FEDERAL PUBLIC DEFENDER
Western District of Washington

Thomas W. Hillier, II
Federal Public Defender

October 10, 2006

06 - CR-003
Testify

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

I am informed that a public hearing on proposed amendments to the Federal Rules of Criminal Procedure is scheduled to occur on February 2, 2007 in San Francisco. I would like to testify on behalf of Federal Public and Community Defenders at that hearing. If the hearing goes forward and I am invited to speak, I would appreciate information concerning the time, place and deadlines for written submissions. Thank you for your help.

Very truly yours,

Thomas W. Hillier, II
Federal Public Defender
Chair, Legislative Expert Panel, Federal Public and
Community Defenders

TWH/mp

1601 Fifth Avenue, Room 700, Seattle, Washington 98101 - Telephone (206) 553-1100 Fax (206) 553-0120

FEDERAL PUBLIC DEFENDER
Western District of Washington

Thomas W. Hillier, II
Federal Public Defender

Testimony

January 17, 2007

Peter G. McCabe
Secretary of the Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Administrative Office of the United States Courts
1 Columbus Circle, N.E.
Washington, DC 20544

Re: Testimony and Comments on Proposed Amendments to the Federal Rules of Criminal Procedure Published for Comment in August 2006

Dear Mr. McCabe:

Please accept the enclosed submission as my written testimony in connection with the hearing before the Advisory Committee on Criminal Rules on January 26, 2007. This submission will also serve as the formal written comments of the Federal Public and Community Defenders on the proposed amendments. I apologize for the length of our materials. The awkward construction of the Criminal Victims Rights Act (CVRA) complicated our submission on the related proposed amendments. Our comments on Rule 29 include a lengthy analysis of the cases used by the Department of Justice to support its view that Rule 29 needs to be amended. This exercise proved to be worthwhile. Information provided by the Department was incomplete and inaccurate, and our analysis shows the cases the Department cites do not support its claim that the proposed amendment is warranted.

Very truly yours,

Thomas W. Hillier, II
Federal Public Defender
Chair, Legislative Expert Panel, Federal Public and Community Defenders

TWH/mp
Enclosure

1601 Fifth Avenue, Room 700, Seattle, Washington 98101 - Telephone (206) 553-1100 Fax (206) 553-0120

STATEMENT OF THOMAS W. HILLER, II
IN CONNECTION WITH TESTIMONY TO BE GIVEN
BEFORE THE ADVISORY COMMITTEE ON CRIMINAL RULES
ON JANUARY 26, 2007
AND WRITTEN COMMENTS
ON BEHALF OF THE FEDERAL PUBLIC AND COMMUNITY DEFENDERS
REGARDING AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE PUBLISHED FOR COMMENT IN AUGUST 2006

My name is Thomas W. Hiller, II. I have been the Federal Public Defender for the Western District of Washington since 1982, and Chair of the Legislative Expert Panel of the Federal Public and Community Defenders since 1993. Federal Public and Community Defenders have offices in 88 of 94 federal judicial districts, and we represent the majority of individuals who are prosecuted in the United States district courts each year. In my capacity as Chair of the Legislative Expert Panel, I coordinate Defender input on legislative issues of importance to our mission and the welfare of our clients.

I appreciate the opportunity to testify before the Advisory Committee on Criminal Rules on the amendments of the Federal Rules of Criminal Procedure published for comment in August 2006. Please accept this submission as my written testimony, and as the formal written comments of the Federal Public and Community Defenders on the proposed amendments.

I. PROPOSED AMENDMENTS TO RULE 29

The Federal Public and Community Defenders oppose the proposed revision to Rule 29, which would require a defendant seeking a mid-trial judgment of acquittal to waive all constitutional double jeopardy protections for the sole purpose of allowing the government to seek appellate review of any adverse judicial decision.

According to the Report of the Advisory Committee of May 20, 2006, the proposed revision is the result of a years-long campaign by the Department of Justice. The Department has argued to the Committee that the current version of Rule 29 is anomalous and highly undesirable because it insulates erroneous pre-verdict acquittals from appeal. In support of its position, the Department has asserted that statistical and anecdotal evidence provided by the Department to the Committee reflects the frequency of erroneous pre-verdict acquittals. We have reviewed the Department's statistics as well as the available records from the cases cited by the Department. The result of that review, which is further described in this letter and in the Analysis of Case Summaries attached as Exhibit B, demonstrates that the Department's arguments are meritless as to both the frequency of pre-verdict acquittals in general and the "erroneous" nature of the acquittals singled out by it in particular.

More fundamentally, the Department's attempt to revise Rule 29 to require criminal defendants to choose between constitutional protections is a direct assault on the principles underlying the Double Jeopardy and Due Process Clauses and the power of the

judiciary to protect individuals from governmental overreaching. For the following reasons, we believe that the proposed revision is misguided as a matter of policy and wrong as a matter of law. We urge the Committee to reject it.

A. The Proposed Rule Would Interfere with the Inherent Power of the Judiciary.

For over sixty years, Rule 29 has provided the procedural framework that enables trial courts to perform the vital duty of protecting criminal defendants from being convicted on the basis of legally inadequate evidence. Far from being a "historical accident" or "anomaly," the Rule is based on common law and constitutional principles relating to the power of the judiciary that have existed "from time immemorial." *Ex parte United States*, 101 F.2d 870, 876 (7th Cir. 1939), *aff'd sub nom United States v. Stone*, 308 U.S. 519 (1939).

Courts have long possessed the inherent power to determine questions of law. *See, e.g.*, James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* 183-262, 217 (1898) ("The constitutional guaranty restrains the lay jury to the limited and special role of determining controverted issues of fact. Questions of law, methods of practice, and points of procedure are exclusively the province of the judge."). That power includes the power to decide that the party who bears the burden of proof has failed to introduce sufficient evidence at trial to sustain its burden as a matter of law. *See Sparf v. United States*, 156 U.S. 51, 99-100 (1895) ("[I]f there be some evidence bearing upon a particular issue in a cause, but it is so meager as not, in law, to justify a verdict in favor of the party producing it, the court is in the line of duty when it so declares to the jury."); *Ex parte United States*, 101 F.2d at 878 ("The power to direct a verdict and the power to render a judgment of dismissal pursuant to the reservation of the legal question are clearly incidental to, and necessarily flow from, the judicial function of determining the legal sufficiency of the evidence.").

For hundreds of years, courts presiding over cases in which there has been a failure of proof have refused to allow the jury the opportunity to render a verdict against the defending party, irrespective of the procedural mechanism invoked by the court and irrespective of whether the case was civil or criminal in nature. *See Sparf*, 156 U.S. at 100 ("Who can doubt, for instance, that the court has the right, even in a capital case, to instruct the jury as a matter of law to return a verdict of acquittal on the evidence adduced by the prosecution?"); *Ex parte United States*, 101 F.2d at 874-75, 876 (describing practice of taking legally insufficient case from jury in common law England); J. Chitty, *Treatise on the Criminal Law* 437-47 (1819) (discussing traditional practice under English common law that courts in criminal trials had discretion to direct acquittal under appropriate circumstances). In such cases, the rule was to terminate the case prior to the jury's verdict, most typically by directing the jury to return a verdict for the defendant. *See Ex parte United States* at 876; Chitty, *Criminal Law* at 437-47. Indeed, American courts have long recognized that acquittal is appropriate at the earliest point that the government's inability to prove its case becomes obvious, even if the government has not finished presenting all of its evidence. *See, e.g., United States v. Ubl*, 472 F. Supp. 2d

1236, 1237, 1238 (N.D. Ohio 1979) (acquitting defendant before close of government's case because "[t]o continue the trial after it is apparent that the prosecution cannot introduce sufficient evidence to support a guilty verdict would be a waste of everyone's time and extremely unfair to the defendant. It would simply be a travesty of justice."); *United States v. Maryland Coop. Milk Producers, Inc.*, 145 F. Supp. 151, 152 (D.D.C. 1956) (when "basic facts appear inescapably leading to the conclusion that, irrespective of whatever other evidence may be introduced, the prosecution must fail . . . it is proper to stop the further introduction of evidence and entertain a motion for judgment of acquittal. Such a course is in the interest of efficiency and expedition in the administration of justice.").

Rule 29 serves a vital role in providing a procedural mechanism whereby courts can exercise their inherent power. Indeed, the need for such a mechanism in a criminal case is undeniably heightened. *Ex parte United States*, 101 F.2d at 878 ("The essence of legal power is to take the case away from the jury, where there is an insufficiency of evidence to sustain a conviction. . . . The court has inherent power to invoke these procedural aids in its effort to administer criminal justice."). The government is no ordinary plaintiff, having within its grasp the full resources of the Executive branch to muster and present its evidence. And in contrast to civil cases, a verdict against the defendant will result in a loss of liberty, which may include a lengthy prison sentence or even death. *Accord United States v. Melillo*, 275 F. Supp. 314, 318 (D.C. N.Y. 1967) ("Since penalties are more severe in criminal than in civil cases and a greater probability of accuracy in findings of fact is demanded, more stringent control by the trial judge is warranted.").

In cases where, despite the government's resources, it has clearly failed to present legally sufficient evidence against the defendant, Rule 29 properly permits the court to acquit the defendant at the close of the government's case. This ensures that the defendant need not be subjected to the "further embarrassment, expense and ordeal" of continuing the trial, and precludes the possibility that "even though innocent, he may be found guilty." *Green v. United States*, 355 U.S. 184, 187-88 (1957). It also permits the court to focus the jury on whatever legally viable issues remain, thereby improving the efficiency and accuracy of the process. And it serves an important institutional function in generally deterring the government from instituting a criminal proceeding on less than adequate evidence.

Of course, under the 1994 amendments to the Rule, the court need not render a pre-verdict acquittal at all. In closer cases, or cases in which the court believes the government's interest in appealing the ruling may outweigh the defendant's interest in ending his ordeal, the court has the option to reserve decision until the jury renders a verdict. Importantly, however, that provision was intended to *increase* a court's ability to address Rule 29 motions in the manner most appropriate to a given case, not curtail it. *See* Fed. R. Crim. P. 29, advisory committee's note (explaining that the amendment is intended to "remove the dilemma in those close cases in which the court would feel pressured into making an immediate, and possibly erroneous, decision"). The proposed Rule, however, would have the opposite effect by removing all discretion from the court

regarding when to decide the motion. It would therefore represent a philosophical retreat from the 1994 amendments, as well as an unwarranted incursion on the court's proper role as arbiter of the law in every trial over which it presides. As such, it should be withdrawn.

B. The Proposed Rule Would Threaten the Exercise of Core Constitutional Rights.

In addition to intruding upon the judicial function, the proposed Rule threatens core constitutional rights and principles. It would require a district court to reserve decision on a clearly meritorious Rule 29 motion simply to allow the government to prolong its deficient prosecution (and the defendant's agony) through appeal and possible retrial. It thus subverts the very purpose of the Rule, which is to protect an innocent defendant's immediate interest in finality, a right protected by both the Due Process and Double Jeopardy Clauses. Indeed, the Department's real complaint is not with Rule 29 at all but with the Constitution, for as the Department well knows, it is the Due Process and Double Jeopardy Clauses and not the Rules of Procedure that preclude it from appealing a judgment of acquittal for insufficient evidence.

A defendant has a constitutional right to put the government to its burden of producing sufficient evidence to prove beyond a reasonable doubt all essential elements of the crime with which he is charged. *See In re Winship*, 397 U.S. 358, 364 (1970). If the government fails to carry that burden, the prosecution ought to end immediately. *See* 2A Charles A. Wright, *Fed. Prac. & Proc. Crim. 3d* § 462 (2006) ("The motion for judgment of acquittal at the close of the government's case implements the requirement that the prosecution must establish a prima facie case by its own evidence before the defendant may be put to his defense.") (citations and internal quotation marks omitted). Indeed, continuing the trial past the close of the government's evidence in such a case threatens to transform it from a legal proceeding into a farce – one where the defendant must defend against a charge that cannot be legally sustained and the court must instruct the jury that it may find facts that do not, as a matter of law, exist. *Accord Ubl*, 472 F. Supp. 2d at 1237 (continuing a trial past the point where the legal deficiency of the prosecution is manifest would "simply be a travesty of justice"). Yet that is precisely what the proposed Rule would require in any case where a defendant wished to protect his interest in finality by retaining his double jeopardy rights.

It is no answer to say that in such cases, a defendant can rest assured that no defense is needed because the jury will certainly acquit. One need only look to the 190 exonerations based on DNA evidence since 1992 to know that juries sometimes get it wrong. *See* www.innocenceproject.org; *see also* Amy Baron-Evans, *An Important but Modest Check on Prosecutorial Overreaching and Wrongful Conviction*, Boston Bar Journal (September/October 2004) (citing empirical evidence that defendants begin with a presumption of guilt and jurors often apply a preponderance of the evidence standard despite instructions to the contrary). Yet there are also substantial risks inherent in presenting a defense, including the risk that the defense case will introduce evidence that corroborates or fills in some portion of the government's case, or opens the door to

otherwise inadmissible evidence in rebuttal. *See Smith v. Massachusetts*, 543 U.S. 462, 472 (2005). If that happens, not only does the defendant increase his chances of a jury conviction, but he also taints, however imperceptibly, the court's later review of the merits of his Rule 29 motion. Simply put, as all attorneys and judges know, the landscape is inescapably altered once the defense puts on a case. It is one thing to require a defendant to face such risks in a case where the court is not as yet convinced that an acquittal is legally required, as Rule 29 currently does. But it is quite another to require it in every instance, irrespective of the court's reasoned judgment that the government's case is legally deficient.

Nor is the difficulty solved by permitting pre-verdict judgments of acquittal upon a defendant's waiver of double jeopardy. Allowing a prosecutor who is unable to convince the presiding judge that the government has presented sufficient evidence to permit a finding of guilt at the close of its case to nonetheless make the same pitch a second time – whether to a jury or an appellate court – does not just undermine the authority of the trial court. It represents a rejection of the principle that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense." *Green*, 355 U.S. at 187. As such, it is a direct assault on the principles underlying the Double Jeopardy Clause: "[A] verdict of acquittal is final, ending a defendant's jeopardy . . . [and] the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous." *Id.* at 188.

In its press to revise Rule 29, the Department seeks a rule to allow it to do what the Double Jeopardy Clause would otherwise forbid: appeal every judgment of acquittal. As the law currently stands – as it has stood since the birth of our nation – acquittals are generally unassailable. "The doctrine is ancient that one shall not be put twice in jeopardy of life or limb for the same offense. A verdict of acquittal shall not be set aside." *Ex parte United States*, 101 F.2d at 874 n.12 (listing cases); *see also Smith*, 543 U.S. at 467 ("[W]e have long held that the Double Jeopardy Clause of the Fifth Amendment prohibits reexamination of a court-decreed acquittal to the same extent it prohibits reexamination of an acquittal by jury verdict"). And while the Department is permitted to appeal post-verdict acquittals, that represents "a *single exception* to the principle that acquittal by judge precludes reexamination of guilt no less than acquittal by jury." *Smith*, 543 U.S. at 467 (emphasis supplied). Yet, if the Department's proposal is adopted, this single exception would, quite literally, become the Rule.

The Department's attempt to rewrite history in support of the proposed Rule should not be countenanced by the Committee. If there is anything historically anomalous about the Rule as currently written, it is that courts are permitted to reserve decision on a Rule 29 motion to permit the government to appeal *any* judgment of acquittal. The general practice under the common law was to end the prosecution by directed verdict or some other procedural mechanism once the prosecution's deficiency was made manifest, *see* Part A, *supra*, and appeals from those decisions were barred by the Double Jeopardy Clause. The government did not even have general permission to file appeals in criminal cases until 1971, and its ability to do so has always been expressly limited by the double jeopardy protections afforded defendants by the

Constitution. *See* 18 U.S.C. § 3731 ("no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution"). In the four times that Congress has amended § 3731 since 1971, Congress has never removed the statute's reference to the Double Jeopardy Clause as an express limitation on the government's ability to file an appeal. Far from supporting the dilution of double jeopardy protections, § 3731 reaffirms Congress's belief that those protections should properly serve to check the government's ability to seek appellate review.[1]

Moreover, it is not at all clear that the proposed Rule is permissible under the Rules Enabling Act. The rules may not be used for the purpose of restricting the exercise of constitutional rights. *See* 18 U.S.C. § 2072(b) (providing that the rules of practice and procedure "shall not abridge, enlarge or modify any substantive right"). Yet that is precisely what proposed Rule 29 is designed to do. *Compare Green*, 355 U.S. at 188 ("[T]he Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous.") *with* proposed Rule 29, advisory committee note ("The purpose of the amendment is to allow the government to seek appellate review of any judgment of acquittal."). The administration of justice simply is not served when criminal rules of procedure intentionally restrict individual protections at the Department's behest.

Even assuming such a rule would be permissible under the Rules Enabling Act, the proposed Rule – which would condition a defendant's right to immediately terminate a clearly deficient prosecution upon a waiver of double jeopardy protections – is likely unconstitutional itself. "The doctrine of unconstitutional conditions holds that the government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether. It reflects a triumph of the view that government may not do indirectly what it may not do directly . . . ." *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415 (1988); *United States v. Scott*, 450 F.3d 863, 866 (9th Cir. 2006) (unconstitutional conditions doctrine prohibits "governmental end-runs around the barriers to direct commands") (citing Sullivan, *Unconstitutional Conditions* at 1492).

A defendant's interest in exercising his constitutional right to be tried on legally sufficient evidence ripens at the very latest at the close of the government's case. Yet under the proposed Rule, an innocent defendant must endure the stigma, emotional strain and financial expense of defending past the close of the deficient prosecution, and run the risk that he will be convicted erroneously, solely to allow the government to do an end-run around his double jeopardy rights and appeal the acquittal. Alternatively, the defendant can enforce his due process right to be tried on legally sufficient evidence as soon as it ripens, but only if he agrees to waive his double jeopardy rights and allow the government to appeal the acquittal. This catch-22 may well render the waiver provision

[1] The language of § 3731 that "no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution," if not taken as merely an expression of Congress's support for the double jeopardy clause, is otherwise superfluous, as Congress could not have abrogated double jeopardy protections through operation of the statute even if it had tried to do so.

an unconstitutional condition in violation of the law. *See also Green*, 355 U.S. at 193-94 ("Conditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy.").

Even assuming that the proposed Rule is both within the Committee's rule-making authority and constitutional, it is not at all clear how the Rule could be implemented. Troubling issues such as the court's jurisdiction to continue the trial as to other defendants or counts following a pre-verdict acquittal, or whether a defendant could be held pending appeal (for instance, because he poses a risk of flight) despite the fact that he has been acquitted of the crime with which he was charged, remain unaddressed and unanswered by the proposed Rule. Nor does the proposal appear to contemplate the impact of prolonged trials and appeals (not to mention successive trials) on an already-overburdened court docket. And, of course, the proposed Rule would effectively prevent district courts from separating the wheat from the chaff when instructing the jury, thereby increasing the likelihood of jury confusion, unreliable jury verdicts, and negative public perception of a justice system that requires defendants, judges and jurors to bear the inefficiency and costs of an ill-conceived prosecution. The Department has come forward with nothing to address how to resolve these and other vexing issues related to the proposed revision of Rule 29, even assuming the revision itself was not inconsistent with the Constitution and relevant statutes.

C. The Department Has Failed Credibly to Show that Erroneous Mid-Trial Acquittals Pose Any Problem That Warrants Restriction of Constitutional Rights and Judicial Power.

Given the significant impact of the proposed Rule on individual constitutional rights, judicial authority and the administration of justice, the Committee ought not to even consider adopting it without powerful evidence that the current Rule poses a problem that needs correcting. At the very least, because courts have been granting acquittals with no right of governmental appeal since time immemorial (either through directed verdicts or, after 1944, through Rule 29), one would expect some evidence of a drastic change in circumstance to support the proposed change in the Rule. Yet the Department has not offered the Committee any historical analysis whatsoever. Instead, the Department's submission focuses almost exclusively on the alleged experience of the current administration. *See* Memorandum from Eric H. Jaso, September 15, 2003 ("2003 DOJ Mem."); Memorandum from James Comey, Robert McCallum, and Christopher Wray, December 16, 2004 ("2004 DOJ Mem."). Specifically, in support of its argument that pre-verdict Rule 29 acquittals pose a significant problem to the administration of justice, the Department offers: (1) statistical data for the year 2002 collected by the Administrative Office of the Courts, (2) statistical data since 1999 collected through an informal "survey" of United States Attorney's Offices; (3) citations to 18 published appellate opinions reversing post-verdict Rule 29 dismissals between January 1, 2002 and June 30, 2003; (4) statistical data on appeals of post-verdict acquittals for the years 2000 and 2001 collected by the Criminal Appellate Section at Main Justice; and (5) a series of

"representative case summaries" of pre-verdict acquittals that the Department contends were granted erroneously.

The Department's purported data on the frequency of erroneous pre-verdict acquittals is incomplete, misleading and unreliable. Take, for instance, the Department's reliance on the AO statistics for 2002. The Department notes that 336 defendants received judicial acquittals during that time period and spends a full paragraph comparing that statistic to other data, ultimately concluding that judicial acquittals "represent a substantial proportion – 13% of all jury verdicts and almost 10% of the verdicts issued at trial." *See* 2004 DOJ Mem. at 7. Relegated to a footnote is the disclosure that, in fact, those 336 judicial acquittals include *pre*-verdict Rule 29 acquittals, *post*-verdict Rule 29 acquittals, *and* acquittals following *bench trials*. *See id.* at 7, n.5. The entire paragraph is thus utterly meaningless for purposes of discussing the prevalence of pre-verdict Rule 29 acquittals.[2]

In fact, since 2002, the number of judicial acquittals (whether pursuant to Rule 29 or following a bench trial) has steadily decreased while the number of prosecutions has increased. During the twelve-month period ending September 2005, judges acquitted defendants in only 159 cases. *See* Administrative Office of the U.S. Courts, Judicial Business of the United States Courts 2005, Table D-4 (attached as Exhibit A). During that same period, the Department prosecuted a total of 86,000 individuals. Out of those prosecutions, 74,024 defendants – or 86 percent – pled guilty. Only 3,835 – or 4.5 percent — proceeded to trial. Of those few defendants who went to trial, 520 individuals were acquitted, with only 159 of those acquittals ordered by the court. In other words, out of 86,000 criminal prosecutions, a district court acquitted a defendant in only 0.18 percent of cases, less than one-fifth of one percent. And, of course, this statistic includes *all* judicial acquittals; pre-verdict acquittals under Rule 29 necessarily amount to even less than that. Thus it is clear that contrary to the Department's insinuations, district courts exercise their power to acquit defendants sparingly, and with considerable restraint.

