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Proposed Amendments to the Federal Rules of Criminal Procedure in Light of the Crime Victims Rights Act

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By Paul G. Cassell*

Last October, Congress passed and the President signed into law the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act (CVRA).[1] The CVRA will reshape the federal criminal justice system, forcing significant changes to the Federal Rules of Criminal Procedure. The CVRA transforms crime victims into participants in the criminal justice process by guaranteeing them notice of court hearings, the right to attend those hearings, and the opportunity to be heard at appropriate points in the process. In this memorandum, I try to provide comprehensive suggestions about the changes to the criminal rules the CVRA requires both as a matter of law and of sound public policy.

This memorandum is divided into two parts. In Part I, I briefly sketch the background leading to the CVRA's enactment. For the last ten years, Congress has been considering amending the U.S. Constitution to protect crime victims' rights. Unable to garner the necessary super-majority needed to pass a constitutional amendment, the principle sponsors (Senator Jon Kyl of Arizona and Senator Dianne Feinstein of California) decided instead to pass a broad federal statute protecting victims' rights throughout the federal system. They intended that the statute significantly improve how federal courts treat crime victims. To that end, the CVRA confers rights on victims throughout the criminal process.

In Part II, I provide a rule-by-rule analysis of the multiple changes needed in the Federal Rules of Criminal Procedure to implement the CVRA. Of particular importance is new language protecting crime victims' rights to be notified of, be present at, and be heard at public criminal proceedings. The right to notice is implemented in a new Rule 10.1, which mandates that prosecutors keep victims apprised of criminal proceedings. The right to attend court proceedings is implemented in a new Rule 43.1, which generally gives victims the right to remain in the courtroom even when they are witnesses. The right to be heard at bail, plea, and sentencing hearings is reflected in changes to Rule 46(k), Rule 11, and Rule 32 respectively.

I also propose other significant changes to conform the Rules to the CVRA. Rule 1 would provide a definition of "victim" consistent with the CVRA. Rule 17 would give victims notice before confidential personal information can be subpoenaed. Rules 20 and 22 would allow victims to be heard before judges transfer cases to remote districts. Rule 32 would provide victims access to the relevant parts of presentence reports so that they can make an effective sentencing recommendation. Rule 44.1 would recognize a court's discretionary power to appoint volunteer attorneys to represent victims. Rule 50 would protect a victim's right to proceedings free from

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[1] Crime Victims' Rights Act, Pub. L. No. 108-405, 118 Stat. 2261 (codified as 18 U.S.C. § 3771).

unreasonable delay. And Rule 53 would allow closed circuit transmission of court proceedings in cases involving multiple victims.

This memorandum also contains several appendices. Because the CVRA is not yet widely available in the standard West Publishing rule book, Appendix A contains a full copy of the legislation. Shortly after the passage of the CVRA, chief sponsor Senator Jon Kyl took to the Senate floor to provide a section-by-section explanation. Appendix B is a copy of his helpful analysis. Finally, while I discuss my proposed changes rule-by-rule in the body of this memorandum, it might be helpful for the Committee to see a clean draft of the proposed rule changes interlineated into the text of the current rules. Appendix C contains a clean copy.

I have considerable background on victims issues, which is why I have written this (perhaps too lengthy) analysis of the issues. Along with co-authors Douglas Beloof and Stephen Twist, I have a new law school casebook coming out shortly on the subject of crime victims' rights – VICTIMS IN CRIMINAL PROCEDURE.[2] I teach a course on Crime Victims' Rights annually at the University of Utah College of Law. I have also published several articles on crime victims' rights[3] and have testified before Congress on the subject.[4] I hope that my background will allow me to provide some assistance to the members of the Committee as it attempts to integrate victims into the federal criminal system.

I. GENERAL BACKGROUND TO THE CRIME VICTIMS' RIGHTS ACT

The Crime Victims' Rights Movement developed in the 1970s because of an imbalance in the criminal justice system. Victims' advocates argued that the criminal justice system had become

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[2] North Carolina Academic Press (forthcoming 2d ed. 2005).

[3] Paul G. Cassell, *Barbarians at the Gates: A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479 (1999); Paul G. Cassell, *Balancing the Scales of Justice: The Case for and Effects of Utah's Victims Rights Amendment*, 1994 UTAH L. REV. 1373 (1994); Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. TIMES, July 6, 1998, at B7.

[4] *See, e.g.*, "The Right of Crime Victims To Be Heard Throughout the Criminal Justice Process," Testimony before the Subcomm. on the Constitution of the Senate Judiciary Comm, May 1, 1999 (St. Louis, Missouri); "A Response to the Critics of the Victims' Rights Amendment," Testimony before the Senate Judiciary Comm., Mar. 24, 1999 (Washington, D.C.); "The Victims' Rights Amendment," Testimony before the Senate Judiciary Comm., Apr. 28, 1998 (Washington, D.C.); "A Constitutional Amendment Protecting the Rights of Crime Victims," Testimony before the Senate Judiciary Comm., Apr. 16, 1997 (Washington, D.C.).

preoccupied with defendants' rights to the exclusion of considering the legitimate interests of crime victims.[5] These advocates urged reforms to give more attention to victims' concerns.

The movement received considerable impetus with the publication in 1982 of the Report of the President's Task Force on Victims of Crime. The Task Force concluded that the criminal justice system "has lost an essential balance. . . . [T]he system has deprived the innocent, the honest, and the helpless of its protection. . . . The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be addressed."[6] The Task Force recommended multiple reforms, including a federal constitutional amendment to protect crime victims.

In the wake of that recommendation, crime victims advocates considered how best to pursue a federal amendment. Realizing the difficulty of achieving the consensus required to amend the United States Constitution, advocates decided to go to the states first to enact state victims amendments. They have had considerable success with this states-first strategy.[7] To date, about thirty states have adopted victims' rights amendments to their own state constitutions.[8]

With the passage of these state amendments in hand, in 1995 victims advocates decided the time was right to press for a federal constitutional amendment. Lead most prominently by the National Victims Constitutional Amendment Network,[9] the advocates approached the President and Congress about a federal amendment. In 1996, Senators Kyl and Feinstein introduced a federal

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[5] *See generally* BELOOF, CASSELL & TWIST, *supra*, chapter 1; Cassell, *Balancing the Scales of Justice*, *supra*, 1994 UTAH L. REV. 1380-82.

[6] PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 114 (1982).

[7] *See* S. REP. 108-191, 108 Cong., 1st Sess. 3 (2004).

[8] See ALA. CONST. amend. 557; ALASKA CONST. art. I, § 24; ARIZ. CONST. art. II, § 2.1; CAL. CONST. art. I, §§ 12, 28; COLO. CONST. art. II, § 16a ; CONN. CONST. art. I, § 8(b); FLA. CONST. art. I, § 16(b); IDAHO CONST. Art. I, § 22; ILL. CONST. art. I, § 8.1; IND. CONST. art. I, § 13(b); KAN. CONST. art. 15, § 15; LA. CONST. art. 1, § 25; MD. DECL. OF RIGHTS art. 47; MICH. CONST. art. I, § 24; MISS. CONST. art. 3, § 26A; MO. CONST. art. I,§ 32; NEB. CONST. art. I, § 28; NEV. CONST. art. I, § 8; N.J. CONST. art. I, § 22; NEW MEX. CONST. art. 2, § 24; N.C. CONST. art. I, § 37; OHIO CONST. art. I, § 10a; OKLA. CONST. art. II, § 34; OR. CONST.; R.I. CONST. art. I, § 23; S.C. CONST. art. I, § 24; TENN. CONST. art. 1, § 35; TEX. CONST. art. I, § 30; UTAH CONST. art. I, § 28; VA. CONST. art. I, § 8-A; WASH. CONST. art. 2, § 33; WIS. CONST. art. I, § 9m. These amendments passed with overwhelming popular support.

[9] *See* www.nvcan.org.

victims' rights amendment.[10] In the following years, however, despite the backing of many members of Congress of both political parties and of both President Clinton and later President Bush, the Amendment could never gain the required two-thirds vote for approval.

In April 2004, victims advocates met with Senators Kyl and Feinstein to decide whether to push again for a federal constitutional amendment. Concluding that the amendment had only majority support in Congress rather than the required super-majority, the advocates decided to press for a far-reaching federal statute protecting victims' rights in the federal criminal justice system. In exchange for backing off from the federal amendment, victims' advocates received near universal congressional support for a "broad and encompassing" statutory victims' bill of rights.[11] This "new and bolder" approach not only created a string of victims' rights, but also provided funding for victims' legal services and created remedies when victims' rights were violated.[12]

The legislation that ultimately passed – the Crime Victims' Rights Act – gives victims "the right to participate in the system."[13] Specifically, the Act grants victims:

> (1) The right to be reasonably protected from the accused;
>
> (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused;
>
> (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding;
>
> (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding;
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> (5) The reasonable right to confer with the attorney for the Government in the case;
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> (6) The right to full and timely restitution as provided in law;

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[10] S.J. Res. 52, 104th Cong., 2nd Sess (Apr. 22, 1996).

[11] 150 CONG. REC. S4261(daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

[12] *Id.* at S4262 (statement of Sen. Feinstein).

[13] *Id.* at S4263 (statement of Sen. Feinstein). For a description of victim participation, see Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289 (1999).

(7) The right to proceedings free from unreasonable delay; and

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.[14]

The congressional sponsors described these as "broad rights"[15] whose "significance [should not] be whittled down or marginalized by the courts or the executive branch. This legislation is meant to correct, not continue, the legacy of the poor treatment of crime victims in the criminal process."[16]

II. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE TO IMPLEMENT THE CVRA

In light of the CVRA, the Committee needs to significantly change the Federal Rules of Criminal Procedure. As should be obvious from the description of the CVRA's goals, the Act is not an invitation to business as usual for federal courts. Rather, Congress intended to make crime victims participants in the criminal process. Congress will be watching to see whether the Judiciary (and the Executive) will fully and fairly implement the new Act. As Senator Leahy warned, "Passage of this bill will necessitate careful oversight of its implementation by Congress."[17]

Broadly construing the CVRA also required because the Act is remedial legislation. As the Supreme Court has instructed, "When Congress uses broad generalized language in a remedial statute, and that language is not contravened by authoritative legislative history, a court should interpret the provision generously so as to effectuate the important congressional goals."[18] The Committee is, of course, aware of the need to effectuate the goals of the CVRA, having previously withdrawn the Committee's proposed amendment to Rule 32 regarding sentencing allocution by all victims in light of the new Act.

With the goal of effectively implementing the Act in mind, I propose the following Rules changes for consideration by the Committee. In the sections that follow, I first recite a specific proposed change followed by the rationale for that change as both a matter of law and of policy. Appendix C provides a clean copy of all the rules with the proposed revisions interlineated.

Rule 1 - Definition of "Victim"

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[14] 18 U.S.C. § 3771(a).

[15] 150 CONG. REC. S4269 (statement of Sen. Kyl).

[16] *Id.* (statement of Sen. Feinstein).

[17] *Id.* at S4271 (statement of Sen. Leahy).

[18] *California v. American Stores Co.*, 495 U.S. 271, 279 n.4 (1990).

The Proposal:

Rule 1 should be amended to include the following definition of a victim:

(11) "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 these rules, but in no event shall the defendant be named as such guardian or representative.

The Rationale:

The CVRA itself directly defines "victim" with this language,[19] which ought to be folded into the rules for convenience. The rules currently define such terms as "attorney for the government," "federal judge," and "petty offense;" "victim" likewise should be defined.

A definition is required for a second reason: Rule 32 currently contains a differing definition of "victim" as "an individual against whom the defendant committed an offense for which the court will impose sentence."[20] Because that definition varies from that mandated by the CVRA, it will have to be changed.

The term "victim" used in the CVRA has an interpretative history.[21] The CVRA's definition of "victim" is taken almost verbatim from the 1996 Mandatory Victims Restitution Act (MVRA).[22] In turn, the MVRA drew on the 1982 Victim Witness Protection Act (VWPA).[23] As a result, the CVRA uses a definition of "victim" that is twenty-two years-old and has not produced major

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[19] 18 U.S.C. § 3771(e).

[20] Fed. R. CRIM. P. 32(a)(2).

[21] *See generally* BELOOF, CASSELL & TWIST, *supra*, chapt. 2 (reviewing different definitions of "victim" for purposes of crime victims legislation).

[22] *See* 18 U.S.C. § 3663A(a)(2).

[23] *See* 18 U.S.C. § 3663(a)(2).

administrative or definitional problems. Courts will be able to use that case law to determine who qualifies as a "victim."[24]

Rule 1 also appears to be the best place to include the CVRA's language about a "representative" of a victim. This language, too, draws on the restitution statutes.[25]

Rule 2 – Fairness to Victims in Construction

The Proposal:

Rule 2 should be amended to require fairness to victims in construing the rules as follows:

> These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration to the government, defendants, and victims, and to eliminate unjustifiable expense and delay.

The Rationale:

The CVRA broadly mandates that victims have the right to "be treated with fairness and with respect for the victim's dignity and privacy." This right to fairness appears to create a substantive

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[24] *See, e.g., Hughey v. United States*, 495 U.S. 411 (1990) (holding that VWPA limited "victim" to victims of the actual offense of conviction so that district court could not order restitution on basis of charges that were dropped as part of plea agreement); *United States v. Follet*, 269 F.3d 996 (9th Cir. 2001) (holding that a free clinic was not a "victim" of the defendant's rape of his niece); *Moore v. United States*, 178 F.3d 994 (8th Cir. 1999) (bank customer was "victim" of attempted bank robbery under MVRA where defendant pointed a sawed-off shotgun at the customer and the teller, who were standing only two feet apart, while demanding money); *United States v. Sanga*, 967 F.2d 1332 (9th Cir. 1992) (holding that foreign national who conspired to be brought into United States illegally was still a "victim" of the conspiracy where her smuggler threatened her life and forced her to work as live-in maid once she had arrived); *United States v. Bedonie*, 317 F. Supp. 2d 1285 (D. Utah 2003) (holding that "victim" in manslaughter case under MVRA was murdered person himself and not the estate). *See generally* John F. Wagner, Jr., Annotation, *Who is a "Victim," So as to Be Entitled to Restitution Under Victim and Witness Protection Act*, 108 A.L.R. FED. 828 (2005).

A few new issues will need to be litigated. For example, the *Hughey* case noted above conflicts with the views of Senator Jon Kyl, co-sponsor of the CVRA, who explained that the definition of "victim" in the CVRA is an intentionally broad definition because "all victims of crime deserve to have their rights protected, whether or not they are the victim of the count charged." *See* 150 CONG. REC. S10910-01 (Oct. 9, 2004) (statement of Sen. Kyl).

[25] *See, e.g.*, 18 U.S.C. § 3663A(a) (same definition of victim "represenative").

right to fairness, as is found in some state victims' rights amendments – including the amendment found in Senator Kyl's home state of Arizona.[26] This broad reading was explained by Senator Kyl:

> The broad rights articulated in this section are meant to be rights themselves and are not intended to just be aspirational. One of these rights is the right to be treated with fairness. Of course, fairness includes the notion of due process.[27]

In light of victims' new substantive right to fairness, Rule 2 should be amended to make clear that all of the rules must be construed to be fair to victims no less than to the government and defendants.

(New) Rule 10.1 - Notice of Proceedings for Victims

The Proposal:

A new Rule 10.1 should be added to guarantee victims their right to notice of proceedings as follows:

> **Rule 10.1 Notice to Victims.**
> **(a) Identification of Victim.** During the prosecution of a case, the attorney for the government shall, at the earliest reasonable opportunity, identify the victims of the crime.
> **(b) Notice of Case Events.** During the prosecution of a crime, the attorney for the government shall make reasonable efforts to provide victims the earliest possible notice of:
> (1) The scheduling, including scheduling changes and/or continuances, of each court proceeding that the victim is either required to attend or entitled to attend;
> (2) The release or detention status of a defendant or suspected offender;
> (3) The filing of charges against a defendant, or the proposed dismissal of all charges, including the placement of the defendant in a pretrial diversion program and the conditions thereon;
> (4) The right to make a statement about pretrial release of the defendant;
> (5) The victim's right to make a statement about acceptance of a plea of guilty or *nolo contendere*;
> (6) The victim's right to attend public proceedings;
> (7) If the defendant is convicted, the date and place set for sentencing and the victim's right to address the court at sentencing; and

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[26] *See, e.g.*, ARIZ. CONST., art. 2, § 2(A)(1) (victim's right to be "treated with fairness, respect, and dignity"); UTAH CONST., art. I, § 28(1)(a) (same). *See generally* Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1387-88 (noting that Utah's provision is drawn from Arizona's and that it creates substantive rights).

[27] 150 CONG. REC. 4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

(8) After the defendant is sentenced, the sentence imposed and the availability of the Bureau of Prisons notification program, which shall provide the date, if any, on which the offender will be eligible for parole or supervised release.

(c) Multiple Victims. The attorney for the government shall advise the court if the attorney believes that the number of victims makes it impracticable to provide personal notice to each victim. If the court finds that the number of victims makes it impracticable to give personal notice to each victim desiring to receive notice, the court shall fashion a reasonable procedure calculated to give reasonable notice under the circumstances.

The Rationale:

This proposed change stems from the CVRA's command that victims have the "right to reasonable, accurate, and timely notice of any public court proceeding . . . involving the crime . . . ."[28] Under this provision, victims have the right to notice of the arraignment as well as subsequent proceedings. Congress believes that victims should know about court proceedings, as Senator Feinstein urged:

> Victims are the persons who are directly harmed by the crime and they have a stake in the criminal process because of that harm. Their lives are significantly altered by the crime and they have to live with the consequences for the rest of their lives. To deny them the opportunity to know of and be present at proceedings is counter to the fundamental principles of this country. It is simply wrong.[29]

There can be no dispute, then, that victims are entitled to notice of court proceedings. The tricky issue is how to provide that notice to victims. This responsibility must fall on prosecutors and their investigative agents for several reasons. First, prosecutors and their agents are the only ones who know the identity of the victims in the first instance. In a bank robbery, for example, it is the FBI agents who will respond and interview the tellers. Second, prosecutors and their agents continue working with victims throughout the course of a prosecution. They work with victims in investigating the crime, identifying potential defendants, preparing the indictment, and presenting evidence to the grand jury and at any preliminary hearing, bail hearing, or trial. Because of that working relationship, in many cases prosecutors are best situated to provide notice. Third, most crime victims will lack legal counsel and will be unfamiliar with the nature of federal criminal proceedings. They may require assistance from someone familiar with the process in understanding what kinds of hearings are contemplated. United States Attorney's Offices, including the Victim-

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[28] 18 U.S.C. § 3771(a)(2).

[29] 150 CONG. REC. S2468 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein); *see also id.* at S4267 (statement of Sen. Kyl) ("It does not make sense to enact victims' rights that are rendered useless because the victim never knew of the proceeding at which the right had to be asserted.").

Witness Components in those offices, are well-situated to provide that assistance. For all these reasons, notice is appropriately provided by prosecutors. Most states follow this approach as well.[30]

It appears that the Justice Department agrees with this assessment. In the *Attorney General Guidelines for Victim and Witness Assistance*, the Department already requires prosecutors and their agents to provide notice to crime victims. In particular, the *Guidelines* currently obligate prosecutors to provide "the earliest possible notice" of:

> (a) The release or detention status of an offender or suspected offender. . . .
>
> (b) The filing of charges against a suspected offender, or the proposed dismissal of all charges. . . .

