** The government must use its best efforts to give the victim reasonable, accurate, and timely notice of any public court proceeding involving the crime.

**(2)** ***Attending the Proceeding.*** The court must not exclude a victim from a public court proceeding involving the crime, unless the court determines by clear and convincing evidence that the victim's testimony would be materially altered if the victim heard other testimony at that proceeding. In determining whether to exclude a victim, the court must make every effort to permit the fullest attendance possible by the victim and must consider reasonable alternatives to exclusion. The reasons for any exclusion must be clearly stated on the record.

**(3)** ***Right to Be Heard on Release, a Plea, or Sentencing.*** The court must permit a victim to be reasonably heard at any public proceeding in the district court concerning

release, plea, or sentencing involving the crime.

**(b) Enforcement and Limitations.**

**(1)** ***Time for Deciding a Motion.*** The court must promptly decide any motion asserting a victim's rights described in these rules.

**(2)** ***Who May Assert the Rights.*** A victim's rights described in these rules may be asserted by the victim, the victim's lawful representative, the attorney for the government, or any other person as authorized by 18 U.S.C. § 3771(d) and (e).

**(3)** ***Multiple Victims.*** If the court finds that the number of victims makes it impracticable to accord all of them their rights described in these rules, the court must fashion a reasonable procedure that gives effect to these

rights without unduly complicating or prolonging the proceedings.

**(4)** ***Where Rights May Be Asserted.*** A victim's rights described in these rules must be asserted in the district where a defendant is being prosecuted for the crime.

**(5)** ***Limitations on Relief.*** A victim may move to reopen a plea or sentence only if:

(A) the victim asked to be heard before or during the proceeding at issue, and the request was denied;

(B) the victim petitions the court of appeals for a writ of mandamus within 10 days after the denial, and the writ is granted; and

(C) in the case of a plea, the accused has not pleaded to the highest offense charged.

**(6)** ***No New Trial.*** A failure to afford a victim any right described in these rules is not grounds for a new trial.

**Rule 61. Title**

These rules may be known and cited as the Federal Rules of Criminal Procedure.

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
*Presiding*

JAMES C DUFF
*Secretary*

January 10, 2008

MEMORANDUM

To: The Chief Justice of the United States and the Associate Justices of the Supreme Court

From: James C. Duff

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court proposed amendments to Rules 1, 12.1, 17, 18, 32, 41, 45, 60, and new Rule 61 of the Federal Rules of Criminal Procedure, which were approved by the Judicial Conference at its September 2007 session. The Judicial Conference recommends that the amendments and new rule be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendments and new rule, I am transmitting an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference as well as the Report of the Advisory Committee on the Federal Rules of Criminal Procedure.

Attachments

**EXCERPT FROM THE**
**REPORT OF THE JUDICIAL CONFERENCE**

**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:**

* * * * *

## FEDERAL RULES OF CRIMINAL PROCEDURE

***Rules Approved for Approval and Transmission***

The Advisory Committee on Criminal Rules submitted proposed amendments to Rules 1, 12.1, 17, 18, 32, 41(b), 45, 60, and new Rule 61 with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments and rules (with the exception of a technical amendment to Rule 45) were circulated to the bench and bar for comment in August 2006. The advisory committee held a public hearing on the proposed changes in Washington, D.C. and heard testimony from several witnesses.

The proposed amendments, with the exception of proposed amendments to Rules 41 and 45, implement various provisions in the Crime Victims' Rights Act (18 U.S.C. § 3771). During the public comment period, the proposed amendments were criticized both for going too far and for not going far enough. Those who believed that the proposed amendments went too far raised the concern that they upset the rules' careful procedural framework, tipping the adversarial balance between the prosecution and the defendant and depriving the defense of critical rights. Some asserted that certain of the proposed amendments tipped the balance so far as to be unconstitutional. Others, including Senator Kyl, who was the Act's chief sponsor, asserted that the advisory committee did not fully implement the Act. The committee proposed rule amendments to implement the specific rights recognized in the Act. The committee did not propose a number of other amendments to many rules to provide specific rights in particular

proceedings, not expressly stated in the Act but based on the Act's general right that crime victims be treated fairly and with respect.

As a threshold matter, the advisory committee discussed whether any of the criminal procedural rules should be amended to set out the statutory rights provided in the Crime Victims' Rights Act. Federal procedural rules generally do not repeat statutory provisions. First, it is unnecessary; a rule containing statutory substantive provisions cannot alter or add force to those statutory provisions. The Crime Victims' Rights Act is self-executing. Additionally, there are disadvantages to having the procedural rules repeat statutory provisions. Any future amendment of the underlying statute will make the parallel rule inconsistent and cause confusion until a corresponding change in the rule is promulgated, which is a deliberate and slow process. The inevitable language differences between a statute and a procedural rule create inconsistency and confusion that may generate litigation. The advisory committee recognized these concerns but concluded that carefully drafted rule amendments to implement the specific rights set out in the Act would be appropriate and helpful.

The advisory committee declined, however, to amend the vast majority of rules to include additional rights. The committee carefully reviewed proposals that would have amended a large number of individual rules to provide rights not expressly stated in the Act, based on the crime victims' general right to be treated fairly and with respect. The advisory committee concluded that such proposals would have inserted into the criminal procedural rules substantive rights that are not specifically recognized in the Act – in effect creating new victims' rights not expressly provided for in the Act.

The advisory committee was concerned that such proposals not only could create new substantive rights, they would change the rules in very detailed ways without a sufficient basis to do so. There is as yet little case law or judicial experience interpreting and applying the Act to

specific cases and facts. Basing specific rules amendments on general statutory language, without the customary and important guidance provided by judges interpreting and applying the statute to a developed record, is premature and invites error. The advisory committee was concerned that comprehensive rule changes made now, spelling out how this generally stated statutory right is to be implemented in particular proceedings, would freeze the jurisprudence into rigid requirements. Such requirements could hamper rather than help judges provide additional procedural protections that might be needed in individual cases. To make such sweeping, yet detailed, rules changes in the absence of guidance from experienced district judges around the country would have substituted the premature judgment of the rules committees for that of the judges charged with ensuring that the rights of defendants, the prosecution, and crime victims are protected in every case.

In addition, these proposals would have the potential of micro-managing judges in exercising their judgment in individual cases. To a large extent, the federal procedural rules have functioned effectively because they rely on the practical experience and wisdom of federal judges to carry out their duties without such detailed instructions.

Without a sound empirical basis, without guidance from judges and litigants who have applied the Act to different circumstances, and without guidance from victims and their representatives who have had actual experience in federal court under the Act, the advisory committee decided to defer taking action on these numerous other proposals for rule amendments based on the general statutory language. The committee intends to: (1) gather more information on precisely how the proposals would operate in specific proceedings and what effects they might have; (2) obtain empirical data substantiating the existence and nature of problems that could be addressed by rule; and (3) provide additional time for courts to acquire experience under the Act and to develop case law construing it.

The advisory committee proposed the following amendments to implement the specific rights set out in the Act. The proposed amendment to Rule 1 incorporates the Act's definition of "crime victim" into the rules. The Committee Note to the rule makes clear the court's authority to decide any dispute as to who is a victim in a particular case.

The proposed amendment to Rule 12.1 prevents automatic disclosure to the defense of a crime victim's address and telephone number when an alibi defense is raised and the government intends to rely on the victim's testimony to establish the defendant's presence at the scene of the alleged offense. The amended rule requires the defendant to establish a need to obtain the information. After the need has been established, the amendment authorizes the court to "fashion a reasonable procedure that allows preparation of the defense and also protects the victim's interests."