Similarly, the Department points to the fact that it was able to identify 18 appellate reversals of post-verdict Rule 29 acquittals in a randomly selected 18-month period. Of course, it makes sense that at least some post-verdict Rule 29 acquittals would be reversed on appeal. When a case is close, the Rule explicitly suggests that judges reserve decision on the Rule 29 motion until after the jury's verdict to allow the possibility of appellate review and, if necessary, reversal. *See* Fed. R. Crim. P. 29, advisory committee's note. There is something odd about criticizing judges for following exactly the course suggested by the Rule. Nor does it follow logically that a similar reversal rate would exist for pre-verdict Rule 29 acquittals, where the deficiency in the prosecution is more obvious and the court is more certain in its judgment. Indeed, in our experience, judges agonize over Rule 29 motions and reserve decision on them, or deny

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[2] Even if all 336 defendants had received a pre-verdict Rule 29 acquittal, they would still have comprised less than one-half of one percent of the individuals prosecuted by the Department in those 12 months (78,835 total).

them outright, in cases where the issues are at all close. These cases, like the Department's other statistics, tell the Committee nothing about the prevalence or lack thereof of erroneous pre-verdict Rule 29 acquittals.

In fact, the Department's sole "evidence" of erroneous pre-verdict acquittals is found in the handful of "representative case summaries" it presented to the Committee. But the records of those cases tell a far different story than the summaries prepared by the Department. Although most of the cases used as examples were not named or otherwise identified for ease of independent review, we were able to identify the majority of the cases and investigate them by gathering and reading transcripts, examining the records maintained in the PACER system, and speaking with the defense attorneys involved. (The very fact that these cases were presented to the Committee anecdotally and without readily verifiable references renders the Department's call to action suspect.) In nearly every instance, the record revealed that the Department's description was either grossly misleading or based upon the prosecutor's personal description of circumstances beyond the record or sometimes even contradicted by the record. *See* Analysis of Case Summaries (attached as Exhibit B).

The Department's frustration with the cited decisions appears to stem not from the district court's "error," but from its own misunderstanding of how the burden of proof is allocated at the Rule 29 stage. Although a court engaging in a Rule 29 analysis must view the evidence in the light most favorable to the prosecution, there must still be sufficient record evidence to allow a reasonable and unbiased jury to find every element of the charged offense beyond a reasonable doubt. In other words, a case cannot get to the jury if there is no evidence to support one of the essential elements, or even if there is some evidence but that evidence could not persuade beyond a reasonable doubt, even if the prosecution's theory of criminality is otherwise generally plausible. Time and again the case records reflect that the court acquitted the defendant not because it did not credit the government's theory but because there was no actual sufficient evidence to support it.

Through the case summaries, the Department inaccurately suggests that many courts have granted Rule 29 acquittals simply because they did not understand the law. *See, e.g.*, 2003 DOJ Mem. at 12-13 (discussing cases in which the court supposedly granted an acquittal because it "misconstrued the statute being enforced"). At other times, the Department directly attacks the integrity of the court, insinuating that the court dissembled about the reasons for its decision or otherwise accusing the court of violating its judicial obligations, an outrageous ploy given that those accusations are without a single citation to the record. *See, e.g.*, 2003 DOJ Mem. at 12 (accusing court of acquitting defendant in one case (*McGrew*) "for the sole reason that he was scheduled to attend a conference," and insinuating that the court's grant of an acquittal in another case (*Palermo*) was based on its dislike of the government's investigative techniques rather than the legal merits of the government's case), 14 (citing a case in which the government wholly failed to present admissible evidence of the jurisdictional element (*Cunningham*) as an example of its proposition that some judges "made clear that their ruling was based on their dislike of the type of prosecution"). *Cf. United States v. Nolen*, 2006 WL 3598522, *4-*8 (5th Cir., Dec. 12, 2006) (upholding, at government's behest as against

defendant's Sixth Amendment appeal, the revocation of a defense attorney's *pro hac vice* status, and suspension of the attorney from practice in the district for five years, for violating Prof. Disc. R. 8.02 (lawyer "shall not make a statement ... with reckless disregard as to its truth or falsity concerning the ... integrity of a judge") by filing a pleading accusing a Magistrate Judge of having an unstated ulterior motive for entering a certain pretrial order). If the Department truly believed that any judge had decided a case in a manner inconsistent with the judicial oath, the proper recourse would be to file a complaint against that judge, not to impose sweeping restrictions on the rights of all defendants nationwide. The government did not choose this course because the records for the cases it brings to this Committee do not support its insinuations. Our case summaries provide germane information from the case records. Full records are available for the Committee's review. We encourage that review because through it the Department's disingenuity is revealed.

D. The Premise of the Proposed Rule is Inconsistent with Fundamental Concepts of Fairness and Justice.

In the final analysis, trials are not a science, and district courts – like lawyers, juries, and appellate courts – make mistakes. But the mistakes go both ways. For example, a brief search of an equally random 12-month period uncovered 14 individuals whom the courts of appeals found had been erroneously convicted on insufficient evidence. *See, e.g., United States v. Mulero-Joubert*, 289 F.3d 168 (1st Cir. 2002) (reversing conviction for insufficient evidence); *United States v. Friedman*, 300 F.3d 111 (2d Cir. 2002) (same); *United States v. Handakas*, 286 F.3d 92 (2d Cir. 2002) (same), *overr'd on different grounds United States v. Rybicki*, 354 F.3d 124, 143-44 (2d Cir. 2003); *United States v. Schwarz*, 283 F.3d 76 (2d Cir. 2002) (same); *United States v. Gumbs*, 283 F.3d 128 (3d Cir. 2002) (same); *United States v. Turner*, 272 F.3d 380 (6th Cir. 2001) (same); *United States v. Thomas*, 284 F.3d 746 (7th Cir. 2002) (same); *United States v. Peters*, 277 F.3d 963 (7th Cir. 2002) (same); *United States v. Rivera*, 273 F.3d 751 (7th Cir. 2001) (same); *United States v. Torres-Alvarez*, 44 Fed. Appx. 818 (9th Cir. 2002) (same); *United States v. Leveque*, 283 F.3d 1098 (9th Cir. 2002) (same); *United States v. Guzman*, 33 Fed. Appx. 275 (9th Cir. 2002) (same); *United States v. Ali*, 266 F.3d 1242 (9th Cir. 2001) (same). Many of those 14 unfortunate people served months or even years in prison before having their convictions reversed. Necessarily, in each of those cases, a district court judge had erred under Rule 29 in *failing* to enter a judgment of acquittal.

Every error, regardless of whether made by a judge or a jury, has the potential to undermine public confidence in the ability of our system to administer justice. A few judges may err in granting pre-verdict Rule 29 acquittals, just as some err in entering a conviction on legally insufficient evidence. But to exalt the government's ability to "correct" a district court's judgment on appeal over an individual's right to protection from double jeopardy is to turn our backs on a fundamental principle of American jurisprudence:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal, and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may well be found guilty. . . . Thus it is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous.

Green, 355 U.S. at 187-88.

The Department's position that it must have a vehicle to appeal "erroneous" Rule 29 acquittals reflects a rejection of the principle that "it is far worse to convict an innocent man than to let a guilty man go free." *See In re Winship*, 397 U.S. at 202 (Harlan, J., concurring)); *see also Coffin v. United States*, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."). The preference for freeing the guilty over imprisoning the innocent has ancient roots that reach back through the common law to the Roman Empire. *See* Blackstone, *Commentaries*, Bk. IV 352 ("[F]or the law holds, that it is better that ten guilty persons escape than that one innocent suffers."); M. Tullius Cicero, *Pro Sextio Roscio Amerino* (80 B.C.) ("Utilis est autem absolvi innocentem quam nocentum causam non dicere" -- "It is more important that the innocent is acquitted than that the guilty is not brought to justice.").[3] It is enshrined in our system through numerous protections that depend upon a presumption of innocence and require convictions to be obtained in a fair manner, through the introduction of constitutionally obtained, legally sufficient evidence. *See, e.g., In re Winship*, 397 U.S. 358 (1970); *Benton v. Maryland*, 395 U.S. 784 (1969); *Miranda v. Arizona*, 384 U.S. 486 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961). And while those protections, like many others, may allow a few "guilty" to go free, that is precisely the kind of trade-off that our system was designed to tolerate. The Department's relentless efforts to revise Rule 29 reflect a rejection of this fundamental concept in favor of one that equates maximizing convictions with doing justice. Indeed, the Department's arguments to this Committee have been animated by the principle that it is better that double jeopardy protections be lost than that one guilty defendant go free. That notion is abhorrent to our concepts of justice and ordered liberty. As such, the proposed Rule ought to be withdrawn.

E. Conclusion

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[3] Available in *Pro Quinctio. Pro Roscio Amerino. Pro Roscio Comoedo*, The Three Speeches on the Agrarian Law Against Rullus, B. Orations (Translator J. H. Freese) (Harvard 1930).

Curtailing the power of the judiciary to enforce the protections of the Due Process and Double Jeopardy Clauses is unwarranted by any credible evidence, increases the risk that innocent people will be erroneously convicted, and threatens the very foundations of our system of justice. We urge the Committee to withdraw proposed Rule 29, particularly where, as here, the Department's complaint is not with the Rule itself, but with the constitutional rights it facilitates.

II. PROPOSED AMENDMENTS RELATING TO CRIME VICTIMS

Congress enacted the Crime Victims' Rights Act ("CVRA" or "the Act") when sponsors of a crime victims' constitutional amendment failed to secure sufficient support for its passage following years of debate. The Act sets forth eight substantive rights, 18 U.S.C. § 3771(a), which already existed in some form, *see* 42 U.S.C. § 10606 (repealed) & § 10606, Fed. R. Crim. P. 32(i)(4)(B), but were neither limited nor enforceable. All of the listed rights are subject to explicit or implicit "reasonableness" limitations. *See* 18 U.S.C. § 3771(a), (b)(1), (d)(2). District courts shall "ensure" that these rights are "afforded" in public court proceedings involving an offense against a crime victim. *See* 18 U.S.C. 3771(b)(1). Victims may seek mandamus from the court of appeals when they believe their rights were denied, under certain conditions and subject to limitations that are stated or implied in the statute, *see* 18 U.S.C. § (d)(3), (5), or that must be presumed. *See Clark v. Martinez*, 543 U.S. 371, 381 (2005) (presuming that Congress did not intend a meaning that raises serious constitutional doubts); *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (assuming that Congress legislates in light of constitutional limitations).

As demonstrated in recent cases, judges attempting to apply the CVRA have had a difficult time of it. *See* Parts B and E, *infra*. As written, many of the statute's terms are poorly articulated, vague, poorly coordinated, and seemingly impractical or incapable of application in the context of a fair and orderly criminal justice process.[4] Adding to the courts' difficulties, victim advocacy groups, whose mission is to expand victim rights,[5] have pressed aggressive interpretations of the Act in district court proceedings and in mandamus actions. A number of these interpretations are so extreme as to be unconstitutional.

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[4] The legislative history of the Act is unhelpful, consisting only of the floor statements of the two disappointed sponsors of the failed constitutional amendment, a notoriously unreliable source of congressional intent, *see Regan v. Wald*, 468 U.S. 222, 237 (1984), *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 390-91 (2000) (concurring), and an unembellished description in a House Judiciary Committee Report. "Nowhere in the legislative history . . . does one find the debate or exchange of ideas that more frequently accompanies the art of law-crafting." *United States v. Marcello*, 370 F.Supp.2d 745, 749 (N.D. Ill. 2005).

[5] The National Crime Victim Law Institute's State/Federal Clinics and Demonstration Project operates clinics in several states, including the Crime Victim Legal Assistance Project, a federal clinic at Arizona State University School of Law. The mission of these organizations is to litigate and expand victims' rights. *See* National Crime Victim Law Institute, State/Federal Clinics and Demonstration Project, available at http://law.lclark.edu/org/ncvli/demoproject.html.

Congress did not pass a constitutional amendment in response to the lobbying of victims' rights advocates, but rather a statute, and it is well to remember why.[6] The fundamental objection to creating constitutional rights for victims was that it would install the private prosecution model the Framers rejected, unbalance the adversary criminal justice system the Framers created, and threaten the Bill of Rights.[7] Opposition was also based on the recognition that if victims were allowed to drive the criminal process, their desire for vengeance and lack of expertise would lead to unfair and unreliable results.[8] Family members of victims candidly and poignantly told Congress of being in an emotional state in which they sought vengeance, not justice, and of their gratitude that the legal system stood as a buffer between them and the accused.[9] Prosecutors and former prosecutors testified that giving victims too much say over release, plea and sentencing would undermine law enforcement strategy, resulting in fewer convictions, and in some cases threatening witness safety.[10]

Thus, the constitutional amendment failed, and a statute was passed. Defendants continue to have constitutional rights, victims now have statutory rights, the constitutional rights of defendants must always trump the statutory rights of victims, and the adversary criminal justice system remains intact.

The task for this Committee is to "prescribe general rules of practice and procedure" in the United States district courts, which "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(a), (b). It would be contrary to the

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[6] The proposed constitutional amendment provided that "victims' rights 'shall not be *denied* . . . and may be *restricted* only as provided in this article," but the "CVRA strikes a different balance, and it is fair to assume that it does so to accommodate the concerns of such legislators [who opposed the CVRA] . . . . In particular, it lacks the language that prohibits all exceptions and most restrictions on victims' rights, and it includes in several places the term 'reasonable' as a limitation on those rights." *United States v. Turner*, 367 F.Supp.2d 319, 333 n.13 (E.D.N.Y. 2005) (emphasis in original).

[7] *See* S. Rep. No. 108-191 at 68-69 (minority views) (The "colonies shifted to a system of public prosecutions because they viewed the system of private prosecutions as 'inefficient, elitist, and sometimes vindictive.' . . . [T]he Framers believed victims and defendants alike were best protected by the system of public prosecutions that was then, and remains, the American standard for achieving justice."); *id.* at 70 ("[W]e have historically and proudly eschewed private criminal prosecutions based on our common sense of democracy."); *id.* at 56 ("Never before in the history of the Republic have we passed a constitutional amendment to guarantee rights to a politically popular group of citizens at the expense of a powerless minority," or "to guarantee rights that intrude so technically into such a wide area of law, and with such serious implications for the Bill of Rights.").

[8] *Id.* at 73, 85-86.

[9] *Id.* at 85.

[10] *Id.* at 74-76, 103.

Rules Enabling Act, and also unconstitutional, for any rule to implement any victims' statutory right in a manner that would abridge defendants' constitutional rights. No rule should create or invite a conflict between a statutory right of a victim and a constitutional or statutory right of a defendant or any other person or entity. Where a procedural provision found in the CVRA is unworkable as written, the Committee may supersede it. *Id.*, § 2072(b).

A. Rule 1(b)(11)

The first sentence of proposed Rule 1(b)(11) states: "'Victim' means a 'crime victim' as defined in 18 U.S.C. § 3771(e)." That statutory definition states: "For the purposes of this chapter, 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. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative."

Adopting the statutory definition verbatim is problematic for several reasons. The judge's duty under the CVRA is spelled out in § 3771(b)(1): "In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a)." The Rules of Criminal Procedure are properly directed only to procedures to guide judges in carrying out that duty in criminal proceedings in the United States district courts. A "court proceeding involving an offense against a crime victim" presupposes that an offense against a crime victim has been charged. However, the first sentence of § 3771(e) does not explicitly state that the offense in question has been charged, or that it has been charged against a defendant who is being prosecuted in a United States district court. Further, not all offenses "in the District of Columbia," even if charged, are prosecuted in a United States district court. If the first sentence of § 3771(e) is incorporated in Rule 1, putative victims or enterprising victim advocates may invoke the rules on the theory that a person is a victim of a crime that has not been charged or is not being prosecuted against a defendant in a United States district court, as some have already attempted to do.[11] This is contrary to § 3771(b)(1), is not what Congress intended,[12] and would raise a serious constitutional

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[11] *See In re Searcy*, Slip Op., 2006 WL 2871205 (4th Cir. Oct. 6, 2006) (rejecting claim by civil RICO plaintiff that he was entitled to restitution under the CVRA); *In re W.R. Huff Asset Management Co., LLC*, 409 F.3d 555, 564 (2d Cir. 2005) (rejecting petition for mandamus seeking to vacate settlement agreement approved by district court among the United States and convicted, acquitted and uncharged members of Rigas family, and stating that "the CVRA does not grant victims any rights [to restitution] against individuals who have not been convicted of a crime.").

[12] Even when considering a constitutional amendment, the Senate Judiciary Committee "anticipate[d] that courts, in interpreting the amendment, will . . . focus[] on the criminal charges that have been filed in court." *See* S. Rep. No. 108-191 at 30 (Nov. 7, 2003). Further, Congress

problem as well. *Cf. Hughey v. United States*, 495 U.S. 411, 421 n.5 (1990) ("To order a defendant to make restitution to a victim of an offense for which the defendant was not convicted would be to deprive the defendant of due process of law.").

The second sentence of § 3771(e) should not be incorporated verbatim because it is wrong as a practical and legal matter. A judge in a criminal case cannot decide whom to name or not name as a guardian of a victim or a representative of a victim's estate. Who may or may not assert rights on behalf of the victim is better placed in Rule 60(b) under "Who May Assert Rights," as in our proposal below. *See* Part F(2), *infra*.

The rule should also clarify the particular Rules of Criminal Procedure in which the definition applies to avoid unintended consequences. For example, the statutory definition, which refers to "persons," would not apply to organizational victims that are the subject of Rule 12.4(a)(2).

We agree with the National Association of Criminal Defense Lawyers (NACDL) that a procedure must be added to the rules for a factfinding hearing to determine whether a person claiming to be, or claimed by the government to be, a "victim" entitled to assert rights under 18 U.S.C. § 3771(a), is in fact such a "victim." Treating anyone who claims to be, or is claimed to be, such a "victim" would unnecessarily disrupt the criminal proceedings, undermine the defendant's rights, and disregard the presumption of innocence. *See United States v. Turner*, 367 F.Supp.2d 319, 325-26 (E.D.N.Y. 2005) ("I cannot ignore the possibility that by requiring me to afford rights to 'crime victims' in this case, the CVRA may impermissibly infringe upon the presumption of Turner's innocence."); *cf. United States v. Marcello*, 370 F.Supp.2d 745, 747 n.5 (N.D. Ill. 2005) ("For me to consider the likelihood of guilt based solely on a witness's faith in the prosecution [and to permit the victim to be heard on that basis] would violate the law that an indictment is merely an accusation."). This was one of the very objections to a crime victims' constitutional amendment:

> Not all who claim to be victims are indeed victims and, more significantly, not all those charged are the actual perpetrators of the injuries that victims have suffered. By naming and protecting the victim as such before the accused's guilt or the facts have been determined, the proposed amendment would undercut one of the most basic components of a fair trial, the presumption of innocence.

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passed the CVRA after the Supreme Court had interpreted language in the Victim Witness Protection Act (VWPA), 18 U.S.C. § 3663(a)(2), from which the definition in 18 U.S.C. § 3771(e) is partially drawn, as authorizing restitution only for "loss caused by the conduct underlying the offense of conviction." *Hughey v. United States*, 495 U.S. 411, 420 (1990). When Congress incorporates a term into a statute that the Supreme Court has previously interpreted, Congress is assumed to have incorporated that interpretation. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990).

S. Rep. No. 108-191 at 83 (Nov. 7, 2003) (minority views). Further, a person the government has identified as a victim may wish to dispute that status; indeed, we are aware of one case in which a lawyer the government identified as a "victim" of a former client's misbehavior did not wish to be identified or treated as such. We therefore adopt NACDL's language in our proposed Rule 60(b)(4). *See* Part F(2), *infra*. Rule 1(b)(11) should make reference to that provision.

The second sentence of proposed Rule 1(b)(11), stating that "[a] person accused of an offense is not a victim of that offense," should be deleted. First, it is simply untrue that no person accused of an offense is a victim of that offense. The very question at trial is whether *anyone* was a victim and, if so, in certain cases, *who* was the victim. In a self defense case, who the victim was is the difference between guilt and innocence. Victim provocation, coercion and duress are sufficiently common that they are explicit grounds for departure under the sentencing guidelines. U.S.S.G. §§ 5K2.10, 5K2.12. Deeming by rule that every accused is "not a victim of that offense" would conflict with the presumption of innocence in some cases, and with mitigating sentencing considerations in others. Again, this was one of the objections to a crime victims' constitutional amendment:

> Consider a simple assault case in which the accused claims that she was acting in self-defense. Absent some sort of corroborating evidence, the jury's verdict will likely turn on who it believes, the accused or her accuser. The amendment treats the accuser as a "victim," granting him broad participatory and other rights, before a criminal or even a crime has been established.

S. Rep. No. 108-191 at 83-84 (Nov. 7, 2003) (minority views).

Second, deeming the accused not to be a victim in the definitional section of the rules is an awkward and unnecessary way to implement the provision that "[a] person accused of the crime may not obtain any form of relief under this chapter." 18 U.S.C. § 3771(d)(1). All this provision means is that the defendant in the case is not allowed to assert any of the victim's statutory rights as a basis for relief on his or her own behalf. *See* 150 Cong. Rec. S10910-01, S10912 (Oct. 9, 2004). A rule should simply say so. It should be placed in "Who May Assert Rights" in Rule 60(b)(4), as in our proposal below. *See* Part F(2), *infra*.