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[30] *See, e.g.,* ALA. STAT. § 15-23-62 (requiring law enforcement officers to give victims initial description of their rights "[t]he name and telephone number of the office of the prosecuting attorney to contact for further information); ARIZ. REV. STAT. § 13-4409 (requiring prosecutor to provide notice to victim of criminal proceedings; CONN. GEN. STAT. ANN. § 51-286e (requiring prosecutor to notify victim of any judicial proceedings related to the case); DEL. CODE ANN. tit. 11 § 9411 (requiring Attorney General to provide information to victim including "[n]otice of the scheduling of court proceedings and changes including trial date, case review and sentencing hearings"); GA. CODE ANN. § 17-17-8(b) (requiring prosecutor where possible to give victim "prompt advance notification of any scheduled court proceedings"); KY. REV. STAT. ANN. § 421.500.5 (requiring prosecutor to provide victim "prompt notification, if possible, of judicial proceedings relating to the case"); ME. REV. STAT. ANN. tit. 15 § 6101 (requiring prosecutor to provide victims of certain crimes notice of any plea agreement and of trial date); MASS. GEN. LAWS ANN. ch. 258B § 3 (requiring prosecutor to give victims notice of various rights); MICH. COMP. LAWS ANN. §780.755 (requiring prosecutor to give victims notice of court proceedings); MINN. STAT. ANN. § 611A.03 (requiring prosecutor to give victim notice of plea agreement and sentencing hearing); N.M. STAT. ANN. § 31-26-9(B) (requiring prosecutor to provide victim with notice of scheduled court proceedings); N.Y. LAW. § 646a (requiring prosecutor to provide notice of court proceedings); S.D. CODIFIED LAWS. § 23A-28C-1 (requiring prosecutor to notify victim of certain hearings); TENN. CODE ANN. § 40-38-103 (requiring prosecutor to notify victim of "times, dates, and locations of all pertinent stages in the proceedings); TEX. C.C.P. CODE ANN. art 56.08(b) (requiring prosecutor to give victim notice of court proceedings); UTAH CODE. ANN. § 77-38-3 (requiring prosecutor to give victim notice of "important criminal justice hearings");WIS. STAT. § 972.14(2m) ("Before pronouncing sentence, the court shall inquire of the district attorney whether he or she has complied with § 971.095(2) and with sub. (3)(b), whether any of the victims of a crime considered at sentencing requested notice of the date, time and place of the sentencing hearing and, if so, whether the district attorney provided to the victim notice of the date, time and place of the sentencing hearing."); WYO. STAT. ANN 1-40-204(b)(i) (requiring prosecutor to inform victim about all hearings). *But see* OHIO REV. CODE ANN. § 2930.06(C) (requiring court to give notice to victim of court proceedings)..

> (c) The scheduling, including scheduling changes and/or continuances, of each court proceeding that the victim or witness is either required to attend or entitled to attend. . . .
>
> (d) The acceptance of a plea of guilty or *nolo contendere* or the rendering of a verdict after trial. . . .
> (e) If the offender is convicted, the date set for sentencing, the sentence imposed . . . .[31]

To avoid breaking any new ground, the proposed new rule 10.1 is lifted essentially verbatim from the *Attorney General Guidelines for Victim and Witness Assistance*. As a result, this new rule does not create significant new responsibilities for prosecutors and their agents.

The drafters of the CVRA also appear to believe that the notification obligations will fall primarily on prosecutors' offices. The CVRA authorizes $22,000,000 over the next five fiscal years to the Office for Victims of Crime of the Department of Justice for enhancement of victim notification systems.[32] Presumably, those enhanced new notification systems can be used to keep victims apprised of court proceedings. Moreover, the CVRA directs that the Department of Justice and its investigative agencies "shall make their best efforts to see that crime victims are *notified of*, and accorded, the rights described in subsection (a)."[33]

Proposed new Rule 10.1 adds only two additional obligations beyond those found in the *Attorney General Guidelines*: notice to victims of (1) their right to make a statement regarding any proposed plea and (2) their right to attend public proceedings. With respect to the first point, given that the *Attorney General Guidelines* already requires prosecutors to confer with victims about pleas, it should not be burdensome for prosecutors to also inform victims about their rights in connection with a public plea proceeding. With respect to the second point, the *Attorney General Guidelines* already require prosecutors to inform victims of their right to attend trial. The proposed change

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[31] ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE, at 31 (2000); *see also* U.S. DEPT. OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY 82 (1997) ("Prosecutors' offices should notify victims in a timely manner" of all significant hearings).

[32] *See* 118 Stat. 2260, 2264; *see also* 150 CONG. REC. SS4267 (statement of Sen. Kyl) (April 22, 2004) ("we authorized an appropriation of to assure . . . that moneys would be made available to enhance the victim notification system, *managed by the Department of Justice's Office for Victims of Crime*, and the resources additionally to develop state-of-the-art systems for notifying crime victims of important statements of development); *but cf. id.* (discussing court notification of attorneys of record and concluding "it is a relatively simple matter to add another name and telephone number or address to that list").

[33] 18 U.S.C. § 3771(c)(1) (emphasis added).

merely requires prosecutors to inform victims of their right to attend all public proceedings as guaranteed in the CVRA. These modest changes should not require prosecutors to devote any significant new resources to victim notification.

Rule 11(a)(3) - Victims' Views on *Nolo Contendere* Pleas

The Proposal:

Rule 11's procedures on pleas should be revised to allow victims to express their views on any plea arrangement (including any plea of *nolo contendere*) before the court decides whether to accept it, as follows:

> (a)(3) *Nolo Contendere Plea.* Before accepting a plea of *nolo contendere*, the court must consider the parties' and victims' views and the public interest in the effective administration of justice.

The Rationale:

As discussed at greater length in the sections immediately below, the CVRA gives victims the right to be heard regarding any "plea." It would seem to be a natural corollary that the court should consider the victim's views before accepting any plea of *nolo contendere*. Moreover, the court is already required to consider the "public interest" in determining whether to accept such a plea. The victims' views would seem to be part of the larger public interest the court should consider.

Rule 11(b)(4) - Victims' Right To Be Heard on Pleas

The Proposal:

The court should be required to address any victim present in court when a plea is taken to determine whether the victim wishes to make a statement and to consider the victim's view before accepting a plea, as follows:

> **(4) Victims' Views.** Before the court accepts a plea of guilty or *nolo contendere* or allows any plea to be withdrawn, the court must address any victim who is present personally in open court. During this address, the court must determine whether the victim wishes to present views regarding the proposed plea or withdrawal and, if so, what those views are. The court shall consider the victim's views in acting on the proposed plea or withdrawal.

The Rationale:

The CVRA guarantees victims the right to "to be reasonably heard at any public proceeding in the district court involving . . . [a] plea . . . ."[34] Many states have similar rights.[35] The rationale for a victim's right to be heard at this stage is to give the judge as much information as possible from which to decide whether to accept a plea. It is clear that the court is under no obligation to accept a plea proposed by the parties.[36]

The proposed rule change requires the court to directly address any victim who is present in court. This is consistent with the legislative history of the CVRA which explains that "[t]his provision is intended to allow crime victims to directly address the court in person."[37] Moreover, courts are required to directly address defendants during plea proceedings,[38] so victims should be treated even-handedly. Addressing victims personally may also be important because many victims will lack the assistance of counsel. Untrained in legal proceedings, victims may be uncertain about what exact point in the process they should present their views. Having the court address the victim will eliminate that uncertainty and ensure that the victim's right to be heard is protected.

Rule 11(c)(1) - Prosecution To Consider Victims' Views on Pleas.

The Proposal:

The prosecution should be required to consider the victims' views in developing any proposed plea arrangement as follows:

> **(1)** ***In General.*** An attorney for the government and the defendant's attorney, or the defendant when proceeding *pro se*, may discuss and reach a plea agreement. The court must not participate in these discussions. The attorney for the government shall make reasonable efforts to notify identified victims of, and consider the victims' views about, any proposed plea negotiations. If the defendant pleads guilty or *nolo contendere* to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will . . . .

The Rationale:

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[34] 18 U.S.C § 3771(a)(4).

[35] *See generally* BELOOF, CASSELL & TWIST, *supra* (chapt. 7.B).

[36] *See, e.g., United States v. Bean*, 564 F.2d 700 (5th Cir. 1977).

[37] 150 CONG. REC. S 4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl)(reprinted in Appendix B).

[38] *See* FED. R. CRIM. P. 11(b)(1) ("Before the court accept a plea of guilty . . . the court must address the defendant personally in open court.").

The proposed change requires prosecutors to make reasonable efforts to notify victims about pleas and to consider the victims' views regarding pleas. This requirement is taken verbatim from the *Attorney General Guidelines for Victim and Witness Assistance*, which already directs prosecutors to "make reasonable efforts to notify identified victims of, and consider victims views about, any proposed or contemplated plea negotiations."[39] About 29 states already require prosecutors to "consult with" or "obtain the views of" victims at the plea agreement stage.[40]

The proposed rule helps to implement not only a victim's right to be heard at plea proceedings but also the right to "confer with the attorney for the government"[41] and to be "treated with fairness . . . ."[42] Given that victims have the right to confer, the conferring should take place at the most salient points in the process. As Senator Feinstein explained, "This right [to confer] is intended to be expansive. For example, the victim has the right to confer with the Government concerning any critical stage or disposition of the case."[43] Given that the overwhelming majority of federal criminal cases are resolved by a plea, the victim should be able to confer with the prosecutor regarding the plea.

Rule 11(c)(2) - Court to be Advised of Victim Objections to Plea

The Proposal:

Prosecutors (and victims attorneys) should be required to advise the court whenever they are aware that the victim objects to a proposed plea agreement as follows:

> **2) *Disclosing a Plea Agreement.*** The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera. When a plea is presented in open court, the attorney for the government or the attorney for any victim shall advise the court when

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[39] ATTORNEY GENERAL GUIDELINES, *supra*, at 33 (defining what can be considered in determining whether notice is reasonable in a particular case); *see also* U.S. DEPT. OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY 87 (1997) ("Prosecutors should make every effort . . . to consult with the victim on the terms of any negotiated plea . . . .").

[40] U.S. DEPT. OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 31ST CENTURY 75 (1997)

[41] 18 U.S.C. § 3771(a)(5).

[42] 18 U.S.C. § 3771 (a)(8).

[43] 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

the attorney is aware that the victim has any objection to the proposed plea agreement.

The Rationale:

In circumstances where an attorney (either for the government or for the victim) is aware of a victim's objection to a plea, that information should be relayed to the court. The victim's attorney will, no doubt, do this on her own initiative. The rule is intended to clarify that the prosecutor is under an equal obligation to communicate this information to the court.

The CVRA appears to obligates prosecutors to communicate a victim's objection to the court. The CVRA commands that prosecutors use their "best efforts" to enforce victims' rights.[44] A victim, often untrained in the law and unexpectedly thrust into criminal proceedings, may well believe that prosecutors automatically relay any objection to the plea to the court. The proposed rule avoids any confusion by requiring the prosecutor to notify the court of a victim's concern. The rule is limited to situations where the prosecutor is "aware" of an objection.

This approach is consistent with the leading case of *State v. Casey*,[45] which considered whether a victim's request to be heard regarding a plea made to the prosecutor was sufficient to trigger the victim's constitutional right to be heard.[46] In *Casey*, the victim had told the prosecutor that she wished to be heard in opposition to a plea. The prosecutor refused to convey that information to the court. After the plea was accepted, the victim appealed to the Utah Supreme Court, urging that her right under the Utah Victims' Rights Amendment to be heard regarding a plea had been violated. The state responded that the victim was required to petition the court directly to be heard. In rejecting that argument, the Court explained that prosecutors no less than other components of the criminal justice system were required to assist victims throughout the process under the Utah statutory scheme.[47] More important for present purposes, the Court also concluded that prosecutors had ethical obligations as officers of the court to convey that information to the judge:

> Prosecutors must convey such requests [to be heard] because they are obligated to alert the court when they know that the court lacks relevant information. This duty, which is incumbent upon all attorneys, is magnified for prosecutors because, as our case law has repeatedly noted, prosecutors have unique responsibilities. . . . The prosecutor is the representative not of an ordinary party to a controversy, but of a

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[44] 18 U.S.C. 3771(c).

[45] 44 P.3d 756 (Utah 2002).

[46] *See generally*, *Recent Developments in Utah Law*, 2003 UTAH L. REV. 716 (2003).

[47] *Casey*, 44 P.3d at 763.

> sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest in a criminal prosecution is not that it shall win but that justice shall be done.[48]

Applying the reasoning of *Casey* to analogous rights under the CVRA, a prosecutor must convey a victim's request to be heard regarding a plea to the court. But it also seems that the prosecutor should convey a victim's objection regarding a plea to the court. In determining whether to accept a plea, the court is making a public interest determination.[49] As the Tenth Circuit has explained, "'Rule 11 also contemplates the rejection of a negotiated plea when the district court believes that bargain is too lenient, or otherwise *not in the public interest*.'[50]" When the prosecutor is aware that a keenly interested member of the public – the victim – has an objection, the court should be apprised of that concern.

An alternative way of drafting the rule is to require courts to inquire of prosecutors whether the victim has been advised of the proposed plea and whether the victim wishes to make a statement concerning it.[51] For example, Oregon requires the court to ask the prosecutor whether the victim has been consulted about a plea and, if so, what the victim's view is:

> (b) Before the judge accepts a plea of guilty or no contest, the judge shall ask the district attorney if the victim requested to be notified and consulted regarding plea discussions. If the victim has made such a request, the judge shall ask the district attorney if the victim agrees or disagrees with the plea discussions and agreement and the victim's reasons for agreement or disagreement.[52]

South Dakota law contains a similar requirement that prosecutors disclose "any comments" by the victim about the plea:

> If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court, or on a showing of good cause,

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[48] *Id.* at 764 (internal quotations and citations omitted).

[49] *See, e.g. United States v. Bean*, 564 F.2d 700 (5th Cir. 1977).

[50] *United States v. Carrigan*, 778 F.2d 1454, 1462 (10th Cir. 1985) (emphasis added) (*quoting United States v. Miller*, 722 F.2d 562, 563 (9th Cir.1983)).

[51] *See* U.S. DEPT. OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY 108 (1997) ("Judges should facilitate the input of crime victims into plea agreements .... and they should request that prosecuting attorneys demonstrate that reasonable efforts were made to confer with the victim.").

[52] OREGON REV. STAT. § 135.406.

in chambers, at the time the plea is offered. The prosecuting attorney shall disclose on the record any comments on the plea agreement made by the victim, or his designee, of the defendant's crime to the prosecuting attorney. Thereupon the court may accept or reject the agreement . . . .[53]

Texas law requires the court to ask the prosecutor whether a victim impact statement has been submitted. If so, the court must review the statement:

> Before accepting a plea of guilty or a plea of *nolo contendere*, the court shall inquire as to whether a victim impact statement has been returned to the attorney representing the state and ask for a copy of the statement if one has been returned.[54]

The rule proposed here is narrower than all these state formulations; it only requires a prosecutor to confer with the victim about the plea and inform the courts if the victim *objects*. For many significant categories of federal cases (e.g., a typical drug trafficking offense, a status offense such as felon in possession of a firearm, etc.), there will be no victim. To require in every case some sort of victim inquiry by the court or victim certification by the prosecutor would unnecessarily waste time. The proposed rule requires only that the prosecutor report a victim objection – in which case the court will presumably want to pay the most careful attention to whether to accept a plea.

Rule 12.1 – Victim Addresses and Phone Numbers Not Disclosed for Alibi Purposes

The Proposal:

The rule regarding disclosure of witnesses the government will use to disprove an alibi should be revised to eliminate the requirement that the victim's address and telephone number be disclosed to the defendant as follows:

(b) Disclosing Government Witnesses.

(1) ***Disclosure.*** If the defendant serves a Rule 12.1(a)(2) notice, an attorney for the government must disclose in writing to the defendant or the defendant's attorney:

(A) the name~~, address, and telephone number~~ of each witness and the address and telephone number of each witness (other than a victim) that the government intends to rely on to establish the defendant's presence at the scene of the alleged offense; and

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

(2) ***Time to Disclose.*** Unless the court directs otherwise, an attorney for the government must give its Rule 12.1(b)(1) disclosure within 10 days after the

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[53] S.D. CODIFIED LAWS § 23A-7-9.

[54] TEXAS. CODE CRIM. PRO. 26.13

defendant serves notice of an intended alibi defense under Rule 12.1(a)(2), but no later than 10 days before trial.

(c) Continuing Duty to Disclose. Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name of each additional witness, and the address, and telephone number of each additional witness (other than a victim) if:

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

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

In addition, a similar change should be made to Rule 12.3 regarding the address and telephone number of victims who will be used to disprove a public-authority defense.

The Rationale:

This proposed change implements the victim's right to be "reasonably protected from the accused."[55] Victims cannot be reasonably protected if the defendant, without good reason, receives the victim's address and telephone. The proposed rule would eliminate the requirement that the information be *automatically* provided to the defense even without any showing of need. At the same time, however, nothing in the rule would preclude the defense from seeking access to that information through an appropriate motion. The court could then determine whether any such motion had merit.[56]

Rule 15 - Victims' Right to Attend Pre-Trial Depositions

The Proposal:

Rule 15 should be amended to allow victims to attend any deposition in a case, as follows:

(i) Victims Can Attend. Victims can attend any public deposition taken under this rule under the same conditions as govern a victim's attendance at trial.

The Rationale:

Victims have the right "not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would

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[55] 18 U.S.C. § 3771(a)(1).

[56] *Cf. United States v. Wills*, 88 F.3d 704, 710 (9th Cir. 1996) (delayed disclosure of alibi witness allowed because witness feared for safety and defendant had violent history; *ex parte* hearing allowed because of need to keep identity of witness from the defendant).

be materially altered if the victim heard other testimony at that proceeding."[57] Depositions authorized by Rule 15 are for the purpose of preserving evidence at trial,[58] and thus appear to be an extension of the trial. Victims accordingly have the right to attend such proceedings (if they are public) under the same conditions governing their attendance at trial. To avoid any confusion over this issue, the proposed rule change simply clarifies that victims' right to attend proceedings extends to depositions.

Just as victims can be excluded from trial in certain unusual situations where their testimony would be materially affected, they can likewise be excluded from a deposition in those situations. The proposed rule change simply carries forward the limitations on attending trial to the deposition setting by providing that the "same conditions" apply to the victim's attendance.

Rule 17 - Victims' Right to Notice of Subpoena of Confidential Information

The Proposal:

Rule 17 regarding subpoenas should be modified to give victims notice before personal or confidential information is subpoenaed and to allow victims to file a motion to quash such a subpoena as follows:

> (2) After indictment, no record or document containing personal or confidential information about a victim may be subpoenaed without notice to the victim, given through the attorney for the government or for the victim. On motion made promptly by the victim, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.

Rationale:

The existing Rules governing subpoenas are flawed because they allow the parties to subpoena personal or confidential information about a victim from third parties without the knowledge of the victim. This issue was highlighted recently in the notorious Utah state criminal proceedings involving the kidnapping of Elizabeth Smart.[59] Attorneys for Elizabeth's alleged kidnapper subpoenaed class records from her high school (class and teacher lists, report cards, and disciplinary and attendance records) and medical records from her hospital.[60] The school turned over

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[57] 18 U.S.C. § 3771(a)(3).

[58] *See, e.g., United States v. Edwards*, 69 F.3d 419, 437 (10th Cir. 1994).

[59] *See generally* ED SMART & LOIS SMART, BRINGING ELIZABETH HOME: A JOURNEY OF FAITH AND HOPE (2003).

[60] Stephen Hunt, *Defense Blasted for Obtaining Smart's School Records*, The Salt Lake Trib., Jan. 14, 2005, at B2.

the requested records without notice to the Smart family, while the hospital refused to turn over the requested records. Elizabeth's father learned about the subpoena only after her school records had already been turned over to defense counsel. The Smart family attorney then filed a motion to have the records returned to the school. Prosecutors in the case have objected to the fact that they were not given an opportunity to file a motion to quash.[61] The matter is apparently still under review in the state courts.