The proposed amendment to Rule 17 requires for the first time a court order before a subpoena can be issued to a third party to obtain personal or confidential information concerning a victim. The proposed amendment requires that the victim be notified of such a request unless exceptional circumstances are shown to the court. The Committee Note provides examples of exceptional circumstances, including situations where evidence might be lost or destroyed without immediate action, or where providing notice would unfairly prejudice the defense by prematurely disclosing sensitive defense strategy.

Rule 18 would be amended to require a court to consider a victim's convenience, as well as the convenience of the defendant and witnesses, in setting the place of trial.

Several changes are proposed to Rule 32, including adopting the more expansive definition of "crime victim" used in amended Rule 1. The new term applies to all crime victims, not only to a victim of a crime of violence or sexual abuse, as previously defined in the rule. The proposed amendment makes it clear that the presentence investigation should include

information pertinent to restitution whenever the law permits the court to order restitution, not only when it requires restitution. A provision was also added to incorporate the Act's language that a victim has the right "to be reasonably heard" in judicial proceedings regarding sentencing. The Committee Note states that absent unusual circumstances, any victim who is in the courtroom should be allowed a reasonable opportunity to speak directly to the judge.

The last amendment addressed to victims' rights, proposed new Rule 60, gathers in one rule a number of crime victims' rights. Existing Rule 60 would be renumbered as Rule 61, and an entirely new rule focused on crime victims' rights is proposed as a substitute. Proposed new Rule 60 incorporates several provisions of the Act. The new rule provides that: (1) the government must use its best efforts to give victims reasonable, accurate, and timely notice of any public court proceeding involving the crime; (2) the court must not exclude a victim from public court proceedings involving the crime unless there is evidence that the victim's testimony would be changed if allowed to hear the testimony; (3) the victim has the right to be reasonably heard at any public hearing on release, plea, or sentencing; and (4) the court must promptly decide any motion asserting a victim's rights, which may be raised by the victim or the victim's legal representative in accordance with the Act.

The proposed amendment to Rule 41 authorizes a magistrate judge in a district in which activities related to a crime may have occurred, or in the District of Columbia, to issue a search warrant for property located outside any state or federal judicial district but within a United States territory, possession, or commonwealth or within certain premises associated with United States diplomatic and consular missions. The amendment responds to a problem that affects investigations of cases involving corruption in United States embassies and consulates around the world. Under the current rules, magistrate judges are not provided the authority to issue warrants

for such locations. The proposed amendment was deliberately limited to specified locations to avoid thorny international issues, which defeated a broader proposal recommended in 1990.

The Pacific Islands Committee of the Judicial Council of the Ninth Circuit requested the advisory committee to consider deferring application of the rule to American Samoa until the local judiciary could study and comment on the proposal. The advisory committee received no comments on the proposal from the American Samoan judiciary during the six-month public comment period. Meanwhile, the Department of Justice urged the advisory committee to include American Samoa in the rule to facilitate ongoing criminal investigations that the current rules were hampering. The advisory committee decided to include American Samoa in the proposed amendment to Rule 41.

The proposed amendment to Rule 45 corrects a cross-reference to Civil Rule 5, which was renumbered as part of the general restyling of the Civil Rules. The amendment is technical and was not published for comment.

The Committee concurred with the advisory committee's recommendations.

**Recommendation**: That the Judicial Conference –

Approve the proposed amendments to Criminal Rules 1, 12.1, 17, 18, 32, 41(b), 45, 60, and new Rule 61, and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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**To:** **Hon. David F. Levi, Chair**
**Standing Committee on Rules of Practice and Procedure**

**From:** **Hon. Susan C. Bucklew, Chair**
**Advisory Committee on Federal Rules of Criminal Procedure**

**Subject:** **Report of the Advisory Committee on Criminal Rules**

**Date:** **May 19, 2007 (revised July 2007)**

## I. Introduction

The Advisory Committee on Federal Rules of Criminal Procedure ("the Committee") met on April 16-17, 2007, in Brooklyn, N.Y. and took action on a number of proposed amendments to the Rules of Criminal Procedure.

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This report addresses a number of action items:

(1) approval of published Rules 1, 12.1, 17, 18, 32, 41(b)(5), 60, and 61 for transmission to the Judicial Conference;

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## II. Action Items–Recommendations to Forward Amendments to the Judicial Conference

The first seven amendments discussed below implement the Crime Victims' Rights Act (CVRA), codified as 18 U.S.C. § 3771. As explained when these rules were proposed for publication, they reflect two basic decisions. The first decision concerns the scope of the proposals. The CVRA reflects a careful Congressional balance between the constitutional rights of defendants, the discretion afforded the prosecution, and the new rights afforded to victims. Given that careful balance, the Committee generally sought to implement, but not go beyond, the rights created by the statute. For the same reason, the Committee adopted the statutory language whenever possible. The second decision concerns the structure of the proposed amendments. The Committee believed it would be easier for victims and their advocates (as well as judges, prosecutors and defense counsel)

to identify the new provisions regarding victims if they were placed in a single rule. Therefore where possible the Committee placed many of the new provisions in a single rule (new Rule 60) rather than scattering them throughout the rules.

The proposed amendments generated a large number of written comments (as well as testimony at the public hearing) including both criticism that the proposed rules went too far, tipping the adversarial balance and depriving the defense of critical rights, and criticism that the proposed rules did not go far enough to implement the specific provisions of the CVRA and the fundamental policies that it reflects. Of particular note were letters from Senator Kyl, one of the sponsors of the CVRA, and Representatives Poe and Costa, co-chairs of the Congressional Victims' Rights Caucus. In addition to concerns focusing on specific amendments, some comments urged that the Committee begin the drafting process anew, rather than moving forward with the proposed amendments.

The Committee devoted a great deal of time, attention, and thought to the public comments, hearing testimony, and the important issues raised therein. After the public comment period closed, a subcommittee met several times by teleconference and exchanged many preliminary memoranda and e-mails. Its work was incorporated into a detailed report to the full Advisory Committee, which then discussed the CVRA rules for more than five hours at its April meeting.

After careful consideration, the Advisory Committee recommends that the full slate of proposed rules, as modified in response to the public comments, be approved and forwarded to the Judicial Conference. These proposals implement core requirements of the CVRA. The Committee favors proceeding on a step-by-step basis, beginning generally with amendments that implement the clear requirements imposed by the statute, leaving many other issues that are less clear for additional development by judicial decisions that will provide concrete examples of the factual situations in which the issues arise and give us the benefit of thoughtful treatment by the judges who confront these issues.

The Committee recognized that further amendments may also be desirable, but concluded that need not and should not delay the adoption of the proposed amendments. The Committee will treat the question of victims' rights as a continuing agenda item, allowing for consideration of amendments to other rules (or revisions, as needed in light of experience, to the rules that would be amended by our proposal). Several additional amendments have been suggested by Senator Kyl, Representatives Poe and Costa, Judge Paul Cassell, and the Federal Public and Community Defenders, among others. Additional proposals may come to the Committee's attention as a result of developments in judicial decisions.

It is important to note that proceeding in this fashion will expedite the implementation of core requirements of the CVRA, and will not prevent the immediate implementation of any other provisions of the Act. The courts are already bound to follow the statute. But where the statute's

dictates are not clear, or its directives may be accommodated in more than one way, the Committee felt it best to allow some judicial development of the issues which will guide the rulemaking process. (The same course of action is being followed, for example, with the forfeiture rules that will be discussed later in this report.)