For these reasons, Rule 1(b)(11) should be modified as follows:

> (11) "Victim" as that term is used in Rules 32 and 60[13] means a person directly and proximately harmed as a result of the commission of a Federal offense, or as a result of the commission of an offense in the District of Columbia, that has been charged and is being prosecuted against a

[13] We do not include Rules 12.1, 17 or 18 because, for the reasons stated herein, we believe that the proposed amendments to those rules should be withdrawn.

defendant in the United States District Court. The procedure for determining any dispute as to whether a person is a "victim" is set forth in Rule 60(b)(4)(A).[14]

B. Rule 12.1

The Committee states that it is interested in receiving comments on whether this Rule should provide that disclosure of the victim's address and telephone number will not be made unless the defendant establishes a need for this information (as the proposed rule is written and what we will call Option 1), or should assume that a defendant will need this information to respond to the government's challenge to his alibi, and that disclosure should be limited only when a special need for protection of the victim requires the court to fashion an alternative procedure to allow the preparation of the defense (as the existing Rule 12.1 provides and what we will call Option 2).

We do not believe that Option 1 is supportable under the Constitution, the CVRA or 28 U.S.C. § 2072. The requirement that the addresses and telephone numbers of the defendant's alibi witnesses and of the government's rebuttal witnesses be disclosed in addition to their names was added to Rule 12.1 in recognition of the need for such information to "facilitate locating and interviewing those witnesses." *See* Note to 2002 Amendments. The current rule assumes that the defendant needs to locate, interview and investigate a witness the government intends to rely on to rebut the defendant's alibi defense, consistent with common sense and the defendant's rights to cross-examine the witnesses against him and prepare for trial.

In *Smith v. Illinois*, 390 U.S. 129 (1968), the Supreme Court reversed a conviction where the trial court prohibited questions of a government witness regarding his real name and address, stating:

> When the credibility of a witness is in issue, the very starting point in exposing falsehood and bringing out the truth through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination *and out-of-court investigation*. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself.

Id. at 131 (internal quotation marks and citations omitted) (emphasis supplied). In *Alford v. United States*, 282 U.S. 687 (1931), the Court reversed a conviction where the court sustained objection to elicitation of the witness's address: "The question, 'Where do you live?' was not only an appropriate preliminary to the cross-examination of the witness, but on its face without any declaration of purpose as was made by [defense] counsel here,

[14] We cite to Rule 60(b)(4)(A) because "Who May Assert Rights" appears in that subdivision of our proposed Rule 60.

was an essential step in identifying the witness with his environment, to which cross-examination may always be directed." *Id.* at 693.

In *Smith* and *Alford*, as in cases involving an alibi defense, the witness claimed to be a percipient witness to a key conversation or transaction with the defendant. Both cases made clear that to require the defendant to establish that elicitation of a witness's identity and address would necessarily lead to discrediting the witness is itself "to deny a substantial right and to withdraw one of the safeguards essential to a fair trial." *Id.* at 692; *Smith*, 390 U.S. at 132 (same). Disclosure of a key witness's name and address before trial is often even more important than eliciting it in open court because it assures that the defendant can investigate the witness's background to discover avenues for impeachment. *Martin v. Tate*, 96 F.3d 1448 (Table), 1996 WL 506503 *6 (6th Cir. 1996).

No witness or class of witnesses, particularly percipient witnesses and including confidential informants, *United States v. Roviaro*, 353 U.S. 53, 62-65 (1957), is entitled to a presumption that their identity or whereabouts may be withheld at the expense of the defendant's rights to cross-examine, to call witnesses in his own behalf, and to effectively investigate. Indeed, the law presumes the opposite. *See United States v. Navarro*, 737 F.2d 625, 633 (7th Cir. 1984) ("*Alford* and *Smith* thus make it clear that a defendant is presumptively entitled to cross-examine a key government witness as to his address and place of employment."). To obtain any special protection, the government or the witness must justify it with a specific showing that disclosure would endanger the witness's safety, or would *merely* harass, annoy, or humiliate the witness. *See Smith*, 390 U.S. at 133-34 (White, J., Marshall, J., concurring); *Alford*, 282 U.S. at 694; *see also, e.g., United States v. Hernandez*, 608 F.2d 741, 745 (9th Cir. 1974); *United States v. Dickens*, 417 F.2d 958, 961-62 (8th Cir. 1969); *United States v. Palermo*, 410 F.2d 468, 472 (7th Cir. 1969); *United States v. Varelli*, 407 F.2d 735, 750-51 (7th Cir. 1969); *United States v. Barajas*, 2006 WL 35529 **7-9 (E.D. Cal. 2006); *United States v. Fenech*, 943 F. Supp. 480, 488-89 (E.D. Pa. 1996).

Option 1 would reverse these traditional presumptions and upset the constitutional balance by assuming that all victim witnesses whom the government claims would rebut a defendant's alibi defense are in need of protection against the accused (an assumption that is unsupported), and placing on the defendant the burden to show a need to locate and interview such witnesses (which should go without saying, as under the current rule).

Under Option 1, as now, the government, without any showing of need, could force the defendant to disclose the names, addresses and telephone numbers of his alibi witnesses by making the request in Rule 12.1(a), on pain of having any undisclosed alibi witness excluded. The defendant, however, would be denied the address and telephone number of any witness the government intended to rely on to rebut his alibi defense if such witness was an alleged victim, unless the defendant established a need for the information. Option 1 would therefore violate the Due Process Clause, which "speak[s] to the balance of forces between the accused and the accuser," and prohibits notice-of-

alibi rules that are not reciprocal.[15] *See Wardius v. Oregon*, 412 U.S. 470, 475 (1973). "It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State." *Id.* at 476.

The Committee Note states that the proposed amendment implements a victim's rights to be reasonably protected from the accused, and to be treated with respect for dignity and privacy. *See* 18 U.S.C. § 3771(a)(1), (a)(8). Option 1, we believe, misperceives how these seemingly free floating rights were intended to be implemented, or could be implemented consistent with the reasonable presumption that Congress did not intend an interpretation which raises serious constitutional doubts. *Clark v. Martinez*, 543 U.S. 371, 381 (2005). Section (b)(1) of § 3771 states that, in any court proceeding involving an offense against a crime victim, the court shall assure that the rights described in subsection (a) are afforded. Reasonably (and constitutionally) applied to the rights set forth in subsections (a)(1) and (8), this means that victims (or the government on their behalf) may claim that a victim's right to dignity or privacy or to be reasonably protected is being, or would be, violated, under the particular facts and circumstances. Only a claim within the core of what would be understood, within the context of an adversary process, by "respect for dignity and privacy" or "reasonably protected from the accused" could survive a constitutional vagueness challenge to the statute. To create a presumption by rule that this is always the case, relieving victims (alone of all witnesses) of any obligation to establish that it *is* the case, and withholding the information necessary to locate and interview them unless the defendant can show a special need for the information, is not a reasonable interpretation of the CVRA and would abridge defendants' constitutional rights.

Further, this seems a dangerous and slippery slope. It is inconsistent with the very underpinnings of the criminal justice system to send a message by rule that the dignity and privacy of any class of witnesses is legitimately threatened by being a witness. It is not reasonable to protect victims from the accused through a rule that begins with a factually baseless presumption that victims are always in need of protection from the accused. If investigation of a key government witness may be denied or restricted on these amorphous and free-floating bases, it suggests that cross-examination itself, or the

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[15] Nor is Option 1 reciprocal when the defendant *does* establish a need for a victim's address and telephone number. In that event, the court could "fashion a reasonable procedure that allows the preparation of the defense and also protects the victim's interests." While the government's investigation would be unfettered, some restriction, requested by the victim, the government or likely both, would necessarily be imposed on the defendant's investigation. This restriction may be rather mild, such as requiring the defendant not to attend the interview (defendants rarely if ever do), or quite intrusive and unconstitutional (witnesses working closely with the government often claim that they wish to be interviewed only in the presence of the government attorney or agent). In any event, some restriction would be imposed on the defense that is not reciprocally imposed on the government.

exercise of any other right of the defendant that may cause a victim discomfort, may be restricted or prohibited.

Lest the Committee doubt what mischief such a broad interpretation would encourage, victim advocates recently filed a mandamus action arguing that the victim had a right to obtain the entire presentence report pursuant to the right to be "treated with fairness" under 18 U.S.C. § 3771(a)(8), which was necessary, they said, to effectuate the victim's right to be "reasonably heard" under 18 U.S.C. § 3771(a)(4), which they claimed was a right to litigate the sentence as the equivalent of a party.[16] Although the Ninth Circuit rejected the victim's petition, saying that it found no support for the victim's argument in the statute, it did not mention what portions of the statute the petition had relied on, did not explicate the scope of any portion of the statute; in short, said nothing to discourage the next claim to similar effect. *In re Kenna*, 453 F.3d 1136 (9th Cir. 2006) (*Kenna II*). As this case demonstrates, there is no limit to the extravagant claims that can and will be made. The Committee should not create any rule based on a similarly open-ended reading of any provision of § 3771(a).

Option 2 is already available under existing Rule 12.1, which assumes the defendant needs the information, and allows the court under subsection (d) to make an exception to any requirement under subsections (a)-(c) for good cause shown. In *United States v. Wills*, 88 F.3d 704, 710 (9th Cir. 1996), the Ninth Circuit upheld the district's decision to allow the government's motion under Rule 12.1(d) to delay disclosure based on witness safety and to delay the witness's testimony to permit a reasonable time for the defense to investigate. Further, the government may obtain a temporary restraining order prohibiting harassment of a victim or any witness in a Federal criminal case. *See* 18 U.S.C. § 1514.

If any revision is made to Rule 12.1, it should leave subsections (a) through (c) intact, and revise subsection (d) as follows:

(d) Exceptions.

(1) In General. For good cause, the court may grant an exception to any requirement of Rule 12.1(a)-(c).

(2) Victim's Address and Telephone Number. If on motion in accordance with Rule 60(b)(1)-(4), the court finds that disclosure to the defendant of the address or telephone number of a victim whom the government intends to rely on as a rebuttal witness to the defendant's alibi defense would violate the victim's right to be reasonably protected from the accused, the court shall

[16] *See In re Kenna*, No. 06-73352 (9th Cir.), Petition for Writ of Mandamus Pursuant to 18 U.S.C. § 3771(d)(3), July 30, 2006 (on file with author). Speaking of fairness, the victim attempted to proceed in the district court without notice to the parties, a tactic the district court judge did not allow, but the Ninth Circuit failed to treat the defendant as a respondent to the mandamus action as required by Fed. R. App. P. 21 and the Due Process Clause. *See* Part F, *infra*.

fashion a reasonable alternative procedure that assures preparation of the defense and also assures protection of the victim.

The Committee Note should state that this rule recognizes that the defendant needs to respond to the government's challenge to his alibi defense, and that the "reasonable alternative procedure" must provide the defendant with the information necessary to prepare a defense and in sufficient time to investigate and use it. The Note should suggest options for a reasonable alternative procedure: that the court might order that the defendant not attend the interview, or that the victim's address and telephone number be disclosed to the defendant's attorney (and any defense investigator) under a protective order prohibiting disclosure to the defendant; that if delayed disclosure is allowed, the court must grant sufficient additional time to investigate; and that the court may authorize the defendant and his counsel to meet with the victim at a place other than the victim's address. The Note should clearly state that the court may not require or authorize a victim to be interviewed in the government's presence, as this would expose defense strategy, interfere with preparation of the defense, and violate the defendant's rights to effective assistance of counsel and due process of law.[17]

C. Rule 17

Like proposed Rule 12.1 (Option 1), the proposed revision of Rule 17 does not implement any specific right under 18 U.S.C. § 3771(a), assumes that victims' "privacy" and "dignity" are threatened by ordinary procedures designed to facilitate adversarial testing, and would result in wasteful and disruptive mandamus actions, or worse, pressure judges into granting motions to quash that they would not grant absent the threat of mandamus. The proposed rule would undermine or prevent effective cross-examination, would permit premature disclosure of defense plans and strategy to the government, and would otherwise create an unfair trial advantage for the government by exempting grand jury subpoenas, with which the government obtains the vast majority of its trial evidence, from its terms.

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[17] *See Weatherford v. Bursey*, 429 U.S. 554, 558 (1977) (finding no violation of the Sixth Amendment where there was "no communication of defense strategy to the prosecution"); *Williams v. Woodford*, 384 F.3d 567, 585 (9th Cir. 2004) ("Substantial prejudice results from the introduction of evidence gained through the interference against the defendant at trial, from the prosecution's use of confidential information pertaining to defense plans and strategy, and from other actions designed to give the prosecution an unfair advantage at trial."); *Shillinger v. Haworth*, 70 F.3d 1132 (10th Cir. 1995) (Sixth Amendment violated when sheriff in whose presence defense attorney was forced to prepare client for trial passed attorney work product on to prosecutor); *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947) ("[I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he . . . prepare his legal theories and plan his strategy without undue and needless interference."); *Ake v. Oklahoma*, 470 U.S. 68, 82-83 (1985) (indigent defendant has a right to make an *ex parte* showing of relevance of expert testimony).

Defendants have a right to effectively prepare for trial, which includes a right against disclosure of defense strategy to the government. *See* footnote 17, *supra*. The proposed rule provides that a subpoena requiring the production of personal or confidential information about a victim may be granted *ex parte*, but that the court may require that notice be given to the victim. It would be naïve to suppose that victims in the vast majority of cases would not disclose to the government the documents and details of a proceeding on a motion to quash a defense subpoena. This is even more likely under the CVRA, which provides victims with a reasonable right to confer with the government. 18 U.S.C. § 3771(a)(5). The court could not direct the victim not to disclose defense strategy to the government without inviting a petition for writ of mandamus claiming that the right to confer with the prosecutor was denied. Thus, the proposed rule would set up a direct conflict between the defendant's right to shield defense strategy from the government and the victim's statutory right to confer with the government.

Further, if notice were given to the victim, it would be based on a finding, according to the Note, that the victim's right to be treated "with respect for the victim's dignity and privacy" were implicated. An *ex parte* hearing at that point would conflict with the victim's procedural right to have the government assert the victim's rights if the victim so desired. 18 U.S.C. § 3771(d)(1). The rule could conceivably supersede that procedural provision, by providing that the government may not assert the victim's rights in a proceeding on a motion to quash or modify a subpoena under Rule 17. However, if the court denied the victim's motion to quash, the victim, spurred on by the Rule's premise that victims' "dignity" and "privacy" are legitimately threatened by a subpoena for information about them, could then file a mandamus action, which in turn would expose defense strategy to the government. Even more dangerous, because it would be hidden, courts would often feel pressured by the threat of mandamus to grant a victim's motion to quash when they would otherwise give precedence to the defendant's right to a fair and reliable trial.

The proposed rule would also violate the Sixth Amendment guarantee of an opportunity to effectively confront and cross-examine adverse witnesses. In order to effectively confront and cross-examine a witness, either party may delay use and disclosure of impeachment information until after the witness has testified on direct, both to prevent tailoring of the testimony in expectation of the cross-examination and to use the element of surprise to expose the witness' untruthfulness to the jury. *See, e.g., In re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d 887, 893 (D.C. Cir. 1999). This concept is explicit in Fed. R. Evid. 613(a) (cross-examiner need not show witness document from which s/he is cross-examining, abrogating "Rule in Queen Caroline's Case"). The Confrontation Clause permits impeachment "in every mode authorized by the established rules governing the trial or conduct of criminal cases." *Kirby v United States*, 174 US 47, 55 (1899). Procedures that require the defendant to disclose cross-examination to the witness in advance violate the defendant's right to confront the witnesses against him.[18] *See, e.g., United States v. Cerro*, 775 F.2d 908, 915 (7th Cir. 1985); *United States v. Bohle*, 445 F.2d 54, 75 (7th Cir. 1971).

[18] In *Cerro*, the Seventh Circuit held that a pretrial conference under Rule 17.1 may not be used to bypass the limitations of Rule 16, because to do so would require disclosure of impeachment

Finally, the proposed rule would create an unfair advantage for the government by exempting grand jury subpoenas. The government gets the vast majority of its trial evidence through grand jury subpoenas. Defendants must rely on trial subpoenas. Thus, while the rule on its face applies to subpoenas sought by either the defense or the government, the fact is that it would always apply to defendants and rarely if ever to the government. This would be unfair and unbalanced.

For these reasons, proposed Rule 17 should be withdrawn.

D. Rule 18

The proposed revision of Rule 18 would require the district court to set the place of trial within the district with due regard for the convenience of any victim. The Committee Note says that this implements crime victims' right to attend proceedings under 18 U.S.C. § 3771(b), but it seems clear that this interpretation of 18 U.S.C. § 3771(b) is wrong. Subsection (b)(1) of § 3771 provides that "[b]efore making a determination described in subsection (a)(3)" – that is, to exclude the victim because there is clear and convincing evidence that his or her testimony would be materially altered by hearing other testimony -- the court must consider reasonable alternatives to exclusion and make every effort to permit the fullest attendance possible. In short, subsection (b)(1) requires the court to consider alternatives to complete exclusion before ruling that complete exclusion is proper. The place of trial within the district has nothing to do with subsection (b)(1).

What this revision would do (as the second sentence of the Note seems to acknowledge) is create a new substantive right for victims who are not testifying, contrary to section 2072(b). These victim spectators could use such a rule to enforce their "right" to decide where the trial would be held, and to do so (unlike the defendant and actual witnesses) under threat of mandamus. A victim could thereby impose hardship and expense on the defendant and actual witnesses in the case, as well as the judge and prosecutor.

This does not seem sensible, nor does the statute require or even imply it. For these reasons, the proposed revision of Rule 18 should be withdrawn.

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evidence and thus impair the right to effective cross-examination. *See* 775 F.2d at 915. In *Bohle*, the court said, "we fail to see what interest is to be served by making opposing counsel and the witness privy to the specific impeaching information. . . . In the instant case, for example, the witness was permitted time by the voir dire procedure to consider her answer and to eliminate any reaction of surprise to the alleged impeaching material out of the presence of the jury. Such a practice would appear to have a strong tendency to undermine the function of confronting the witness with the question in the first place. The loss to the jury of the witness's initial and immediate response is accompanied by the loss of one potentially significant aspect of the credibility determination." *See* 445 F.2d at 75.

E. Rule 32

The proposed revision of **subdivision (c)(1)(B)** would require the Probation Officer to conduct an investigation and submit a report containing sufficient information for the court to order restitution if "the law permits restitution," rather than only if "the law requires restitution," as now. This would prevent a court from sentencing without a presentence report, Fed. R. Crim. P. 32(c)(1)(A)(ii), in a great many cases, *see* 18 U.S.C. § 3663, and thus unnecessarily delay sentencing and waste resources in those cases.

This would enlarge and modify, rather than implement, subsection (a)(6) of 18 U.S.C. § 3771, which provides a "right to full and timely restitution as provided in law." In enacting the CVRA, Congress intended no change to existing law governing restitution. *See* H.R. Rep. No. 108-711, 2005 U.S.C.C.A.N. 2274, 2283 (Sept. 30, 2004) ("it makes no changes in the law with respect to victims' ability to get restitution").

The proposed revision of **subdivision (d)(2)(B)** would delete the requirement that information regarding the financial, social, psychological, and medical impact on a victim be "verified" and "stated in a nonargumentative style." Nothing in the CVRA requires or suggests this change. Indeed, the note does not identify any provision of the statute upon which it is based.

These requirements were added to Rule 32 in 1984 under the Sentencing Reform Act. With the advent of determinate sentencing, the reliability of information included in the presentence report became critically important. *See* S. Rep. No. 98-225, 98th Cong., 1st Sess. 59, 74 (1984). According to a Probation Monograph issued at the time, victim impact letters, often urging a harsh sentence, "would rarely have evidentiary value," their content was to be "evaluated and investigated," and only "the information the officer believes to be reliable is included in the report." *See* The Presentence Investigation Report for Defendants Sentenced Under the Sentencing Reform Act of 1984 at I5-I6, Publication 107, Probation and Pretrial Services Division, Administrative Office of the United States Courts, September 1987, revised March 1992. Victim impact information, provided by interested laypersons who are not officers of the court, is uniquely prone to be unreliable. Indeed, it was in part because victim-initiated prosecutions were vindictive and used to exert financial pressure that the Framers adopted a public prosecution model.[19]

The proposed revision would send the message to Probation Officers that victim impact information should *not* be verified, and *should* be stated in an argumentative style. This is contrary to the requirement of the Due Process Clause that defendants be sentenced on the basis of "accurate" information, not "misinformation," and not facts that are "materially untrue." *See Townsend v. Burke*, 334 U.S. 736, 741 (1948); *United States*

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[19] *See* S. Rep. No. 108-191 at 68 (Nov. 7, 2003) (minority views), citing Abraham S. Goldstein, Prosecution: History of the Public Prosecutor, in 3 Encyclopedia of Crime and Justice 1286, 1286-1287 (S. Kadish ed. 1983).

v. Tucker, 404 U.S. 443, 447 (1972). Further, it is inconsistent with statutory procedures for the collection and verification of information for a restitution order. 18 U.S.C. § 3664(a), (b), (d)(2), (4), (e).

It is not appropriate for the rules, however inadvertently, to invite the inclusion of unverified and biased information in presentence reports. The most common complaints of Defenders and CJA counsel about the sentencing process, and increasingly so, are that Probation Officers are not neutral but adversarial, and that presentence reports routinely contain unverified, unreliable, and exaggerated information. Indeed, the Supreme Court and lower court judges have recently recognized that the inclusion of unreliable information in presentence reports is a widespread and serious problem. *See United States v. Booker*, 543 U.S. 220, 304 (2005) (referring to "hearsay-riddled presentence reports") (Scalia, J., dissenting in part); *Blakely v. Washington*, 542 U.S. 296, 311-12 (2004) (describing unfairness of sentencing based on "facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong"); *United States v. Kandirakis*, 441 F. Supp. 2d 282, 303 (D. Mass. 2006) ("The system relies on 'findings' that rest on 'a mishmash of data[,] including blatantly self-serving hearsay largely served up by the Department [of Justice].'"). The Sentencing Commission too has recognized that "untrustworthy information" is often used to establish relevant conduct. *See* U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 50 (2004), available at http://www.ussc.gov/15_year/15year.htm. The inclusion in presentence reports of unverified information stated in an argumentative style is particularly untenable because several courts of appeals treat the mere inclusion of hearsay allegations in a presentence report as evidence the court may rely on in sentencing, unless the *defendant* comes forward with evidence to rebut it.[20]

If any change should be made, the requirements of "verified" information "stated in a nonargumentative style" should apply to *all* information in the presentence report. We urge the Committee to add this requirement as subsection (d)(4):

> (4) **Reliable Information.** All information included in the presentence report must be verified and stated in a nonargumentative style.