The problem that occurred in the Smart case under the Utah state rules could occur under the federal rules. The federal rules currently allow the *witness* to whom the subpoena for documents or records is issued to object,[62] but there is no provision for notifying the *victim* if personal or confidential information about the victim has been requested. Allowing such subpoenas to be delivered without notice to the victim violates the provisions of the CVRA guaranteeing victims the rights to be treated "with respect for the victim's dignity and privacy" as well as "with fairness."[63] With respect to the protection for dignity and privacy, allowing subpoenas to go directly to third party custodians of records could provide no protection if the custodian was either disinterested or disinclined to protect the victim's privacy. This is no far-fetched situation, as third parties who are subpoenaed will often have no interest in incurring legal fees in fighting to protect the rights of a victim. Even if they are interested, third parties may not fully understand the sensitive nature of certain victims' information. Victims may also have important statutory rights to protect. In the Elizabeth Smart case, for example, the school may have violated the Family Educational Rights and Privacy Act by turning over private information about Elizabeth.[64]

The new proposed rule remedies this problem by simply giving victims notice before their personal or confidential information is subpoenaed from a third party. The proposed rule makes no *substantive* change in the right of the party of obtain appropriate information through a subpoena. Instead, it merely changes procedures to insure victims are treated fairly by having the opportunity to file a motion to quash where such a motion is appropriate. The court is then authorized to grant the victim's motion to quash under the same standards that already apply to other motions to quash – where compliance would be "unreasonable or oppressive."[65]

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[61] Pat Reavy, *Quash Smart Subpoenas, DA Says*, DESERET MORNING NEWS, Feb. 1, 2005, at B3.

[62] FED. R. CRIM. P. 17(c).

[63] 18 U.S.C. § 3771(a)(8).

[64] Pat Reavy, *Elizabeth Wants Records Returned*, DESERET MORNING NEWS, Jan. 15, 2005, at B3.

[65] *See* FED. R. CRIM. P. 17(c)(2).

The proposed change does not interfere with the legitimate interests of the government or defendants. The change will not hamper government investigations, because it applies only to subpoenas issued after indictment. (Before indictment, a victim's privacy is protected through grand jury secrecy.) After indictment, the only legitimate purpose for a subpoena by either the government or the defendant is to obtain testimony or evidence for a court hearing. Rule 17 does not permit a subpoena for discovery purposes,[66] although upon a proper showing a party can obtain pre-trial access to materials.[67] Therefore, when challenged by a victim on a motion to quash, the party seeking the evidence will prevail upon a proper showing that the subpoena is appropriate. The only change made by the rule, then, is to give the victim an opportunity for court review in cases where legitimate privacy or other protected interests are at stake. The victim's right to be treated with "fairness" requires nothing less.

Rule 18 - Victims' Interests Considered in Setting Place of Prosecution

The Proposal:

Rule 18 should be amended to require the court to consider the convenience of victims in setting the place of prosecution as follows:

> **Rule 18. Place of Prosecution and Trial**
> Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice.

The Rationale:

This change helps to implement a victim's right to be treated "with fairness."[68] The rule change is quite modest. Rule 18 already requires the court to consider the convenience of the "witnesses" in a case. In many cases, of course, the victim will be a witness. But for clarity in those cases and to cover the cases in which the victim is not a witness, the rule should be amended to refer specifically to victims.

Rule 20 - Victims' Views Considered Regarding Consensual Transfer

The Proposal:

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[66] *See generally United States v. Nixon*, 418 U.S. 683, 689 (1974).

[67] *See* 418 U.S. at 699.

[68] 18 U.S.C. § 3771(a)(8).

Rule 20 should be amended to allow for consideration of the victim's views in any decision to transfer a case as follows:

Rule 20. Transfer for Plea and Sentence

(a) Consent to Transfer. A prosecution may be transferred from the district where the indictment or information is pending, or from which a warrant on a complaint has been issued, to the district where the defendant is arrested, held, or present if:

(1) the defendant states in writing a wish to plead guilty or nolo contendere and to waive trial in the district where the indictment, information, or complaint is pending, consents in writing to the court's disposing of the case in the transferee district, and files the statement in the transferee district; and

(2) the United States Attorneys in both districts approve the transfer in writing <u>after consultation with any victim. If any victim objects to the transfer, the United States attorney in the transferring district or the victim's attorney shall advise the court where the indictment or information is pending of the victim's concerns</u>.

Note: a similar change is proposed for Rule 20(d) regarding transfer of juvenile proceedings.

The Rationale:

This change implements the victim's right to be "treated with fairness."[69] The procedure for transferring a case for a plea is not constitutionally required, but rather is designed for the convenience of the defendant and the government.[70] In considering whether such administrative reasons justify a transfer, the concerns of the victim appear to be appropriately entered into the balance. For reasons similar to those discussed above in connection with changes regarding plea procedures, the prosecution is directed to confer with the victim and advise the court if there is any objection to the transfer.[71]

<u>Rule 21 - Victims' Views Considered Regarding Transfer for Prejudice</u>

The Proposal:

Rule 21 should be amended to require consideration of the victim's interest in whether a case should be transferred as follows:

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[69] 18 U.S.C. § 3771(a)(8).

[70] *See generally* WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 321 at 357-58.

[71] *See* Proposed Amendment to Rule 11(c)(1), *supra*.

(e) Victims' Views. The court shall not transfer any proceeding without giving any victim an opportunity to be heard. The court shall consider the views of the victim in making any transfer decision.

The Rationale:

Rule 21 authorizes transfer of a case for prejudice or convenience of the parties. The proposed rule would require that the court consider the view of the victim in making any such transfer decision. Such consideration would seem to be part and parcel of protecting the victim's right to be "treated with fairness."[72] In addition, the vicinage provision of Article III and the public's First Amendment right of access to trials gives constitutional overtones to the victim's right in this area.

Victims can have compelling interests in transfer decisions.[73] Typically, victims want to have the case tried in the community in which the crime was committed. Traveling to a remote location to observe trial proceedings can be financially difficult, if not impossible in some cases. Moreover, victims who must travel to distant communities may lose the emotional support of family and friends, which can be especially important when observing emotionally-charged court proceedings.

Defendants, too, have the right to have cases tried locally. Under the Sixth Amendment to the Constitution, "In all criminal prosecutions, *the accused* shall enjoy the right to a speedy and public trial, by an important jury of the State and district wherein the crime shall have been committed . . . ."[74] This right might arguably be viewed as the defendant's to assert or waive as circumstances dictate. For federal cases, however, the vicinage right is not exclusively placed in the hands of the defendant. Instead, Article III provides that the "the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial *shall* be held in the state where the said crimes have been committed."[75]

This Article III vicinage right was designed to protect not only the rights of the defendant but also the rights of the community – including victims in the community.[76] Historically, the provision appears to have been a response to abuses of King George III in trundling American patriots off to

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[72] 18 U.S.C. § 3771(a)(8).

[73] *See generally* BELOOF, CASSELL & TWIST, *supra*, Chapt. 6.C (reviewing case law on the victim's interest in venue decisions).

[74] U.S. CONST. amend. VI (emphasis added).

[75] U.S. CONST., Art. III, § 2 (emphasis added).

[76] *See generally* Steven A. Engel, *The Public's Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658 (2000).

England for trial – an abuse sufficiently important to merit mention in the Declaration of Independence. But the provision is designed to secure a trial within the same political community ("the state") in which the victim would likely reside. The Framers could not specify a narrower subdivision within the state because of differences among the thirteen states in the jury selection process[77] and because the construction of the federal judicial system was a task left to Congress in the future.

The text of the Article III provision contrasts with the Sixth Amendment in that the defendant is not mentioned. This supports the reading that it is a structural guarantee, designed to protect broader interests than the defendant's alone.[78] Moreover, the provision provides for trial in the state "where the Crimes shall have been committed." In most cases, this state would be where the victim resided; whether the defendant also resided in that state was incidental.

An understanding of the Article III provision as protecting the community's interest is bolstered by the Supreme Court's decisions on right of public access to trials. In cases such as *Richmond Newspapers, Inc. v. Virginia*,[79] the Court has held that implicit in the First Amendment is a guarantee of the public's right to attend trials. Compelling victims' interests underlie this guarantee. As the Court has explained, "The presence of interested spectators may keep [the defendant's] triers keenly alive to a sense of their responsibility and to the importance of their functions."[80] In addition, "public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct."[81] As Justice Blackmun has emphasized, "The victim of the crime, the family of the victim, [and] others who have suffered similarly, ... have an interest in observing the course of a prosecution."[82] Victims are vitally interested in observing criminal trials because society has withdrawn "both from the victim and the vigilante the enforcement of criminal law, but [it] cannot erase from people's consciousness the fundamental, natural yearning to see justice done – or even the urge for retribution."[83]

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[77] *See id.* at 1687 n.156 (citing 4 DEBATES ON THE ADOPTION OF TH FEDERAL CONSTITUTION 150 (Elliot ed. 1836) (1787) (remarks of Gov. Johnston of North Carolina noting differences between juror selection in states of North Carolina and Virginia).

[78] *See* Engel, *supra*, at 1687. *See also* Drew L. Kirshen, *Vicinage*, 29 OKLA L. REV. 803 (1976).

[79] 448 U.S. 555 (1980).

[80] *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979) (internal citation omitted).

[81] *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 509 (1984).

[82] *Gannett Co.*, 443 U.S. at 428 (Blackmun, J., concurring in part and dissenting in part).

[83] *Richmond Newspapers*, 448 U.S. at 571.

To be sure, transferring a trial to a distant city probably does not abridge the public right of access to a trial. But it can surely burden the victim's right, which suggests that victims ought to be heard before any such decision is made.

The Article III vicinage provision and the public right of access to trials provide constitutional underpinnings for construing the victim's rights under the CVRA to include a right to be heard on transfer proceedings. Congress has mandated that victims be "treated with fairness." This is a broad provision intended to be broadly construed, as Senator Feinstein has stated:

> The *broad rights* articulated in this section are meant to be rights themselves and are not intended to just be aspirational. One of these rights is the right to be treated with fairness. Of course, fairness includes *the notion of due process*. Too often victims of crime experience a secondary victimization at the hands of the criminal justice system. This provision is intended to direct government agencies and employees, whether they are in executive or judicial branches, to treat victims of crime with the respect they deserve and to *afford them due process*.[84]

As should be clear from the italicized language, Congress intended to afford crime victims a broad right to due process in criminal proceedings. Due process, of course, uncontroversially includes a right to be heard.[85] Thus, victims should be heard before the court makes a transfer decision.

Concluding that victims have a right to be heard on transfer decision does not mean, of course, that they will dictate the transfer decision. In some cases, for example, the defendant can establish sufficiently pervasive prejudice in a particular community to entitle him to a change of venue to protect his constitutional rights.[86] But the limited point here is that victims may have useful information that the judge ought to consider in reaching a decision. Moreover, even if the judge determines to transfer a case, the victims may have views on where to transfer the case (e.g., to an adjacent state rather than a distant one) or how to impanel an unbiased jury (e.g., importing a jury rather than exporting the trial) that the judge should usefully consider.

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[84] 150 CONG. REC.S2469 (daily ed. Apr.22, 2004) (statement of Sen. Kyl) (emphases added).

[85] *Mullane v. Central Hanover Bank & Trust* Co., 339 U.S. 306, 314 (1950).

[86] *Irvin v. Dowd*, 366 U.S. 717 (1961) (holding that prisoner should have been granted change of venue where pre-trial publicity caused prejudice). *But cf.* GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS 252 (1995) (calling for abolition of a defendant's right to change venue because it "is, in effect, to accord the defense a whole peremptory challenge against the entire community").

An illustration of the general approach that the proposed rule would embody is found in the leading case from the New Jersey Supreme Court, *State v. Timmendequas*.[87] *Timmendequas* was a capital case in which the trial judge determined to import a jury from a distant community rather than force the family of the young girl who was murdered to travel to another district. Construing New Jersey state law provisions that are similar to the CVRA, the court explained that the trial judge properly considered the views of the victim's family:

> Over the past decade, both nationwide and in New Jersey, a significant amount of legislation has been passed implementing increased levels of protection for victims of crime. Specifically, in New Jersey, the Legislature enacted the "Crime Victim's Bill of Rights," N.J.S.A. 52:4B-34 to -38. That amendment marked the culmination of the Legislature's efforts to increase the participation of crime victims in the criminal justice system. The purpose of the Victim's Rights Amendment was to "enhance and protect the necessary role of crime victims and witnesses in the criminal justice process. In furtherance of [that goal], the improved treatment of these persons should be assured through the establishment of specific rights." N.J.S.A. 52:4B-35 (1985). One of the enumerated rights guaranteed for victims is "[t]o have inconveniences associated with participation in the criminal justice process minimized to the fullest extent possible." N.J.S.A. 52:4B-36(d). . . .
>
> The [trial] court explicitly stated that it was not favoring the rights of the victims over those of defendant. Rather, it was simply taking their concerns into consideration, as it had not done previously. Taking the concerns of the victim's family into account does not constitute error, provided that the constitutional rights of the defendant are not denied or infringed on by that decision.[88]

For all these reasons, Rule 21 ought to be amended to allow victims to provide information to the judge on transfer decisions.

Rule 23 - Victims' Views Considered Regarding Non-Jury Trial

The Proposal:

The court should be required to consider the views of victims before allowing waiver of a jury trial as follows:

> **Rule 23. Jury or Nonjury Trial**
> (a) **Jury Trial.** If the defendant is entitled to a jury trial, the trial must be by jury unless:
> (1) the defendant waives a jury trial in writing;

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[87] 737 A.2d 55 (N.J. 1999), *cert. denied*, 534 U.S. 858 (2001).

[88] 737 A.2d at 76 (internal citations omitted). The hardship to the victim was established via affidavits from the victim's family provided to the court by the prosecutor.

(2) the government consents; and
(3) the court approves after considering the views of any victims.

The Rationale:

The "preferred" trial method in the federal courts is a jury trial.[89] As Justice Blackmun has explained, the public has interests, independent of a criminal defendant, in monitoring judges, police, and prosecutors – and in being "educated about the manner in which criminal justice is administered."[90]

The Supreme Court has concluded that the right to a jury trial is waivable by the defendant.[91] But to help protect the general public interest in trial by jury, Rule 23 requires not only prosecutor approval,[92] but also judicial approval before proceeding by way of bench trial. This approval requires careful weighing of the competing concerns. The Supreme Court has instructed that "the duty of the trial court . . . [in considering whether to approve a jury trial waiver] is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increased in degree as the offenses dealt with increase in gravity."[93] This is a "serious and weighty" responsibility.[94]

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[89] *Singer v. United States*, 380 U.S. 24, 35 (1965) ("Trial by jury has been established by the Constitution as the 'normal and preferred mode of disposing of issues of fact in criminal cases.'") (citation omitted). *See generally* Rachel E. Barkow, *Recharing the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 68 (2003).

[90] *Gannett Co. v. De Pasquale*, 443 U.S. 368, 428-29 (1979) (Blackmun, J., dissenting in part).

[91] *See Patton v. United States*, 281 U.S. 276 (1930). *But cf.* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1196-98 (1991) (mounting a strong argument against *Patton* and noting that before 1930 court decisions had held jury trial could not be waived).

[92] FED. R.CRIM. PRO. 23(a)(2). *See generally* ABA STANDARDS FOR CRIMINAL JUSTICE § 15-1.2, COMMENTARY at 15.17 (2d ed. 1980) (concluding that arguments in favor of requiring prosecutorial approval of jury trial waivers outweigh those against).

[93] *Patton v. United States*, 281 U.S. at 312-13.

[94] *United States v. Saadya*, 750 F.2d 1419, 1421 (9th Cir. 1985) (internal quotation omitted).

To discharge that serious and weighty responsibility, the trial court should receive as much information as possible. The victim may be well-situated to provide information about how the public will view a non-jury trial. The proposed rule change takes the modest step of allowing the victim to be heard before the court approves any non-jury trial, a step that is consistent with the CVRA's command that victims be "treated with fairness."[95]

This change would not interfere with defendants' rights. The Supreme Court has squarely held that the defendant has no constitutional right to unilaterally elect a bench trial.[96] Of course, there may be circumstances were the court believes that, despite a victim's objection, a non-jury trial is nonetheless appropriate. Moreover, in extreme cases the defendant may have a *right* to a non-jury trial where pre-trial publicity has pervasively tainted the jury pool.[97] Nothing in the proposed rule change would interfere with a court's right to approve a bench trial in such circumstances, after considering the victim's perspective.

Rule 32(a) – Deleting Old Definition of Victim

The Proposal:

The definition of "victim" currently contained in Rule 32 should be stricken as follows:

Rule 32. Sentencing and Judgment

~~**(a) Definitions.** The following definitions apply under this rule:~~

~~(1) "Crime of violence or sexual abuse" means:~~

~~(A) a crime that involves the use, attempted use, or threatened use of physical force against another's person or property; or~~

~~(B) a crime under 18 U.S.C. §§ 2241–2248 or §§ 2251–2257.~~

~~(2) "Victim" means an individual against whom the defendant committed an offense for which the court will impose sentence.~~

Rationale:

The old definition in Rule 32 is now too narrow because it is limited to crimes of violence or sexual abuse. The CVRA includes all victims within its protections. In the proposed new rules, "victim" would be defined in Rule 1. Accordingly, this narrower definition here can simply be

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[95] 18 U.S.C. § 3771(a)(8).

[96] *Singer*, 380 U.S. at 36 (finding that waiver of jury trial may be conditioned on consent of prosecutor). *Cf.* Adam H. Kurland, *Providing a Federal Criminal Defendant with a Unilateral Right toa Bench Trial: A Renewed Call to Amend Federal Rule of Criminal Procedure 23(A)*, 23 U.C. DAVIS L. REV. 309 (1993) (urging such that the rules be amended to create such a right, but not considering in any way the victim's interests involved).

[97] *See Singer*, 380 U.S. at 37-38 (leaving this question open).

stricken. The Committee is well aware of this issue, having withdrawn a previous proposal to expand Rule 32 to include all victims in the wake of the CVRA.[98]

Rule 32(c)(1)(B) – Presentence Report Considering Restitution in All Cases

The Proposal:

Rule 32(c)(1)(B) should be amended to require that the presentence report contain restitution information in all cases as follows:

> **(c) Presentence Investigation.**
> **(1) *Required Investigation.***
> (A) *In General.* The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless:
> (i) 18 U.S.C. § 3593(c) or another statute requires otherwise; or
> (ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.
> (B) *Restitution.* If the law ~~requires~~ permits restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.

The Rationale:

As currently written, the rule directs that a presentence report contain information about restitution only where the law "requires" restitution. The proposed amendment would change this to direct that all presentence reports contain appropriate restitution information whenever the law "permits" restitution. If the law permits restitution, the court ought to receive information sufficient to allow it to determine whether to order such restitution. Only then can the court appropriately exercise its discretion.

In most cases, restitution is covered by one of two federal statutes: The Mandatory Victims Restitution Act of 1996 (MVRA),[99] and its predecessor, the Victim and Witness Protection Act of

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[98] *See* Letter from Ed Carnes, Chair of the Advisory Comm. On Federal Rules of Criminal Procedure to Hon. David F. Levi, Chair of the Standing Comm. On Rules of Practice and Procedure (May 18, 2004) (noting that proposed expansion of Rule 32 should be withdrawn if the CVRA was passed).

[99] Pub. L. 104-132, Title II, § 201, 110 Stat. 1214, 1227-1236, *codified as* 18 U.S.C. §§3663A, 3664.

1982 (VWPA).[100] The MVRA "firmly directs that "[n]otwithstanding any other provision of law, when sentencing a defendant convicted of [certain offenses such as crimes of violence] . . . the court *shall* order . . . that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate."[101] On the other hand, the earlier VWPA allows for restitution in the court's discretion, after weighing various factors to determine whether restitution is appropriate.[102]

In its current form, Rule 32(c)(1)(B) suggests that the probation officer is required to include information relevant to restitution only when the court is proceeding under the MVRA, because only then is restitution (in the language of the current Rule) "required." There is no sound reason for such a limitation, particularly after the enactment of the CVRA. The CVRA guarantees that victims have "the right to full and timely restitution as provided in law."[103] Even when the court is proceeding under the discretionary VWPA, without appropriate information in the presentence report, the court cannot determine whether to exercise its discretion to award restitution. Therefore, the Rule should be changed to require that the presentence report contain restitution information, from which the court can determine whether to make a restitution award.

(New) Rule 32(c)(3) – Probation Officer to Seek Out Victim Information

The Proposal:

The probation officer preparing a presentence report should be directed to determine whether a victim wishes to provide information for the report as follows:

> (3) *Victim Information.* The probation officer must determine whether any victim wishes to provide information for the presentence report.