**1. ACTION ITEM–Rule 1. Scope; Definitions; Proposed Amendment Defining "Victim."**

This amendment incorporates by reference the definition of the term "crime victim" found in the Crime Victims' Rights Act (CVRA), codified as 18 U.S.C. § 3771(e). The statutory definition provides that a victim is "a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia." The Committee revised the text of Rule 1(b)(11) in response to public comments by transferring portions of the subdivision relating to who may assert the rights of a victim to Rule 60(b)(2). The Committee Note was revised to reflect that change and to indicate that the court has the power to decide any dispute as to who is a victim. The Committee concluded that it was not necessary at this point to create detailed procedures for this determination, though something of this nature could be added in the future if experience indicates it would be desirable.

The Committee considered but did not adopt two other suggested changes. Although some comments suggested that the definition should be expressly limited to the specific rules adopted to implement the CVRA, these concerns seemed misplaced. The definitions in Rule 1 are applicable only to the Criminal Rules themselves[1]; they do not govern, for example, rights to obtain restitution, to bring civil actions, and so forth. Accordingly, the Committee declined to add a listing of the rules to which the definition would be applicable. The Committee also declined to add additional language limiting the definition to a person injured by a crime that is the subject of a pending prosecution. The only instances in which the present and proposed Criminal Rules provide rights to victims — Rules 12.1, 12.4, 17, 18, 32, 38, and 60 — are those in which a prosecution is pending. Moreover, proposed Rule 60(b)(4) requires the rights provided therein to be asserted in the district in which the defendant is being prosecuted.

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[1] In addition to the proposed rules, the new definition would apply to current Rules 12.4 and 38, which use the term "victim" or "victims." The adoption of the general definition does not appear to pose a problem for the interpretation or application of either provision. Rule 12.4(a)(2) requires the government to file a statement identifying an organizational victim. Rule 38(e) authorizes a court to stay a sentence providing for notice to victims under 18 U.S.C. § 3555. Section 3555 gives the court discretion to require that the defendant give victims notice and an explanation of his conviction of fraud or other intentionally deceptive practices.

With the modifications noted above, the Committee voted 10 to 1 in favor of recommending approval of the amendment to Rule 1.

***Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 1 be approved and forwarded to the Judicial Conference.***

**2. ACTION ITEM–Rule 12.1. Notice of Alibi Defense; Proposed Amendment Regarding Victim's Address and Telephone Number.**

This amendment implements the victim's right under the Crime Victims' Rights Act to be reasonably protected from the accused, and to be treated with respect for the victim's dignity and privacy. *See* 18 U.S.C. § 3771(a)(1) & (8). The amended rule provides that a victim's address and telephone number should not automatically be provided to the defense when an alibi defense is raised. If a defendant establishes a need for this information, the court has discretion either to order its disclosure to the defense or to fashion an alternative procedure that provides the defendant with the information necessary to prepare a defense but also protects the victim's interests.

At the suggestion of the Standing Committee, we requested public comment on the question whether the rule should assume that a defendant must demonstrate need to get the name and contact information for a victim who will testify to rebut his alibi defense, or should instead require a case-by-case showing of the need to withhold this information. Several comments urged that the published rule struck the wrong balance, and that the proposed amendment to Rule 12.1 tips the adversarial balance too far as a policy or constitutional matter by requiring a showing of need. Critics argue that this violates the fundamental requirement that discovery be reciprocal, which is a condition of requiring the defendant to produce information about his defense in advance of trial; the defendant must provide the names and contact information for his alibi witnesses, but he may be denied the same information about victims who will be called as alibi witnesses. Many other comments argued that the proposed rule does not go far enough. These comments argued the amendment gives too little weight to victim interests in providing — upon a showing of need — for either disclosure of the name and contact information to the defense or providing some other reasonable procedure to allow the preparation of the defense as well as the protection of the victim's interests.

The Committee considered these concerns at length before approving the rule by a 9 to 2 vote. It concluded that the rule, as published, strikes an appropriate balance and does not violate the requirement that discovery be reciprocal. The rule triggers a judicial determination in any case where the defendant meets the low threshold standard of showing a "need" for the name and contact information of a victim who will testify to rebut his alibi. Generally the defense will be able to meet this standard, though there will be occasional cases in which the defense is already aware of the

name and contact information of a victim who will be called to rebut his alibi. Once there has been a showing of "need," the rule requires the court either to provide this information to the defense or to fashion some other reasonable procedure that allows the preparation of the defense while protecting the victim's interest. The rule fairly puts the burden, in the first instance, on the defendant to bring the issue before the court. In a normal case, the victim is not likely to be in a position to raise a timely objection or establish a basis for non- disclosure, and the government may not be privy to all of the relevant facts. If the defendant establishes a need for this information, the amendment gives the government or the victim time to weigh in before disclosure can occur. The "need" threshold is an appropriate basis to trigger the court's consideration of all aspects of the need and risk analysis. Finally, the proposed amendment does provide ample authority to protect the victim. In the exceptional case in which the authority to fashion an alternative to disclosure is not sufficient for this purpose, the court has the authority under Rule 12.1(d) for good cause to grant relief from any of the requirements in the Rule 12.1.

The Committee voted 9 to 2 to forward proposed Rule 12.1 to the Standing Committee.

***Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 12.1 be approved as published and forwarded to the Judicial Conference.***

**3. ACTION ITEM–Rule 17. Subpoena; Proposed Amendment Regarding Personal or Confidential Information About Victim.**

This amendment implements the provision in the Crime Victims' Rights Act, codified at 18 U.S.C. § 3771(a)(8), which states that victims have a right to respect for their "dignity and privacy." The rule provides a protective mechanism when the defense subpoenas a third party to provide personal or confidential information about a victim. Third party subpoenas raise special concerns because a third party may not assert the victim's interests, and the victim may be unaware of the existence of the subpoena. Accordingly, the amendment requires judicial approval before service of a subpoena seeking personal or confidential information about a victim from a third party. The amendment also provides a mechanism for notifying the victim, and makes it clear that a victim may move to quash or modify the subpoena under Rule 17(c)(2) on the grounds that it is unreasonable or oppressive. Following publication the text was also modified to make it clear that a victim could also object by other means, such as a letter to the court.

The amendment seeks to protect the privacy and dignity interests of victims without unfair prejudice to the defense. During the comment period it drew criticism from both advocates of victims, who argued that it did not go far enough, and persons concerned that it unduly restricted defense access to critical information during preparation for trial. More general concerns were also expressed about ex parte judicial action.

At present, all subpoenas are issued by the court in blank at the request of a party under Rule 17(c), and served without notice to opposing counsel. As published, the amendment authorized the court to approve the issuance of the subpoenas ex parte, and made notice to the victim discretionary. This portion of the amendment was revised to omit the reference authorizing ex parte action, and to provide that the court must, absent exceptional circumstances, give notice to the victim prior to approving such a subpoena. The Committee approved this language after an extended discussion that included consideration of substituting the "good cause shown" standard (which was rejected by a vote of 8 to 4). The Committee also added language to the note leaving to the judgment of the district court the determination whether to permit the matter to be decided ex parte without notice to anyone in a particular case. This clarifies the point that in exceptional cases the subpoena can be served without notice to either the government or the victim. The note references as examples of such exceptional circumstances situations where evidence might be lost or destroyed without immediate action, or where providing notice would unfairly prejudice the defense by premature disclosure of sensitive defense strategy.