The proposed revision of **subdivision (i)(4)(B)** replaces the right of a victim of particular crimes to "speak" at sentencing, with the right of a victim of any crime to be "reasonably heard" at sentencing, as in § 3771(a)(4). However, it retains the requirement that the court address any victim at sentencing. This is not required by § 3771(a)(4). For a variety of reasons, it will often be impracticable and disruptive for the court to address

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[20] *See United States v. Caldwell*, 448 F.3d 287, 290-91 (5th Cir. 2006); *United States v. Daniel*, 178 Fed. Appx. 345, 346 (5th Cir. Apr. 25, 2006); *United States v. Bobadilla-Diaz*, 176 Fed. Appx. 858, 859 (9th Cir. 2006); *United States v. Prochner*, 417 F.3d 54, 66 (1st Cir. 2005); *United States v. Hall*, 109 F.3d 1227, 1233 (7th Cir. 1997); *United States v. Terry*, 916 F.2d 157, 160-62 (4th Cir. 1990).

every victim present at a sentencing. Moreover, a requirement that the court "address" any victim at sentencing may imply that a victim always has a right to "speak" orally at sentencing. Congress, however, enacted a right to be "reasonably heard." As explained in the discussion of Rule 60(a)(3) below, *see* Part F(1), *infra*, the right to be "reasonably heard" is not necessarily a right to "speak." Thus, Rule 60(a)(3) should state that courts have discretion to determine the form in which a victim may be "reasonably heard" as appropriate under the circumstances, and Rule 32 should not suggest otherwise.

For these reasons, the title of Rule 32(i)(4) should be changed from "Opportunity to Speak" to "Opportunity to be Heard." In addition, Rule 32(i)(4)(B) should be changed as follows:

> **(B) By a Victim.** A victim's right to be reasonably heard at sentencing is addressed in Rule 60(a)(3).

F. Rule 60

Rule 60 should state general rules of practice and procedure to enforce the rights described in 18 U.S.C. § 3771(a) without enlarging such rights and without abridging the constitutional or statutory rights of defendants or any other person or entity. 28 U.S.C. § 2072(a), (b). The need for a clear and chronological set of rules beyond merely re-stating the loosely worded and poorly coordinated provisions of the CVRA is amply demonstrated by a recent case in the Central District of California which resulted in two published court of appeals decisions interpreting the CVRA. The troubling history of this case is not much in evidence in the court of appeals' opinions. The following account is based on the complete district and appeals court records.

The underlying criminal case, *United States v. Leichner*, No. CR 03-00568-JFW (C.D. Cal.), was a prosecution of a father and son for wire fraud and money laundering in which investors had been defrauded of $94 million, to which each pled guilty. Over sixty victims, including Patrick Kenna, submitted written victim impact statements regarding both defendants, and several, including Kenna, spoke at the father's sentencing hearing about the impact on them of both defendants' conduct.[21] At the son's sentencing hearing three months later, the court, *sua sponte*, spoke at length and with compassion about the harm to investors. Most of the discussion between the court and counsel was about an issue Kenna had raised at the father's sentencing, to wit, why the government had not indicted others and recovered money the father apparently had hidden in spite of the son's extensive cooperation. Kenna then asked to speak, claiming that he wished to tell the court about impacts that had unfolded since the father's sentencing hearing 90 days prior. The court declined to hear Kenna, saying it had re-reviewed all of the written victim impact statements, recalled the oral statements from the father's sentencing hearing, and there was nothing more to say that would have a further impact. The court

[21] *United States v. Moshe Leichner*, No. CR 03-00568-JFW, Transcript of Sentencing Hearing, February 28, 2005 (on file with author).

then imposed sentence,[22] and promptly entered judgment.[23] Not recognizing Kenna's request as a "motion," the court did not hear from the parties and did not determine whether Kenna in fact had anything to add, as he claimed. Nor did the court have notice that Kenna intended to file a petition for writ of mandamus in the court of appeals, or that it had any authority to stay the proceedings.

The Crime Victim Legal Assistance Project then filed a petition for mandamus on behalf of Kenna, with *amicus* support from its umbrella organization the National Crime Victim Law Institute, using it as a test case. Without even a minimally developed district court record, or, as explained below, any briefing by the defendant or the government, a panel of the Ninth Circuit held that the district court committed an error of law in declining to allow Kenna to allocute at the son's sentencing hearing. *Kenna v. United States District Court*, 435 F.3d 1011, 1017 (9th Cir. 2006) (*Kenna I*).

As a remedy, the Crime Victim Legal Assistance Project asked the Ninth Circuit to vacate the sentence and order the district court to resentence the defendant after hearing from "the victims." *Id.* at 1017. Here, the panel ran into or created a number of problems, some quite serious. It correctly recognized that the CVRA requires victims to move to "re-open" a sentence in the district court, not in the court of appeals. *Id.* at 1017, citing 18 U.S.C. § 3771(d)(5). Because it issued its decision six months, rather than 72 hours, after the petition was filed, contrary to 18 U.S.C. § 3771(d)(3), the time for both parties to file a notice of appeal had long since passed without any notice of appeal having been filed, and the judgment had become final. The panel posed this task for the district court, attributing a meaning to the term "re-open" that is neither stated nor implied in the statute as applied to a final judgment and suggesting that the defendant's double jeopardy rights might safely be disregarded: "In ruling on the motion [to re-open], the district court must avoid upsetting constitutionally protected rights, but it must also be cognizant that the only way to give effect to Kenna's right to speak as guaranteed to him by the CVRA is to vacate the sentence and hold a new sentencing hearing." *Id.* at 1017. Compounding the problem, the panel inexplicably failed to treat the defendant as a respondent to the petition for mandamus, issuing orders to respond only to the trial judge (who did respond) and the government (which did not), contrary to Fed. R. App. P. 21.[24] As a result, the court of appeals (like the district court before it) had no briefing by any party to the proceeding, including the defendant whose due process and double jeopardy rights were at stake. The panel merely stated that the defendant "is not a party to this mandamus action," while correctly recognizing that "reopening his sentence in a proceeding where he did not participate may well violate his right to due process." 435

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[22] *United States v. Zvi Leichner*, No. CR 03-00568-JFW, Transcript of Sentencing Hearing, May 23, 2005 (on file with author).

[23] *United States v. Zvi Leichner*, No. CR 03-00568-JFW, Judgment and Commitment, May 25, 2005, available on PACER, Docket No. 145.

[24] *Kenna v. United States District Court*, No. 05-73467 (9th Cir.), Order docketed August 8, 2005, available on PACER and on file with author.

F.3d at 1017. Finally, the opinion concluded by holding that the district court must entertain a motion to re-open by *any* of the victims in the case, and if granted, allow *any* of them to speak at a new sentencing hearing, despite the fact that only Kenna had filed a petition for writ of mandamus, thus, according to 18 U.S.C. § 3771(d)(5), confining any relief to Kenna alone. Judge Friedman (writing dubitante) noted that this was probably wrong. 435 F.3d at 1019.

In sum, *Kenna I* sets dangerous and incorrect precedent, including (1) that a final judgment may be "re-opened" as a result of a successful mandamus action, (2) that Rule 21 and a defendant's due process rights may be ignored in a mandamus action, and (3) that if one victim complies with the requirements of 18 U.S.C. § 3771(d)(5), the district court must entertain a motion to "re-open" by and grant relief to any and all victims.

The district court then granted Kenna's motion to re-open the sentencing hearing. But first, the Crime Victim Legal Assistance Project filed a motion asserting a right to obtain the entire presentence report. It filed this motion *ex parte*, offering no authority or reason why the parties should not be notified or heard.[25] Now fully aware of the stakes and the need for full development of the record after being blindsided in *Kenna I*, the district court rejected the motion without prejudice to serving it on the parties, ordered the government to respond "[i]n light of [its] previous failure to take a written position with respect to Mr. Kenna's appeal to the Ninth Circuit," and also ordered the defendant to respond.[26] In *Kenna I*, the panel had stated its belief that Kenna "does not claim the right to present evidence or testify under oath; he seeks the right of allocution, much like that traditionally guaranteed a criminal defendant before sentence is imposed. . . . [T]he right to present evidence . . . is not at issue here." *Kenna I*, 435 F.3d 1014 n.2. Now, however, the Crime Victim Legal Assistance Project revealed its intention to establish a right to present evidence, not only about the personal impact of the offense on the victim, but about the calculation of the guideline range under the United States Sentencing Guidelines, and a right to litigate the sentence as the equivalent of a party.[27] The defendant, the government, and the Probation Office opposed the motion in writing.[28]

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[25] *United States v. Leichner*, No. CR 03-00568-JFW, Crime Victim's *Ex Parte* Application for Disclosure of Presentence Report, Apr. 25, 2006 (on file with author).

[26] *United States v. Leichner*, No. CR 03-00568-JFW, Minutes of In Chambers Order, April 26, 2006, Docket No. 216, available on PACER and on file with author.

[27] Of note, while some investors lost their life savings, Kenna recovered his entire investment and thus suffered no loss within the meaning of the Federal Sentencing Guidelines. *United States v. Zvi Leichner*, No. CR 03-00568-JFW, Amicus Brief filed by Christopher Lemoine 7-8, April 4, 2006, PACER Docket No. 214 (on file with author).

[28] *United States v. Leichner*, No. CR-00568-JFW, Government's Response to Victim Patrick Kenna's Motion for Disclosure of Presentence Report, May 30, 2006, including Exhibit A, Letter of Supervising U.S. Probation Officer, May 1, 2006; Defendant's Opposition to Motion of W. Patrick Kenna to Disclose PSR, May 25, 2006; Defendant's Response to Victim's Reply, June 15, 2006, PACER Docket Nos. 226, 227, 230 (on file with author).

After a full hearing (at which the Crime Victim Legal Assistance Project rejected the offer of the court and the parties to disclose a portion of the report pertaining only to the impact on Kenna), the district court denied the motion.[29] The Crime Victim Legal Assistance Project filed another petition for writ of mandamus. Though the Ninth Circuit again failed to treat the defendant as a respondent (and actually prohibited him from responding),[30] it did at least have the benefit of a fully developed record below and a brief from the government.[31] This time, the Ninth Circuit rejected Kenna's petition. *In re Kenna*, 453 F.3d 1136 (9th Cir. 2006). But for the participation of the parties in the district court and the government's brief in the court of appeals, the Crime Victim Legal Assistance Project may have succeeded in creating precedent for its preferred private prosecution model, and for disregarding the interests of all concerned in the privacy and confidentiality of the presentence report.

The beleaguered district court judge then held a new sentencing hearing, permitting Kenna and other victims to speak. Kenna offered no information about further impacts that had occurred since the father's sentencing hearing, as he had claimed he would, instead reiterating the same information and complaints. Having received further information from defense counsel and the government regarding the extent, truthfulness and completeness of the defendant's cooperation and restitution, the court seriously considered imposing a lower sentence and expressed increased frustration with the government for failing to make better use of the information the defendant provided, but in the end accepted the government's recommendation and imposed the same sentence.[32] This arguable waste of resources, and serious threat to the defendant's constitutional rights, might have been avoided had procedures designed to ensure a full airing of the facts and law been followed in the district and appeals court proceedings that led to the decision in *Kenna I*.

1. Proposed Rule 60(a)

We agree that proposed **Rule 60(a)(1)**, requiring the government to use its best efforts to give notice of public proceedings involving the crime, is the most practical way to implement the right to notice of public court proceedings involving the crime as set forth in § 3771(a)(2) and (b)(1), in addition to being required by § 3771(c)(1) and pre-existing law.

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[29] *United States v. Leichner*, No. CR 03-00568-JFW, Transcript of Proceedings, June 19, 2006 (on file with author).

[30] *In re Kenna*, No. 06-73352 (9th Cir.), Order docketed July 3, 2006 (on file with author). Yet in *In re Mikhel*, 453 F.3d 1137 (9th Cir. 2006), decided two days later, the Ninth Circuit correctly treated the defendant as a respondent.

[31] *In re Kenna*, No. 06-73352 (9th Cir.), Real Party in Interest's Response to Victim W. Patrick Kenna's Petition for Writ of Mandamus, July 3, 2006 (on file with author).

[32] *United States v. Zvi Leichner*, No. CR 03-00568-JFW, Transcript of Sentencing Hearing 32-96, July 17, 2006 (on file with author).

Proposed **Rule 60(a)(2)** should not re-state the substantive statutory right "not to be excluded" except under certain circumstances set forth in subsection (a)(3) of § 3771. Instead, it should provide a procedure for implementing that right without infringing on the right of the defendant to a fair and reliable trial. "The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion." Fed. R. Evid. 615, 1972 advisory committee note. As related in the Apocrypha, sequestration has been used since biblical times, and "is (next to cross-examination) one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice." *Opus 3 Ltd. v. Heritage Park, Inc.*, 91 F.3d 625, 628-29 (4th Cir. 1996). Thus, the decision whether to permit a witness to be present for other testimony that may influence his or her own must be made with care, that is, by considering the victim's intended testimony, that of other witnesses the victim would hear if present, and any other information that would tend to show that the victim's testimony would be materially altered. Further, it is "natural and irresistible for a jury, in evaluating the relative credibility of a [witness] who testifies last, to have in mind and weigh in the balance the fact that he heard the testimony of all those who preceded him." *Portuondo v. Agard*, 529 U.S. 61, 67-68 (2000). For this reason, the prosecutor also may prefer exclusion of government witnesses, including the victim, from the courtroom during each others' testimony.

Further, the rule should make sense of the interaction between subsection (a)(3) of § 3771 and the second sentence of § 3771(b)(1). In particular, which "determination described in subsection (a)(3)" is it that must not be made until the court has first considered alternatives to exclusion of the victim? Is it the determination of whether there is clear and convincing evidence that the victim's testimony would be materially altered? Or is it the determination that the victim would be properly excluded? We think that the latter interpretation is the only sensible one, as the Ninth Circuit has assumed. *In re Mikhel*, 453 F.3d 1137, 1139 (9th Cir. 2006).

The last sentence of the proposed rule, in suggesting that no reasons must be given when the court denies exclusion even though reasons must be stated for granting a motion to exclude, is not even-handed or conducive to making an adequate record for all purposes. The rule should require that the court "state its reasons for any decision under this rule." There is no need to specify that the reasons be stated on the record or that they must be clear, as that is assumed of every judicial decision on a motion.

For these reasons, we propose the following in place of proposed subdivision (a)(2):

> **(2) Hearing on Motion to Exclude.** If a party seeks exclusion of the victim from any part of a public court proceeding involving the crime on the ground that the victim's testimony would be materially altered if the victim heard other testimony at that proceeding, the court shall conduct an evidentiary hearing to determine whether the victim's testimony would be materially altered.

(A) The standard of proof required to establish that the victim's testimony would be materially altered is clear and convincing evidence.

(B) The Federal Rules of Evidence apply at such a hearing.

(C) Rule 26.2(a)-(d) and (f) apply at such a hearing. In addition, after the victim has testified on direct examination at the hearing, the court, upon motion of the defendant, must order the government to produce to the defendant and the defendant's attorney any statement of the victim in the government's possession or control that relates to the subject matter of the victim's testimony at the hearing.[33]

(D) Upon motion of the defendant, the court shall order the government to disclose to the defendant and the defendant's attorney before the hearing **(i)** a written summary of the testimony of other witnesses (including the names, addresses and telephone numbers of those witnesses) on the same subject matter as that upon which the victim is expected to testify, and which the victim would hear, if not excluded from the proceeding; and **(ii)** all other evidence or information in the government's possession or control that tends to support the defendant's position on the motion permitted by this rule.

(E) If the court determines by clear and convincing evidence that the victim's testimony would be materially altered if the victim heard other testimony at the proceeding, the court must consider reasonable alternatives to exclusion, making every effort to permit the fullest attendance possible under the circumstances.

(F) The court must state its reasons for any decision under this rule.

Proposed **Rule 60(a)(3)** should not simply re-state the substantive right "to be reasonably heard" at a public proceeding involving release, plea or sentencing. Instead, the rule should make clear that the district court has broad discretion in deciding how to reasonably assure that right under the variety of circumstances in which it will arise, without infringing on the rights of the defendant or other third parties, the prosecutor's discretion, or the orderly administration of justice.

It is entirely appropriate that courts have discretion to regulate a victim's right to be "reasonably heard" as appropriate under the circumstances, and is necessary to

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[33] Under Rule 26.2(a), the disclosure of a witness' statement is required only "on motion of a party who did not call the witness." When the defendant seeks exclusion, the defendant will have to call the victim. In other contexts where the defendant must call a government witness in order to litigate an issue, some courts, but not all, interpret Rule 26.2 to require disclosure of their statements to the defendant. That should be made explicit here.

maintain a balanced and constitutional criminal justice system. This is clear beyond peradventure when one considers that the defendant, whose life, liberty and property rights are at stake, has a *constitutional* right to be heard, yet that right is not unlimited. "The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor v. Illinois*, 484 U.S. 400, 410 (1988). "Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying *falsely*." *See Nix v. Whiteside*, 475 U.S. 157, 173 (1986) (emphasis in original). Nor are an accused's constitutional rights necessarily violated because he was prevented from introducing hearsay, *see Chambers v. Mississippi*, 410 U.S. 484 (1973), or from presenting evidence that is unreliable. *United States v. Scheffer*, 523 U.S. 303, 309 (1998). Courts may constitutionally preclude defendants from offering otherwise relevant evidence if they fail to comply with procedural rules that require notice to be given. *See Michigan v. Lucas*, 500 U.S. 145, 152-53 (1991); *Taylor*, 484 U.S. at 417; *Williams v. Florida*, 399 U.S. 78, 81-82 (1970). And a defendant's constitutional right to allocute at sentencing "may be limited both as to duration and as to content. He need be given no more than a reasonable time; he need not be heard on irrelevancies or repetitions." *Ashe v. North Carolina*, 586 F.2d 334, 336-37 (4th Cir. 1978).

A rule that recognizes courts' discretion to regulate a victim's statutory right to be "reasonably heard" is essential in light of several controversies concerning the meaning and scope of that right which will otherwise continue to vex the courts and threaten the balance, order and reliability of criminal trials. One issue is whether the victim has an absolute right to speak in person. One court has said that a victim's right to speak in person is "absolute." *United States v. Degenhardt*, 405 F. Supp.2d 1341, 1349 (D. Utah 2005). Another court has rejected the argument that a victim's family member must be heard orally at a pre-trial detention hearing even though he had nothing material to say, finding that "reasonably heard" is a legal term of art meaning in writing or in person at the judge's discretion, and that when Congress uses such a term, it is presumed to know and intend its traditional meaning. *See Marcello*, 370 F.Supp.2d at 748, citing *Morissette v. United States*, 342 U.S. 246, 263 (1952).

In *Kenna I*, the Ninth Circuit panel held that Kenna had a right to "allocute," *i.e.*, speak orally about victim impact, at the defendant's sentencing hearing although he had submitted a written victim impact statement and had spoken at the co-defendant's sentencing three months prior. The panel recognized that the district court "may place reasonable constraints on the duration and content of victims' speech," 435 F.3d at 1014, but did not think Kenna's statement would be irrelevant or repetitious because he claimed he wished to tell the court about further impacts that had transpired since his previous written and oral statements. *Id.* at 1013, 1016-17. The panel relied in part on its perception that the "right to be reasonably heard" at a "public proceeding" was synonymous with "speak." *Id.* at 1014. But the sole purpose of the phrase "public proceeding" in the statute was to limit the right to be "reasonably heard" to public, as opposed to closed, proceedings.[34] Judge Friedman, concerned about the seemingly broad

[34] *See* 150 Cong. Rec. S10910 (Oct. 9, 2004); 150 Cong. Rec. S4268 (April 22, 2004). *See also* S. Rep. No. 108-191 at 38 (Nov. 7, 2003).

sweep of some of the language in the opinion, wrote separately to state his doubts about the court's apparent holding that a "victim has an absolute right to speak at sentencing, no matter what the circumstances," and his belief that "the statutory standard of 'reasonably heard' may permit a district court to impose reasonable limitations on oral statements." *Id.* at 1018-19.

A rule that makes clear to judges that they may limit and regulate a victim's right to be "reasonably heard" is consistent with congressional intent. A major objection to the failed constitutional amendment was its apparent creation of an absolute right to speak and prohibition on courts' ability to respond flexibly if, for example, there were multiple victims, the victim was involved in the criminal activity, the victim provoked the crime, or the content of the victim's statement would violate the defendant's right to due process.[35] The "CVRA strikes a different balance, and it is fair to assume that it does so to accommodate the concerns of such legislators. . . . In particular, it lacks the language that prohibits all exceptions and most restrictions on victims' rights, and it includes in several places the term 'reasonable' as a limitation on those rights." *United States v. Turner*, 367 F.Supp.2d 319, 333 n.13 (E.D.N.Y. 2005)

Another issue is the claim being pressed by victim advocates that victims have a right to litigate a defendant's sentence as the functional equivalent of a party, that is, to present legal argument and factual evidence under the sentencing laws and guidelines, and to receive the entire presentence report to that end. This would instate the private prosecution model the Framers rejected and Congress sought to avoid in the CVRA. It would seriously threaten the defendant's right to Due Process of Law by requiring him to defend against two adversaries. And it would violate the privacy rights and confidentiality interests of the defendant, the defendant's family, other victims, treatment providers, the government and government witnesses in the presentence report, and thereby interfere with the free flow of information to the court at sentencing.[36] While the Ninth Circuit rejected such claims in *Kenna II*, the opinion does not mention the arguments the victim made or why the court rejected them. *See* 453 F.3d 1136. A rule telling courts that they may preclude legal argument and otherwise reasonably regulate victim input would assist courts faced with such claims in other cases.