The Rationale:

The probation officer should determine whether a victim wishes to provide information for a presentence report. Under the CVRA, the victim has "the right to be reasonably heard at any public

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[100] Pub. L. 97-291, § 4, 96 Stat. 1248, 1249-53, *codified as* 18 U.S.C. §§3663, 3664. *See generally United States v. Bedonie*, 317 F. Supp. 2d 1285 (D. Utah 2004) (discussing different statutes).

[101] 18 U.S.C. § 3663A(a)(1); *see United States v. Monts*, 311 F.3d 993, 1001 (10th Cir. 2002) (restitution under the MVRA is mandatory), *cert. denied*, 538 U.S. 938 (2003).

[102] 18 U.S.C. § 3663A(a)(1)(B); *see United States v. Fountain*, 786 F.2d 790, 801 (7th Cir. 1985) (restitution under the VWPA is discretionary).

[103] 18 U.S.C. § 3771(a)(6).

proceeding in the district court involving . . . sentencing . . . ."[104] This right clearly encompasses the victim's right to "allocute" or make an oral statement at sentencing, as discussed below in connection with Rule 32(i). But the right also seems to include the opportunity to provide information to the probation office during preparation of the presentence report.

The sponsors of the CVRA intended for the right to be heard to be construed broadly. As Senator Kyl explained at some length:

> [The CVRA] provides victims the right to reasonably be heard at any public proceeding involving . . . . sentencing. This provision is intended to allow crime victims to directly address the court in person. It is not necessary for the victim to obtain the permission of either party to do so. This right is a right independent of the government or the defendant that allows the victim to address the court. To the extent the victim has the right to independently address the court, the victim acts as an independent participant in the proceedings. When a victim invokes this right during . . . sentencing proceedings, it is intended that the he or she be allowed to provide all three types of victim impact: the character of the victim, the impact of the crime on the victim, the victims' family and the community, and sentencing recommendations.
> . . .
>
> It is not the intent of the term "reasonably" in the phrase "to be reasonably heard" to provide any excuse for denying a victim the right to appear in person and directly address the court. Indeed, the very purpose of this section is to allow the victim to appear personally and directly address the court. This section would fail in its intent if courts determined that written, rather than oral communication, could generally satisfy this right. On the other hand, the term "reasonably" is meant to allow for *alternative methods* of communicating a victim's views to the court when the victim is unable to attend the proceedings. Such circumstances might arise, for example, if the victim is incarcerated on unrelated matters at the time of the proceedings or if a victim cannot afford to travel to a courthouse. In such cases, communication by the victim to the court is permitted by *other reasonable means*. In short, the victim of crime, or their counsel, should be able to provide any information, as well as their opinion, directly to the court concerning the . . . sentencing of the accused. . . .[105]

The Act's other major sponsor, Senator Feinstein, agreed:

> It is important that the "reasonably be heard" language not be an excuse for minimizing the victim's opportunity to be heard. Only if it is not practical for the

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[104] 18 U.S.C. § 3771(a)(4).

[105] 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen Kyl) (emphases added).

victim to speak in person or if the victim wishes to be heard by the court in a different fashion should this provision mean anything other than an in-person right to be heard.[106]

In light of this legislative history, victims undoubtedly have a right to make an in-court statement at sentencing as part of their right "to be heard." But they also have the right to make reasonable alternative communications with the court. If there is any doubt about whether the right "to be heard" covers communications to the probation officer, clearly the right "to be treated with fairness" would comfortably cover such a requirement. The simplest way to allow cover this is through written communication via the presentence report.

The proposed rule requires the probation office to affirmatively seek out the victim. It seems unlikely that a probation officer could prepare thorough presentence report without obtaining the victim's views. Because there is no way to know in advance whether the victim will have relevant information for the report, the probation officer should be required to investigate whether the victim has useful information. Of course, nothing in the proposed rule change would require the probation officer to include irrelevant information in the report.

Rule 32(e) – Prosecutor to Disclose Presentence Report to Victim

The Proposal:

The prosecutor should be required to disclose relevant parts of the presentence report to victims as follows:

(e) Disclosing the Report and Recommendation.

(1) ***Time to Disclose.*** Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty.

(2) ***Minimum Required Notice.*** The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period. The attorney for the government shall, if any victim requests, communicate the relevant contents of the presentence report to the victim.

(3) ***Sentence Recommendation.*** By local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence.

The Rationale:

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[106] *Id.* (statement of Sen. Feinstein).

The CVRA appears to entitle victims to be heard on disputed Guidelines issues and, as a consequence, to review relevant parts of the presentence report. The CVRA gives victims "the right to be reasonably heard at any public proceeding in the district court involving . . . sentencing . . . ."[107] This codifies the right of crime victims to provide what is known as a "victim impact statement" to the court.[108] The victim's right to be heard, however, is not narrowly circumscribed to just impact information. To the contrary, the right conferred is a broad one – to be "reasonably heard" at the sentencing proceeding.

The victim's right to be "reasonably heard" appears to include a right for the victim to speak to disputed Guidelines issues. As Senator (and co-sponsor) Jon Kyl explained, the right includes sentencing recommendations:

> When a victim invokes this right during . . . sentencing proceedings, it is intended that he or she be allowed to provide all three types of victim impact: the character of the victim, the impact of the crime on the victim, the victim's family and the community, and *sentencing recommendations*.[109]

A "sentencing recommendation" will often directly implicate Guidelines issues, particularly where a court gives significant weight to the Guidelines calculation (as most currently do).[110] For example, if the victim wishes to recommend a 60-month sentence when the maximum guideline range is only 30 months, that sentencing recommendation may be meaningless unless a victim can provide a basis for recalculating the Guidelines or departing from the Guidelines.

Congress intended the right to be heard to be construed broadly, as Senator Feinstein stated:

> The victim of crime, or their counsel, should be able to provide *any information*, as well as their opinion, directly to the court concerning the . . . sentencing of the

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[107] 18 U.S.C. § 3771(a)(4).

[108] *See generally* BELOOF, CASSELL & TWIST, *supra*, chapt. 10 (2d ed. 2005 forthcoming) (discussing victim impact statements); Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1395-96 (1994) (same).

[109] 150 CONG.REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) (emphasis added). *See generally* BELOOF, CASSELL & TWIST, *supra*, chapt. 10 (discussing three types of victim impact information).

[110] *See, e.g., United States v. Wilson*, 350 F. Supp. 2d 910 (D. Utah 2005) (giving "heavy weight" to Guidelines recommendation).

accused.[111]

Again, it is hard to see how victims can meaningfully provide "any information" that would have a bearing on the sentence without being informed of the Guidelines calculations that likely will drive the sentence.

In addition, the CVRA gives victims the broad and independent right to be "treated with fairness"[112] which would seem to encompass a right of access to relevant parts of the presentence report. The victims right to fairness gives victims a free-standing right to due process. As Senator Kyl instructed:

> The broad rights articulated in this section are meant to be rights themselves and are not intended to just be aspirational. One of these rights is the right to be treated with fairness. Of course, *fairness includes the notion of due process*. . . . This provision is intended to direct government agencies and employees, whether they are in the executive or judicial branches, to treat victims of crime with the respect they deserve *and to afford them due process.*[113]

Due process principles dictate that victims have the right to be apprised of Guidelines calculations and related issues. As the Supreme Court has held: "It is . . . fundamental that the right to . . . an opportunity to be heard 'must be granted at a meaningful time and *in a meaningful manner*.'"[114] It is not "meaningful" for victims to make sentencing recommendations without the benefit of knowing what everyone else in that courtroom knows – what the recommended Guidelines range is. Yet Congress plainly intended to pass a law establishing "[f]air play for crime victims, *meaningful participation* of crime victims in the justice system, protection against a government that would take from a crime victim the dignity of due process. . . ."[115]

A victim's right to be heard regarding the presentence report is important for another reason: insuring proper restitution. Federal law guarantees most victims of serious crimes the right to

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[111] 150 CONG.REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein) (emphasis added).

[112] 18 U.S.C. § 3771(a)(8).

[113] 150 CONG. REC. S10912 (statement of Sen. Kyl) (Oct. 9, 2004) (emphases added).

[114] *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

[115] 150 CONG. REC. S4264 (Apr. 22, 2004) (statement of Sen. Kyl) (emphasis added).

restitution.[116] Reinforcing those laws, the new Crime Victims Rights Act also guarantees that victims have "[t]he right to full and timely restitution as provided in law."[117] As a practical matter, many of the calculations undergirding an award of restitution will rest on information contained in the presentence report. While the restitution statutes have their own detailed procedural provisions,[118] it is unclear how those provisions are integrated with the Guidelines procedural provisions. For all these reasons, the CVRA should be understood as giving victims the right to be heard *before* a court makes any final conclusions about Guidelines calculations and other sentencing matters and to have access to relevant parts of the presentence report.

Last month, I testified before the Sentencing Commission and urged that they change their *Manual* along the lines of the suggestions contained in this memorandum.[119] In particular, I urged the Commission to change its current rule limiting access to the pre-sentence report only to the parties.[120] My proposal was recently disputed by the Practitioners' Advisory Group to the Sentencing Commission. In a February 28, 2005, letter to the Commission,[121] they argue that "nothing in the CVRA or its legislative history states that crime victims should be permitted to review portions of the presentence report, dispute guidelines calculations, raise grounds for departures, or as such rights would seem to imply, appeal a sentence on factual or legal grounds."[122]

The Practitioners' Advisory Group's letter analyzes only the victim's right to be heard. It does not consider whether the victim's right to fairness creates a due process right to review the presentence report and dispute Guidelines calculations. Presumably the Practitioners' Advisory Group, which includes many defense attorneys, would be outraged if sentencing occurred without notice to defendants about relevant parts of the presentence report and recommended Guidelines ranges – and properly so. It would be unfair to force defense counsel to argue sentencing issues without basic information about what is being considered at the sentencing hearing. But the same due process principles dictate that victims should receive this information as well.

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[116] *See* 18 U.S.C. § 3663A (Mandatory Victims Restitution Act); *see also* 18 U.S.C. § 3663 (Victim Witness Protection Act).

[117] 18 U.S.C. § 3771(a)(6).

[118] 18 U.S.C. § 3664.

[119] *See* Testimony of Paul G. Cassell to the U.S. Sentencing Comm'n (Feb. 15, 2005) (available on http://sentencing.typepad.com).

[120] U.S.S.G. § 6A1.2.

[121] Letter from Amy Baron-Evans & Mark Flanagan to Hon. Ricardo Hinojosa (Feb. 28, 2005) (available on http://sentencing.typepad.com).

[122] *Id.* at 2.

The Practitioners' Advisory Group also seemingly raises a concern that can be dispelled. The Group wonders whether a victim's right to be heard on Guidelines issues would imply a right to appeal a sentence on factual or legal grounds. It would not. The CVRA contains its own specific appellate provisions, which permit victim appeals only for denials of their rights.[123] It specifically allows a right to seek "to re-open . . . a sentence" only for violations of a victim's "right to be heard."[124] Moreover, while victims have due process protections, due process does not guarantee a right to an appeal.[125] Finally, the Sentencing Reform Act spells out the limited rights of appeal on Guidelines issues available to only the government and the defense.[126] For all these reasons, victims have the right to review relevant parts of the presentence report and be heard on Guidelines issues in the trial court, but not the right to appeal Guidelines issues to the appellate courts.

The question then arises of how to provide victims access to the presentence report. Nothing in current law precludes releasing presentence reports to victims. Title 18 U.S.C. § 3552 *requires* disclosure to government and defense counsel, but does not forbid further dissemination. Most courts have held that circulation is allowed to third parties upon a proper showing of particularized need approved by the court.[127] Some courts' local rules also additional circulation with an order of the court.[128] Victims should be able to establish particularized need for access to the Guidelines calculations and related parts of the presentence report, as without access they are unable to effectively make a sentencing recommendation.

In view of that legal landscape, the ways in which the Rules could handle disclosure of the presentence reports to victims are:

(1) No Disclosure.

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[123] 18 U.S.C. § 3771(d)(5).

[124] 18 U.S.C. § 3771(d)(5)(A).

[125] *See McKane v. Durston*, 153 U.S. 684 (1894).

[126] 18 U.S.C. § 3742.

[127] *See, e.g., United States v.* Corbitt, 879 F.2d 224, 238 (7th Cir. 1989) (compelling, particularized need standard); *United States v. Charmer Indus., Inc.*, 711 F.2d 1164, 1173 (2d Cir. 1983) (compelling need standard); *United States v. Schlette*, 842 F.2d 1574, 1576 (9th Cir. 1988) (interests of justice standard).

[128] *See, e.g.*, D. Utah Crim. Local R. 32-1(c) (pre-sentence reports not released without order of the court).

The Rules could opt not to direct disclosure of any type to a victim. In my view, this approach would be inconsistent with CVRA's command that victims be "reasonably heard" at sentencing and be "treated with fairness," for all the reasons explained above.

(2) Complete Disclosure.

Because the victim's right to be heard seemingly includes at least some access to the presentence report, the Rules could direct full disclosure of the pre-sentence report to the victim. While there are apparently no statutory barriers to this approach, legitimate objections might be raised. Portions of the report may contain sensitive private information about the defendant (results of psychiatric examinations, prior history of drug use, childhood sexual abuse, and the like). The report may also disclose confidential law enforcement information that should not be widely circulated. Victims do not need access to these parts of the report. In light of these concerns, total disclosure seems unnecessary.

(3) Selective Disclosure.

The Rules could direct that the probation office redact any presentence report to remove confidential information and the provide the redacted report to the victim. This, too, seems problematic, in that it might require considerable work by busy probation officers to prepare two separate documents (presumably only after consulting with the attorneys on both sides of the case about what might be viewed as confidential).

(4) Disclosure Through Prosecutors.

The simplest solution to the competing concerns is disclosure through an intermediary, specifically the prosecutor. The prosecutor would serve as the filter for confidential information and could assist the victim by highlighting critical parts of the report. It might be objected that this approach would burden prosecutors, who are no less busy than probation officers. But the new law already gives victims the right to "confer" with prosecutors[129] – and presumably they will be conferring regarding the important topic of sentencing. Moreover, many U.S. Attorney's Offices already have Victim-Witness Coordinators who communicate with victims regarding impact statements. The CVRA also authorizes increased funding of $22 million for the Victim/Witness Assistance Programs in U.S. Attorney's Offices, so presumably they will be able to expand their victim services.[130]

Requiring prosecutors to disclose pre-sentence reports to victims in all cases, even when they are not interested in such disclosure, might be burdensome. Accordingly, disclosure of the report should be required only upon request for a victim.

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[129] 18 U.S.C. § 3771(a)(5).

[130] *See* 118 Stat. 2260, 2264.

Some of the aspects of preparing and disclosing presentence reports are covered in Chapter 6.A of the *United States Sentencing Guidelines Manual*. The *Manual* falls within the jurisdiction of the U.S. Sentencing Commission. Accordingly, the Advisory Committee should coordinate with the Commission to insure that any changes in the Criminal Rules are consistent with the provisions of the *Manual*.

Rule 32(f), (h), (i) – Victim Opportunity to Object to Presentence Report.

The Proposal:

Rule 32(f), (h), and (i) should be amended to allow the victim to object to the presentence report as follows:

(f) Objecting to the Report.

(1) ***Time to Object.*** Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report. The attorney for the government or for the victim shall raise for the victim any reasonable objection by the victim to the presentence report.

(2) ***Serving Objections.*** An objecting party must provide a copy of its objections to the opposing party and to the probation officer.

(3) ***Action on Objections.*** After receiving objections, the probation officer may meet with the parties and the victim to discuss the objections. The probation officer may then investigate further and revise the presentence report as appropriate.

. . .

(h) Notice of Possible Departure from Sentencing Guidelines. Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission or in a victim impact statement, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure. The attorney for the government or for the victim shall advise defense counsel and the court of any ground identified by the victim that might reasonably serve as a basis for departure.

(i) Sentencing.

(1) ***In General.*** At sentencing, the court:

(A) must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report;

(B) must give to the defendant and an attorney for the government a written summary of—or summarize in camera— any information excluded from the presentence report under Rule 32(d)(3) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information;

(C) must allow the parties' attorneys and any victims to comment on the probation officer's determinations and other matters relating to an appropriate sentence; and

(D) may, for good cause, allow a party to or any victim make a new objection at any time before sentence is imposed.

(2) ***Introducing Evidence; Producing a Statement.*** The court may permit the parties or the victim to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)–(d) and (f) applies. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.

(3) ***Court Determinations.*** At sentencing, the court:

(A) may accept any undisputed portion of the presentence report as a finding of fact;

(B) must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and

(C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.

The Rationale:

For the reasons explained in the preceding section, the victim's right to be "reasonably heard" at sentencing hearing encompasses the right to be heard on Guidelines issues. The changes in Rule 32 noted above simply allow the victim to exercise that right at the appropriate points in the Guidelines process.

Changing the rule in this fashion would also clarify the appropriate sequencing at sentencing hearings. Rule 32(i) already allows the victim to submit "any information" about the sentencing.[131] Yet if the experience in my court is any guide, frequently the victim's allocution occurs only after all of the issues surrounding the presentence report have been determined. If the victim's right to provide information to the court is going to have meaning, that information must be allowed to have possible effect on critical sentencing issues, including issues about Guidelines calculations.

The proposed changes would allow the victim to comment at the sentencing hearing on matters within the presentence report. While it might be objected that the victim is not a party to the case, Congress intended that the victim become participants in the process with rights "independent of the government or the defendant . . . ."[132] Those independent rights includes the opportunity to

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[131] FED. R. CRIM. P. 32(i).

[132] 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

make "sentencing recommendations."[133] Given that matters in the presentence report may often determine what effect a sentencing recommendation will have, the victim's right would seem to extend to commenting on that report.

As with the changes discussed in the previous section, changes in the *Sentencing Guidelines Manual* are also required here. The Committee should coordinate with the Sentencing Commission to insure that its actions are consistent.

Rule 32(i)(4) - Conforming Amendment to Victims' Right to Be Heard

The Proposal:

Rule 32(i)(4) ought to be amended to conform the definition of victim to that found in the CVRA as follows:

> **(4) *Opportunity to Speak.***
>
> (A) *By a Party*. Before imposing sentence, the court must:
>
> (i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;
>
> (ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and
>
> (iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.
>
> (B) *By a Victim*. Before imposing sentence, the court must address any victim of a the crime ~~of violence or sexual abuse~~ who is present at sentencing and must permit the victim to speak or submit any information about the sentence. ~~Whether or not the victim is present, a victim's right to address the court may be exercised by the following persons if present:~~
>
> ~~(i) a parent or legal guardian, if the victim is younger than 18 years or is incompetent; or~~
>
> ~~(ii) one or more family members or relatives the court designates, if the victim is deceased or incapacitated.~~
>
> (C) *In Camera Proceedings*. Upon a party's motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).

The Rationale:

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[133] *Id.*

As noted earlier,[134] Rule 32 currently contains a definition of "victim" that is narrower than that required by the CVRA. The simplest fix is simply to strike the definition of victim and victim's representative here and include an appropriate definition in Rule 1.

(New) Rule 43.1 – Victim's Right to Attend Trials

The Proposal:

A new rule should be added implementing the victim's right to be present at trials and other proceedings as follows:

> **Rule 43.1 Victim's Presence**
> **(a) Victim's Right to Attend.** A victim has the right to attend any public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding. Before making any determination to exclude a victim, the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision to exclude a victim shall be clearly stated on the record.
> **(b) Proceeding With and Without Notice.** The court may proceed with a public proceeding without a victim if proper notice has been provided to that victim under Rule 10.1. The court may proceed with a public proceeding (other than a trial or sentencing) without proper notice to a victim only if doing so is in the interests of justice, the court provides prompt notice to that victim of the court's action and of the victim's right to seek reconsideration of the action if a victim's right is affected, and the court insures that notice will be properly provided to that victim for all subsequent public proceedings.
> **(c) Numerous Victims.** If the court finds that the number of victims makes it impracticable to according all of the victims the right to be present, the court shall fashion a reasonable procedure to facilitate victims' attendance.
> (d) **Right to be Heard on Victims' Issues.** In addition to rights to be heard established elsewhere in these rules, at any public proceeding at which a victim has the right to attend, the victim has the right to be heard on any matter directly affecting a victim's right.