The amendment applies only to subpoenas served after a complaint, indictment, or information has been filed. It has no application to grand jury subpoenas. When the grand jury seeks the production of personal or confidential information, grand jury secrecy affords substantial protection for the victim's privacy and dignity interests.

After extended discussion the Committee voted 9 to 3 in favor of recommending the approval of the proposed amendment to Rule 17.

***Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 17 be approved and forwarded to the Judicial Conference.***

**4. ACTION ITEM–Rule 18. Place of Trial Within District; Proposed Amendment Requiring Court to Consider Convenience of Victims.**

This amendment requires the court to consider the convenience of victims – as well as the convenience of the defendant and witnesses – in setting the place for trial within the district. It is intended to implement the victim's "right to be treated with fairness" under the Crime Victims' Rights Act, codified at 18 U.S.C. § 3771(a)(8). Because the interests of victims who will testify are already considered when setting the place for trial within a district, the amendment's focus is on victims who will not testify. In response to public comments, the Committee revised the note to delete some language that might be misconstrued and to state that the court has substantial discretion to balance any competing interests.

The Committee voted 9 to 2 in favor of recommending approval of the proposed rule.

***Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 18 be approved and forwarded to the Judicial Conference.***

**5. ACTION ITEM–Rule 32. Sentencing and Judgment; Proposed Amendment Deleting Definition of Victim, Amending Scope of Presentence Investigation and Report, and Providing for Victim's Opportunity to Be Heard at Sentencing.**

Several amendments to Rule 32 are proposed to implement various aspects of the Crime Victims' Rights Act.

First, Rule 32(a) is amended by deleting the definitions of "victim" and "[c]rime of violence or sexual abuse." These provisions have been superseded by the CVRA. As noted above, a companion amendment to Rule 1 incorporates the CVRA's broader definition of victim. The amendment would delete all of the text in Rule 32(a). The Committee proposes reserving Rule 32(a), rather than renumbering all of the subdivisions of this complex rule.

Second, the Committee proposes amending Rule 32(c)(1) to make it clear that the presentence investigation should include information pertinent to restitution whenever the law permits the court to order restitution, not merely when it requires restitution. This amendment implements the victim's statutory right under the Crime Victims' Rights Act to "full and timely restitution as provided in law." *See* 18 U.S.C. § 3771(a)(6).

Third, Rule 32(d)(2)(B) is amended to make it clear that victim impact information should be treated in the same way as other information contained in the presentence report. The amendment deletes language requiring victim impact information to be "verified" and "stated in a nonargumentative style" because that language does not appear in the other subparagraphs of Rule 32(d)(2).

Fourth, amended Rule 32(i)(4)(B) deletes language which refers only to victims of crimes of violence or sexual abuse. As noted above, these provisions have been superseded by the CVRA.

Fifth, subdivision (i)(4)(B) has been amended to incorporate the statutory language of the CVRA, which provides that victims have the right "to be reasonably heard" in judicial proceedings regarding sentencing. *See* 18 U.S.C. § 3771(a)(4). This proposed change prompted the greatest number of public comments. One concern that was expressed repeatedly was that the statutory language might be interpreted to cut back on the victim's right to be heard at sentencing because the

statutory phrase replaced language giving victims of crimes of violence or sexual offenses the right "to speak." The Committee added language to the note stating that absent unusual circumstances any victim who is in the courtroom should be allowed a reasonable opportunity to speak directly to the judge. Other comments requested changes falling outside the bounds of the published amendments, such as adding a requirement that victims be given the right to disclosure to all or part of the presentence report. A change of this nature would require publication for notice and comment, and thus could not be considered as part of this amendment.

After extended discussion and votes on preliminary matters, the Committee voted 10 to 2 to forward the proposed Rule 32 amendments to the Standing Committee.

***Recommendation–The Advisory Committee recommends that the proposed amendments to Rule 32 be approved and forwarded to the Judicial Conference.***

**6. ACTION ITEM–Rule 60. Victim's Rights. Proposed New Rule Providing for Notice to Victims, Attendance at Proceedings, the Victim's Right to Be Heard; Enforcement of Victim's Rights; and Limitations on Relief.**

This rule implements several provisions of the Crime Victims' Rights Act, codified as 18 U.S.C. § 3771, in judicial proceedings in the federal courts. It contains provisions regarding the notice to victims regarding judicial proceedings, the victim's attendance at these proceedings, and the victim's right to be heard, as well as provisions governing the enforcement of victims' rights, including who may assert these rights and where they may be asserted. The Rule also incorporates the statutory provisions limiting relief. Following publication, the Rule was amended throughout to use consistent language to describe its application to the rights of victims "described in these rules." That change responds to concerns that the Rule might be thought to apply to other contexts where victim interests are considered, where there are distinct bodies of statutory or decisional law.

Rule 60, like other CVRA amendments, was criticized both for going too far and not going far enough. A number of commentators proposed additions which were not considered on the merits because they would require publication for comment. These include the following: (1) a provision governing the time when victim rights must be raised, (2) a provision requiring victims to assert their rights under the same procedural rules applicable to the parties, (3) a provision applying waiver to victim rights not asserted in a timely manner, (4) a provision requiring victims to be notified of their rights at proceedings, and (5) a provision giving the victims the right to be heard at any proceeding affecting their rights, not just at bail, plea, and sentencing hearings. Other comments suggested that some or all of the provisions in Rule 60 were unnecessary because they were already provided for by statute, or were beyond the scope of the Enabling Act. Finally, there was support for adding a

provision that would indicate that the victim's rights under the Criminal Rules do not override the constitutional rights of the defendant or third parties, and do not override statutory rights in the absence of a showing of compelling need. These proposals, and others, can be considered by the Committee in the future. Finally, support was also expressed for unpacking Rule 60 and distributing its changes throughout the rules. As noted above, the Advisory Committee has reaffirmed its view that it is desirable to group these key provisions in a single rule.

Subdivision (a)(1) implements 18 U.S.C. § 3771(a)(2), which provides that a victim has a "right to reasonable, accurate, and timely notice of any public court proceeding. . . ." The proposed amendment requires "the government" to use its best efforts to notify victims of public court proceedings.

Subdivision (a)(2) implements 18 U.S.C. § 3771(a)(3), which provides that the victim shall not be excluded from public court proceedings unless the court finds by clear and convincing evidence that the victim's testimony would be materially altered by attending and hearing other testimony at the proceeding. It closely tracks the statutory language.

Subdivision (a)(3) implements 18 U.S.C. § 3771(a)(4), which provides that a victim has the "right to be reasonably heard at any public proceeding in the district court involving release, plea, [or] sentencing . . . ." It tracks the statutory language.

Subdivision (b) implements the provisions of 18 U.S.C. § 3771(d)(1), (2), (3), and (5). It provides that the victim and the attorney for the government may assert the rights provided for under the Crime Victims' Rights Act, and that those rights are to be asserted in the district where the defendant is being prosecuted. Where there are too many victims to accord each the rights provided by the statute, the district court is given the authority to fashion a reasonable procedure to give effect to the rights without unduly complicating or prolonging the proceedings.

In response to public comments, proposed Rule 60 was amended to state that the "victim's legal representative" may raise the victim's rights, as specified by the CVRA. The note has been revised to state the Committee's understanding that counsel may present the views of the victim or the victim's lawful representative. The rule was also revised to state that a victim's rights can be raised by "any other person as authorized by 18 U.S.C. § 3771(d) and (e)." This incorporates the statutory provisions regarding victims who are minors and other victims who are incompetent, incapacitated or deceased, and it also recognizes the statutory limitations on a defendant's assertion of rights as a victim, which are found in 18 U.S.C. § 3771(d)(1) and (e).