A lurking problem, exacerbated by the notion that victims have an "absolute" right to speak in person at proceedings involving release, plea or sentencing, is that victims may seek to speak on matters that may affect the judge's decision, but without prior notice, any discovery of what they have said before or intend to say, or an adequate opportunity for the defendant to respond. The practical effect would be to circumvent

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[35] S. Rep. No. 108-191 at 76, 85, 106-107 & n.133 (Nov. 7, 2003) (minority views).

[36] *See* Amy Baron-Evans, *Traps for the Unwary Under the Crime Victims' Rights Act: Lessons from the Kenna Cases*, 19 Fed. Sent. R. 49, 2006 WL 3522468 **5-9 (Vera Inst. Just.), October 2006; *In re Kenna*, No. 06-73352 (9th Cir.), Real Party in Interest's Response to Victim W. Patrick Kenna's Petition for Writ of Mandamus, July 3, 2006 (on file with author).

notice and adversarial testing required by rules of procedure and evidence, the restitution statutes, and constitutional provisions that apply with respect to any other witness, a possibility that is particularly dangerous given the heightened risk of unreliability of victim statements. This, in turn, would violate defendants' constitutional rights under the Due Process Clause to notice and the opportunity to challenge facts that may be used to deprive them of life, liberty or property. *See Burns v. United States*, 501 U.S. 129, 137-38 (1991); *Gardner v. Florida,* 430 U.S. 349, 351, 358 (1977); *United States v. Tucker*, 404 U.S. 443, 447 (1972); *Townsend v. Burke*, 334 U.S. 736, 741 (1948); *United States v. Curran*, 926 F.2d 59, 61, 63 (1st Cir. 1991).

For these reasons, we join the National Association of Criminal Defense Lawyers in recommending the following language for Rule 60(a)(3):

> **(3) Right to be Reasonably Heard**
>
> At or before any public proceeding in the district court concerning release, plea, or sentencing, the court shall adopt and follow appropriate procedures which afford any victim the right to be reasonably heard. Any such procedures must afford the defendant notice, including prompt disclosure of a copy of any written submission from a victim, and a fair opportunity to respond.

We also join NACDL's recommendation for a Committee Note explaining that the court acts reasonably only if it requires any presentation to be made at a time and in a manner that allows the defendant prompt access to any statement of the victim and a fair opportunity to prepare for and respond at the hearing. The note should state that the court has the authority to hear the victim in writing; to control the timing, duration and tenor of any oral statement; to place the victim under oath and permit questioning by the parties; to preclude legal argument; to limit the content to matters that are relevant, not repetitious, and about which the victim is competent to testify, and to apply any of the rules of evidence; to prohibit abusive language; and to impose any other reasonable restriction necessary to ensure a fair proceeding and a decision based only on considerations made relevant by the governing body of substantive law.

Because the rule for cases involving multiple victims, included in the proposed rule as **Rule 60(b)(3)**, seems to more naturally follow here, we suggest that it be renumbered **Rule 60(a)(4)**. We also believe that it should be revised to incorporate the limits of 18 U.S.C. § 3771(b)(1), as follows:

> **(4) Cases Involving Multiple Victims.** If the court finds that the number of victims makes it impracticable to accord all of the victims any of the rights described in 18 U.S.C. § 3771(a) that are applicable in a public proceeding involving an offense that has been charged and is being prosecuted in the United States district court, the court shall fashion a reasonable procedure to give effect to those rights that does not unduly complicate or prolong the proceedings.

2. Proposed Rule 60(b)

As plainly demonstrated by the *Kenna* cases, the parties to the proceeding must be given notice and an opportunity to respond to any request for enforcement of victim rights, and to do so in an orderly manner. This is necessary to preserve the defendant's right to Due Process of Law, to ensure the government's participation as a party to the proceedings, to give the district court sufficient notice and information to rule appropriately, and to create an adequate factual and legal record for the court of appeals. Ensuring that these rudiments are observed in the district court will also facilitate the parties' participation in any mandamus action, as the parties will have had the opportunity to develop their arguments before the 72-hour mandamus timetable begins. This can be achieved by requiring that the victim assert any right by "motion" (as required by 18 U.S.C. § 3771(d)(1), (3) and (5)) and that such motion be in accordance with Rules 47 and 49.

The rule should also specify when and where any rights described in 18 U.S.C. § 3771(a) must be asserted, and by whom they may or may not be asserted consistent with 18 U.S.C. § 3771(d)(1) and (e). As noted in the discussion of Rule 1, a procedure to determine who is a victim when that status is disputed is necessary to avoid needless disruption of the criminal proceedings, to preserve the defendant's presumption of innocence and other rights, and to permit a person identified as a victim to dispute being identified as such.

To permit a reasoned decision on a motion under 18 U.S.C. § 3771, the rule should require "reasonable promptness" in making that decision. Subsection (b)(1) of 18 U.S.C. § 3771 requires that the court state "clearly ... on the record" its reasons for any decision "denying relief" under the CVRA. In the interests of balance and making an adequate record for all purposes for the court of appeals, the rule should require that the court state its reasons for *any* decision on a motion under the CVRA. There is no need to specify what is to be assumed of every judicial decision on a motion -- that it will appear on the record, and that it will be clear.

The short time periods set forth in the CVRA disclose Congress' intent that interference in the orderly criminal process be minimal. In *Kenna I*, the Ninth Circuit seemed to chide the district court for not postponing sentencing until the petition for writ of mandamus was resolved, six months after it was filed. *Kenna I*, 435 F.3d at 1018 n.5. However, the statute prohibits a stay or continuance of more than five days. Further, the district court had no notice that a petition for writ of mandamus would be filed. The rules can avoid having district court judges placed in untenable positions and unnecessary disruption, in part, by stating the district court's authority to grant a stay of up to five days, but only if the victim certifies an intention to file a petition for a writ of mandamus and makes a substantial showing of a failure to afford the asserted right. The latter requirement is the same as that required for a certificate of appealability for the appeal of a final order in a habeas proceeding, where interests in efficiency and finality are similarly implicated.

Given the Ninth Circuit's failure to accord a defendant in a criminal case an opportunity to be heard in a mandamus action, and its statement in *Kenna I* that a criminal defendant is not a party to a victim's mandamus action, the rules should direct attention to the applicable Federal Rules of Appellate Procedure. For clarity and convenience, especially for unrepresented victims and inexperienced counsel, we recommend that this be stated in Rule 60(b) itself, or at the very least in the note. This Committee should also recommend to the Advisory Committee on Appellate Rules that it clarify that Rule 21 and other pertinent provisions of the Federal Rules of Appellate Procedure apply in mandamus actions under 18 U.S.C. § 3771(d)(3).

The rules should implement the so-called "motion to re-open a plea or sentence" of § 3771(d)(5) in a manner that makes sense and avoids constitutional violations such as what may well have occurred as a result of *Kenna I*. As with the initial assertion of rights and consistent with § 3771(d)(5)(A), the rule should provide the parties with notice and an opportunity to be heard. Since the statute requires the motion to be made in the district court, the rule should require that before such a motion may be made, the district court must have jurisdiction over the case. The undefined and unfamiliar term "highest offense" must be defined. Most importantly, the rule must avoid the vacatur of any judgment that has become final. One of the reasons a victims' constitutional amendment failed was that giving victims constitutional rights at a defendant's sentencing hearing could result in the sentence being vacated and the defendant being re-sentenced, which, if the new sentence was more severe, would raise a double jeopardy claim.[37] The defendant also has a double jeopardy right against having a plea to a lesser offense vacated and a greater charge re-instated. *Ricketts v. Adamson*, 483 U.S. 1 (1987). The CVRA in fact does not contemplate a double jeopardy violation (nor could it, obviously). It provides for a total of no more than 15 or 16 days between denial of a motion asserting a right under section 3771(a) and the court of appeals decision on a petition for mandamus (10 days to file the petition, any intermediate Saturdays, Sundays and holiday, and 3 days for decision), well before a judgment would become final. *See* Fed. R. App. P. 4. However, as in *Kenna I*, compliance with that tight schedule will not always occur. Yet, *Kenna I* may suggest that it is possible or even necessary for a district court to disregard the defendant's double jeopardy rights in that situation. The Rule and Note should also make clear that only the particular victim who asserted a right by motion in compliance with the rule and filed a petition for mandamus within 10 days may move to re-open a plea or sentencing hearing. The statute says so, but the Ninth Circuit said otherwise. The rule should correct that misimpression.

To maintain the careful balance Congress sought to strike between victims' statutory rights on the one hand, and constitutional rights, prosecutorial discretion, and the effective functioning of the criminal justice system on the other, the rule, in addition to prohibiting a new trial as relief, should state that in no case may the failure to afford a right under § 3771(a), or a claimed failure to afford such a right, result in the violation of any constitutional right. A defendant has due process rights to be accurately apprised of the consequences of a plea, *Mabry v. Johnson*, 467 U.S. 504, 509 (1984), and to specific

[37] *See* S. Rep. 108-191 at 103 (Nov. 7, 2003) (minority views).

enforcement of a promise made in a plea bargain, *Santobello v. New York*, 404 U.S. 257, 262 (1971), even if he pled guilty or agreed to plead guilty to a less serious offense than the most serious one charged. A victim may assert a right to be free from what she believes is unreasonable delay that would conflict with a defendant's due process right to prepare a defense. The media has a First Amendment right of access to court proceedings. Members of the defendant's family, for example, have the right not to be excluded from a public trial. In contrast, victims do not have constitutional rights. Thus, any relief granted to a victim under the statute may not violate the constitutional rights of others. Further, the rule should clarify that the violation of any statutory right is prohibited unless the victim establishes a compelling need for the relief sought and that the ends of justice so require. The defendant and the public have rights under the Speedy Trial Act, for example. Anyone, including the defendant and other victims, has a statutory right to privacy in any records filed or testimony heard for purposes of issuing and enforcing an order of restitution. 18 U.S.C. § 3664(d)(4).

Finally, the rule should make clear that a victim, certainly no less than a party, is subject to waiver of rights not asserted in a timely or otherwise regular manner. *See, e.g.*, Fed. R. Crim. P. 12(e).

For all of these reasons, we propose the following Rule 60(b) and accompanying Committee Note:

(b) Generally Applicable Procedures.

(1) Motion Asserting Rights. The assertion of any right under 18 U.S.C. § 3771(a) shall be by motion in accordance with the procedures applicable to parties under Rules 47 and 49.

(2) When Rights Must Be Asserted. Rights under 18 U.S.C. § 3771(a) must be asserted before or during the proceeding at issue.

(3) Where Rights Must Be Asserted. Rights under 18 U.S.C. § 3771(a) must be asserted in the district court in which the defendant is being prosecuted for the crime charged.

(4) Who May Assert Rights.

(A) The victim may assert rights under 18 U.S.C. § 3771(a). If either the defendant or the government disputes the claim by any person to be a "victim" entitled to assert rights under § 3771(a), or if any person opposes the government's naming that person as a "victim," the court shall conduct an evidentiary hearing at which the person asserting the claim (or the government, if it supports the assertion) must prove, by clear and convincing evidence, whichever (or both) of these propositions is disputed -- (i) that a federal offense or an offense in the District of Columbia that has been charged and is being prosecuted in the United States district court has been committed,

and (ii) that the person claiming, or for whom are being claimed, the rights of a "victim" was directly and proximately harmed by the commission of that offense. Rule 26.2(a)-(d) and (f), and the Federal Rules of Evidence, apply at such a hearing.

(B) In the case of a victim who is under 18 years of age, incompetent, incapacitated or deceased, any of the victim's family members, legal guardians, estate representatives, or any other person appointed by the court as suitable, may assert the victim's rights under 18 U.S.C. § 3771(a). The defendant may not assert the victim's rights under 18 U.S.C. § 3771(a) on behalf of the victim.

(C) The attorney for the government may assert the victim's rights under 18 U.S.C. § 3771(a).

(D) The defendant may not assert the victim's rights under 18 U.S.C. § 3771(a) as a basis for relief.

(5) Time for and Form of Decision. The court must decide a motion asserting a right described in 18 U.S.C. § 3771(a) with reasonable promptness. The court must state its reasons for any such decision.

(6) Stay of Proceedings. If the court has denied a motion asserting a right described in 18 U.S.C. § 3771(a), and the movant certifies an intention to file a petition for writ of mandamus in the court of appeals under 18 U.S.C. § 3771(d)(3) and makes a substantial showing of a failure to afford the victim the asserted right, the court may stay the proceedings for a period not to exceed five days.

(7) Writ of mandamus. The procedures governing a petition for a writ of mandamus under 18 U.S.C. § 3771(d)(3) are found in Rule 21 and other pertinent provisions of the Federal Rules of Appellate Procedure.

(8) Limitations on Relief. A victim may move to re-open a plea or sentencing hearing, in compliance with subsections (b)(1)-(3) of this rule, and only if:

(A) the victim asserted a right to be heard before or during a plea or sentencing proceeding in the district court in compliance with subsections (b)(1)-(3) of this rule and the district court denied the relief sought;

(B) the victim petitioned the court of appeals for a writ of mandamus within 10 days of such denial;

(C) jurisdiction over the case is in the district court;

(D) the judgment has not become final; and

(E) in the case of a plea, the accused did not plead nolo contendere or guilty, or agree to plead nolo contendere or guilty, to one or more counts carrying a cumulative statutory maximum sentence equal to or greater than the statutory maximum sentence for any other offense charged.

(9) Prohibition of Relief. In no case shall a failure to afford a victim any right under 18 U.S.C. § 3771(a), or a claimed failure to afford such a right, result in:

(A) a new trial;

(B) any violation of any constitutional right;

(C) any violation of any statutory right unless the victim establishes a compelling need for the relief sought and that the ends of justice so require.

(10) Waiver. A victim waives judicial enforcement of any right under 18 U.S.C. § 3771(a) which is not asserted in accordance with this rule. For good cause shown, the court may grant relief from the waiver.

COMMITTEE NOTE

Subdivision (b)(1). The Crime Victims' Rights Act requires that victims assert statutory rights by "motion." 18 U.S.C. § 3771(d)(1), (3), (5). The rule requires compliance with Rules 47 and 49 to ensure that all parties to the proceeding are given notice and an opportunity to respond, to ensure that the district court itself receives notice, and to ensure that the issues are adequately addressed and a record made. If a victim who is not represented by counsel attempts to assert a right in a manner that does not comply with Rule 47 or Rule 49, the district court may inform the victim of the proper procedure and permit him or her an opportunity to comply.

Subdivision (b)(2). Subsection (d)(5)(A) of 18 U.S.C. § 3771 requires that before a victim may move to re-open a plea or sentence, the victim must have asserted the right to be heard before or during the proceeding at issue. The rule imposes this requirement as to all motions asserting rights under 18 U.S.C. § 3771(a). Such rights are judicially enforceable only in connection with a proceeding. The requirement seeks to avoid after the fact assertions of rights which would make them more difficult to enforce, and to ensure an orderly and fair process.

Subdivision (b)(3). Subsection (d)(3) of 18 U.S.C. § 3771 requires that the rights described in subsection (a) be asserted in the district court in which the defendant is being prosecuted for the crime, or, if no prosecution is underway, in the district in which the

crime occurred. The rule requires that rights described in 18 U.S.C. § 3771(a) must be asserted in the district court in which the defendant is being prosecuted for the crime charged. The judge's duty under the Crime Victims' Rights Act, the only proper subject of these rules, is stated in § 3771(b)(1): "In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a)." A "court proceeding involving an offense" presupposes that a crime has been charged and is being prosecuted.

Subdivision (b)(4). Consistent with subsections (d)(1) and (e) of 18 U.S.C. § 3771, the rule permits the victim, his or her lawful representative, or the attorney for the government to assert a victim's rights under 18 U.S.C. § 3771(a), and prohibits the defendant from asserting a victim's rights under 18 U.S.C. § 3771(a) on behalf of the victim or as a basis for relief for the defendant. A procedure is provided to determine whether a person claiming or claimed to be a victim entitled to assert rights under 18 U.S.C. § 3771(a) is such a victim when that status is disputed by any person. This procedure is intended to protect the constitutional rights of the defendant, to provide relief to a person claimed to be a victim who disputes being designated as such, and to promote efficiency in the criminal process.

Subdivision (b)(5). Subsection (d)(3) of 18 U.S.C. § 3771 states that the court shall take up and decide a motion asserting a victim's rights "forthwith." To permit reasoned decision, the rule requires "reasonable promptness" in deciding such a motion. Subsection (b)(1) of 18 U.S.C. § 3771 requires that the court state "clearly ... on the record" it reasons for any decision "denying relief" under the Crime Victims' Rights Act. The rule replaces that provision with a requirement that the court state its reasons for any decision on a motion under the Act. There is no need to specify that such decision will appear on the record and that it will be clear, as that is assumed of every judicial decision on a motion, whether written or oral.

Subdivision (b)(6). Consistent with 18 U.S.C. § 3771(d)(3), the rule allows the district court, after denying a motion asserting a right described in 18 U.S.C. § 3771(a), to stay proceedings for no more than five days. Before the court may stay the proceedings, the movant must certify, orally or in writing, an intention to file a petition for writ of mandamus in the court of appeals. The movant must also make a substantial showing of a failure to afford the victim the asserted right. As in the context of a certificate of appealability under 28 U.S.C. § 2253, this means that the movant must demonstrate that reasonable jurists would find the district court's decision was debatable or wrong. *See Tennard v. Dretke*, 542 U.S. 274, 282 (2004); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Subdivision (b)(7). For clarity and convenience, the rule states that the procedures governing a petition for a writ of mandamus under 18 U.S.C. § 3771(d)(3) are found in Rule 21 and other pertinent provisions of the Federal Rules of Appellate Procedure.

Subdivision (b)(8). Subsection (d)(5) of 18 U.S.C. § 3771 sets forth certain conditions that a victim must meet before he or she may move to re-open a plea or sentencing hearing in the district court, in the event the court of appeals grants a petition for writ of mandamus on the basis that the district court failed to afford the victim a right to be heard at a plea or sentencing hearing. The rule retains those conditions, and adds others. To ensure that the parties receive notice and an opportunity to be heard, it requires that a motion to re-open a plea or sentencing hearing comply with subdivisions (b)(1)-(3) of this rule. In recognition that a motion cannot be made in the district court unless the district court has jurisdiction over the case, it requires that such a motion may be made only if the district court has jurisdiction over the case. It avoids the possibility that a defendant's double jeopardy rights may be violated by requiring that the judgment has not become final. Finally, the rule provides for the situation where the defendant has not yet pled guilty or nolo contendere, but has agreed to do so, at the point when the victim asserts a right and claims that the district court failed to afford it, which then becomes the basis of a mandamus action. The rule replaces the undefined statutory term, "highest offense," with the phrase "one or more counts carrying a cumulative statutory maximum sentence equal to or greater than the statutory maximum for any other offense charged." Consistent with § 3771(d)(5), only a particular victim who followed the procedures set forth in subdivision (b)(8) of this rule may make a motion to re-open a plea or sentencing hearing, and, if granted, be heard in the proceeding thereafter.

Subdivision (b)(9). Subsection (d)(5) of 18 U.S.C. § 3771 prohibits a new trial as relief for a failure to afford a right under 18 U.S.C. § 3771(a). The rule provides that in no case shall a failure to afford a right under 18 U.S.C. § 3771(a), or a claimed failure to afford such a right, result in a new trial, any violation of any constitutional right, or any violation of any statutory right unless the victim establishes a compelling need for the relief sought and that the ends of justice so require. The rule is intended to avoid the violation of any constitutional right of the defendant or any other person or entity, and to avoid any unwarranted violation of the statutory rights of the defendant, other persons or entities, or the public. This subdivision of the rule is intended to maintain the careful balance Congress sought to strike between victims' statutory rights on the one hand, and constitutional rights, prosecutorial discretion, and the effective functioning of the criminal justice system on the other.

Subsection (b)(10). The rule provides that a victim waives judicial enforcement of any right under 18 U.S.C. § 3771(a) not asserted in accordance with this rule, and that the court may grant relief from the waiver for good cause shown. The rule is modeled on Rule 12(e).