The Rationale:

The Rules should reflect the CVRA's command that victims have the right to attend public proceedings in all but the most unusual circumstances. The CVRA guarantees victims the right to attend a proceeding "unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that

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[134] *See* discussion accompanying Rules 1, 32(a), *supra*.

proceeding."[135] This is a fundamental right for victims. As the President's Task Force on Victims of Crime concluded: "The crime is often one of the most significant events in the lives of victims and their families. They, no less than the defendant, have a legitimate interest in the fair adjudication of the case, and should therefore, as an exception to the general rule providing for the exclusion of witnesses, be permitted to be present for the entire trial."[136] The CVRA implements this recommendation by "allow[ing] crime victims, in the vast majority of cases, to attend the hearings and trial of the case involving their victimization. This is so important because crime victims share an interest with the government in seeing that justice is done in a criminal case and this interest supports the idea that victims should not be excluded from public criminal proceedings, whether these are pre-trial, trial, or post-trial proceedings."[137] Most states have also now adopted some form of a victim's right to attend court proceedings, including the trial.[138]

One possible way of addressing the victim's right to be present would be to leave the matter to the Federal Rules of Evidence. Federal Rule of Evidence 615 – the so-called "rule on witnesses" – requires exclusion of witnesses with certain exceptions. Among the exceptions is a fourth exception for "a person authorized by statute to be present."[139] This exception was added to cover crime victims,[140] who had a right to attend trials subject to certain conditions even before the passage of the CVRA.[141] Without the explicit listing of this exception, some trial courts had simply overlooked the victim's right to attend – most notoriously in the Oklahoma City bombing trial.[142]

But relying merely on Rule 615 to cover the victim's right to attend proceedings would be inadequate. First, the defendant's right to attend proceedings is sufficiently important to merit treatment in a specific rule in the Federal Rules of Criminal Procedure – Rule 43. The proposed victim's rule – Rule 43.1 – would evenhandedly mirror that treatment for victims.

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[135] 18 U.S.C. § 3771(a)(3).

[136] PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 80-81 (1982).

[137] 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

[138] *See generally* Douglas E. Beloof & Paul G. Cassell, *The Victim's Right to Attend Trial: The Emerging National Consensus*, __ LEWIS & CLARK L. REV. ___ (forthcoming 2005).

[139] FED. R. EVID. 615(4).

[140] *See* FED. R. EVID. 615, Adv. Comm. Notes, 1998 Amendments.

[141] *See* 42 U.S.C. § 10606 (1990) (replaced by the CVRA).

[142] *See* Cassell, *Barbarians at the Gates?*, *supra*, 1999 UTAH L. REV. at 515-22; S. REP. 108-191, 108th Cong., 1st Sess. 20-21 (2003). I served as counsel for the victims of the bombing who were pursuing this issue, and later called the omission in Rule 615 to the attention of the Evidence Committee.

Second, Rule 615 does not appear to comprehensively handle the victim's right to attend. For starters, it would seem that the Advisory Committee Notes in the Federal Rules of Evidence now need to be revised to reference the CVRA. Otherwise, judges, prosecutors, and defense counsel might simply be unaware that a victim whose testimony will not be materially affected is now "authorized by statute" to be present. Even if the legally-trained actors in the system realize the CVRA's ramifications, most crime victims are not legally trained and lack experience in the criminal justice system. Therefore, their rights should be laid out in the most direct manner possible – specifically by listing their right to attend in the criminal rules.

Finally, providing the details of the victim's right to attend is important for practical reasons. The CVRA qualifies the victim's right to attend by requiring exclusion when the victim's testimony "would be materially altered if the victim heard other testimony at that proceeding."[143] The CVRA, however, contains additional procedural requirements that judges must follow before excluding a victim: "Before making any determination . . . [to exclude a victim], the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding."[144] The Act also requires that "the reasons for any decision to exclude the victim shall be clearly stated on the record."[145] These procedural requirements are new and potentially complex. Moreover, issues surrounding victim attendance at criminal proceedings are likely to occur frequently. Victims can appeal any exclusion order, and appellate courts must take up those appeals expeditiously.[146] Accordingly, it is important that lawyers, judges, and victims have the new rule and its procedural requirements at their fingertips, rather than being forced to dig it out through some cross-reference to the United States Code. For all these reasons, subsection (a) of the proposed rule simply tracks verbatim the substantive and procedural requirements of the CVRA.

Because the issues addressed in subsection (a) potentially bear on the how Federal Rule of Evidence 615 should be drafted, the Criminal Rules Committee should coordinate its actions with the Evidence Rules Committee.

Subsection (a) also limits the right to attend to "public" proceedings. It is clear that the CVRA intended to make no change in the circumstances in which proceedings could be closed to the public. As Senator Feinstein and Senator Kyl explained in a colloquy regarding the law, "the Government or the defendant can request, and the court can order, judicial proceedings to be closed

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[143] 18 U.S.C. § 3771(a)(3).

[144] 18 U.S.C. § 3771(b).

[145] 18 U.S.C. § 3771(b).

[146] 18 U.S.C. § 3771(d)(3).

under existing laws. [The CVRA] is not intended to alter those laws or their procedures in any ways . . . . In this regard, it is not our intent to alter 28 C.F.R. § 50.9 in any respect."[147]

Subsection (b) turns to the potentially complex subject of whether the court may go forward with a proceeding when the victim is not present. If the victim has been properly notified but has elected not to attend the proceeding, of course the court may proceed. The tricky issue is what do when the victim is absent because of lack of notice of the proceeding. It could be argued that the court has no choice but to reschedule such a proceeding, just as it would be required to reschedule a proceeding where the defendant had not received notice. The CVRA mandates that courts "shall ensure" that crime victims receive their rights.[148] One of the rights is notice for court proceedings.[149] If the victim has not received notice of a proceeding, then going forward with the proceeding apparently violates the victim's rights. As Senator Kyl explained, "It does not make sense to enact victims' rights that are rendered useless because the victim never knew of the proceeding at which the right had to be asserted. Simply put, a failure to provide notice of proceedings at which a right can be asserted is equivalent to a violation of the right itself."[150]

The proposed rule stakes out a more limited position than the absolute requirement of proper victim notification. Proposed Rule 43.1 would allow the court to move forward with all proceedings – other than trial or sentencing – without notice to the victim provided three conditions are met: (1) doing so is in the interests of justice, (2) the court provides prompt notice to the victim of the court's action and of the victim's right to seek reconsideration of the action if a victim's right is affected, and (3) the court insures that notice will be properly provided to the victim for all subsequent public proceedings.

Each of these three conditions serves important purposes. For starters, the court should not move forward unless the interests of justice are served – the first requirement. The court should also notify the victim of the opportunity to seek reconsideration of the court's action if a victim's right is affected. For example, if the court holds a bail hearing without proper notice to the victim and determines to release a defendant, the victim should be advised of this fact and of the right to ask the court to reconsider that bail decision. (The CVRA, as noted earlier, gives victims the right to provide information regarding bail decisions.[151]) Finally, if the court is moving forward without

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[147] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statements of Sen. Kyl and Sen. Feinstein).

[148] 18 U.S.C. § 3771(b).

[149] 18 U.S.C. § 3771(a)(2).

[150] 150 CONG. REC. S10910 (statement of Sen. Kyl) (Oct. 9, 2004) (reprinted in Appendix B).

[151] *See* 18 U.S.C. § 3771(a)(4).

proper notice to a victim at a particular proceeding, it seems only fair that the problem be solved for future proceedings – the third requirement.

The proposed rule would not authorize a court to proceed with either a trial or sentencing without proper notice to the victim. With respect to trials, a victim of a crime simply deserves the opportunity to see the evidence against her victimizer. If some modest delay in the trial must occur to make this happen, that is a small price to pay for respecting the victim's right to attend the trial. With respect to sentencing, here too a victim simply deserves the right to make a statement – to tell her victimizer about the damage done by his crime and to urge the court to impose an appropriate sentence. Moreover, neither a trial nor a sentencing can redone. Double jeopardy principles may well forbid retrial even when a victim has received no notice,[152] and the CVRA itself bars a new trial remedy.[153] So too, sentencings would appear to be subject to limitations that might prevent a crime victim from obtaining a resentencing[154] – although the CVRA directly allows for re-sentencings in certain limited circumstances.[155]

While neither trial nor sentencing could proceed without proper notice to the victim, this limitation will affect only a small number of cases for a short period of time. A large percentage of victims may choose to waive any right to receive notice. For those victims electing to receive notice, presumably notice will be properly given in the vast majority of cases. Even apart from notice requirements, the majority of victims will be trial witnesses, and therefore will have been subpoenaed to attend trial. Victims will also often be aware of sentencings through the work of probation officers in preparing presentence reports. In the tiny minority of cases where notice has not been properly provided, notice will often be only a telephone call away. While the burdens of delaying a trial or sentencing are not trivial, Congress has required that the victim's rights must take precedence. Subsection (b) faithfully implements that determination.

Subsection (c) of the proposed rule deals with the victim's right to attend in situations involving multiple victims. Congress has recognized that in some situations – e.g., the Oklahoma

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[152] *See* U.S. CONST., amend. V. *See generally* Douglas Evan Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 BYU L. REV. ___ (forthcoming).

[153] 18 U.S.C. § 3771(d)(5).

[154] *See* FED. R. CRIM. P. 35 (correction of sentence allowed only for technical or other clear error). Whether denial of a victim's right constitutes "clear error" subject to correction presumably will need to be resolved in future cases.

[155] 18 U.S.C. § 3771(d)(5) (authorizing a victim motion to "re-open a . . . sentence" if right was denied); *see* 150 CONG. REC. S10910 (statement of Sen. Kyl) (Oct. 9, 2004) (reprinted in Appendix B) (discussing this provision). In light of these provisions, the Committee may need to consider redrafting Rule 35 to allow re-opening of sentences imposed in violation of victims' rights.

City bombing – it is not possible to afford all victims the opportunity to attend trials. The CVRA accordingly provides that in situations where "the number of crime victims makes it impracticable" to protect rights for all victims, the court "shall fashion a reasonable procedure" to give effect to victims' concerns.[156] Possible procedures include closed circuit transmission of the proceedings to an ceremonial courtroom, auditorium or other facility that will accommodate many people. To permit such transmission, an amendment to Rule 53 is proposed below.

Subsection (d) gives victims a general right to be heard on issues "directly affecting" their rights. The CVRA specifically mandates that victims have the right to be heard about release of the defendant, a plea, or a sentence.[157] The right to be heard at these hearings have been addressed elsewhere in these proposed rules. But courts sometimes will consider other issues that directly affect victims' rights. For example, courts may consider whether to release the address and telephone number of the victim to the defendant.[158] It makes little sense for the court to decide this issue without hearing from the victim, particularly since the CVRA gives victims the right "to be reasonably protected from the accused."[159] Subsection (d) would cover this situation and others similar to it by allowing victims who are present at a hearing to be heard on issues "directly" affecting their rights.

Rule 44.1 – Discretionary Appointment of Counsel for Victim

The Proposal:

The court's discretionary authority to appoint counsel for a victim should be included in a new rule as follows:

Rule 44.1 Counsel for Victims.

When the interests of justice require, the court may appoint counsel for a victim to assist the victim in exercising their rights as provided by law.

The Rationale:

An argument could be made that the CVRA guarantees crime victims the right to counsel. After all, the CVRA guarantees victims the right to be "treated with fairness" and fairness could be

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[156] 18 U.S.C. § 3771(d)(2).

[157] 18 U.S.C. § 3771(a)(4).

[158] *See* discussion of changes to Rule 12.1, *supra.*

[159] 18 U.S.C. § 3771(a)(1).

understood as embracing the assistance of counsel.[160] At the same time, however, nothing in the CVRA directly mandates counsel for victims. As Senator Kyl explained, "This bill does not provide victims with a right to counsel but recognizes that a victim may enlist counsel on their own."[161]

Courts, however, have inherent authority to appoint a volunteer lawyer to represent a crime victim. While the CVRA does not *create* a right to counsel for victims, nothing in the Act deprived the courts of their pre-existing inherent authority. The courts generally have the right to appoint volunteer counsel in civil cases,[162] a power that would seem to extend to criminal cases. Indeed, the Supreme Court has left open the question of whether federal courts possess the inherent authority to *require* counsel to provide legal services to the poor.[163] The local rules of some federal courts already explicitly recognize this power.[164] In addition, Title 28 broadly permits the court in both civil and criminal cases to "request an attorney to represent *any person* unable to afford counsel."[165] Finally, before *Gideon*, courts could request that lawyers provide assistance to indigent criminal defendants. In light of all these facts, federal courts likely have the inherent power to request attorneys to represent indigent crime victims.[166]

In addition, at least one statute already directly authorize federal courts to appoint counsel for child victims in certain cases. Title 18 U.S.C. § 3509 provides: "The court may appoint a guardian ad litem for a child who was a victim of, or a witness to, a crime involving abuse or exploitation to protect the best interests of the child." Congress, however, has not yet provided

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[160] *Cf. Gideon v. Wainwright*, 372 U.S. 335, 388 (1963) (discussing "fairness" to the defendant as a reason for recognizing a right to appointed counsel).

[161] 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

[162] *See generally* Judy E. Zelin, *Court Appointment of Attorney to Represent, Without Compensation, Indigent in Civil Action*, 52 A.L.R.4TH 1063 (1987 & 2004 Supp.).

[163] *Mallard v. United States District Court*, 490 U.S. 296, 307 & n.8 (1989).

[164] *See, e.g.*, D. UTAH CIV. R. 83-1.1(b)(3) ("Any attorney who is admitted to the bar of this court must agree, as a condition of such admission, to engage in a reasonable level of pro bono work when requested to do so by the court").

[165] 28 U.S. § 1915(e)(1) (emphasis added).

[166] *See* BELOOF, CASSELL & TWIST, *supra*, Chapt 6.A (reaching this conclusion).

funding for this particular right.[167] Criminal Justice Act funding is also unavailable for victim representation, as that Act is limited to criminal defense.[168]

The proposed rule would simply recognize this discretionary power of the courts to appoint volunteer counsel. The rule is purely discretionary (the court "may" appoint counsel) and is limited to situations where the interests of justice require appointment. The rule does not address payment for counsel, as this matter must be left to subsequent appropriations from Congress. The court, however, ask for volunteer counsel to assist victims.

There is good reason to expect that volunteers will be forthcoming. Not only are many attorneys willing to undertake pro bono representation, but the CVRA itself authorizes millions of dollars in funding for victim representation around the country. The authorization includes support for the National Crime Victims Law Institute at the Northwestern School of Law of Lewis and Clark College to help establish eleven legal offices around the country representing crime victims.[169]

Finally, it might be argued that this subject need not be discussed in a rule, because the court's inherent authority to seek counsel would exist even without a rule. Both courts and victims, however, will find it useful to have this authority close at hand in the criminal rules. In addition, prosecutors are obligated by the CVRA, "in the event of any material conflict of interest between the prosecutor and the crime victim" to "advise the crime victim of the conflict and take reasonable steps to direct the crime victim to the appropriate legal referral, legal assistance, or legal aid agency."[170] This may frequently require prosecutors to help victims obtain legal counsel. Accordingly, a separate rule on this subject is appropriate.

For all these reasons, the Rules should be amended to recognize the court's authority to appoint volunteer counsel to represent a crime victim.

Rule 46 - Victims' Right to Be Heard Regarding Defendant's Release from Custody

The Proposal:

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[167] Memorandum from the Administrative Office of the United States Courts, to the Judges, United States District Court United States Magistrate Judges, (March 19, 1991) (Available from the Administrative Office).

[168] *See* 18 U.S.C. § 3006A(a)(1).

[169] *See* 42 U.S.C. 10603d; *see also* 150 Cong. Rec. S4266 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) (noting appropriations for the National Crime Victims Law Institution "to provide grants and assistance to lawyers to help victims of crime in court"; funding sufficient to "provide for two new regional offices and nine specific clinics").

[170] 18 U.S.C. § 3771(c)(2).

Victims should be explicitly given the right to be heard regarding the defendant's release from custody as follows:

> **(k) Victims' Right to Be Heard.** A victim has the right to be heard regarding any decision to release the defendant. The court shall consider the views of victims in making any release decision, including such decisions in petty cases. In a case where the court finds that the number of victims makes it impracticable to accord all of the victims the right to be heard in open court, the court shall fashion a reasonable procedure to facilitate hearing from representative victims.

The Rationale:

The CVRA guarantees victims the right "to be reasonably heard" at "any public proceeding . . . involving release . . . ."[171] A similar right already exists for victims of stalking offenses.[172] The proposed rule simple recognizes that right, and further directs that the court shall consider the views of the victim. The victim's right to be heard would be meaningless if the court did not consider the victim's view. Moreover, existing law appear to recognize that the court should consider the victim's concerns.[173]

Rule 48 – Victims' Views on Dismissal to be Considered.

The Proposal:

The court should be required to consider the views of victims in deciding whether to grant dismissal as follows:

> **Rule 48. Dismissal**
> **(a) By the Government.** The government may, with leave of court, dismiss an indictment, information, or complaint. The government may not dismiss the prosecution during trial without the defendant's consent. In deciding whether to grant the government's motion to dismiss, the court shall consider the views of any victims.

The Rationale:

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[171] 18 U.S.C. § 3771(a)(4).

[172] 18 U.S.C. § 2263.

[173] *See, e.g.*, 18 U.S.C. § 3142(c) (court to consider whether release of the defendant "will endanger the safety of any other person").

This proposed change would implement a victim's right to be "treated with fairness" and to be heard at any proceeding "involving release" of the defendant by requiring the court to consider the views of the victim before granting a government motion to dismiss a charge. The rule already requires leave of court before a dismissal can be approved. In determining whether to grant leave, the court should consider whether dismissal is "clearly contrary to manifest public interest."[174] Among the relevant factors in making this public interest determination are whether the prosecution is motivated by "animus towards the victim."[175] The proposed rule would simply require the court to consider the views of the victim in making this determination, leaving the weight to be given to those views up to the court.

Rule 50 – Victims' Right to Proceedings Free From Unreasonable Delay.

The Proposal:

A victim's right to proceedings free from unreasonable delay should be recognized as follows:

> **(b) Defendant's Right Against Delay.** The court shall assure that the defendant's right to a speedy trial is protected, as provided by the Speedy Trial Act.
> **(c) Victim's Right Against Delay.** The court shall assure that a victim's right to proceedings free from unreasonable delay is protected. A victim has the right to be heard regarding any motion to continue any proceeding. If the court grants a motion to continue over the objection of a victim, the court shall state its reasons in the record.

The Rationale:

The CVRA gives victims the right "to proceedings free from unreasonable delay."[176] In addition, child victims previously had the right to a "speedy trial" in certain situations.[177] A number of states have similar provisions.[178]

The proposed rule would give effect to these rights by requiring courts to protect against unreasonable delay. Of course, in some situations, delay is reasonable. In others, however, the court should deny a motion to continue to bring closure to a victim. As Senator Feinstein has explained:

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[174] *United States v. Cowan*, 524 F.2d 504,513 (5th Cir. 1975).

[175] *In re Richards*, 213 F.3d 773, 787 (3rd Cir. 2000).

[176] 18 U.S.C. § 3771(a)(7).

[177] 18 U.S.C. § 3509(j).

[178] *See* BELOOF, CASSELL & TWIST, *supra*, Chapt. 6.B; Cassell, *Balancing the Scales of Justice*, *supra*, 1994 UTAH L. REV. at 1406.