Finally, the statute and the implementing rule make it clear that failure to provide relief under the rule never provides a basis for a new trial. Failure to afford the rights provided by the statute and implementing rules may provide a basis for re-opening a plea or a sentence, but only if the victim

can establish all of the following: the victim asserted the right before or during the proceeding, the right was denied, the victim petitioned for mandamus within 10 days as provided by 18 U.S.C. § 3771 (d)(3), and – in the case of a plea – the defendant did not plead guilty to the highest offense charged. (The term "highest offense charged" was drawn from the CVRA, 18 U.S.C. § 3771 (d)(5)(C).)

The Committee voted 10 to 2 in favor of recommending that proposed Rule 60 be approved.

***Recommendation–The Advisory Committee recommends that proposed Rule 60 be approved and forwarded to the Judicial Conference.***

**7. ACTION ITEM–Rule 61. Title; Proposed New Rule.**

This amendment renumbers current Rule 60 as Rule 61 to accommodate the new victims' rights rule. The Committee approved the amendment without objection.

***Recommendation–The Advisory Committee recommends that the proposal to renumber Rule 60 as Rule 61 be approved and forwarded to the Judicial Conference.***

**8. ACTION ITEM–Rule 41, Search and Seizure; Proposed Amendment Authorizing Magistrate Judge to Issue Warrants for Property Outside of the United States.**

This amendment responds to a problem that affects the investigation of cases involving corruption in United States embassies and consulates around the world. Often the most important evidence is located in the offices or residences associated with the consulate or embassy. Problems of this nature have arisen in cases involving embassies and consulates in many countries, and similar difficulties have arisen in American Samoa, a United States territory that is administered by the Department of the Interior but has no federal district court. Although these locations are all within U.S. control, they are not in any State or U.S. judicial district. As currently written, Rule 41(b) does not provide magistrate judges with the authority to issue warrants for such locations. (Although the USA PATRIOT Act amended Rule 41(b)(3) to provide magistrate judges with the authority to issue warrants outside the magistrate judge's district, this authority is applicable only in cases involving certain terrorism offenses.)

The language of the proposed amendment was based upon Rule 41(b)(3), added by the USA PATRIOT Act, and upon the definition of the special maritime and territorial jurisdiction of the United States contained in 18 U.S.C. § 7, which includes U.S. consulates and embassies. The

proposed amendment provides for jurisdiction in any district in which activities related to the crime under investigation may have occurred, or in the District of Columbia, which is the default jurisdiction for venue under 18 U.S.C. § 3238.

A similar but broader amendment was approved in 1990 by the United States Judicial Conference, which recommended that the Supreme Court adopt the new rule. The Supreme Court declined to adopt the rule at that time, concluding that the matter required "further consideration." The 1990 proposal was broadly worded: it applied to property "lawfully subject to search and seizure by the United States." The current proposal, in contrast, is limited to property within any of the following: (1) a territory, possession, or commonwealth of the United States; (2) the premises of a United States diplomatic or consular mission in a foreign state, and related buildings and land; and (3) the residences and related property owned or leased by the United States and used by United States personnel assigned to United States diplomatic or consular missions in foreign states. These are all locations in which the United States has a legally cognizable interest or in which it exerts lawful authority and control. The amendment was intentionally drafted narrowly to avoid any thorny international issues. It addresses only search warrants, not arrest warrants, since the latter may raise issues under extradition treaties.

The published draft incorporated the language of 18 U.S.C. § 7(9), the statutory provision granting jurisdiction over crimes committed in diplomatic and consular missions, as well as the residences and related property owned or leased by the United States for United States personnel assigned to diplomatic or consular missions. At the urging of the Committee's Style Consultant, the statutory language was simplified. The committee note was also amended to include a statement that the Rule is intended to authorize a magistrate judge to issue a warrant in all locations where the statute provides for jurisdiction, and that the differences in language reflect only differing style conventions.

At the request of the Standing Committee a reference to American Samoa was added to the rule and placed in brackets, and public comment was sought on whether American Samoa presented a special case. The Pacific Islands Committee of the Judicial Council of the Ninth Circuit opposed the application of the rule to American Samoa, suggesting that the matter requires further study, and that a different amendment that would treat the High Court of Samoa as the equivalent of a state court would be preferable to the current proposal.

The Advisory Committee concluded that the rule should apply to American Samoa. A gap in the Government's ability to enforce the law is plainly present in American Samoa, and that gap should be remedied. The Department is presently conducting investigations involving possible federal criminal activity in American Samoa, and the Federal Bureau of Investigation has established a Resident Agency there to address criminal activity. Because American Samoa is not located within any federal judicial district, violations of Title 18 that occur in American Samoa must be prosecuted

in districts outside of American Samoa, consistent with the venue provisions of 18 U.S.C. § 3238. The proposed amendment of Rule 41(b) would simply provide United States magistrate judges located in those other federal districts with the authority to issue search warrants to gather evidence that pertains to those federal criminal violations. The suggestion of the Pacific Islands Committee for a different amendment to Rule 41 addresses distinct issues of comity that are beyond the focus of the current proposal; this suggestion should not delay the implementation of the current proposal.

The Committee unanimously approved the proposed amendment for transmittal to the Standing Committee.

***Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 41(b) be approved and forwarded to the Judicial Conference.***

* * * * *

# PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

## Rule 1. Scope; Definitions

* * * * *

1 **(b) Definitions.** The following definitions apply to these

2 rules:

3 * * * * *

4 (11) "Victim" means a "crime victim" as defined in 18

5 U.S.C. § 3771(e).

6 * * * * *

### Committee Note

**Subdivision (b)(11).** This amendment incorporates the definition of the term "crime victim" found in the Crime Victims' Rights Act, codified at 18 U.S.C. § 3771(e). It provides that "the term 'crime victim' means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia."

Upon occasion, disputes may arise over the question whether a particular person is a victim. Although the rule makes no special provision for such cases, the courts have the authority to do any necessary fact finding and make any necessary legal rulings.

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*New material is underlined; matter to be omitted is lined through.

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## CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The Committee revised the text of Rule 1(b)(11) in response to public comments by transferring portions of the subdivision relating to who may assert the rights of a victim to Rule 60(b)(2). The Committee Note was revised to reflect that change and to indicate that the Court has the power to decide any dispute as to who is a victim.

**Rule 12.1. Notice of an Alibi Defense**

1 * * * * *

2 **(b) Disclosing Government Witnesses.**

3 **(1)** ***Disclosure.***

4 (A) *In General.* If the defendant serves a Rule

5 12.1(a)(2) notice, an attorney for the

6 government must disclose in writing to the

7 defendant or the defendant's attorney:

8 (i) ~~(A)~~ the name~~, address, and telephone~~

9 ~~number~~ of each witness — and the

10 address and telephone number of each

11 witness other than a victim — that the
12 government intends to rely on to
13 establish that the ~~defendant's presence~~
14 defendant was present at the scene of
15 the alleged offense; and
16 (ii) ~~(B)~~ each government rebuttal witness to
17 the defendant's alibi defense.
18 (B) *Victim's Address and Telephone Number.* If
19 the government intends to rely on a victim's
20 testimony to establish that the defendant was
21 present at the scene of the alleged offense and
22 the defendant establishes a need for the
23 victim's address and telephone number, the
24 court may:
25 (i) order the government to provide the
26 information in writing to the defendant
27 or the defendant's attorney; or

28 (ii) fashion a reasonable procedure that
29 allows preparation of the defense and
30 also protects the victim's interests.