EXHIBIT A

Table D-4.
U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Major Offense (Excluding Transfers), During the 12-Month Period Ending September 30, 2005

Nature of Offense	Total Defendants	Not Convicted				Convicted and Sentenced			
		Total	Dismissed	Acquitted by		Total	Plea of Guilty	Convicted by	
				Court	Jury			Court	Jury
TOTAL	86,000	8,661	8,141	159	361	77,339	74,024	291	3,024
VIOLENT OFFENSES, TOTAL	2,983	352	294	15	43	2,631	2,398	28	205
HOMICIDE	149	23	16	-	7	126	104	2	20
ROBBERY, TOTAL	1,396	69	61	4	4	1,327	1,263	3	61
BANK	1,345	58	50	4	4	1,287	1,228	2	57
OTHER ROBBERY OFFENSES	51	11	11	-	-	40	35	1	4
ASSAULT	869	208	177	8	23	661	606	21	34
KIDNAPPING	69	12	10	2	-	57	36	1	20
RACKETEERING—VIOLENT	382	25	20	-	5	357	302	1	54
CARJACKING	59	5	4	-	1	54	46	-	8
TERRORISM	13	6	4	1	1	7	7	-	-
OTHER VIOLENT OFFENSES	46	4	2	-	2	42	34	-	8
PROPERTY OFFENSES, TOTAL	14,926	1,729	1,658	27	44	13,197	12,643	29	525
BURGLARY	60	10	9	-	1	50	48	-	2
LARCENY AND THEFT, TOTAL	2,704	746	732	11	3	1,958	1,904	11	43
BANK	115	4	4	-	-	111	108	-	3
POSTAL SERVICE	380	20	19	1	-	360	355	-	5
INTERSTATE SHIPMENTS	61	2	1	-	1	59	55	-	4
THEFT—U.S. PROPERTY	1,653	515	505	8	2	1,138	1,116	9	13
THEFT—MARITIME JURISDICTION	199	94	94	-	-	105	104	-	1
TRANSPORTATION, ETC., STOLEN PROPERTY	171	11	9	2	-	160	142	1	17
OTHER LARCENY AND THEFT OFFENSES	125	100	100	-	-	25	24	1	-
EMBEZZLEMENT, TOTAL	712	75	70	2	3	637	606	1	30
BANK	271	34	33	1	-	237	231	-	6
POSTAL SERVICE	215	25	25	-	-	190	185	-	5
FINANCIAL INSTITUTIONS	26	2	2	-	-	24	24	-	-
OTHER EMBEZZLEMENT OFFENSES	200	14	10	1	3	186	166	1	19
FRAUD, TOTAL	10,219	755	709	13	33	9,464	9,046	14	404
TAX	623	29	27	-	2	594	554	2	38
FINANCIAL INSTITUTIONS	1,232	76	75	-	1	1,156	1,108	2	46
SECURITIES AND EXCHANGE	152	11	6	1	4	141	126	-	15
MAIL	848	68	63	1	4	780	716	1	63
WIRE, RADIO, OR TELEVISION	570	59	57	-	2	511	473	1	37

Table D-4. (September 30, 2005—Continued)

Nature of Offense	Total Defendants	Not Convicted				Convicted and Sentenced			
		Total	Dismissed	Acquitted by		Total	Plea of Guilty	Convicted by	
				Court	Jury			Court	Jury
FRAUD (CONTINUED)									
BANKRUPTCY	113	14	13	1	-	99	92	1	6
SOCIAL SECURITY	546	78	72	3	3	468	459	1	8
FALSE PERSONATION	45	8	8	-	-	37	35	-	2
CITIZENSHIP AND NATURALIZATION	200	24	23	-	1	176	171	-	5
PASSPORT	538	28	28	-	-	510	502	1	7
IDENTIFICATION DOCUMENTS AND INFORMATION	1,020	34	32	1	1	986	975	1	10
FALSE CLAIMS AND SERVICES—GOVERNMENT	251	16	15	-	1	235	220	-	15
FALSE STATEMENTS	905	83	78	2	3	822	787	1	34
CONSPIRACY TO DEFRAUD THE UNITED STATES	2,098	121	109	4	8	1,977	1,918	2	57
UNAUTHORIZED ACCESS DEVICES	599	44	43	-	1	555	536	1	18
COMPUTER	106	11	11	-	-	95	91	-	4
HEALTH CARE	285	42	40	-	2	243	207	-	36
OTHER FRAUD OFFENSES	88	9	9	-	-	79	76	-	3
FORGERY AND COUNTERFEITING	**1,078**	**102**	**97**	**1**	**4**	**976**	**933**	**3**	**40**
AUTO THEFT	**59**	**10**	**10**	**-**	**-**	**49**	**46**	**-**	**3**
OTHER PROPERTY OFFENSES	**94**	**31**	**31**	**-**	**-**	**63**	**60**	**-**	**3**
DRUG OFFENSES, TOTAL	**29,251**	**2,663**	**2,515**	**36**	**112**	**26,588**	**25,309**	**57**	**1,222**
MARIJUANA, TOTAL	**6,855**	**718**	**686**	**3**	**29**	**6,137**	**6,018**	**13**	**106**
SELL, DISTRIBUTE, OR DISPENSE	3,582	277	262	1	14	3,305	3,226	6	73
IMPORT/EXPORT	1,556	119	106	-	13	1,437	1,413	1	23
MANUFACTURE	225	22	22	-	-	203	200	-	3
POSSESSION	1,492	300	296	2	2	1,192	1,179	6	7
ALL OTHER DRUGS, TOTAL	**22,176**	**1,920**	**1,805**	**33**	**82**	**20,256**	**19,108**	**44**	**1,104**
SELL, DISTRIBUTE, OR DISPENSE	17,449	1,483	1,388	27	68	15,966	15,035	32	899
IMPORT/EXPORT	1,398	151	145	2	4	1,247	1,203	7	37
MANUFACTURE	1,109	77	72	-	5	1,032	968	2	62
POSSESSION	2,220	209	200	4	5	2,011	1,902	3	106
OTHER DRUG OFFENSES	**220**	**25**	**24**	**-**	**1**	**195**	**183**	**-**	**12**

Table D-4. (September 30, 2005—Continued)

Nature of Offense	Total Defendants	Not Convicted				Convicted and Sentenced			
		Total	Dismissed	Acquitted by		Total	Plea of Guilty	Convicted by	
				Court	Jury			Court	Jury
FIREARMS AND EXPLOSIVES									
OFFENSES, TOTAL	**9,806**	**953**	**836**	**25**	**92**	**8,853**	**8,226**	**34**	**593**
FIREARMS, TOTAL	**9,617**	**927**	**816**	**22**	**89**	**8,690**	**8,083**	**34**	**573**
POSSESSION BY PROHIBITED PERSONS	6,188	571	499	13	59	5,617	5,242	22	353
FURTHERANCE OF VIOLENT/DRUG TRAFFICKING CRIMES	1,613	155	144	4	7	1,458	1,317	7	134
OTHER FIREARMS OFFENSES	1,816	201	173	5	23	1,615	1,524	5	86
EXPLOSIVES	**189**	**26**	**20**	**3**	**3**	**163**	**143**	**-**	**20**
SEX OFFENSES, TOTAL	**1,683**	**117**	**104**	**5**	**8**	**1,566**	**1,491**	**11**	**64**
SEXUAL ABUSE OF ADULTS	99	23	16	1	6	76	67	1	8
SEXUAL ABUSE OF MINORS	350	27	25	-	2	323	304	5	14
SEXUALLY EXPLICIT MATERIAL	995	47	45	2	-	948	923	5	20
TRANSPORTATION FOR ILLEGAL SEXUAL ACTIVITY	233	19	17	2	-	214	193	-	21
OTHER SEX OFFENSES	6	1	1	-	-	5	4	-	1
JUSTICE SYSTEM OFFENSES, TOTAL	**1,504**	**192**	**180**	**2**	**10**	**1,312**	**1,248**	**7**	**57**
AIDING, ABETTING, ACCESSORY, ETC.	648	46	45	-	1	602	596	1	5
OBSTRUCTION OF JUSTICE	235	51	44	1	6	184	141	2	41
ESCAPE FROM CUSTODY	260	18	16	-	2	242	238	1	3
FAILURE TO APPEAR	207	60	60	-	-	147	144	1	2
PERJURY	80	6	4	1	1	74	69	-	5
CONTEMPT	74	11	11	-	-	63	60	2	1
IMMIGRATION OFFENSES, TOTAL	**17,829**	**646**	**623**	**5**	**18**	**17,183**	**17,003**	**36**	**144**
ALIEN SMUGGLING	3,542	156	148	-	8	3,386	3,330	3	53
IMPROPER ENTRY BY ALIEN	2,348	143	142	-	1	2,205	2,186	15	4
IMPROPER REENTRY BY ALIEN	11,142	314	303	4	7	10,828	10,736	17	75
FRAUD AND MISUSE OF VISA/PERMIT	708	25	22	1	2	683	670	1	12
OTHER IMMIGRATION OFFENSES	89	8	8	-	-	81	81	-	-
GENERAL OFFENSES, TOTAL	**2,613**	**476**	**444**	**10**	**22**	**2,137**	**1,960**	**21**	**156**
BRIBERY	177	18	16	-	2	159	147	-	12
MONEY LAUNDERING	1,041	192	176	5	11	849	741	2	106
RICO [1]	211	22	19	-	3	189	170	-	19
RACKETEERING—GENERAL	147	3	3	-	-	144	142	-	2
EXTORTION AND THREATS	176	32	28	-	4	144	134	-	10
GAMBLING AND LOTTERY	90	10	10	-	-	80	79	-	1
FAILURE TO PAY CHILD SUPPORT	114	11	10	-	1	103	99	-	4
OTHER GENERAL OFFENSES	657	188	182	5	1	469	448	19	2

Table D-4. (September 30, 2005—Continued)

Nature of Offense	Total Defendants	Not Convicted				Convicted and Sentenced			
		Total	Dismissed	Acquitted by		Total	Plea of Guilty	Convicted by	
				Court	Jury			Court	Jury
REGULATORY OFFENSES, TOTAL	**1,925**	**361**	**338**	**13**	**10**	**1,564**	**1,489**	**24**	**51**
CIVIL RIGHTS	89	22	15	1	6	67	50	-	17
FOOD AND DRUG	75	4	4	-	-	71	67	-	4
HAZARDOUS WASTE TREATMENT, DISPOSAL, AND STORAGE	44	13	13	-	-	31	31	-	-
TELEGRAPH, TELEPHONE, AND RADIOGRAPH	31	2	2	-	-	29	27	-	2
NATIONAL DEFENSE	31	8	8	-	-	23	23	-	-
ANTITRUST	32	2	-	-	2	30	29	-	1
LABOR	72	4	4	-	-	68	67	-	1
GAME AND CONSERVATION	194	21	20	1	-	173	165	5	3
NATIONAL PARKS	103	49	47	2	-	54	51	3	-
CUSTOMS	70	8	8	-	-	62	61	-	1
POSTAL SERVICE	153	14	14	-	-	139	138	-	1
REPORTING OF MONETARY TRANSACTIONS	301	26	25	1	-	275	261	1	13
MIGRATORY BIRD	124	9	9	-	-	115	106	9	-
MARITIME AND SHIPPING	92	4	4	-	-	88	82	-	6
AIRCRAFT REGULATIONS	102	41	38	3	-	61	60	-	1
OTHER REGULATORY OFFENSES	412	134	127	5	2	278	271	6	1
TRAFFIC OFFENSES, TOTAL	**3,480**	**1,172**	**1,149**	**21**	**2**	**2,308**	**2,257**	**44**	**7**
DRUNK DRIVING	1,238	355	346	8	1	883	861	18	4
OTHER TRAFFIC OFFENSES	2,242	817	803	13	1	1,425	1,396	26	3

NOTE: THIS TABLE INCLUDES DEFENDANTS IN ALL FELONY AND CLASS A MISDEMEANOR CASES, BUT INCLUDES ONLY THOSE PETTY OFFENSE DEFENDANTS WHOSE CASES HAVE BEEN ASSIGNED TO DISTRICT JUDGES. BEGINNING IN 2005, CATEGORIES FOR CRIMINAL OFFENSES WERE MODIFIED. ALSO BEGINNING IN 2005, DEFENDANTS CHARGED IN TWO OR MORE CASES THAT WERE TERMINATED DURING THE REPORTING PERIOD ARE COUNTED SEPARATELY FOR EACH CASE. PREVIOUSLY, SUCH DEFENDANTS WERE COUNTED ONLY ONCE. THEREFORE, DATA FOR 2005 AND THEREAFTER ARE NOT COMPARABLE TO DATA PUBLISHED IN PREVIOUS YEARS.

[1] RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS.

EXHIBIT B

ANALYSIS OF CASE SUMMARIES

In its September 2003 memorandum to the Advisory Committee and then in a December 2004 memorandum, the Department submitted descriptions of a number of cases at varying levels of detail as representative examples of "particularly egregious" pre-verdict judgments of acquittal, involving what it described as district judges' legal error, judicial bias, or intentional "abuse" of Rule 29 in order to end a meritorious prosecution and to prevent appellate review. *See* Memorandum from Eric H. Jaso, September 15, 2003 ("2003 DOJ Mem."), at 12-14; Memorandum from James Comey, Robert McCallum, and Christopher Wray, December 16, 2004 ("2004 DOJ Mem."), at 10-17. Although most of the cases used as examples were unnamed or otherwise unidentified for the Committee's independent review, we were able to identify and investigate the majority of the cases.

We gathered and read transcripts, examined the records maintained in the PACER system, and spoke with the defense attorneys involved. Our investigation reveals that, in nearly every instance, the Department's description of these cases is either grossly misleading or based on the prosecutor's personal evaluations of circumstances beyond the record or sometimes even contradicted by the record.[1]

United States v. Cunningham, Crim. No. 02-194 (D. Colo.)

Leroy Cunningham was charged with being a felon in possession of an unloaded firearm he had found in a garbage area. An element of the offense is that the defendant's alleged possession of a firearm "affected" interstate commerce. The government proposed to establish that element in this case by proving that the firearm had, at some time prior to the defendant's alleged possession of it, traveled across a state line, and to establish that fact by proving that the firearm in question had been manufactured in a different state. The court granted a judgment of acquittal at the close of the government's case, finding that the government had failed to prove beyond a reasonable doubt that the gun had traveled in interstate commerce.

The Department asserts that the court's ruling stands as an example of a court granting a judgment of acquittal "based on [the judge's] dislike of the type of prosecution." According to the Department, the judge in this case "has exhibited great hostility towards firearms prosecutions." As stated by the Department, the court granted the pre-verdict judgment of acquittal although "the evidence showed that there are no gun manufacturers in Colorado and that the gun was stamped with the name of an out-of-state manufacturer – sufficient evidence under 10th Circuit precedent."

The record reveals that the ATF agent who testified for the government in an attempt to prove the interstate nexus never testified that there are no gun manufacturers in Colorado. Indeed, his testimony indicated that there *are* in fact gun manufacturers in Colorado. *See* Transcript of Jury Trial, July 16, 2002, at 42, 45. In any event, along with much of his testimony regarding the origin of the firearm in question, the agent's testimony regarding whether the manufacturer whose name was stamped on the firearm had a plant in Colorado was stricken from the record as hearsay. *Id.* at 33-43. The prosecutor repeatedly attempted to introduce hearsay

[1] All materials referenced herein are on file with the author and available upon request.

evidence through the ATF agent, and the court properly sustained defense counsel's many objections to that evidence. Defense counsel did not object to the introduction of the firearm itself.

The court's evidentiary rulings were proper. Although the ATF agent had "researched" unnamed periodicals and visited the facilities of some firearms manufacturers, he had no personal knowledge of this particular manufacturer's facilities or processes. Further, the prosecutor was unable to lay a proper foundation to establish the agent as an interstate nexus expert. *Id.* at 43-46. The agent had simply attended an interstate nexus "school" for a week in 1992 and then attended "advanced" interstate nexus training by touring some manufacturing facilities, but not the one or ones in question. Finally, there was no evidence that the manufacturer, whose name was stamped on the firearm, was an out-of-state manufacturer. As a result, the Department's description of the record evidence is inaccurate.

In granting the judgment of acquittal, the court stated:

> You know, this has been a point that has concerned the Court all along, even in cases involving guilty pleas, is I've asked attorneys from this office how you would prove this, and so far you've slid by on these guilty pleas. But you can't have agents read records and then come into court and testify as to what's in the records.
>
> If the ATF maintains records as to where every gun manufacturer manufactures weapons and those records are required to be maintained as a matter of law and if the other requirements of a public record can be established or a business record, then you may be able to overcome a hearsay objection.
>
> But what you cannot do, as I understand the rules of evidence, is short-circuit that process by not producing any record at all and having a case agent come in and say, I'm a case agent, I'm with the ATF, I've studied this a lot, I've read every book the ATF ever puts out and I can tell you that Tanfoglio has no manufacturing plant in Colorado. That's hearsay. It's double hearsay.

Id. at 59-60. The court recommended that the U.S. Attorney's office "rethink how you try these cases and cases where there's a guilty plea." Notably, this advice has been echoed by the Court of Appeals for the Eleventh Circuit, which specifically recommended that, "because the government bears the burden of proof, prosecutors would be well advised to offer direct evidence rather than proof by inference upon which a jury could rely." *United States v. Clay*, 355 F.3d 1281, 1287 (11th Cir. 2004) (upholding conviction where the firearm admitted in evidence had a marking indicating both the name of the company *and* the location of that company, and there was no objection to its admission or the inference that might be drawn from it).

Even if the state of the evidence was actually as the Department describes, the Tenth Circuit case referred to by the Department does not support the conclusion that the court's ruling was in direct conflict with binding case law. The case referred to, *United States v. Thody*, 978 F.2d 625, 631 (10th Cir. 1992), does not stand for the proposition that evidence that a gun is

marked with an out-of-state manufacturer's *name* is legally sufficient to prove interstate travel, as the Department suggests. In *Thody*, the specific question presented was whether the words stamped on a firearm "Made in Spain" is hearsay. The court in *Thody* simply held that the words stamped on the firearm were not hearsay. *Id.* at 631. In *Cunningham*, the firearm (and the words stamped on it) was admitted. It was the ATF agent's testimony about what those words meant that was excluded as inadmissible hearsay. Moreover, the issue was presented in *Thody* as one of plain error, whereas in this case, the defense attorney vigorously objected to the prosecutor's various attempts at introducing the agent's hearsay testimony. Thus, nothing about the court's ruling in *Cunningham* was inconsistent with *Thody*.

Significantly, cases decided after *Thody* have indicated that with a proper objection at trial, and without the ATF agent's personal knowledge or properly founded expert testimony of the particular manufacturer's processes, then a mark of a manufacturer's name on a firearm without any indication of the location of manufacture would not be sufficient evidence. *See, e.g.*, *Clay*, 355 F.3 at 1286-87. The court's ruling in *Cunningham* was entirely consistent with the requirement that the element be proved with sufficient evidence.

Thus, far from exemplifying a court's hostility toward a type of prosecution, *United States v. Cunningham* represents an instance in which an independent-minded district judge refused to allow the government to "slide" on an essential element of its case. The court exhibited respect for the constitutional allocation of the burden of proof, concern for the integrity of the criminal process, and an awareness of the institutional advantage of the prosecution, and granted a wholly proper Rule 29 acquittal.

United States v. Dewansingh, Crim. No. 02-073 (S.D.N.Y.)

The government prosecuted Mr. Dewansingh for placing a note at his place of employment that stated, "Anthrax is here." On the second day of trial, the court requested that the government brief the issue of whether the word "use" in the context of "threatens to use a weapon of mass destruction" under 18 U.S.C. § 2332a required a threat to perform an affirmative act. The government chose not to brief the issue as requested. *See United States v. Taylor*, Crim. No. 02-073 2003 U.S. Dist. LEXIS 15506, *5 n.6 (S.D.N.Y. Sept. 8, 2003) (reciting procedural background in the companion case of Mr. Dewansingh's co-defendant). The following day, the government rested its case, and the court granted Mr. Dewansingh's motion for acquittal under Rule 29. *Id.* at *5. The court reasoned that, because the note stated that anthrax was already present, there was no evidence that the note constituted "a threat to do an act that would be harmful at once or in the future." *Id.* at 6 (quoting Transcript of Proceedings, Mar. 26, 2003, at 383-85). According to the court's reading of the term "threaten to use," the statute required that there be evidence that the threat be imminent or in the future, not an act that had already occurred.

Although the court's statutory construction resulted in a nonappealable judgment of acquittal in Mr. Dewansingh's case, the court's analysis and reasoning was not shielded from review by the court of appeals. In the companion case involving Mr. Dewansignh's co-defendant, Evelyn Taylor, the parties consented to a procedure that would allow the government

to appeal Ms. Taylor's pre-verdict judgment of acquittal that was based on the same reasoning. Yet, rather than challenge the legal ruling pursuant to the agreed procedure, the government voluntarily dismissed the appeal with prejudice. Given its manifest disinterest in pursuing the legal question on appeal in the companion case, the government can hardly complain now that Mr. Dewansingh's case represents a "misapplication of Rule 29." Instead, the case represents an appropriate exercise of the court's power under Rule 29 to end a case whose facts do not constitute a crime under the law as then determined.[2]

United States v. Segura, Crim. No. 00-30144 (S.D. Ill)

Michael and Cynthia Segura, a married couple, were charged with conspiracy to defraud the U.S. Postal Service, three substantive counts of mail fraud based on three checks that were sent by Mrs. Segura to pay for bulk mailing services (with Mr. Segura charged as an aider and abettor), and one count of conspiracy to commit mail fraud. At the close of the government's case, the court took up Michael Segura's Rule 29 motion on all five counts. Although Mr. Segura had ordered the mailing services, the court cited the appropriate standard and ruled that there was "not a scintilla of evidence" that Mr. Segura caused or knowingly helped cause the checks to go forward as part of a scheme to defraud and knowing that there were insufficient funds, as alleged in the indictment. *See* Transcript, Nov. 17, 2000, Judgment of Acquittal, at 9.

With respect to the conspiracy counts against Mr. Segura, the court ruled that there was no evidence that a rational juror could find constituted proof beyond a reasonable doubt either that there was a *scheme* to defraud or that Mr. Segura knowingly *agreed* with Mrs. Segura to devise a scheme to defraud the direct mail service or the Postal Service. *Id.* at 12. Viewing the evidence in the light most favorable to the government, the court found that the Seguras had an "unreasonable expectation" that the money would be available to cover the checks, but that this mental state constituted "criminal negligence, not criminal intent." *Id.* at 13.

> [T]hey have to prove more than negligence here and all the evidence in this case has been of negligence. But we have a higher standard of proof in a criminal court of law. This isn't a civil court of law. I know I don't have to point that out. The burden is higher not to show these people were negligent in their expectations, reasonable or not, that they could pay this bill.
> . . . .
>
> [T]here is ample evidence that these people are poor, poor business people. But to say that at some point in time there was an agreement to device [*sic*] a scheme [—] now you've got two people, married people, who can't even agree with each other how the wife ought to run her business. . . . I can't find a conspiracy between these people.

Id. at 14-15. The court further stated that "there has been a loss here. It is

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[2]The Second Circuit very recently disagreed with the court's reasoning regarding the meaning of "threatens to use" in *United States v. Davila*, 461 F.3d 298, 302-04 (2d Cir. 2006).

inexcusable. But to say that it amounts to criminal conduct is stretching it." *Id.* at 15.

In rejecting the prosecutor's argument that the insufficient checks themselves proved the scheme, the court stated, "there are two different things there. One is the underlying act which you have to prove but by itself is not sufficient. All the cases say that. But where is the evidence of the scheme, the plan or course of action, formed with the intent?" The court concluded, "I think the government meticulously and carefully proved that these people were horrible, horrible people, they had horrible judgment. They're guilty of causing NSF checks to be placed. . . But there is . . . insufficient evidence to show a conspiracy. There is no evidence of there ever being a scheme." *Id.* at 20-21.