> This provision does not curtail the government's need for reasonable time to organize and prosecute its case. Nor is the provision intended to infringe on the defendant's due process right to prepare a defense. Too often, however, delays in criminal proceedings occur for the mere convenience of the parties and those delays reach beyond the time needed for defendant's due process or the government's need to prepare. The result of such delays is that victims cannot begin to put the criminal justice system behind them and they continue to be victimized. It is not right to hold crime victims under the stress and pressure of future court proceedings merely because it is convenient for the parties or the court.[179]

The proposed rule gives victims the right to be heard on any continuance. This is consistent with the intent of the CVRA's drafters. As Senator Kyl stated: "This provision [in the CVRA] should be interpreted so that any decision to schedule, reschedule, or continue criminal cases *should include victim input* through the victim's assertion of the right to be free from unreasonable delay."[180]

The proposed rule also requires that the court state its reason for granting any continuance. This requirement stems from a recommendation from the President's Task Force on Victims of Crime. The Task Force noted "the inherent human tendency to postpone matters, often for insufficient reason," and accordingly recommended that "reasons for any granted continuance . . . be clearly stated on the record."[181] Several states have adopted similar provisions.[182]

Rule 51 – Claiming Error Regarding Victims' Rights.

The Proposal:

The procedures for a victim to assert error should be spelled out in the rules as follows:

> **Rule 51. Preserving Claimed Error**
> **(a) Exceptions Unnecessary.** Exceptions to rulings or orders of the court are unnecessary.

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[179] 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

[180] 150 CONG. REC. S10910 (statement of Sen. Kyl) (Oct. 9, 2004) (emphasis added) (reprinted in Appendix B).

[181] PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 76 (1982).

[182] *See, e.g.,* ARIZ. REV. STAT. ANN. § 13-4435(B) (courts required to "state on the record the reason for [any] continuance"); Utah Code Ann. 77-38-7(3)(a) (court required to "enter in the record the specific reason for the continuance and the procedures that have been taken to avoid further delays").

(b) Preserving a Claim of Error. A party or a victim may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party or a victim does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

The Rationale:

The CVRA authorizes victim appeals and includes expedited procedures for handling those appeals.[183] The proposed rule would simply fold in victims to the existing rule regarding preservation of errors.

Rule 53 – Closed-Circuit Transmission of Proceedings for Victims

The Proposal:

Closed-circuit transmission of court proceedings for victims should be authorized as follows:

Rule 53. Courtroom Photographing and Broadcasting Prohibited

(a) General Rule. Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.

(b) Closed-Circuit Transmission for Victims. In order to permit victims of crime to watch criminal trial proceedings, the court may authorize closed-circuit televising of the proceedings for viewing by victims or other persons the court determines have a compelling interest in doing so.

The Rationale:

The CVRA grants victims the right to attend trials, as noted previously in connection with Rule 43.1. At the same time, however, the CVRA recognizes that in some situations with many victims, the court may have to craft "reasonable procedures" to protect victims rights.[184] One such reasonable procedure would appear to be closed-circuit transmission of court proceedings to a

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[183] *See* 18 U.S.C. § 3771(d)(3).

[184] 18 U.S.C. § 3771(d)(2).

facility sufficiently large to accommodate all the victims. Indeed, this was the procedure followed in the Oklahoma City bombing case.[185]

The proposed rule would authorize such transmission in appropriate cases. The language for the proposed rule comes from 42 U.S.C. § 10608(a), which authorizes closed-circuit transmissions "notwithstanding any provision of the Federal Rules of Criminal Procedure to the contrary" in cases in which a proceeding has been transferred more than 350 miles – e.g., the Oklahoma City bombing trial. There appears to be no good reason to limit such transmissions to such situations where venue has been transferred in light of the CVRA's mandate that the court fashion "reasonable procedures" to protect the rights of multiple victims. The proposed rule simply authorizes courts to allow such transmissions in appropriate cases.

Rule 58 – Victims and Petty Offenses.

The Proposal:

Courts should hear from victims regarding sentences in petty cases as follows:

(3) ***Sentencing.*** The court must give the defendant an opportunity to be heard in mitigation and then proceed immediately to sentencing. The court must also give victims an opportunity to be heard. The court may, however, postpone sentencing to allow the probation service to investigate or to permit either party to submit additional information.

The Rationale:

The CVRA gives all "victims" the right to be heard at sentencing. Victim includes anyone who is directly and proximately harmed by "a Federal offense."[186] The Act does not require that the offense be a felony or misdemeanor. Accordingly, a victim has a right to be heard at sentencing for any petty offense.

CONCLUSION

The CVRA will require significant changes to the Federal Rules of Criminal Procedure. In this memorandum, I have tried to provide one possible way to implement the congressional command that victims become participants in the criminal justice process, with specific language and supporting analysis for each change. Undoubtedly there are many reasonable ways of implementing the CVRA. But since the Committee will be making many decisions about how to best change the rules, one concluding thought may be worth highlighting.

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[185] Jo Thomas, *Trial to Be Shown in Oklahoma for Victims*, THE NEW YORK TIMES, Jan. 30, 1997, at A14.

[186] 18 U.S.C. § 3771(e).

Congress will be paying close attention to how courts protect the new victims' rights. For example, the CVRA directs the Administrative Office to report each year the number of time that victims have attempted to assert their rights and been denied the relief they requested.[187] More generally, Congress viewed the new Act as an important step to protecting crime victims – a "new and bolder approach than has ever been tried before in our Federal System."[188] Congress is eagerly awaiting to see the results of this approach. As Senator Leahy warned, "Passage of this bill will necessitate careful oversight of its implementation by Congress."[189] And victims' advocates, too, will be watching carefully.

In light of this congressional and victims' interest, the Judiciary should comprehensively protect crime victims' rights by changes in court rules. If Congress believes that the federal rules fail to faithfully reflect crime victims' concerns, it can of course directly amend the rules. But such direct amendments may not sufficiently attend to the needs of the judicial branch or others involved in the criminal justice process. It is in that spirit of eliminating any need for congressional intervention that I offer these proposals as a possible starting place for discussion.

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[187] 18 U.S.C. § 3771 Note (requiring the Administrative Office of the courts to file an annual report with Congress concerning the number of times a victim's right is asserted and denied by federal courts).

[188] 150 CONG. REC. S4260 (statement of Sen. Feinstein) (Apr. 22, 2004).

[189] *Id.* at S4271 (statement of Sen. Leahy).

APPENDICES

Appendix A: Text of the Crime Victims' Rights Act and Related Provisions

3771. Crime victims' rights.

3771. Crime victims' rights

(a) RIGHTS OF CRIME VICTIMS.-A crime victim has the following rights:

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice of any public proceeding involving the crime or of any release or escape of the accused.

(3) The right not to be excluded from any such public proceeding.

(4) The right to be reasonably heard at any public proceeding involving release, plea, or sentencing.

(5) The right to confer with the attorney for the Government in the case.

(6) The right to full and timely restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

(b) RIGHTS AFFORDED.-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 reasons for any decision denying relief under this chapter shall be clearly stated on the record.

(c) BEST EFFORTS TO ACCORD RIGHTS.-

(1) GOVERNMENT.-Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).

(2) CONFLICT.-In the event of any material conflict of interest between the prosecutor and the crime victim, the prosecutor shall advise the crime victim of the conflict and take reasonable steps to direct the crime victim to the appropriate legal referral, legal assistance, or legal aid agency.

(3) NOTICE.-Notice of release otherwise required pursuant to this chapter shall not be given if such notice may endanger the safety of any person.

(d) ENFORCEMENT AND LIMITATIONS.-

(1) RIGHTS.-The crime victim, the crime victim's lawful representative, and the attorney for the Government may assert the rights established in this chapter. A person accused of the crime may not obtain any form of relief under this chapter.

(2) MULTIPLE CRIME VICTIMS.-In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights contained in this chapter, the court shall fashion a procedure to give effect to this chapter.

(3) WRIT OF MANDAMUS.-If a Federal court denies any right of a crime victim under this chapter or under the Federal Rules of Criminal Procedure, the Government or the crime victim may apply for a writ of mandamus to the appropriate court of appeals. The court of appeals shall take up and decide such application forthwith and shall order such relief as may be necessary to protect the crime victim's ability to exercise the rights.

(4) ERROR.-In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates.

(5) NEW TRIAL.-In no case shall a failure to afford a right under this chapter provide grounds for a new trial.

(6) NO CAUSE OF ACTION.-Nothing in this chapter shall be construed to authorize a cause of action for damages.

(e) DEFINITIONS.-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. 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.

(f) PROCEDURES TO PROMOTE COMPLIANCE.-

(1) REGULATIONS.-Not later than 1 year after the date of enactment of this chapter, the Attorney General of the United States shall promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations described in law respecting crime victims.

(2) CONTENTS.-The regulations promulgated under paragraph (1) shall-

(A) establish an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of the rights of a crime victim;

(B) require a course of training for employees and offices of the Department of Justice that fail to comply with provisions of Federal law pertaining to the treatment of crime victims, and otherwise assist such employees and offices in responding more effectively to the needs of crime victims;

(C) contain disciplinary sanctions, including suspension or termination from employment, for employees of the Department of Justice who willfully or wantonly fail to comply with provisions of Federal law pertaining to the treatment of crime victims; and

(D) provide that the Attorney General, or the designee of the Attorney General, shall be the final arbiter of the complaint, and that there shall be no judicial review of the final decision of the Attorney General by a complainant.".

(b) TABLE OF CHAPTERS.-The table of chapters for part II of title 18, United States Code, is amended by inserting at the end the following:

237. Crime victims' rights3771.

(c) REPEAL.-Section 502 of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10606) is repealed.

SEC. 3. INCREASED RESOURCES FOR ENFORCEMENT OF CRIME VICTIMS' RIGHTS.

(a) CRIME VICTIMS LEGAL ASSISTANCE GRANTS.-The Victims of Crime Act of 1984 (42 U.S.C. 10601 et seq.) is amended by inserting after section 1404C the following:

SEC. 1404D. CRIME VICTIMS LEGAL ASSISTANCE GRANTS.

(a) IN GENERAL.-The Director may make grants as provided in section 1404(c)(1)(A) to State, tribal, and local prosecutors' offices, law enforcement agencies, courts, jails, and correctional institutions, and to qualified public and private entities, to develop, establish, and maintain programs for the enforcement of crime victims' rights as provided in law.

(b) FALSE CLAIMS ACT.-Notwithstanding any other provision of law, amounts collected pursuant to sections 3729 through 3731 of title 31, United States Code (commonly known as the 'False Claims Act'), may be used for grants under this section, subject to appropriation.".

(b) AUTHORIZATION OF APPROPRIATIONS.-In addition to funds made available under section 1402(d) of the Victims of Crime Act of 1984, there are authorized to be appropriated to carry out this Act-

(1) $2,000,000 for fiscal year 2005 and $5,000,000 for each of fiscal years 2006, 2007, 2008, and 2009 to United States Attorneys Offices for Victim/Witnesses Assistance Programs;

(2) $2,000,000 for fiscal year 2005 and $5,000,000 in each of the fiscal years 2006, 2007, 2008, and 2009, to the Office for Victims of Crime of the Department of Justice for enhancement of the Victim Notification System;

(3) $300,000 in fiscal year 2005 and $500,000 for each of the fiscal years 2006, 2007, 2008, and 2009, to the Office for Victims of Crime of the Department of Justice for staff to administer the appropriation for the support of the National Crime Victim Law Institute or other organizations as designated under paragraph (4);

(4) $7,000,000 for fiscal year 2005 and $11,000,000 for each of the fiscal years 2006, 2007, 2008, and 2009, to the Office for Victims of Crime of the Department of Justice, for the support of-

(A) the National Crime Victim Law Institute and the establishment and operation of the Institute's programs to provide counsel for victims in criminal cases for the enforcement of crime victims' rights in Federal jurisdictions, and in States and tribal governments that have laws substantially equivalent to the provisions of chapter 237 of title 18, United States Code; or

(B) other organizations substantially similar to that organization as determined by the Director of the Office for Victims of Crime.

(c) INCREASED RESOURCES TO DEVELOP STATE-OF-THE-ART SYSTEMS FOR NOTIFYING CRIME VICTIMS OF IMPORTANT DATES AND DEVELOPMENTS.-The Victims of Crime Act of 1984 (42 U.S.C. 10601 et seq.) is amended by inserting after section 1404D the following:

SEC. 1404E. CRIME VICTIMS NOTIFICATION GRANTS.

(a) IN GENERAL.-The Director may make grants as provided in section 1404(c)(1)(A) to State, tribal, and local prosecutors' offices, law enforcement agencies, courts, jails, and correctional institutions, and to qualified public or private entities, to develop and implement state-of-the-art systems for notifying victims of crime of important dates and developments relating to the criminal proceedings at issue in a timely and efficient manner, provided that the jurisdiction has laws substantially equivalent to the provisions of chapter 237 of title 18, United States Code.

(b) INTEGRATION OF SYSTEMS.-Systems developed and implemented under this section may be integrated with existing case management systems operated by the recipient of the grant.

(c) AUTHORIZATION OF APPROPRIATIONS.-In addition to funds made available under section 1402(d), there are authorized to be appropriated to carry out this section-

(1) $5,000,000 for fiscal year 2005; and

(2) $5,000,000 for each of the fiscal years 2006, 2007, 2008, and 2009.

(d) FALSE CLAIMS ACT.-Notwithstanding any other provision of law, amounts collected pursuant to sections 3729 through 3731 of title 31, United States Code (commonly known as the 'False Claims Act'), may be used for grants under this section, subject to appropriation.".

SEC. 4. REPORTS.

(a) ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS.-Not later than 1 year after the date of enactment of this Act and annually thereafter, the Administrative Office of the United States Courts, for each Federal court, shall report to Congress the number of times that a right established in chapter 237 of title 18, United States Code, is asserted in a criminal case and the relief requested is denied and, with respect to each such denial, the reason for such denial, as well as the number of times a mandamus action is brought pursuant to chapter 237 of title 18, and the result reached.

(b) GENERAL ACCOUNTING OFFICE.-

(1) STUDY.-The Comptroller General shall conduct a study that evaluates the effect and efficacy of the implementation of the amendments made by this Act on the treatment of crime victims in the Federal system.

(2) REPORT.-Not later than 3 years after the date of enactment of this Act, the Comptroller General shall prepare and submit to the appropriate committees a report containing the results of the study conducted under subsection (a).

Appendix B: Section-by-Section Analysis by Senator Kyl

150 CONG. REC. S10910-01 (Oct. 9, 2004)

Mr. KYL.

Mr. President, as the primary drafter of Title I of H.R. 5107, I would like to make a few comments. After extensive consultation with my colleagues, broad bipartisan consensus was reached and the language in Title I was agreed to.

I would like to make it clear that it is not the intent of this bill to limit any laws in favor of crime victims that may currently exist, whether these laws are statutory, regulatory, or found in case law. I would like to turn to the bill itself and address the first section, (a)(1), the right of the crime victim to be reasonably protected. Of course the government cannot protect the crime victim in all circumstances. However, where reasonable, the crime victim should be provided accommodations such as a secure waiting area, away from the defendant before and after and during breaks in the proceedings. The right to protection also extends to require reasonable conditions of pre-trial and post-conviction relief that include protections for the victim's safety.

I would like to address the notice provisions of (a)(2). The notice provisions are important because if a victim fails to receive notice of a public proceeding in the criminal case at which the victim's right could otherwise have been exercised, that right has effectively been denied. Public court proceedings include both trial level and appellate level court proceedings. It does not make sense to enact victims' rights that are rendered useless because the victim never knew of the proceeding at which the right had to be asserted. Simply put, a failure to provide notice of proceedings at which a right can be asserted is equivalent to a violation of the right itself. Equally important to this right to notice of public proceedings is the right to notice of the escape or release of the accused. This provision helps to protect crime victims by notifying them that the accused is out on the streets.

For these rights to notice to be effective, notice must be sufficiently given in advance of a proceeding to give the crime victim the opportunity to arrange his or her affairs in order to be able to attend that proceeding and any scheduling of proceedings should take into account the victim's schedule to facilitate effective notice.

Restrictions on public proceedings are in 28 CFR Sec. 50.9 and it is not the intent here today to alter the meaning of that provision.

Too often crime victims have been unable to exercise their rights because they were not informed of the proceedings. Pleas and sentencings have all too frequently occurred without the victim ever knowing that they were taking place. Victims are the persons who are directly harmed by the crime and they have a stake in the criminal process because of that harm. Their lives are significantly altered by the crime and they have to live with the consequences for the rest of their lives. To deny them the opportunity to know of and be present at proceedings is counter to the fundamental principles of this country. It is simply wrong. Moreover, victim safety requires that notice of the release or escape of an accused from custody be made in a timely manner to allow the victim to make informed choices about his or her own safety. This provision ensures that takes place.

I would like to turn to (a)(3), which provides that the crime victim has the right not to be excluded from any public proceedings. This language was drafted in a way to ensure that the

government would not be responsible for paying for the victim's travel and lodging to a place where they could attend the proceedings.

In all other respects, this section is intended to grant victims the right to attend and be present throughout all public proceedings.

This right is limited in two respects. First, the right is limited to public proceedings, thus grand jury proceedings are excluded from the right. Second, the government or the defendant can request, and the court can order, judicial proceedings to be closed under existing laws. This provision is not intended to alter those laws or their procedures in any way. There may be organized crime cases or cases involving national security that require procedures that necessarily deny a crime victim the right not to be excluded that would otherwise be provided under this section. This is as it should be. National security matters and organized crime cases are especially challenging and there are times when there is a vital need for closed proceedings. In such cases, the proceedings are not intended to be interpreted as "public proceedings" under this bill. In this regard, it is not our intent to alter 28 CFR Sec. 50.9 in any respect.

Despite these limitations, this bill allows crime victims, in the vast majority of cases, to attend the hearings and trial of the case involving their victimization. This is so important because crime victims share an interest with the government in seeing that justice is done in a criminal case and this interest supports the idea that victims should not be excluded from public criminal proceedings, whether these are pre-trial, trial, or post-trial proceedings.

When "the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding," a victim may be excluded. The standards of "clear and convincing evidence" and "materially altered" are extremely high and intended to make exclusion of the victim quite rare, especially since (b) says that "before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the *S10911criminal proceeding." It should be stressed that (b) requires that "the reasons for any decision denying relief under this chapter shall be clearly stated on the record." A judge should explain in detail the precise reasons why relief is being denied.

This right of crime victims not to be excluded from the proceedings provides a foundation for (a)(4), which provides victims the right to reasonably be heard at any public proceeding involving release, plea, or sentencing. This provision is intended to allow crime victims to directly address the court in person. It is not necessary for the victim to obtain the permission of either party to do so. This right is a right independent of the government or the defendant that allows the victim to address the court. To the extent the victim has the right to independently address the court, the victim acts as an independent participant in the proceedings. When a victim invokes this right during plea and sentencing proceedings, it is intended that the he or she be allowed to provide all three types of victim impact: the character of the victim, the impact of the crime on the victim, the victims' family and the community, and sentencing recommendations. Of course, the victim may use a lawyer, at the victim's own expense, to assist in the exercise of this right. This bill does not provide victims with a right to counsel but recognizes that a victim may enlist a counsel on their own.

It is not the intent of the term "reasonably" in the phrase "to be reasonably heard" to provide any excuse for denying a victim the right to appear in person and directly address the

court. Indeed, the very purpose of this section is to allow the victim to appear personally and directly address the court. This section would fail in its intent if courts determined that written, rather than oral communication, could generally satisfy this right. On the other hand, the term "reasonably" is meant to allow for alternative methods of communicating a victim's views to the court when the victim is unable to attend the proceedings. Such circumstances might arise, for example, if the victim is incarcerated on unrelated matters at the time of the proceedings or if a victim cannot afford to travel to a courthouse. In such cases, communication by the victim to the court is permitted by other reasonable means. In short, the victim of crime, or their counsel, should be able to provide any information, as well as their opinion, directly to the court concerning the release, plea, or sentencing of the accused. This bill intends for this right to be heard to be an independent right of the victim.

It is important that the "reasonably be heard" language not be an excuse for minimizing the victim's opportunity to be heard. Only if it is not practical for the victim to speak in person or if the victim wishes to be heard by the court in a different fashion should this provision mean anything other than an in-person right to be heard.