31 **(2)** ***Time to Disclose.*** Unless the court directs
32 otherwise, an attorney for the government must
33 give its Rule 12.1(b)(1) disclosure within 10 days
34 after the defendant serves notice of an intended
35 alibi defense under Rule 12.1(a)(2), but no later
36 than 10 days before trial.

37 **(c) Continuing Duty to Disclose.**

38 **(1)** ***In General.*** Both an attorney for the government
39 and the defendant must promptly disclose in
40 writing to the other party the name~~,~~ of each
41 additional witness — and the address~~;~~ and
42 telephone number of each additional witness other
43 than a victim — if:

44 (A) ~~(1)~~ the disclosing party learns of the witness
45 before or during trial; and
46 (B) ~~(2)~~ the witness should have been disclosed
47 under Rule 12.1(a) or (b) if the disclosing
48 party had known of the witness earlier.
49 (2) ***Address and Telephone Number of an Additional***
50 ***Victim Witness.*** The address and telephone
51 number of an additional victim witness must not be
52 disclosed except as provided in Rule 12.1
53 (b)(1)(B).
54 * * * * *

**Committee Note**

**Subdivisions (b) and (c).** The amendment implements the Crime Victims' Rights Act, which states that victims have the right to be reasonably protected from the accused and to be treated with respect for the victim's dignity and privacy. *See* 18 U.S.C. § 3771(a)(1) & (8). The rule provides that a victim's address and telephone number should not automatically be provided to the defense when an alibi defense is raised. If a defendant establishes a need for this information, the court has discretion to order its disclosure or to fashion an alternative procedure that provides the

defendant with the information necessary to prepare a defense, but also protects the victim's interests.

In the case of victims who will testify concerning an alibi claim, the same procedures and standards apply to both the prosecutor's initial disclosure and the prosecutor's continuing duty to disclose under subdivision (c).

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## CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The Committee made very minor changes in the text at the suggestion of the Style Consultant. The Committee revised the Note in response to public comments, omitting the suggestion that the court might upon occasion have the defendant and victim meet.

**Rule 17. Subpoena**

1 * * * * *

2 **(c) Producing Documents and Objects.**

3 * * * * *

4 (3) ***Subpoena for Personal or Confidential***

5 ***Information About a Victim.*** After a complaint,

6 indictment, or information is filed, a subpoena

7 requiring the production of personal or confidential

8 information about a victim may be served on a
9 third party only by court order. Before entering the
10 order and unless there are exceptional
11 circumstances, the court must require giving notice
12 to the victim so that the victim can move to quash
13 or modify the subpoena or otherwise object.
14 * * * * *

**Committee Note**

**Subdivision (c)(3).** This amendment implements the Crime Victims' Rights Act, codified at 18 U.S.C. § 3771(a)(8), which states that victims have a right to respect for their "dignity and privacy." The rule provides a protective mechanism when the defense subpoenas a third party to provide personal or confidential information about a victim. Third-party subpoenas raise special concerns because a third party may not assert the victim's interests, and the victim may be unaware of the subpoena. Accordingly, the amendment requires judicial approval before service of a subpoena seeking personal or confidential information about a victim from a third party. The phrase "personal or confidential information," which may include such things as medical or school records, is left to case development.

The amendment provides a mechanism for notifying the victim, and makes it clear that a victim may move to quash or modify the subpoena under Rule 17(c)(2) — or object by other means such

as a letter — on the grounds that it is unreasonable or oppressive. The rule recognizes, however, that there may be exceptional circumstances in which this procedure may not be appropriate. Such exceptional circumstances would include evidence that might be lost or destroyed if the subpoena were delayed or a situation where the defense would be unfairly prejudiced by premature disclosure of a sensitive defense strategy. The Committee leaves to the judgment of the court a determination as to whether the judge will permit the question whether such exceptional circumstances exist to be decided ex parte and authorize service of the third-party subpoena without notice to anyone.

The amendment applies only to subpoenas served after a complaint, indictment, or information has been filed. It has no application to grand jury subpoenas. When the grand jury seeks the production of personal or confidential information, grand jury secrecy affords substantial protection for the victim's privacy and dignity interests.

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## CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The proposed amendment omits the language providing for ex parte issuance of a court order authorizing a subpoena to a third party for private or confidential information about a victim. The last sentence of the amendment was revised to provide that unless there are exceptional circumstances the court must give the victim notice before a subpoena seeking the victim's personal or confidential information can be served upon a third party. It was also revised to add the language "or otherwise object" to make it clear that the victim's objection might be lodged by means other than a motion, such as a letter to the court.

**Rule 18. Place of Prosecution and Trial**

1 Unless a statute or these rules permit otherwise, the
2 government must prosecute an offense in a district where the
3 offense was committed. The court must set the place of trial
4 within the district with due regard for the convenience of the
5 defendant, any victim, and the witnesses, and the prompt
6 administration of justice.

**Committee Note**

The rule requires the court to consider the convenience of victims — as well as the defendant and witnesses — in setting the place for trial within the district. The Committee recognizes that the court has substantial discretion to balance any competing interests.

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## CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

There were no changes in the text of the rule. The Committee Note was amended to delete a statutory reference that commentators found misleading, and to draw attention to the court's discretion to balance the competing interests, which may be more important as the court must consider a new set of interests.

**Rule 32. Sentencing and Judgment**

1 **(a)** **[Reserved.]** ~~**Definitions.** The following definitions~~
2 ~~apply under this rule:~~
3 ~~(1) "Crime of violence or sexual abuse" means:~~
4 ~~(A) a crime that involves the use, attempted use,~~
5 ~~or threatened use of physical force against~~
6 ~~another's person or property; or~~
7 ~~(B) a crime under 18 U.S.C. §§ 2241–2248 or~~
8 ~~§§ 2251–2257.~~
9 ~~(2) "Victim" means an individual against whom the~~
10 ~~defendant committed an offense for which the~~
11 ~~court will impose sentence.~~
12 * * * * *
13 **(c) Presentence Investigation.**
14 **(1)** ***Required Investigation.***
15 * * * * *

16 (B) *Restitution*. If the law ~~requires~~ permits
17 restitution, the probation officer must conduct
18 an investigation and submit a report that
19 contains sufficient information for the court
20 to order restitution.
21 * * * * *
22 **(d) Presentence Report.**
23 * * * * *
24 **(2)** ***Additional Information.*** The presentence report
25 must also contain the following ~~information~~:
26 (A) the defendant's history and characteristics,
27 including:
28 (i) any prior criminal record;
29 (ii) the defendant's financial condition; and
30 (iii) any circumstances affecting the
31 defendant's behavior that may be

32 helpful in imposing sentence or in
33 correctional treatment;
34 (B) ~~verified~~ information~~; stated in a~~
35 ~~nonargumentative style,~~ that assesses ~~the~~ any
36 financial, social, psychological, and medical
37 impact on any victim ~~individual against~~
38 ~~whom the offense has been committed~~;
39 * * * * *
40 **(i) Sentencing.**
41 * * * * *
42 **(4)** ***Opportunity to Speak.***
43 (A) *By a Party*. Before imposing sentence, the
44 court must:
45 (i) provide the defendant's attorney an
46 opportunity to speak on the defendant's
47 behalf;

48 (ii) address the defendant personally in
49 order to permit the defendant to speak
50 or present any information to mitigate
51 the sentence; and
52 (iii) provide an attorney for the government
53 an opportunity to speak equivalent to
54 that of the defendant's attorney.
55 (B) *By a Victim.* Before imposing sentence, the
56 court must address any victim of ~~a~~ the crime
57 ~~of violence or sexual abuse~~ who is present at
58 sentencing and must permit the victim to be
59 reasonably heard ~~speak or submit any~~
60 ~~information about the sentence. Whether or~~
61 ~~not the victim is present, a victim's right to~~
62 ~~address the court may be exercised by the~~
63 ~~following persons if present:~~

64 ~~(i) a parent or legal guardian, if the victim~~

65 ~~is younger than 18 years or is~~

66 ~~incompetent; or~~

67 ~~(ii) one or more family members or~~

68 ~~relatives the court designates, if the~~

69 ~~victim is deceased or incapacitated~~.