The court never called the case a "bad check case that should have been brought in state court," as the Department has told the Committee. Rather, the court acknowledged the different standards for civil and criminal cases and properly held the government to the highest standard of proving criminal intent beyond a reasonable doubt. There is simply no basis for the Department's suggestion that this court "dislikes" mail fraud prosecutions premised on bad checks. If anything, the court made perfectly clear that had there been evidence of an agreement to embark upon a scheme to defraud through the use of bad checks, the court would have denied the motion to acquit and sent the case to the jury.

United States v. McGrew, No. 96-0014 (D. Guam).

The Department describes this case as one in which "a district judge in Guam" granted a judgment of acquittal "for the sole reason that he was scheduled to attend a conference." 2003 DOJ Mem. at 11. The Department further asserts that the court *sua sponte* invited defense counsel to move for acquittal because "it appeared that the trial would continue longer than the judge expected." *Id.* According to the Department, the defense attorney in the case initially rejected the court's invitation and "told the judge that he thought it was unethical to make the motion because he did not believe it was well-founded." *Id.* Those assertions are directly contrary to the record.

In 1996, Chon Hyon McGrew was charged with conspiracy to import methamphetamine, conspiracy to possess methamphetamine, and possession of methamphetamine with intent to distribute. *See United States v. McGrew*, Crim. No. 96-0014 (D. Guam). Before trial, she moved to suppress incriminating evidence as having been illegally obtained, and the district court denied the motion. She was convicted. The Court of Appeals reversed the conviction on the ground that the evidence should have been suppressed. *See United States v. McGrew*, 122 F.3d 847 (9th Cir. 1997). Unwilling to accept that its case had been fatally undermined by its agents' illegal seizure of evidence, the government retried the case without that evidence.

After the government presented its case in the second trial, the judge and the attorneys engaged in a discussion in chambers that was not on the record. The judge asked the defense attorney if he would be filing a Rule 29 motion, and the defense attorney responded that he would. They then had a brief discussion about case law. There was no mention of any

conference that the judge wanted to attend.

The defense attorney made the motion the next day, April 23, 1998. He argued that the inconsistent and irreconcilable witness testimony failed to establish the defendant's connection to a conspiracy as charged, and that there was no evidence that the package of drugs belonged to Ms. McGrew or that she was involved in its importation. After an extended discussion of the evidence and the applicable law for each count, the court took the matter under advisement, indicating that it would enter a ruling in the morning before the trial proceedings started again. *See* Transcript of Proceedings, April 23 & 24, 1998, at 34.

The next morning, the court granted the motion. In doing so, the court cited the controlling standard, indicating that it had "carefully considered all of the evidence presented by the government with all reasonable inferences made in the government's favor. The court has carefully avoided assessing the credibility of witnesses." *Id.* at 37. The court concluded that the "proof of agreement required in conspiracy is sorely inadequate," and further that there was no evidence that Ms. McGrew ever possessed the alleged package of drugs. *Id.* at 37-38. When the prosecutor asked the court to reconsider, the court denied the request, stating, "The court expects the government to have its case well prepared and ready to go. In this case, it was not; it's not a sound case, it's a wobbly case. And I do not fault the government attorney. Witnesses sometimes do and say things. But the facts are the facts and the evidence is the evidence in this case. And the government – the Rule 29 requirements have not been met." *Id.* at 38-39.

As set forth above, the proceedings in this case demonstrate a situation in which the court was intimately familiar with the evidence, the governing law, and the prior proceedings. It was fully engaged and listened carefully to the arguments of counsel for both sides. It took the matter under advisement rather than issue an immediate ruling. There is absolutely no support in the record that the court granted the motion for the "sole reason" that it wanted to attend a conference. The court understood that the defense was not planning to put on proof, so the case would have gone to the jury that morning. Further, as all were aware, because district judges in Guam sit as Article IV judges rather than Article III judges, it is not uncommon for a judge from the territorial court to take a jury verdict in the district court when the district judge is not available.

Yet, the Department asks the Committee to believe that, after more than two years of presiding over this prosecution, the court suddenly abandoned its duties in the middle of the second trial in order to satisfy a personal desire to attend a conference. There is absolutely no support for the Department's accusation, and the Committee should ignore it.

Finally, the Department's implication that it was somehow improper for the court to suggest to defense counsel that a motion for acquittal might be appropriate directly conflicts with a court's ongoing duty, even on its own motion, to ensure that an individual is convicted only upon legally sufficient evidence. *See* Fed. R. Crim. P. 29(a) (requiring the court to grant a judgment of acquittal if it decides to consider the matter "on its own" and the evidence is insufficient to sustain a conviction); *see also* 2A Charles A. Wright, *Federal Practice & Procedure, Criminal 3d* § 469, p. 323 & nn.19-24 ("All courts recognize that they can review the

evidence and reverse if the error is bad enough."). The defendant attorney never informed the court that he believed a Rule 29 motion was unfounded or unethical; to the contrary, he states that the government's case was so weak that he planned to file one all along. The Department's assertion to the contrary is false.

United States v. Palermo, Crim. No. 01-222 (D.N.J.)

United States v. Palermo involved an organized crime prosecution in which three defendants proceeded to trial. *See* Crim. No. 01-222 (D.N.J.). The superseding indictment charged a racketeering conspiracy, a substantive racketeering count, five extortion counts and four travel act/bribery counts. The court acquitted all three defendants of extortion, but consistently and repeatedly denied Rule 29 motions regarding the remaining counts. Two of the defendants pled guilty after the judge acquitted them of the extortion counts and were ultimately sentenced to terms of probation. Mr. Palermo proceeded to jury verdict on the remaining counts. The jury acquitted him of one travel act/bribery count, but could not agree on a verdict for the remaining counts, resulting in a mistrial. Earlier this year, the government moved to dismiss the remaining counts against Mr. Palermo.

The Department describes the case as a Hobbs Act extortion case in which the "judge indicated he was uncomfortable with how the FBI conducted its investigation." 2003 DOJ Mem. at 11. The Department notes that the court observed that "while the defendants did not have a legally sufficient entrapment case, it was somewhat unfair of the government to send the cooperator to meet with the defendants." *Id.* The Department further asserts that the government presented evidence that was "sufficient and presented a clear jury issue as to whether the payments made by the contractor were extortion or a 'finder's fee,' as the defendants claimed." *Id.*

The Department's brief description insinuates that the court granted the three defendants' motions to acquit due to the court's concerns about the FBI investigation or about some type of entrapment that might be said to have existed in fact, but not in law. In reality, the court indicated several days before acquitting the defendants on the extortion charges that it was concerned with whether the government had made out a case of extortion that could go to a jury. *See* Transcript of Proceedings, Oct. 23, 2002, at 1780 ("I've done the work on extortion. Believe me I've read more about extortion in the past three days than I have in my entire life."). The court alerted the parties to the issues that concerned it, referring them to relevant cases and framing the question for briefing. The court repeatedly stressed that the government receives the benefit of all favorable inferences.

After the parties briefed the issue and presented their lengthy arguments, the court conducted an extensive review of the testimony and the law, citing the appropriate standard for Rule 29 motions and allowing the parties to be fully heard. *Id.* at 2138-74. After hearing argument for the motion on the remaining counts, the court ended the proceedings for the day. The next day, after further discussion, the court acquitted the defendants of the extortion counts only. Most important, the court took pains to make explicit that his decision regarding the Rule 29 motion on the extortion counts had nothing to do with any opinion he may have held

regarding the manner in which the FBI conducted the investigation. *Id.* at 2284.

The Department does not inform the Committee of the court's specific ruling that the government failed to prove the element of duress (fear of economic harm) required for a conviction of extortion or that the court noted for the record that its views on the use of the informant were irrelevant to its decision. With this omission, the Department effectively implies that the court's stated reason for acquitting the defendants on the extortion counts was not the real reason. Such speculation and innuendo regarding the honesty of a district court judge, which is directly contradicted by the record, is not a proper basis for amending Rule 29.

United States v. Dugan, Crim. No. 01-1072 (C.D. Cal.)

In October 2001, Walid Dugan was charged in a three-count indictment with (1) falsely representing that he had injected $39,500 cash into a business as required by an SBA-guaranteed loan agreement; (2) falsely stating in a fax and invoice that he had paid $19,000 in certain tenant improvements to G.D. Construction; and (3) falsely stating in the fax that certain improvements had been done when they had not been done.

After Mr. Dugan produced in discovery proof that he had made tenant improvement payments far in excess of what was required before the loan closed, the government dropped the first count and collapsed the remaining counts into one. At trial, counsel for Mr. Dugan elicited testimony from both the government expert and the private lender that even if the $19,000 in tenant improvements set forth in the November 1996 fax and invoice had not been technically completed at the time Mr. Dugan sent the fax, as long as they were made by the time of the closing (which they were), the loan would have closed.

Defense counsel made an oral motion under Rule 29 for acquittal, arguing that the statement in the fax was not false, and that even if it was technically false in that he had not yet finished some of the improvements listed in the invoice, the statement was not "material" because the government's witnesses had testified that the loan would have closed anyway. During the initial discussions, the court expressed "serious misgivings" about whether the government had proved beyond a reasonable doubt that the fax and invoice had the tendency to influence the actions of the government. *See* Transcript of Proceedings, Jan. 24, 2003, at 18. The court pointed out that the government had not put on any evidence or witness that would tend to prove that the completion of the $19,000 tenant improvements was required by the loan agreement or, even if it was, that the fax and invoice ultimately affected the closing of the loan because Mr. Dugan had made the required $39,500 cash injection and the improvements were done before the loan closed. *Id.* at 20-22 ("If all they said was prove to us that you've spent $39,500 of your own money – and he has done that independent of this invoice – how is it material?"). Despite its misgivings, the court then *denied* the Rule 29 motion. *Id.* at 27.

Defense counsel requested that the court reconsider its ruling, and the court decided to take a break from proceedings to do more research. Before the recess, the court stated:

I will tell you that I've been on the bench for 20 years. I have never before even

> given more than two minutes' attention to a motion for a directed verdict or Rule 29 motion, whatever it is. I have never been tempted to grant one, and I am very tempted to grant this one. I don't want to do anything that's unfair to the Government. I believe both the Government and the defendant have a right to a trial by jury, and I am very reluctant to take the case away from the jury. But I also recognize that I have grave concerns about whether there is evidence to meet any kind of a standard as to the element of materiality.

Id. at 29-30. When the court returned from the recess, the court indicated that it had spent the lunch hour "on Rule 29, reviewing my notes, looking at the transcript, looking at the exhibits." The court further stated,

> It's not as if I came out here and the defendant said all kinds of dazzling impressive things and suddenly I was swept off my feet. I have been concerned about this case for days. . . . The evidence is the evidence. What came in in this case is what came in in this case. It doesn't need spin and it doesn't need fancy lawyering. It needs proof beyond a reasonable doubt.

Id. at 30-31. The court then gave the prosecutor an opportunity to argue at great length against the motion, spanning sixteen pages of transcript. After listening to those arguments, the court indicated that it had "given a lot of thought" to the matter, having "spent quite a bit of time" and having "read the cases you made reference to while I was on the break." *Id.* at 48. The court recognized that "a statement is material if it's calculated to induce action or reliance by an agency of the United States." *Id.* The court agreed with the prosecutor that "in the abstract, one could conclude that a false invoice showing an expenditure could be material in some loan from some governmental agency to someone." *Id.*

> But there is no evidence in this case, assuming for purposes of this discussion that that invoice was false and the defendant knew it was false, that under the facts of this case in deciding whether to fund the loan to Mr. Dugan that the SBA could have relied on that invoice. There is no evidence to go to the jury on that.

Id.

Quite astoundingly, in its submission to the Advisory Committee, the Department asserts that the court granted the motion on an "unraised legal ground" to which the government had no opportunity to respond. 2003 DOJ Mem. at 12. According to the Department, the court "ruled that under §1001, a false statement to a private lender in a government-guaranteed loan had to be material not only to the government-guaranteed lender, but also to a government agency." *Id.* The Department now states, without citing any authority, that the judge's legal basis was "directly contrary to the case law under § 1001." *Id.* The transcript confirms that the court made no such ruling. Rather, the court granted the motion on the ground raised by defense counsel and after the government had ample opportunity to research and respond. The court ruled that under the particular facts of this case, the prosecutor had failed to submit evidence that would prove beyond a reasonable doubt that the actions or decisions of the SBA could have been influenced

by the fax and invoice. With respect to the government's argument that, even if the SBA did not rely on the invoice, the private lender could have relied on the invoice, the evidence was clear that the fax and invoice were immaterial to both the lender and the SBA.

Far from standing as an emblem of the need to amend Rule 29 to eliminate non-appealable judgments of acquittal rendered by biased or emotional judges, this case stands as an example of the need to *preserve* this remaining vestige of the district court's inherent power to put an end to legally insufficient prosecutions as soon as the government has put forth its best case.

United States v. H., Crim. No. 01-457, 2001 U.S. Dist. LEXIS 21295 (E.D.N.Y. 2001)

Again, the Department in its description of this case advances the notion that the court's judgment of acquittal stemmed not from a careful and deliberate analysis of the facts and the law, but rather because the judge had a personal "dislike for the type of prosecution" involved and viewed the case "as a dispute better resolved in state court." In this case, the district court presided over a criminal prosecution under 18 U.S.C. § 228 against Mr. H. for his failure to pay child support for his child who, according to the government, resided in a state other than Mr. H., the required jurisdictional hook. At the time, the term "resides" as used in the statute was ambiguous and subject to differing interpretations. If the term meant "domicile," then the government in this case had not proved that the child resided in a state different from Mr. H.

In a lengthy written opinion on the question, the district court carefully navigated traditional methods of statutory construction – including dictionary definitions, the common law, comparable statutory terms, the rule of lenity, and the legislative history of the statute. The court concluded that the term "resides" for purposes of the federal criminal statute means "domicile." Because the proof established that Mr. H.'s domicile was in the same state as his child, the court granted a judgment of acquittal. The court went on to state that "[t]he defendant should be aware that he is in violation of New York law if he fails to properly make child support payments," and that "[t]he threat of State enforcement is real." 2001 U.S. Dist. LEXIS at *37. Finally, the court wrote:

> The problem of deadbeat dads and moms is a serious one. Where applicable, the federal criminal statute designed to protect children against such malefactors should be enforced. The facts, however, demonstrate that this defendant's failure to support his child – heinous as is the offense – does not come within the federal statute.

Id. at 38.

Clearly, the district court's legal determination in this case was not based on the court's personal view that the case should have been resolved in state court. Rather, it was based upon the court's legal construction of an ambiguous statute under circumstances in which there was no case law to the contrary. Although the Second Circuit has since construed the same term "resides" to mean legal "residence" and not "domicile," the appellate court acknowledged the

ambiguity and engaged in extensive analysis to reach its conclusion. *United States v. Venturella*, 391 F.3d 120, 125-34 (2d Cir. 2004). If the Department is upset that some courts narrowly interpret an ambiguous criminal statute, the remedy is not to amend Rule 29 to eliminate non-appealable judgments of acquittal.

Here, the district court properly granted the Rule 29 motion on its carefully considered interpretation of a criminal statute and then the eminently permissible basis that the facts were not sufficient to prove beyond a reasonable doubt that the defendant's child was domiciled in a different state. Indeed, the court was very clear that a criminal action for failure to pay child support could be appropriately resolved in federal court. The Department's unsupported speculations to the contrary are improper and should be rejected.

United States v. Joya-Joya, Crim. No. 03-2897 (S.D. Cal.)

United States v. Joya-Joya was a case in which the government accused eight defendants of conspiracy to distribute over two tons of cocaine. The government did not, however, present any evidence whatsoever that the defendants on trial were the same people who were arrested on the boat in which the cocaine was recovered. In granting the defendants' Rule 29 motions, the court reviewed the paucity of the identification evidence at length:

> First of all, not one witness called by the government identified any defendant in this courtroom as being on the white boat. . . . [N]o member of the Coast Guard boarding team . . . identified any defendant in this courtroom as being on the white boat. Furthermore, not one witness made any courtroom identification of any defendant as being involved in this case in any manner.
>
> Next I would note that no piece of physical evidence has been connected to any defendant by way of named identification, dominion and control documents, or by any other method. . . . [N]o witness was ever even asked if he recognized any of the defendants as being on the white boat.

See Transcript of Proceedings, Sept. 20, 2004, at 3-4. The court went on to emphasize that there was "no mention of any defendant's name in the evidentiary record" and "no personal item of identification as to any defendant in the evidentiary record." *Id.* at 4.

The Department does not dispute any of this but argues that the evidence was still sufficient to go to a jury because the government submitted photographs of the eight people arrested on the boat. *See* 2004 DOJ Memo at 12-13. The Department correctly notes that the court stated that the photographs, which were not "photographs" at all but merely paper copies, were of poor quality, *see* Transcript of Proceedings, Sept. 20, 2004, at 4-5, but then fails to disclose the remaining problems with using those copies as the sole identification evidence:

> [N]one of these photographs show a person with a name; no name is associated with any one of these photographs. Further, no witness identified any person in such a photograph as a person that he observed in the white boat. When the

photographs were displayed to the jury, no one identified any of the individuals in the photographs.

Id. at 5.

In granting the Rule 29 motions, the court discussed its concern with the due process problem that would result by permitting the government to go forward with its paltry evidence:

> Each defendant is entitled to have an individual determination of whether or not he is guilty of the charges. There is no evidence before the Court as to who any of these people are in the courtroom. Aside from the introduction to the jury panel of the participants in this case consisting of the attorneys, the parties, representatives of the parties, and a reading of a long list of names, this jury has not heard the name of any of the defendants since that time.

Id. at 6-7.[3]

Given the absolute dearth of any evidence even as to the defendants' identities, much less their connection to the charged crime, the district court was well within its discretion to acquit the defendants. *Accord United States v. Darrell*, 629 F.2d 1089, 1091 (5th Cir. 1980) (rejecting government's argument that "the jury could infer that the person seated at the counsel table was one and the same person as the person referred to in oral and documentary evidence as Mr. Darrell" and reversing conviction for failure to identify the defendant because in-court identifications are not required only "so long as the evidence is sufficient to permit the inference that the person on trial was the person who committed the crime," and the failure of any evidence identifying the defendant on trial as the person who committed the crime precluded such an inference).

United States v. Cooley, Crim. No. 01-10261-JLT (D. Mass.)

In this case, Thomas Cooley was charged with committing two different bank robberies. The evidence at trial indicated that, in both robberies, the robber used demand notes and threatened to shoot the tellers in the face. In its September 2003 memorandum, the Department states, "a fingerprint expert lifted good quality latent prints from both notes that matched

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[3] In its clarifying remarks, the court expounded on why this was so particularly troubling from a constitutional perspective because the government's evidence depended on a presumption of guilt from the defendants' mere presence in the courtroom:

> [T]he government is asking the jury to find each defendant guilty without knowing who they are individually. The jury on this evidentiary record could not identify these individuals by name. The mere fact that there were eight individuals taken from the boat, that there are eight individuals in trial at this point is an insufficient basis for a jury to make a determination that these eight individuals were the eight individuals on the boat, or that these eight individuals carry the names of the eight individuals who were named as defendants in this case.

Id. at 8.

defendant's prints." 2003 DOJ Mem. at 12. In its December 2004 memorandum, the Department again refers to the case and asserts that "[the defendant's] fingerprints were on the two separate demand notes." 2004 DOJ Mem. at 13. The rest of its description of the case in the later memorandum is largely premised on its assumption that the "evidence" showed beyond a reasonable doubt that the latent fingerprints on the demand notes were in fact those of Mr. Cooley. As explained below, that assumption is without foundation.

While the government did attempt to present latent print evidence relating to the two demand notes, the quality of that evidence was poor. Neither of the so-called "fingerprint experts" called to testify by the government was certified as a latent print examiner by the FBI or by any other national organization (such as the International Association for Identification). Nor had either of these "experts" ever previously testified as a latent print expert in any federal court proceeding. One of the supposed "experts" was a local police officer who had failed the IAI certification tests, and whose examination of the latent fingerprint from the first note failed to comply with any known latent print examination standard. The other "expert" was a Massachusetts state trooper who was likewise uncertified. Notably, that witness testified about "palm prints" – not fingerprints – and he admitted at trial that there was no known established standard for the palm print examination he had conducted.

Finally, and perhaps most significantly, the government stipulated that the Massachusetts AFIS computer system had concluded that there was *no match* between the defendant's fingerprints and the latent fingerprints collected by the government. *See* Trial Exhibit P (Stipulation of Sept. 10, 2003) ("The Massachusetts State Police AFIS computer found no match between any of the latent prints recovered from the demand note used in the April 25, 2001 robbery and any of the fingerprints of the defendant Thomas F. Cooley."); *see also* Transcript of Proceedings, Sept. 10, 2003, at 55-56. In light of these facts, the Department's suggestion that there was strong evidence implicating Mr. Cooley arising from the latent print examinations of the demand notes is seriously misleading.

The Department further states in its 2003 memorandum that the "tellers and . . . bank employees gave descriptions of the robber which generally matched the defendant." 2003 DOJ Mem. at 12. In its later memorandum, the Department simply asserts that "[t]he two bank tellers also gave a description of the defendant." 2004 DOJ Mem. at 13. These statements are likewise grossly misleading. In fact, many of the witnesses' descriptions of the robber did *not* match the defendant at all (*e.g.*, estimating the robber's weight at approximately 145 pounds, when Mr. Cooley weighed in fact well over 300 pounds; estimating the robber's age as in his forties, when Mr. Cooley was actually in his mid-twenties.). *See, e.g.*, Transcript of Proceedings, Sept. 9, 2003, at 108 & Exhibit N; *see also* Transcript of Proceedings, Sept. 8, 2003, at 54. There was no in-court identification of the defendant by any witness. And, perhaps most significant, the only two witnesses who reviewed photo arrays of possible suspects picked out *another* individual from that array and identified that other individual as the robber. *See* Transcript of Proceedings, Sept. 8, 2003, at 68 & Exhibit B (teller identifying another individual as the robber and stating, "That's the guy, that's the guy, that's him.").