Of course, in providing victim information or opinion it is important that the victim be able to confer with the prosecutor concerning a variety of matters and proceedings. Under (a)(5), the victim has a reasonable right to confer with the attorney for the government in the case. This right is intended to be expansive. For example, the victim has the right to confer with the government concerning any critical stage or disposition of the case. The right, however, it is not limited to these examples. This right to confer does not give the crime victim any right to direct the prosecution. Prosecutors should consider it part of their profession to be available to consult with crime victims about concerns the victims may have which are pertinent to the case, case proceedings or dispositions. Under this provision, victims are able to confer with the government's attorney about proceedings after charging. I would note that the right to confer does impair the prosecutiorial discretion of the Attorney General or any officer under his direction, as provided (d)(6).

I would like to turn now to restitution in (a)(6). This section provides the right to full and timely restitution as provided in law. We specifically intend to endorse the expansive definition of restitution given by Judge Cassell in *U.S. v. Bedonie* and *U.S. v. Serawop* in May 2004. This right, together with the other rights in the act to be heard and confer with the government's attorney in this act, means that existing restitution laws will be more effective.

I would like to move on to (a)(7), which provides crime victims with a right to proceedings free from unreasonable delay. This provision does not curtail the government's need for reasonable time to organize and prosecute its case. Nor is the provision intended to infringe on the defendant's due process right to prepare a defense. Too often, however, delays in criminal proceedings occur for the mere convenience of the parties and those delays reach beyond the time needed for defendant's due process or the government's need to prepare. The result of such delays is that victims cannot begin to put the criminal justice system behind them and they continue to be victimized. It is not right to hold crime victims under the stress and pressure of future court proceedings merely because it is convenient for the parties or the court.

This provision should be interpreted so that any decision to schedule, reschedule, or continue criminal cases should include victim input through the victim's assertion of the right to be free from unreasonable delay.

I would add that the delays in criminal proceedings are among the most chronic problems faced by victims. Whatever peace of mind a victim might achieve after a crime is too often inexcusably postponed by unreasonable delays in the criminal case. A central reason for these rights is to force a change in a criminal justice culture which has failed to focus on the legitimate interests of crime victims, a new focus on limiting unreasonable delays in the criminal process to accommodate the victim is a positive start.

I would like to turn to (a)(8). The broad rights articulated in this section are meant to be rights themselves and are not intended to just be aspirational. One of these rights is the right to be treated with fairness. Of course, fairness includes the notion of due process. Too often victims of crime experience a secondary victimization at the hands of the criminal justice system. This provision is intended to direct government agencies and employees, whether they are in executive or judicial branches, to treat victims of crime with the respect they deserve and to afford them due process.

It is not the intent of this bill that its significance be whittled down or marginalized by the courts or the executive branch. This legislation is meant to correct, not continue, the legacy of the poor treatment of crime victims in the criminal process. This legislation is meant to ensure that cases like the McVeigh case, where victims of the Oklahoma City bombing were effectively denied the right to attend the trial and to avoid federal appeals courts from determining, as the Tenth Circuit Court of Appeals did, that victims had no standing to seek review of their right to attend the trial under the former victims' law that this bill replaces.

I would also like to comment on (b), which directs courts to ensure that the rights in this law be afforded and to record, on the record, any reason for denying relief of an assertion of a crime victim. This provision is critical because it is in the courts of this country that these rights will be asserted and it is the courts that will be responsible for enforcing them. Further, requiring a court to provide the reasons for denial of relief is necessary for effective appeal of such denial.

Turning briefly to (c), there are several important things to point out. First, this provision requires that the government inform the victim that the victim can seek the advice of the attorney, such as from the legal clinics for crime victims contemplated under this law, such as the law clinics at Arizona State University and those supported by the National Crime Victim Law Institute at the Law School at Lewis and Clark College in Portland, Oregon. This is an important protection for crime victims because it ensures the independent and individual nature of their rights. Second, the notice section immediately following limits the right to notice of release where such notice may endanger the safety of the person being released. There are cases, particularly in domestic violence cases, where there is danger posed by an intimate partner if the intimate partner is *S10912 released. Such circumstances are not the norm, even in domestic violence cases as a category of cases. This exception should not be relied upon as an excuse to avoid notifying most victims.

I would now like to address the enforcement provisions of the bill in (d). This provision allows a crime victim to enter the criminal trial court during proceedings involving the crime against the victim, to stand with other counsel in the well of the court, and assert the rights provided by this bill. This provision ensures that crime victims have standing to be heard in trial courts so that they are heard at the very moment when their rights are at stake and this, in turn, forces the criminal justice system to be responsive to a victim's rights in a timely way. Importantly, however, the bill does not allow the defendant in the case to assert any of the

victim's rights to obtain relief. This prohibition prevents the individual accused of the crime from distorting a right intended for the benefit of the individual victim into a weapon against justice.

The provision allows the crime victim's representative and the attorney for the government to go into a criminal trial court and assert the crime victim's rights. The inclusions of representatives and the government's attorney in the provision are important for a number of reasons. First, allowing a representative to assert a crime victim's rights ensures that where a crime victim is unable to assert the rights on his or her own for any reason, including incapacity, incompetence, minority, or death, those rights are not lost. The representative for the crime victim can assert the rights. Second, a crime victim may choose to enlist a private attorney to represent him or her in the criminal case-this provision allows that attorney to enter an appearance on behalf of the victim in the criminal trial court and assert the victim's rights. The provision also recognizes that, at times, the government's attorney may be best situated to assert a crime victim's rights either because the crime victim is not available at a particular point in the trial or because, at times, the crime victim's interests coincide with those of the government and it makes sense for a single person to express those joined interests. Importantly, however, the provision does not mean that the government's attorney has the authority to compromise or co-opt a victim's right. Nor does the provision mean that by not asserting a victim's right the government's attorney has waived that right. The rights provided in this bill are personal to the individual crime victim and it is that crime victim that has the final word regarding which of the specific rights to assert and when. Waiver of any of the individual rights provided can only happen by the victim's affirmative waiver of that specific right.

In sum, without the ability to enforce the rights in the criminal trial and appellate courts of this country any rights afforded are, at best, rhetoric. We are far past the point where lip service to victims' rights is acceptable. The enforcement provisions of this bill ensure that never again are victim's rights provided in word but not in reality.

I want to turn to (d)(2) because it is an unfortunate reality that in today's world there are crimes that result in multiple victims. The reality of those situations is that a court may find that the sheer number of victims is so large that it is impracticable to accord each victim the rights in this bill. The bill allows that when the court makes that finding on the record the court must then fashion a procedure that still gives effect to the bill and yet takes into account the impracticability. For instance, in the Oklahoma City bombing case the number of victims was tremendous and attendance at any one proceeding by all of them was impracticable so the court fashioned a procedure that allowed victims to attend the proceedings by close circuit television. This is merely one example. Another may be to allow victims with a right to speak to be heard in writing or through other methods. Importantly, courts must seek to identify methods that fit the case before that to ensure that despite the high number of crime victims, the rights in this bill are given effect. It is a tragic reality that cases may involve multiple victims and yet that fact is not grounds for eviscerating the rights in this bill. Rather, that fact is grounds for the court to find an alternative procedure to give effect to this bill.

I now want to turn to another critical aspect of enforcement of victims' rights, (d)(3). This subsection provides that a crime victim who is denied any of his or her rights as a crime victim has standing to seek appellate review of that denial. Specifically, the provision allows a crime victim to apply for a writ of mandamus to the appropriate appellate court. The provision provides that court shall take the writ and shall order the relief necessary to protect the crime victim's

right. This provision is critical for a couple of reasons. First, it gives the victim standing to appear before the appellate courts of this country and ask for review of a possible error below. Second, while mandamus is generally discretionary, this provision means that courts must review these cases. Appellate review of denials of victims' rights is just as important as the initial assertion of a victim's right. This provision ensures review and encourages courts to broadly defend the victims' rights.

Without the right to seek appellate review and a guarantee that the appellate court will hear the appeal and order relief, a victim is left to the mercy of the very trial court that may have erred. This country's appellate courts are designed to remedy errors of lower courts and this provision requires them to do so for victim's rights. For a victim's right to truly be honored, a victim must be able to assert the rights in trial courts, to then be able to have denials of those rights reviewed at the appellate level, and to have the appellate court take the appeal and order relief. By providing for all of this, this bill ensures that victims' rights will have meaning. It is the clear intent and expectation of Congress that the district and appellate courts will establish procedures that will allow for a prompt adjudication of any issues regarding the assertion of a victim's right, while giving meaning to the rights we establish.

I would like to turn our attention to (d)(4) because that also provides an enforcement mechanism. This section provides that in any appeal, regardless of the party initiating the appeal, the government can assert as error the district court's denial of a crime victim's right. This subsection is important for a couple of reasons. First, it allows the government to assert a victim's right on appeal even when it is the defendant who seeks appeal of his or her conviction. This ensures that victims' rights are protected throughout the criminal justice process and that they do not fall by the wayside during what can often be an extended appeal that the victim is not a party to.

I would like to turn to the next provision, (d)(5). This provision is not intended to prevent courts from vacating decisions in non-trial proceedings, such as proceedings involving release, delay, pleas, or sentencings, in which victims' rights were not protected, and ordering those proceedings to be redone.

It is important for victims' rights to be asserted and protected throughout the criminal justice process, and for courts to have the authority to redo proceedings such as release, delay, pleas, and sentencings, where victims' rights are abridged.

I want to turn to the definitions in the bill, contained in (e). There are a couple of key points to be made about the definitions. A "crime victim" is defined as a person directly and proximately harmed as a result of a federal offense or an offense in the District of Columbia. This is an intentionally broad definition because all victims of crime deserve to have their rights protected, whether or not they are the victim of the count charged. Additionally, crime victims may, for any number of reasons, want to employ an attorney to represent them in court. This definition of crime victim allows crime victims to do that. It also assures that when, for any reason, crime victims unable to assert rights on their own-those rights will still be protected.

Now I would like to turn to the portion of the bill concerning administrative compliance with victims' rights. The provisions of (f) are relatively self-explanatory, but it important to point out that these procedures are completely separate from and in no way limit the victim's rights in the previous section.

I also would like to make it clear that it is the intention of the Congress *S10913

that the money authorized in 1404D for the Director of the Office for Victims of Crimes "for the support of organizations that provide legal counsel and support services for victims in criminal cases for the enforcement of crime victims' rights in Federal jurisdictions, and in States and tribal governments . . ." is intended to support the work of the National Crime Victim Law Institute at the Law School at Lewis and Clark College in Portland, Oregon, and to replicate across the nation the clinics that it is supporting, fashioned after the Crime Victims Legal Assistance Project housed at Arizona State University College of Law and run by Arizona Voice for Crime Victims. The Director of OVC should take care to make sure that these funds go into the support of these programs so that crime victims can receive free legal counsel to enforce their rights in our federal courts. Only in this way will be able to fully and fairly test whether statutes are enough to protect victims' rights. There is no substitute for testing these rights in our courts to see if they have the power to change a culture that for too long has ignored the victim.

Let me comment briefly on the provision on reports. Under (a), the Administrative Office of the U.S. Courts to report annually the number of times a right asserted in a criminal case is denied the relief requested, and the reasons therefore, as well as the number of times a mandamus action was brought and the result of that mandamus.

Such reporting is the only way we in the Congress and other interested parties can observe whether reforms we mandate are being carried out. No one doubts the difficulty of obtaining case-by-case information of this nature. Yes, this information is critical to understanding whether federal statutes really can effectively protect victim's rights or whether a constitutional amendment is necessary. We are certain that affected executive and judicial agencies can work together to implement effective administrative tools to record and amass this data. We would certainly encourage the National Institute of Justice to support any needed research to get this system in place.

One final point. Throughout this Act reference is made to the " accused." The intent is for this word to be used in the broadest sense to include both those charged and convicted so that the rights we establish apply throughout the criminal justice system.

Appendix C – Proposed Amendments to the Federal Rules of Criminal Procedure

All inserts or changes made by Judge Cassell are underlined or ~~lined out~~.

FEDERAL RULES OF CRIMINAL PROCEDURE
Effective March 21, 1946, as amended to December 31, 2004

TITLE I. APPLICABILITY

Rule 1. Scope; Definitions

(a) Scope.

(1) In General. *These rules govern the procedure in all criminal proceedings in the United States district courts, the United States courts of appeals, and the Supreme Court of the United States.*

(2) State or Local Judicial Officer. *When a rule so states, it applies to a proceeding before a state or local judicial officer.*

(3) Territorial Courts. *These rules also govern the procedure in all criminal proceedings in the following courts:*

(A) the district court of Guam;

(B) the district court for the Northern Mariana Islands, except as otherwise provided by law; and

(C) the district court of the Virgin Islands, except that the prosecution of offenses in that court must be by indictment or information as otherwise provided by law.

(4) Removed Proceedings. *Although these rules govern all proceedings after removal from a state court, state law governs a dismissal by the prosecution.*

(5) Excluded Proceedings. *Proceedings not governed by these rules include:*

(A) the extradition and rendition of a fugitive;

(B) a civil property forfeiture for violating a federal statute;

(C) the collection of a fine or penalty;

(D) a proceeding under a statute governing juvenile delinquency to the extent the procedure is inconsistent with the statute, unless Rule 20(d) provides otherwise;

(E) a dispute between seamen under 22 U.S.C. §§ 256–258; and

(F) a proceeding against a witness in a foreign country under 28 U.S.C. § 1784.

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

(1) "Attorney for the government" means:

(A) the Attorney General or an authorized assistant;

(B) a United States attorney or an authorized assistant;

(C) when applicable to cases arising under Guam law, the Guam Attorney General or other person whom Guam law authorizes to act in the matter; and

(D) any other attorney authorized by law to conduct proceedings under these rules as a prosecutor.

(2) "Court" means a federal judge performing functions authorized by law.
(3) "Federal judge" means:
(A) a justice or judge of the United States as these terms are defined in 28 U.S.C. § 451;
(B) a magistrate judge; and
(C) a judge confirmed by the United States Senate and empowered by statute in any commonwealth, territory, or possession to perform a function to which a particular rule relates.
(4) "Judge" means a federal judge or a state or local judicial officer.
(5) "Magistrate judge" means a United States magistrate judge as defined in 28 U.S.C. §§ 631–639.
(6) "Oath" includes an affirmation.
(7) "Organization" is defined in 18 U.S.C. § 18.
(8) "Petty offense" is defined in 18 U.S.C. § 19.
(9) "State" includes the District of Columbia, and any commonwealth, territory, or possession of the United States.
(10) "State or local judicial officer" means:
(A) a state or local officer authorized to act under 18 U.S.C. § 3041; and
(B) a judicial officer empowered by statute in the District of Columbia or in any commonwealth, territory, or possession to perform a function to which a particular rule relates.
(11) "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 these rules, but in no event shall the defendant be named as such guardian or representative.

(c) Authority of a Justice or Judge of the United States. *When these rules authorize a magistrate judge to act, any other federal judge may also act.*

Rule 2. Interpretation

These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration to the government, defendants, and victims, and to eliminate unjustifiable expense and delay.

TITLE II. PRELIMINARY PROCEEDINGS

Rule 3. The Complaint

The complaint is a written statement of the essential facts constituting the offense charged. It must be made under oath before a magistrate judge or, if none is reasonably available, before a state or local judicial officer.

Rule 4. Arrest Warrant or Summons on a Complaint

(a) Issuance. *If the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant to an officer authorized to execute it. At the request of an attorney for the government, the judge must issue a summons, instead of a warrant, to a person authorized to serve it. A judge may issue more than one warrant or summons on the same complaint. If a defendant fails to appear in response to a summons, a judge may, and upon request of an attorney for the government must, issue a warrant.*

(b) Form.

(1) Warrant. *A warrant must:*

(A) contain the defendant's name or, if it is unknown, a name or description by which the defendant can be identified with reasonable certainty;

(B) describe the offense charged in the complaint;

(C) command that the defendant be arrested and brought without unnecessary delay before a magistrate judge or, if none is reasonably available, before a state or local judicial officer; and

(D) be signed by a judge.

(2) Summons. *A summons must be in the same form as a warrant except that it must require the defendant to appear before a magistrate judge at a stated time and place.*

(c) Execution or Service, and Return.

(1) By Whom. *Only a marshal or other authorized officer may execute a warrant. Any person authorized to serve a summons in a federal civil action may serve a summons.*

(2) Location. *A warrant may be executed, or a summons served, within the jurisdiction of the United States or anywhere else a federal statute authorizes an arrest.*

(3) Manner.

(A) A warrant is executed by arresting the defendant. Upon arrest, an officer possessing the warrant must show it to the defendant. If the officer does not possess the warrant, the officer must inform the defendant of the warrant's existence and of the offense charged and, at the defendant's request, must show the warrant to the defendant as soon as possible.

(B) A summons is served on an individual defendant:

(i) by delivering a copy to the defendant personally; or

(ii) by leaving a copy at the defendant's residence or usual place of abode with a person of suitable age and discretion residing at that location and by mailing a copy to the defendant's last known address.

(C) A summons is served on an organization by delivering a copy to an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process. A copy must also be

mailed to the organization's last known address within the district or to its principal place of business elsewhere in the United States.

(4) Return.

(A) After executing a warrant, the officer must return it to the judge before whom the defendant is brought in accordance with Rule 5. At the request of an attorney for the government, an unexecuted warrant must be brought back to and canceled by a magistrate judge or, if none is reasonably available, by a state or local judicial officer.

(B) The person to whom a summons was delivered for service must return it on or before the return day.

(C) At the request of an attorney for the government, a judge may deliver an unexecuted warrant, an unserved summons, or a copy of the warrant or summons to the marshal or other authorized person for execution or service.

Rule 5. Initial Appearance

(a) In General.

(1) Appearance Upon an Arrest.

(A) A person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge, or before a state or local judicial officer as Rule 5(c) provides, unless a statute provides otherwise.

(B) A person making an arrest outside the United States must take the defendant without unnecessary delay before a magistrate judge, unless a statute provides otherwise.

(2) Exceptions.

(A) An officer making an arrest under a warrant issued upon a complaint charging solely a violation of 18 U.S.C. § 1073 need not comply with this rule if:

(i) the person arrested is transferred without unnecessary delay to the custody of appropriate state or local authorities in the district of arrest; and

(ii) an attorney for the government moves promptly, in the district where the warrant was issued, to dismiss the complaint.

(B) If a defendant is arrested for violating probation or supervised release, Rule 32.1 applies.

(C) If a defendant is arrested for failing to appear in another district, Rule 40 applies.

(3) Appearance Upon a Summons. *When a defendant appears in response to a summons under Rule 4, a magistrate judge must proceed under Rule 5(d) or (e), as applicable.*

(b) Arrest Without a Warrant. *If a defendant is arrested without a warrant, a complaint meeting Rule 4(a)'s requirement of probable cause must be promptly filed in the district where the offense was allegedly committed.*

(c) Place of Initial Appearance; Transfer to Another District.

(1) Arrest in the District Where the Offense Was Allegedly Committed. *If the defendant is arrested in the district where the offense was allegedly committed:*

(A) the initial appearance must be in that district; and

(B) if a magistrate judge is not reasonably available, the initial appearance may be before a state or local judicial officer.

(2) Arrest in a District Other Than Where the Offense Was Allegedly Committed. *If the defendant was arrested in a district other than where the offense was allegedly committed, the initial appearance must be:*

(A) in the district of arrest; or

(B) in an adjacent district if:

(i) the appearance can occur more promptly there; or

(ii) the offense was allegedly committed there and the initial appearance will occur on the day of arrest.

(3) Procedures in a District Other Than Where the Offense Was Allegedly Committed. *If the initial appearance occurs in a district other than where the offense was allegedly committed, the following procedures apply:*

(A) the magistrate judge must inform the defendant about the provisions of Rule 20;

(B) if the defendant was arrested without a warrant, the district court where the offense was allegedly committed must first issue a warrant before the magistrate judge transfers the defendant to that district;

(C) the magistrate judge must conduct a preliminary hearing if required by Rule 5.1 or Rule 58(b)(2)(G);

(D) the magistrate judge must transfer the defendant to the district where the offense was allegedly committed if:

(i) the government produces the warrant, a certified copy of the warrant, a facsimile of either, or other appropriate form of either; and

(ii) the judge finds that the defendant is the same person named in the indictment, information, or warrant; and

(E) when a defendant is transferred and discharged, the clerk must promptly transmit the papers and any bail to the clerk in the district where the offense was allegedly committed.