70 * * * * *

**Committee Note**

**Subdivision (a).** The Crime Victims' Rights Act, codified as 18 U.S.C. § 3771(e), adopted a new definition of the term "crime victim." The new statutory definition has been incorporated in an amendment to Rule 1, which supersedes the provisions that have been deleted here.

**Subdivision (c)(1).** This amendment implements the victim's statutory right under the Crime Victims' Rights Act to "full and timely restitution as provided in law." *See* 18 U.S.C. § 3771(a)(6). Whenever the law permits restitution, the presentence investigation report should contain information permitting the court to determine whether restitution is appropriate.

**Subdivision (d)(2)(B).** This amendment implements the Crime Victims' Rights Act, codified at 18 U.S.C. § 3771. The amendment makes it clear that victim impact information should be treated in the same way as other information contained in the

presentence report. It deletes language requiring victim impact information to be "verified" and "stated in a nonargumentative style" because that language does not appear in the other subparagraphs of Rule 32(d)(2).

**Subdivision (i)(4).** The deleted language, referring only to victims of crimes of violence or sexual abuse, has been superseded by the Crime Victims' Rights Act, 18 U.S.C. § 3771(e). The act defines the term "crime victim" without limiting it to certain crimes, and provides that crime victims, so defined, have a right to be reasonably heard at all public court proceedings regarding sentencing. A companion amendment to Rule 1(b) adopts the statutory definition as the definition of the term "victim" for purposes of the Federal Rules of Criminal Procedure, and explains who may raise the rights of a victim, so the language in this subdivision is no longer needed.

Subdivision (i)(4) has also been amended to incorporate the statutory language of the Crime Victims' Rights Act, which provides that victims have the right "to be reasonably heard" in judicial proceedings regarding sentencing. *See* 18 U.S.C. § 3771(a)(4). The amended rule provides that the judge must speak to any victim present in the courtroom at sentencing. Absent unusual circumstances, any victim who is present should be allowed a reasonable opportunity to speak directly to the judge.

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## CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made in the text of the rule. In response to public comments, the Committee Note was amended to make it clear that absent unusual circumstances any victim who is in the courtroom

should have a reasonable opportunity to speak directly to the judge.

**Rule 41. Search and Seizure**

1 * * * * *

2 **(b) Authority to Issue a Warrant.** At the request of a
3 federal law enforcement officer or an attorney for the
4 government:

5 * * * * *

6 **(3)** a magistrate judge — in an investigation of
7 domestic terrorism or international terrorism —
8 with authority in any district in which activities
9 related to the terrorism may have occurred has
10 authority to issue a warrant for a person or property
11 within or outside that district; ~~and~~

12 **(4)** a magistrate judge with authority in the district has
13 authority to issue a warrant to install within the
14 district a tracking device; the warrant may

15 authorize use of the device to track the movement
16 of a person or property located within the district,
17 outside the district, or both~~.~~; and
18 (5) a magistrate judge having authority in any district
19 where activities related to the crime may have
20 occurred, or in the District of Columbia, may issue
21 a warrant for property that is located outside the
22 jurisdiction of any state or district, but within any
23 of the following:
24 (A) a United States territory, possession, or
25 commonwealth;
26 (B) the premises — no matter who owns them —
27 of a United States diplomatic or consular
28 mission in a foreign state, including any
29 appurtenant building, part of a building, or
30 land used for the mission's purposes; or

31 (C) a residence and any appurtenant land owned

32 or leased by the United States and used by

33 United States personnel assigned to a United

34 States diplomatic or consular mission in a

35 foreign state.

36 * * * * *

**Committee Note**

**Subdivision (b)(5).** Rule 41(b)(5) authorizes a magistrate judge to issue a search warrant for property located within certain delineated parts of United States jurisdiction that are outside of any State or any federal judicial district. The locations covered by the rule include United States territories, possessions, and commonwealths not within a federal judicial district as well as certain premises associated with United States diplomatic and consular missions. These are locations in which the United States has a legally cognizable interest or in which it exerts lawful authority and control. The rule is intended to authorize a magistrate judge to issue a search warrant in any of the locations for which 18 U.S.C. § 7(9) provides jurisdiction. The difference between the language in this rule and the statute reflects the style conventions used in these rules, rather than any intention to alter the scope of the legal authority conferred. Under the rule, a warrant may be issued by a magistrate judge in any district in which activities related to the crime under investigation may have occurred, or in the District of Columbia, which serves as the default district for venue under 18 U.S.C. § 3238.

Rule 41(b)(5) provides the authority to issue warrants for the seizure of property in the designated locations when law enforcement officials are required or find it desirable to obtain such warrants. The Committee takes no position on the question whether the Constitution requires a warrant for searches covered by the rule, or whether any international agreements, treaties, or laws of a foreign nation might be applicable. The rule does not address warrants for persons, which could be viewed as inconsistent with extradition requirements.

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## CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

With the assistance of the Style Consultant, the Committee revised (b)(5)(B) and (C) for greater clarity and compliance with the style conventions governing these rules. Because the language no longer tracks precisely the statute, the Committee Note was revised to state that the proposed rule is intended to have the same scope as the jurisdictional provision upon which it was based, 18 U.S.C. § 7(9).

**Rule 60. Victim's Rights**

1 **(a) In General.**

2 **(1)** ***Notice of a Proceeding.*** The government must use

3 its best efforts to give the victim reasonable,

4 accurate, and timely notice of any public court

5 proceeding involving the crime.

6 (2) ***Attending the Proceeding.*** The court must not
7 exclude a victim from a public court proceeding
8 involving the crime, unless the court determines by
9 clear and convincing evidence that the victim's
10 testimony would be materially altered if the victim
11 heard other testimony at that proceeding. In
12 determining whether to exclude a victim, the court
13 must make every effort to permit the fullest
14 attendance possible by the victim and must
15 consider reasonable alternatives to exclusion. The
16 reasons for any exclusion must be clearly stated on
17 the record.
18 (3) ***Right to Be Heard on Release, a Plea, or***
19 ***Sentencing.*** The court must permit a victim to be
20 reasonably heard at any public proceeding in the
21 district court concerning release, plea, or
22 sentencing involving the crime.

23 **(b) Enforcement and Limitations.**

24 (1) ***Time for Deciding a Motion.*** The court must
25 promptly decide any motion asserting a victim's
26 rights described in these rules.

27 (2) ***Who May Assert the Rights.*** A victim's rights
28 described in these rules may be asserted by the
29 victim, the victim's lawful representative, the
30 attorney for the government, or any other person as
31 authorized by 18 U.S.C. § 3771(d) and (e).

32 (3) ***Multiple Victims.*** If the court finds that the number
33 of victims makes it impracticable to accord all of
34 them their rights described in these rules, the court
35 must fashion a reasonable procedure that gives
36 effect to these rights without unduly complicating
37 or prolonging the proceedings.