In its 2003 memorandum, the Department also asserts that "the bank camera photographs

were consistent with the defendant's appearance." 2003 DOJ Mem. at 12. Later, it states more particularly that "the evidence included two video-tapes of the bank robber, carrying a demand note, and matching the same the same physical description of the defendant." 2004 DOJ Mem. at 13. These statements are simply inaccurate, as the photos that were entered into evidence had no shots of the robber's face and were shadowy and unclear. In fact, when the prosecutor mentioned the surveillance photos during the Rule 29 hearing, the judge stated, "You absolutely can't make an identification from that." *See* Transcript of Proceedings, Sept. 10, 2003, at 63. In response to this comment, the prosecutor agreed, stating, "No, and I am not contending otherwise." *Id.*

The judge in *Cooley* actually granted the Rule 29 motion at that close of *all* the evidence, not "at the close of the government's case" as stated in the 2003 memorandum. In fact, the court *denied* the Rule 29 motion when it was first made, but only revisited the issue when it resurfaced in connection with the jury instructions in the case. Specifically, in analyzing the jury instructions proposed by the parties, the court recognized that the government had failed to introduce the requisite degree of evidence required to support a prosecution based on latent prints. Accordingly, there was simply no evidence to support one of the required elements of each of the charged offenses. The court therefore realized that a properly instructed jury would have had no choice but to acquit Mr. Cooley. Thus, the court granted the Rule 29 motion when it became apparent that the government had failed to admit *any* evidence implicating the defendant in the charged crimes other than the highly questionable latent print evidence. Under well-established law, such evidence alone is insufficient to support a guilty verdict. Indeed, during oral argument on the renewed Rule 29 motion, the prosecutor conceded the legal point. *See id.* at 70 ("[I]f the only evidence in the record or the only evidence you find is a fingerprint, then, no, it's not enough.").

It is worth noting, too, that during the Rule 29 hearing, the court expressly indicated that it was granting the Rule 29 motion with some reluctance, but that it felt compelled to grant the motion in light of the overwhelming case law requiring acquittal: "I have read very carefully all of the cases that – when I say I have read them, I read them myself – all the cases that have been presented to me and reread the . . . defendant's motion. And I am inclined to allow it." The court continued, "You know, the good faith basis, you know, I have a lot of respect for you. And I know that you are not going to make that argument frivolously. *And I will give you all the time you want to talk me out of it.*" *Id.* at 58 (emphasis added). The government proceeded to take a long period of time, including several breaks to review additional case law, to argue and reargue the issue presented. *Id.* at 58-84.

Finally, the Department states in its 2003 memorandum that "the judge ruled in a previous case that similar evidence was sufficient to support a jury verdict, and had been affirmed by the First Circuit." 2003 DOJ Mem. at 12. That statement is simply incorrect. The Department apparently refers to *United States v. Wade*, 1995 WL 37304 (1st Cir. 1995) (unpublished), an earlier bank robbery case that had been tried before the same district judge. But in that case, the court of appeals specifically noted that the fingerprint evidence that was admitted in the case was presented by an FBI certified fingerprint expert with "nearly thirty years of experience." *Id.* at *2. In addition, the court noted that the fingerprint evidence was coupled

with additional evidence implicating the defendant in the offense (in that case *both* a handwriting analysis and some identifying testimony from a bank teller). In this case, by contrast, the government did not present any handwriting analysis regarding the demand notes in question, nor did the government present any other evidence suggesting the defendant was the individual who had actually committed the robberies in question. Accordingly, the court's decision in *Cooley* was entirely consistent with *Wade*. The Department's suggestion to the contrary is wrong.

United States v. Collins, Crim. No. 03-163 (W.D.N.C.)

In the case of *Screws v. United States*, 325 U.S. 91 (1945), the Supreme Court held that the due process clause of the Fourteenth Amendment invested in an individual "the right to be tried by a court rather than by ordeal." There, the Court held that a local sheriff could be constitutionally convicted of violating the predecessor statute to 18 U.S.C. § 242 when he intentionally acted to deprive an individual of his due process right to trial by a court by "arresting" him and inflicting deadly harm. *Id.* at 107.

Today, *Screws* stands as the seminal case for prosecutions under 18 U.S.C. § 242, which makes it a federal crime to intentionally deprive someone of a constitutional right under color of law. In order to demonstrate a violation of § 242, the government must establish that the defendant acted (1) willfully, that is with "the particular purpose of violating a protected right made definite by the rule of law" or "recklessly disregarding the risk" that he would do so (2) under color of law, (3) to deprive an individual of a right protected by the Constitution of the United States." *See United States v. Johnstone*, 107 F.3d 200, 210 (3d Cir. 1997) (interpreting *Screws v. United States*, 325 U.S. 91 (1945)); *United States v. Brown*, 250 F.3d 580, 584 (7th Cir. 2001); *United States v. Cobb*, 905 F.2d 784, 787 (4th Cir. 1990).

In this case, the government alleged that, on May 11, 2000, Rodney Collins and Paul Gee, experienced and senior correctional officers at the Mecklenburg County Jail, maliciously beat Midgett for the purpose of wantonly inflicting punishment. The government bore the burden of proving, beyond a reasonable doubt, that Collins and Gee willfully intended to deprive Midgett of his constitutional right not to be deprived of liberty without due process of law through the use of excessive force. *United States v. Mohr*, 318 F.3d 613, 619 (4th Cir. 2003); *United States v. Calhoun*, 726 F.2d 162, 163 (4th Cir. 1984). In determining whether the officers used excessive force in violation of Midgett's constitutional rights, the jury would have had to

> look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Calhoun, 726 F.2d at 163.

The government elected to call only four witnesses, each of whose testimony was

materially inconsistent with one another. The testimony of these witnesses also showed an all-out melee before defendants Collins and Gee ever arrived at the scene upon being summoned by an emergency call. Moreover, the evidence failed to establish to any degree the source of Midgett's minor injuries. Finally, for reasons that are unclear, the government tried the case without calling Midgett as a witness, which created a fatal evidentiary posture in light of the other relevant testimony.

The Department has asserted in its December 2004 memorandum that the court used "an incorrect legal standard" – purportedly argued by defense counsel – when it granted the defendants' motion for judgment of acquittal. 2004 DOJ Mem. at 14. Yet, the transcript of the proceedings confirms that the court was well aware of the proper standard, and that defense counsel argued the proper standard. In referring to the seminal case of *Screws* as establishing the constitutionality of the statute, defense counsel referred to the Supreme Court's reasoning in *Screws* that "there has to be a motive to punish by ordeal rather than trial." Defense counsel next clearly referred to current law of the Fourth Circuit regarding the standard for determining whether the officers used excessive force. *See* Transcript of Proceedings, Oct. 19, 2004, at 218-19 ("The Fourth Circuit has established that you need to focus on the need for force, that need versus the amount used, good faith of the officer, and the extent of the injuries. . . ."). Defense counsel also referred to the requirement of "malice." *Id.* at 219. Finally, defense counsel argued that the guards' blows to Midgett in their efforts to subdue him during an altercation did not "rise to an intentional deprivation of the Constitutional right." *Id.* at 220. Further, the transcript indicates that the court was aware that defense counsel cited *Calhoun* for the controlling standard in a brief filed with the court. *Id.* at 232.

The court ended proceedings for the day. The next morning, the court stated, "I've read all the stuff that you gentlemen have provided . . . I have reread the arguments of counsel. Applying the standard under Rule 29, and considering the evidence in the light most favorable to the government, I believe that I am compelled at this time to determine that the evidence fails to establish any motive to punish by ordeal rather than by trial." *See* Transcript of the Judge's Ruling, Oct. 20, 2004, at 2. The Department does not tell the Committee that the court then went on to explain that the evidence failed to establish the element of excessive force because the testimony was materially irreconcilable. *Id.* (expressly referring to materially conflicting evidence regarding to the extent of force and the extent of bodily injury). Thus, the court's initial reference to the "trial by ordeal" statement in *Screws* was an appropriate nod to the seminal case in the context of the Fourth Circuit's modern articulation of the proper standard. The Department's suggestion that the court acquitted the defendants based upon the "wrong standard" is simply unsupported by the law or the record.

United States v. Foster, Crim. No. 02-10305-JLT (D. Mass.)

The Department's description of the evidence in *United States v. Foster* is equally misleading. *Foster* involved a lawyer who was accused of laundering money for drug dealers. It was undisputed that the lawyer had partnered with his alleged co-conspirators in legitimate business ventures; the only issue was whether the defendant knew that his business partners' money came from selling drugs.

In its December 2004 memorandum, the Department asserts that it presented "the testimony of multiple coconspirators testifying to events showing Mr. Foster's knowledge of the drug money." 2004 DOJ Mem. at 15. As the sole example of this supposed testimony, the Department represents that "after spotting law enforcement surveillance, one dealer picked up the lawyer, told him about it, and together they removed ecstasy pills and money from the dealer's apartment, with the lawyer saying he was happy to do it." *Id.* In fact, the witness, Paul Lozier, testified that he asked Mr. Foster, a criminal defense lawyer, to come with him to the apartment because he was afraid that he was going to be arrested as soon as he arrived home. *See* Transcript of Proceedings, September 14, 2004, at 192-95. Lozier further testified that Mr. Foster "just barely stepped through the threshold of the door" to Lozier's apartment, while Lozier alone "roam[ed] through the house" collecting what he claimed at trial were "fake Ecstasy" and money, which he placed into two small duffel bags. *Id.* at 195. And far from testifying that Mr. Foster knew that Lozier was removing evidence, Lozier testified that he specifically told Mr. Foster "don't worry, this is nothing, very legal in here." *Id.* at 195-96. In light of this testimony, the suggestion in the memorandum that Mr. Foster was "happy" to help hide drugs and money from law enforcement is grossly misleading.

Moreover, at the time of his testimony, Lozier was facing five years in prison and testifying in the hopes of earning a reduced sentence. On cross-examination, Lozier was repeatedly shown to have lied during his proffer sessions, in the grand jury, and at trial. As but one notable example of his lack of credibility, Lozier testified that he had told the government right away that Mr. Foster knew he was a drug dealer – the key issue in Mr. Foster's trial – when in fact a letter from the United States Attorney's Office demonstrated that Lozier did not first make that claim until months later, when his prospects of obtaining a sentence reduction were wearing thin. *See* Transcript of Proceedings, Sept. 15, 2004, at 70-72. Interestingly, although Lozier named four people that he claimed could corroborate his testimony that he had repeatedly told Mr. Foster he was a drug dealer, *id.* at 92-93, the government did not present *any* such testimony, despite calling two of those four to testify later in the trial. In fact, there was *no* credible evidence – and certainly not evidence beyond a reasonable doubt – that Mr. Foster was even aware that any of his partners were drug dealers, much less that he knew that the money his partners were investing in their legitimate business came from drugs, the Department's suggestions in its memorandum notwithstanding.

Perhaps most disturbing, however, is the Department's gross mischaracterization of the action taken by the district court. The Department claims that "the court granted a pre-verdict acquittal because it viewed the evidence in the light most favorable to the defendant" and "applied an incorrect legal standard for proving knowledge." The Department is wrong. The court granted the Rule 29 motion not because it misapplied the law but because the government had wholly failed to present evidence on an essential element of the crime.

To sustain its charge of money laundering, the government needed to present evidence from which the jury could find beyond a reasonable doubt both that Mr. Foster knew that he was dealing in funds that were the proceeds of drug sales and that he engaged in the transactions at issue knowing that their purpose was to conceal or disguise the true source of the funds. *See*

United States v. Morales-Rodriguez, 467 F.3d 1, 12 (1st Cir. 2006); *United States v. Frigerio-Migiano*, 254 F.3d 30, 33 (1st Cir. 2001). To sustain this latter element, the government needed to present "evidence of intent to disguise or conceal the transaction, whether from direct evidence, like the defendant's own statements, or from circumstantial evidence, like the use of a third party to disguise the true owner, or unusual secrecy." *United States v. Cruzado-Laureano*, 404 F.3d 470 (1st Cir. 2005). Here, the government presented no evidence of unusual – or, indeed, *any* – secrecy on the part of the defendant; all of the transactions in which he participated reflected his name and/or the names of his partners, there were no straw purchasers, no "paper" owners, and the only evidence of structured transactions in the entire case related to transactions in which the defendant was *not* involved. Far from "creat[ing] a 'blatancy' defense that does not exist," the court properly applied the law and acquitted the defendant on the government's failure of proof.

Nor was the government caught unawares by the court's ruling. Beginning on the third day of this seven-day trial, the court warned the government that it had concerns about the quantum of proof in this area and encouraged the government to present or direct the court's attention to record evidence supporting its case. *See* Transcript of Proceedings, Sept. 17, 2004, at 55, 67; Transcript of Proceedings, Sept. 22, 2004, at 7-12. The court continued to request record citations during the Rule 29 hearing, but the government offered none. *See* Transcript of Proceedings, Sept. 22, 2004, at 137-38; 141. Tellingly, at the end of that hearing, even the Assistant U.S. Attorney agreed with the court's assessment of the testimony presented by the government witnesses, stating "[a]s you saw, we got stuck with what we got stuck with." *See id.* at 165.

Rather than cite to the record in its memorandum to this Committee, the Department prefers to criticize the court's decision in the *Foster* case because "[t]he jury may have concluded that a lawyer accepting bags containing hundreds of thousands of dollars of cash from drug clients, and entering into business partnerships with them, knows that it is drug money." As an initial matter, that was not the evidence in this case – none of the alleged co-conspirators were "drug clients" of Mr. Foster's and there was no credible evidence that Mr. Foster had any knowledge of their illegitimate businesses. More to the point, whether or not the jury "may have" convicted Mr. Foster is irrelevant if, as here, there was insufficient evidence to sustain the conviction: "[W]here an equal or near equal theory of guilt and a theory of innocence is supported by the evidence viewed in the light most favorable to the verdict, a reasonable jury *must entertain* a reasonable doubt." *Frigerio-Migiano*, 254 F.3d at 36 (citations and internal punctuation omitted) (emphasis in original). Mere speculation and mischaracterizations of the record evidence properly do not make the cut.

As its final point, the Department quotes a juror from the *Foster* trial who "expressed frustration" at the court's decision in an article published in the Boston Globe on October 18, 2004. That article closed with the following statement, which the Department did not see fit to bring to the Committee's attention:

> Another juror in the Foster case, Alex Kevorkian, said he wasn't upset when the trial was cut short. He said he agreed with the judge about the lack of evidence

against Foster. "If you honestly don't believe there's a case against a person, why leave it up to chance? Make sure they get acquitted," Kevorkian said. "It seems like not only a waste of money, but a waste of time and a detriment to the defendant to have it always go to a jury."

See Shelley Murphy, *Acquittal by Judge Draws Criticism*, Boston Globe, October 18, 2004.

United States v. Weingold, Crim. No. 98-483 (D.N.J.)
(described in 2004 DOJ Memo *sub nom United States v. Levine*)

Michael Levine was charged with twelve counts of conspiracy to commit mail fraud, one count of conspiracy to commit money laundering, two substantive counts of money laundering, four counts of making false declarations before a court, four counts of subornation of perjury, and three counts of aiding and assisting the preparation of a false tax return. These charges stemmed from various actions Mr. Levine took as Harold Weingold's attorney. Harold Weingold was engaged in the business of mail order solicitations. He was indicted on similar charges along with Mr. Levine and Robert Dembia, Mr. Levine's law partner.

After the close of the government's case, which lasted approximately two weeks, the court acquitted Mr. Dembia of all charges based on a total lack of evidence. Transcript of Proceedings, April 18, 2001, at 1953-54. The Department has not suggested that this decision was erroneous. After hearing argument from Mr. Levine, who represented himself, the court initially acquitted him of every charge except those relating to money laundering on the ground that there was a total lack of evidence for each count as charged. *Id.* at 1954-77. In particular, with respect to the mail fraud counts, the court ruled that the government's allegations that Mr. Levine conspired on twelve different occasions with his client to mail a fraudulent solicitation were entirely without evidence. The court admonished the prosecutor for choosing to charge Mr. Levine with individual conspiracies for which there was no evidence of Mr. Levine's involvement.

> The charge is conspiracy to commit mail fraud. The charge is not something other than that. It is conspiracy to commit mail fraud. . . .
>
> You charged him. You could have charged one count and you could have lumped them all together and you might have something to argue in front of me. But you didn't do that. Ms. Gerson. You charged – you wanted to have multiple counts. You elected to have 12 counts. I didn't draft the Indictment.
>
> You are responsible for proving the individual conspiracies. Each conspiracy is different. It is not one gran[d] scheme. That is what I'm trying to tell you. Maybe it doesn't get through. If I say it enough times maybe it will go through.
>
> This is not a grand conspiracy because you didn't charge it, Ms. Gerson, for whatever reason. . . . I've listened to two weeks or three weeks of testimony about it. It doesn't do – you know, you don't win cases by having inches and

inches of paper - - . . . in indictments, pile it on and try to make it look like something. You might have had a better case, but you don't.

Id. at 1965-66.

The Department does not suggest that the court erred in acquitting Mr. Levine on the twelve conspiracy counts, or on the eleven other counts of which he was also acquitted at that time. Yet, it has the audacity to complain to the Committee that the district court erred in acquitting Mr. Levine on three money laundering charges, without even mentioning that the case also involved twenty-three other legally deficient charges against Mr. Levine. In any event, as noted above, the court initially *denied* Mr. Levine's motion for acquittal on the money laundering charges. Mr. Levine then asked to take the afternoon in order to reorganize and prepare his defense against those remaining charges. *Id.* at 1988.

The next day, both Mr. Weingold and Mr. Levine rested after presenting their respective defenses. The unrebutted documentary evidence before the court, which was not before the court at the time of the original Rule 29 motion, was that, insofar as Mr. Levine was aware, any transfer of funds to the account in the Cayman Islands was for the purpose of a legitimate business transaction, the purchase of real property in Jamaica. The evidence further established that Mr. Weingold himself transferred the funds back to his own corporate accounts in the United States to pay legal expenses. There was no evidence that Mr. Levine knew the funds were proceeds of any mail fraud or to connect Mr. Levine to any scheme or design to conceal the source or ownership of the money. In fact, the evidence established that Mr. Levine was entirely candid about his understanding of the purpose of the transaction and his involvement throughout the investigation of the case. *See* Transcript of Proceedings, April 19, 2001, at 2128-29.

Upon Mr. Levine's renewed Rule 29 motion, the court acquitted both defendants of the money laundering charges, finding that there was not sufficient proof to establish any of the elements of money laundering. The court engaged in extensive discussion of the elements of the offense, expressing concern about the sufficiency of the government's proof on both the illegal source of the money and concealment or disguise. Transcript of Proceedings, April 20, 2001, at 2276. The court asked, "Where is the disguise, if you would, as to the true intent that it came from – first of all, what is the illegal place it came from? What is the illegality? Second of all, what is the concealment or disguise, the nature and location of the source and ownership and control, if he ends up with the money?" *Id.* at 2276-77. The court emphasized that the money was "in [Weingold's] hands clearly traceable to him. Not to a third party source. Not to a fake company some place. Not to a pseudo name in Liberia. It comes back to the United States in his hand." *Id.* at 2277.

Further, the government conceded that Mr. Levine never handled any of the money or had any personal knowledge of any illegal purpose of opening a bank account in the Cayman Islands. *Id.* at 2285. The court suggested that at most, the government had proven that Mr. Weingold moved the money in order to evade a civil injunction entered against Mr. Weingold and his various companies in a related civil case. As the court stated, "[t]hat may very well be a blatant violation of Judge Bassler's order. How does that convert into what we call - - a special

thing called money laundering?" *Id.* at 2287.

The Department asserts that the court's ruling suffered from a "fundamental misunderstanding of the elements of the offense." 2004 DOJ Mem. at 16. Yet, the Department omits the court's statements just before its summary of the earlier discussion of "the circuitous route of the money going around the circle and ultimately going back home to roost to him." The court stated, "They may have done a lot of things. They may have violated Judge Bassler's Order. I'll tell you one thing. There is not sufficient proof to show any of the elements of money laundering." Transcript of Proceedings, April 20, 2001, at 2290. Thus, it is clear that the court did not rule that, simply because the money ultimately came back to Mr. Weingold, no money laundering took place. Rather, the court found that the movement of the money as established by the evidence did not prove the elements of the offense.

The Department's suggestion that an experienced jurist "fundamentally misunderstood" the statutory elements of the crime and created his own personal and incorrect standard in order to "return a lawyer to practice" is improper and disrespectful. As set forth above, the court granted the motion only after Mr. Levine proved with documentary evidence that he had not been involved in any money laundering scheme. Indeed, at the time of these events, Mr. Levine had been practicing law uninterrupted for over twenty years, and there has never been any disciplinary action taken against him by any court or disciplinary body, nor has he ever been accused by any court or disciplinary body of any wrongdoing of any kind. Moreover, the propriety of the district court's ruling was recognized in a subsequent *Bivens* action brought by Mr. Levine on the ground of malicious prosecution, in which the District Court for the Southern District of New York specifically held that "as to the money laundering ... count .... the defects which required dismissal should have been apparent to any prosecutor prior to the start of the trial." *Levine v. Gerson*, Civ. No. 7:03-02133-CLB-GAY, Mem. & Order (S.D.N.Y. Dec. 7, 2004) (ultimately granting summary judgment to defendants on the ground of immunity).

But perhaps most disturbing, the Department asserts that this case is an example of a court that "intentionally rule[d] pre-verdict in order to shield rulings from appeal." DOJ Mem. 2004 at 16. Until the court stepped in, the collective actions of the government forced Mr. Levine to live under the professional and personal shadow of a criminal investigation and a clearly deficient, multiple-count indictment for nearly five years. That he was forced to defend twenty-six unfounded felony charges is the real travesty in this case, and if anything, the Department should be embarrassed to have presented it as an example of judicial abuse of Rule 29.