38 (4) ***Where Rights May Be Asserted.*** A victim's rights
39 described in these rules must be asserted in the

40 district where a defendant is being prosecuted for
41 the crime.
42 **(5)** ***Limitations on Relief.*** A victim may move to
43 reopen a plea or sentence only if:
44 (A) the victim asked to be heard before or during
45 the proceeding at issue, and the request was
46 denied;
47 (B) the victim petitions the court of appeals for a
48 writ of mandamus within 10 days after the
49 denial, and the writ is granted; and
50 (C) in the case of a plea, the accused has not
51 pleaded to the highest offense charged.
52 **(6)** ***No New Trial.*** A failure to afford a victim any
53 right described in these rules is not grounds for a
54 new trial.

**Committee Note**

This rule implements several provisions of the Crime Victims' Rights Act, codified at 18 U.S.C. § 3771, in judicial proceedings in the federal courts.

**Subdivision (a)(1).** This subdivision incorporates 18 U.S.C. § 3771(a)(2), which provides that a victim has a "right to reasonable, accurate, and timely notice of any public court proceeding. . . ." The enactment of 18 U.S.C. § 3771(a)(2) supplemented an existing statutory requirement that all federal departments and agencies engaged in the detection, investigation, and prosecution of crime identify victims at the earliest possible time and inform those victims of various rights, including the right to notice of the status of the investigation, the arrest of a suspect, the filing of charges against a suspect, and the scheduling of judicial proceedings. *See* 42 U.S.C. § 10607(b) & (c)(3)(A)-(D).

**Subdivision (a)(2).** This subdivision incorporates 18 U.S.C. § 3771(a)(3), which provides that the victim shall not be excluded from public court proceedings unless the court finds by clear and convincing evidence that the victim's testimony would be materially altered by attending and hearing other testimony at the proceeding, and 18 U.S.C. § 3771(b), which provides that the court shall make every effort to permit the fullest possible attendance by the victim.

Rule 615 of the Federal Rules of Evidence addresses the sequestration of witnesses. Although Rule 615 requires the court upon the request of a party to order the witnesses to be excluded so they cannot hear the testimony of other witnesses, it contains an exception for "a person authorized by statute to be present." Accordingly, there is no conflict between Rule 615 and this rule, which implements the provisions of the Crime Victims' Rights Act.

**Subdivision (a)(3).** This subdivision incorporates 18 U.S.C. § 3771(a)(4), which provides that a victim has the "right to be reasonably heard at any public proceeding in the district court involving release, plea, [or] sentencing . . . ."

**Subdivision (b).** This subdivision incorporates the provisions of 18 U.S.C. § 3771(d)(1), (2), (3), and (5). The statute provides that the victim, the victim's lawful representative, and the attorney for the government, and any other person as authorized by 18 U.S.C. § 3771(d) and (e) may assert the victim's rights. In referring to the victim and the victim's lawful representative, the committee intends to include counsel. 18 U.S.C. § 3771(e) makes provision for the rights of victims who are incompetent, incapacitated, or deceased, and 18 U.S.C. § 3771(d)(1) provides that "[a] person accused of the crime may not obtain any form of relief under this chapter."

The statute provides that those rights are to be asserted in the district court where the defendant is being prosecuted (or if no prosecution is underway, in the district where the crime occurred). Where there are too many victims to accord each the rights provided by the statute, the district court is given the authority to fashion a reasonable procedure to give effect to the rights without unduly complicating or prolonging the proceedings.

Finally, the statute and the rule make it clear that failure to provide relief under the rule never provides a basis for a new trial. Failure to afford the rights provided by the statute and implementing rules may provide a basis for re-opening a plea or a sentence, but only if the victim can establish all of the following: the victim asserted the right before or during the proceeding, the right was denied, the victim petitioned for mandamus within 10 days as provided by 18 U.S.C. § 3771(d)(5)(B), and — in the case of a plea — the defendant did not plead guilty to the highest offense charged.

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## CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

Subdivision (a)(2) was revised to make it clear that the duty to permit fullest attendance arises in the context of the victim's possible exclusion.

Subdivision (b)(2) was revised to respond to concerns that the amendments did not clearly state that the victim's lawful representative could assert the victim's rights. The Committee Note makes it clear that a victim or the lawful representative of a victim may generally participate through counsel, and provides that any other person authorized by 18 U.S.C. § 3771(d) and (e) may assert the victim's rights, such as persons authorized to raise the rights of victims who are minors or are incompetent.

References throughout subdivision (b) were revised to indicate that they were applicable to the victim's rights described in the Federal Rules of Criminal Procedure, not merely subdivision (a) of Rule 60.

Other minor changes were made at the suggestion of the Style Consultant to improve clarity.

**Rule 61~~60~~. Title**

1 These rules may be known and cited as the Federal

2 Rules of Criminal Procedure.

## CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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**To:** **Hon. David F. Levi, Chair**
**Standing Committee on Rules of Practice and Procedure**

**From:** **Hon. Susan C. Bucklew, Chair**
**Advisory Committee on Federal Rules of Criminal Procedure**

**Subject:** **Technical Amendment Correcting Cross-Reference in Criminal Rule 45**

**Date:** **June 5, 2007 (Revised June 28, 2007)**

The restyling of the Civil Rules has created an unanticipated problem with the cross references in Criminal Rule 45(c), which governs computing and extending time. The Supreme Court has approved and transmitted to Congress an amendment to Criminal Rule 45(c) that clarifies the method of extending time. Both current Rule 45(c) and the amendment refer to service made in the manner provided under Civil Rule 5(b)(2)(B), (C), or (D). The restyling of the Civil Rules renumbers the provisions to which the current rule and the amendment refer as 5(b)(2)(C), (D), (E), and (F).

Rule 45(c) grants the parties an additional three days for action after certain forms of service. The effect of renumbering subdivisions of the Civil Rule (whether the amendment to Rule 45 is approved or not) is to make this additional three days unavailable in two classes of cases in which it is now available: those in which service is made by electronic means, and those in which service is made by other means that have been consented to in writing. The renumbering also adds three days in a class of cases in which it was not previously available: those in which service by leaving a paper at a person's home or office. Although the Civil Rules Advisory Committee had discussed whether to eliminate the additional three days for electronic filings, where delivery is instantaneous, it decided to retain the extra time for electronic filings to avoid discouraging them. The Criminal Rules Advisory Committee has not discussed any change in the application of the three day rule.

An additional amendment to Rule 45(c) is needed to preserve the status quo regarding the availability of the additional three days after service by electronic means or other means to which there has been written consent, and to eliminate the additional three days when service is made by leaving the papers at a home or office.

A proposed amendment and committee note are attached. (The text assumes that the amendment submitted by the Supreme Court to Congress will go into effect.) The Criminal Rules Committee has approved the proposed technical amendment.

## PROPOSED AMENDMENT TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

### Rule 45. Computing and Extending Time

1 * * * * *

2 **(c) Additional Time After Certain Kinds of Service.**
3 Whenever a party must or may act within a specified
4 period after service and service is made in the manner
5 provided under Federal Rule of Civil Procedure
6 5(b)(2)~~(B),~~ (C), ~~or~~ (D), <u>(E), or (F),</u> 3 days are added after
7 the period would otherwise expire under subdivision (a).

### Committee Note

This amendment revises the cross references to Civil Rule 5, which have been renumbered as part of a general restyling of the Federal Rules of Civil Procedure. No substantive change is intended.

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*New material is underlined; matter to be omitted is lined through. Includes amendment to rule that will take effect on December 1, 2007.

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