(d) Procedure in a Felony Case.

(1) Advice. *If the defendant is charged with a felony, the judge must inform the defendant of the following:*

(A) the complaint against the defendant, and any affidavit filed with it;

(B) the defendant's right to retain counsel or to request that counsel be appointed if the defendant cannot obtain counsel;

(C) the circumstances, if any, under which the defendant may secure pretrial release;

(D) any right to a preliminary hearing; and

(E) the defendant's right not to make a statement, and that any statement made may be used against the defendant.

(2) Consulting with Counsel. *The judge must allow the defendant reasonable opportunity to consult with counsel.*

(3) Detention or Release. *The judge must detain or release the defendant as provided by statute or these rules.*

(4) Plea. *A defendant may be asked to plead only under Rule 10.*

(e) Procedure in a Misdemeanor Case. *If the defendant is charged with a misdemeanor only, the judge must inform the defendant in accordance with Rule 58(b)(2).*

(f) Video Teleconferencing. *Video teleconferencing may be used to conduct an appearance under this rule if the defendant consents.*

Rule 5.1. Preliminary Hearing

(a) In General. *If a defendant is charged with an offense other than a petty offense, a magistrate judge must conduct a preliminary hearing unless:*

(1) the defendant waives the hearing;

(2) the defendant is indicted;

(3) the government files an information under Rule 7(b) charging the defendant with a felony;

(4) the government files an information charging the defendant with a misdemeanor; or

(5) the defendant is charged with a misdemeanor and consents to trial before a magistrate judge.

(b) Selecting a District. *A defendant arrested in a district other than where the offense was allegedly committed may elect to have the preliminary hearing conducted in the district where the prosecution is pending.*

(c) Scheduling. *The magistrate judge must hold the preliminary hearing within a reasonable time, but no later than 10 days after the initial appearance if the defendant is in custody and no later than 20 days if not in custody.*

(d) Extending the Time. *With the defendant's consent and upon a showing of good cause—taking into account the public interest in the prompt disposition of criminal cases—a magistrate judge may extend the time limits in Rule 5.1(c) one or more times. If the defendant does not consent, the magistrate judge may extend the time limits only on a showing that extraordinary circumstances exist and justice requires the delay.*

(e) Hearing and Finding. *At the preliminary hearing, the defendant may cross-examine adverse witnesses and may introduce evidence but may not object to evidence on the ground that it was unlawfully acquired. If the magistrate judge finds probable cause to believe an offense has been committed and the defendant committed it, the magistrate judge must promptly require the defendant to appear for further proceedings.*

(f) Discharging the Defendant. *If the magistrate judge finds no probable cause to believe an offense has been committed or the defendant committed it, the magistrate judge must dismiss the complaint and discharge the defendant. A discharge does not preclude the government from later prosecuting the defendant for the same offense.*

(g) Recording the Proceedings. *The preliminary hearing must be recorded by a court reporter or by a suitable recording device. A recording of the proceeding may be made available to any party upon request. A copy of the recording and a transcript may be provided to any party upon request and upon any payment required by applicable Judicial Conference regulations.*

(h) Producing a Statement.

(1) In General. *Rule 26.2(a)–(d) and (f) applies at any hearing under this rule, unless the magistrate judge for good cause rules otherwise in a particular case.*

(2) Sanctions for Not Producing a Statement. *If a party disobeys a Rule 26.2 order to deliver a statement to the moving party, the magistrate judge must not consider the testimony of a witness whose statement is withheld.*

TITLE III. THE GRAND JURY, THE INDICTMENT, AND THE INFORMATION

Rule 6. The Grand Jury

(a) Summoning a Grand Jury.

(1) In General. *When the public interest so requires, the court must order that one or more grand juries be summoned. A grand jury must have 16 to 23 members, and the court must order that enough legally qualified persons be summoned to meet this requirement.*

(2) Alternate Jurors. *When a grand jury is selected, the court may also select alternate jurors. Alternate jurors must have the same qualifications and be selected in the same manner as any other juror. Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror is subject to the same challenges, takes the same oath, and has the same authority as the other jurors.*

(b) Objection to the Grand Jury or to a Grand Juror.

(1) Challenges. *Either the government or a defendant may challenge the grand jury on the ground that it was not lawfully drawn, summoned, or selected, and may challenge an individual juror on the ground that the juror is not legally qualified.*

(2) Motion to Dismiss an Indictment. *A party may move to dismiss the indictment based on an objection to the grand jury or on an individual juror's lack of legal qualification, unless the court has previously ruled on the same objection under Rule 6(b)(1). The motion to dismiss is governed by 28 U.S.C. § 1867(e). The court must not dismiss the indictment on the ground that a grand juror was not legally qualified if the record shows that at least 12 qualified jurors concurred in the indictment.*

(c) Foreperson and Deputy Foreperson. *The court will appoint one juror as the foreperson and another as the deputy foreperson. In the foreperson's absence, the deputy foreperson will act as the foreperson. The foreperson may administer oaths and affirmations and will sign all indictments. The foreperson—or another juror designated by the foreperson—will record the number of jurors concurring in every indictment and*

will file the record with the clerk, but the record may not be made public unless the court so orders.

(d) Who May Be Present.

(1) While the Grand Jury Is in Session. *The following persons may be present while the grand jury is in session: attorneys for the government, the witness being questioned, interpreters when needed, and a court reporter or an operator of a recording device.*

(2) During Deliberations and Voting. *No person other than the jurors, and any interpreter needed to assist a hearing-impaired or speech-impaired juror, may be present while the grand jury is deliberating or voting.*

(e) Recording and Disclosing the Proceedings.

(1) Recording the Proceedings. *Except while the grand jury is deliberating or voting, all proceedings must be recorded by a court reporter or by a suitable recording device. But the validity of a prosecution is not affected by the unintentional failure to make a recording. Unless the court orders otherwise, an attorney for the government will retain control of the recording, the reporter's notes, and any transcript prepared from those notes.*

(2) Secrecy.

(A) No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

(i) a grand juror;
(ii) an interpreter;
(iii) a court reporter;
(iv) an operator of a recording device;
(v) a person who transcribes recorded testimony;
(vi) an attorney for the government; or
(vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

(3) Exceptions.

(A) Disclosure of a grand-jury matter—other than the grand jury's deliberations or any grand juror's vote—may be made to:

(i) an attorney for the government for use in performing that attorney's duty;
(ii) any government personnel—including those of a state, state subdivision, Indian tribe, or foreign government— that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law; or
(iii) a person authorized by 18 U.S.C. § 3322.

(B) A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law. An attorney for the government must promptly provide the court that

impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule.

(C) An attorney for the government may disclose any grand-jury matter to another federal grand jury.

(D) An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in 50 U.S.C. § 401a), or foreign intelligence information (as defined in Rule 6(e)(3)(D)(iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties. An attorney for the government may also disclose any grand jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate Federal, State, State subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.

(i) Any official who receives information under Rule 6(e)(3)(D) may use the information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. Any State, State subdivision, Indian tribal, or foreign government official who receives information under Rule 6(e)(3)(D) may use the information only consistent with such guidelines as the Attorney General and the Director of National Intelligence shall jointly issue.

(ii) Within a reasonable time after disclosure is made under Rule 6(e)(3)(D), an attorney for the government must file, under seal, a notice with the court in the district where the grand jury convened stating that such information was disclosed and the departments, agencies, or entities to which the disclosure was made.

(iii) As used in Rule 6(e)(3)(D), the term "foreign intelligence information" means:

(a) information, whether or not it concerns a United States person, that relates to the ability of the United States to protect against—

- *actual or potential attack or other grave hostile acts of a foreign power or its agent;*
- *sabotage or international terrorism by a foreign power or its agent; or*

• clandestine intelligence activities by an intelligence service or network of a foreign power or by its agent; or

(b) information, whether or not it concerns a United States person, with respect to a foreign power or foreign territory that relates to—

• the national defense or the security of the United States; or

• the conduct of the foreign affairs of the United States.

(E) The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs— of a grand-jury matter:

(i) preliminarily to or in connection with a judicial proceeding;

(ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury;

(iii) at the request of the government, when sought by a foreign court or prosecutor for use in an official criminal investigation;

(iv) at the request of the government if it shows that the matter may disclose a violation of State, Indian tribal, or foreign criminal law, as long as the disclosure is to an appropriate state, state-subdivision, Indian tribal, or foreign government official for the purpose of enforcing that law; ~~or~~

(v) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.

(F) A petition to disclose a grand-jury matter under Rule 6(e)(3)(E)(i) must be filed in the district where the grand jury convened. Unless the hearing is ex parte—as it may be when the government is the petitioner—the petitioner must serve the petition on, and the court must afford a reasonable opportunity to appear and be heard to:

(i) an attorney for the government;

(ii) the parties to the judicial proceeding; and

(iii) any other person whom the court may designate.

(G) If the petition to disclose arises out of a judicial proceeding in another district, the petitioned court must transfer the petition to the other court unless the petitioned court can reasonably determine whether disclosure is proper. If the petitioned court decides to transfer, it must send to the transferee court the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand-jury secrecy. The transferee court must afford those persons identified in Rule 6(e)(3)(F) a reasonable opportunity to appear and be heard.

*(4) **Sealed Indictment.** The magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. The clerk must then seal the indictment, and no person may disclose the indictment's existence except as necessary to issue or execute a warrant or summons.*

*(5) **Closed Hearing.** Subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury.*

*(6) **Sealed Records.** Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.*

*(7) **Contempt.** A knowing violation of Rule 6, or of guidelines jointly issued by the Attorney General and the Director of National Intelligence pursuant to Rule 6, may be punished as a contempt of court.*

***(f) Indictment and Return.** A grand jury may indict only if at least 12 jurors concur. The grand jury—or its foreperson or deputy foreperson—must return the indictment to a magistrate judge in open court. If a complaint or information is pending against the defendant and 12 jurors do not concur in the indictment, the foreperson must promptly and in writing report the lack of concurrence to the magistrate judge.*

***(g) Discharging the Grand Jury.** A grand jury must serve until the court discharges it, but it may serve more than 18 months only if the court, having determined that an extension is in the public interest, extends the grand jury's service. An extension may be granted for no more than 6 months, except as otherwise provided by statute.*

***(h) Excusing a Juror.** At any time, for good cause, the court may excuse a juror either temporarily or permanently, and if permanently, the court may impanel an alternate juror in place of the excused juror.*

***(i) "Indian Tribe" Defined.** "Indian tribe" means an Indian tribe recognized by the Secretary of the Interior on a list published in the Federal Register under 25 U.S.C. § 479a–1.*

Rule 7. The Indictment and the Information

(a) When Used.

*(1) **Felony.** An offense (other than criminal contempt) must be prosecuted by an indictment if it is punishable:*

(A) by death; or

(B) by imprisonment for more than one year.

*(2) **Misdemeanor.** An offense punishable by imprisonment for one year or less may be prosecuted in accordance with Rule 58(b)(1).*

***(b) Waiving Indictment.** An offense punishable by imprisonment for more than one year may be prosecuted by information if the defendant—in open court and after being advised of the nature of the charge and of the defendant's rights—waives prosecution by indictment.*

(c) Nature and Contents.

*(1) **In General.** The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government. It need not contain a formal introduction or conclusion. A count may incorporate by reference an allegation made in another count. A count may allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. For each count, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated. For purposes of an indictment referred to in section 3282 of title 18, United States Code, for which the identity of the defendant is unknown, it shall be sufficient for the indictment to describe the defendant as an individual whose name is unknown, but who has a particular DNA profile, as that term is defined in section 3282.*

*(2) **Criminal Forfeiture.** No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information provides notice that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute.*

*(3) **Citation Error.** Unless the defendant was misled and thereby prejudiced, neither an error in a citation nor a citation's omission is a ground to dismiss the indictment or information or to reverse a conviction.*

*(d) **Surplusage.** Upon the defendant's motion, the court may strike surplusage from the indictment or information.*

*(e) **Amending an Information.** Unless an additional or different offense is charged or a substantial right of the defendant is prejudiced, the court may permit an information to be amended at any time before the verdict or finding.*

*(f) **Bill of Particulars.** The court may direct the government to file a bill of particulars. The defendant may move for a bill of particulars before or within 10 days after arraignment or at a later time if the court permits. The government may amend a bill of particulars subject to such conditions as justice requires.*

Rule 8. Joinder of Offenses or Defendants

*(a) **Joinder of Offenses.** The indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charged—whether felonies or misdemeanors or both— are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.*

*(b) **Joinder of Defendants.** The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.*

Rule 9. Arrest Warrant or Summons on an Indictment or Information

(a) Issuance. *The court must issue a warrant—or at the government's request, a summons—for each defendant named in an indictment or named in an information if one or more affidavits accompanying the information establish probable cause to believe that an offense has been committed and that the defendant committed it. The court may issue more than one warrant or summons for the same defendant. If a defendant fails to appear in response to a summons, the court may, and upon request of an attorney for the government must, issue a warrant. The court must issue the arrest warrant to an officer authorized to execute it or the summons to a person authorized to serve it.*

(b) Form.

(1) Warrant. *The warrant must conform to Rule 4(b)(1) except that it must be signed by the clerk and must describe the offense charged in the indictment or information.*

(2) Summons. *The summons must be in the same form as a warrant except that it must require the defendant to appear before the court at a stated time and place.*

(c) Execution or Service; Return; Initial Appearance.

(1) Execution or Service.

(A) The warrant must be executed or the summons served as provided in Rule 4(c)(1), (2), and (3).

(B) The officer executing the warrant must proceed in accordance with Rule 5(a)(1).

(2) Return. *A warrant or summons must be returned in accordance with Rule 4(c)(4).*

(3) Initial Appearance. *When an arrested or summoned defendant first appears before the court, the judge must proceed under Rule 5.*

TITLE IV. ARRAIGNMENT AND PREPARATION FOR TRIAL

Rule 10. Arraignment

(a) In General. *An arraignment must be conducted in open court and must consist of:*

(1) ensuring that the defendant has a copy of the indictment or information;

(2) reading the indictment or information to the defendant or stating to the defendant the substance of the charge; and then

(3) asking the defendant to plead to the indictment or information.

(b) Waiving Appearance. *A defendant need not be present for the arraignment if:*

(1) the defendant has been charged by indictment or misdemeanor information;

(2) the defendant, in a written waiver signed by both the defendant and defense counsel, has waived appearance and has affirmed that the defendant received a copy of the indictment or information and that the plea is not guilty; and

(3) the court accepts the waiver.

(c) Video Teleconferencing. *Video teleconferencing may be used to arraign a defendant if the defendant consents.*

Rule 10.1 Notice to Victims.

(a) Identification of Victim. *During the prosecution of a case, the attorney for the government shall at the earliest reasonable opportunity, identify the victims of the crime.*

(b) Notice of Case Events. During the prosecution of a crime, the attorney for the government shall make reasonable efforts to provide victims the earliest possible notice of:

(1) The scheduling, including scheduling changes and/or continuances, of each court proceeding that the victim is either required to attend or entitled to attend;
(2) The release or detention status of a defendant or suspected offender;
(3) The filing of charges against a defendant, or the proposed dismissal of all charges, including the placement of the defendant in a pretrial diversion program and the conditions thereon;
(4) The right to make a statement about pretrial release of the defendant;
(5) The victim's right to make a statement about acceptance of a plea of guilty or nolo contendere;
(6) The victim's right to attend public proceeding;
(7) If the defendant is convicted, the date and place set for sentencing and the victim's right to address the court at sentencing; and
(8) after the defendant is sentenced, of the sentence imposed, and the availability of the Bureau of Prisons notification program which shall provide the date, if any, on which the offender will be eligible for parole or supervised release.

(c) Multiple Victims. The attorney for the government shall advise the court if the attorney believes that the number of victims makes it impracticable to provide personal notice to each victim. If the court finds that the number of victims makes it impracticable to give personal notice to each victim desiring to receive notice, the court shall fashion a reasonable procedure calculated to give reasonable notice under the circumstances.

Rule 11. Pleas

(a) Entering a Plea.

*(1) **In General.** A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.*
*(2) **Conditional Plea.** With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.*
*(3) **Nolo Contendere Plea.** Before accepting a plea of nolo contendere, the court must consider the parties' and victims' views and the public interest in the effective administration of justice.*
*(4) **Failure to Enter a Plea.** If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.*

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

*(1) **Advising and Questioning the Defendant.** Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:*

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;
(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;
(C) the right to a jury trial;
(D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;
(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;
(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;
(G) the nature of each charge to which the defendant is pleading;
(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;
(I) any mandatory minimum penalty;
(J) any applicable forfeiture;
(K) the court's authority to order restitution;
(L) the court's obligation to impose a special assessment;
(M) the court's obligation to apply the Sentencing Guidelines, and the court's discretion to depart from those guidelines under some circumstances; and
(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

(2) Ensuring That a Plea Is Voluntary. *Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).*

(3) Determining the Factual Basis for a Plea. *Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.*

(4) Victim's Views. *Before the court accepts a plea of guilty or nolo contendere or allows any plea to be withdrawn, the court must address any victim who is present personally in open court. During this address, the court must determine whether the victim wishes to present views regarding the proposed plea or withdrawal and, if so, what those views are. The court shall consider the victim's views in acting on the proposed plea or withdrawal.*

(c) Plea Agreement Procedure.

(1) In General. *An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. The attorney for the government shall make reasonable efforts to notify identified victims of, and consider the victims' views about, any proposed plea negotiations. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser*

or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) Disclosing a Plea Agreement. *The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera. When a plea is presented in open court, the attorney for the government or attorney for any victim shall advise the court when the attorney is aware that the victim has any objection to the proposed plea agreement.*

(3) Judicial Consideration of a Plea Agreement.

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) Accepting a Plea Agreement. *If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.*

(5) Rejecting a Plea Agreement. *If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):*

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(d) Withdrawing a Guilty or Nolo Contendere Plea. *A defendant may withdraw a plea of guilty or nolo contendere:*

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under Rule 11(c)(5); or
(B) the defendant can show a fair and just reason for requesting the withdrawal.

(e) Finality of a Guilty or Nolo Contendere Plea. *After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.*

(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements. *The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.*

(g) Recording the Proceedings. *The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).*

(h) Harmless Error. *A variance from the requirements of this rule is harmless error if it does not affect substantial rights.*

Rule 12. Pleadings and Pretrial Motions

(a) Pleadings. *The pleadings in a criminal proceeding are the indictment, the information, and the pleas of not guilty, guilty, and nolo contendere.*

(b) Pretrial Motions.

(1) In General. *Rule 47 applies to a pretrial motion.*

(2) Motions That May Be Made Before Trial. *A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.*

(3) Motions That Must Be Made Before Trial. *The following must be raised before trial:*

(A) a motion alleging a defect in instituting the prosecution;
(B) a motion alleging a defect in the indictment or information— but at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense;
(C) a motion to suppress evidence;
(D) a Rule 14 motion to sever charges or defendants; and
(E) a Rule 16 motion for discovery.

(4) Notice of the Government's Intent to Use Evidence.

(A) At the Government's Discretion. At the arraignment or as soon afterward as practicable, the government may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(3)(C).
(B) At the Defendant's Request. At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

*(c) **Motion Deadline.** The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing.*

*(d) **Ruling on a Motion.** The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.*

*(e) **Waiver of a Defense, Objection, or Request.** A party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver.*

*(f) **Recording the Proceedings.** All proceedings at a motion hearing, including any findings of fact and conclusions of law made orally by the court, must be recorded by a court reporter or a suitable recording device.*

*(g) **Defendant's Continued Custody or Release Status.** If the court grants a motion to dismiss based on a defect in instituting the prosecution, in the indictment, or in the information, it may order the defendant to be released or detained under 18 U.S.C. § 3142 for a specified time until a new indictment or information is filed. This rule does not affect any federal statutory period of limitations.*

*(h) **Producing Statements at a Suppression Hearing.** Rule 26.2 applies at a suppression hearing under Rule 12(b)(3)(C). At a suppression hearing, a law enforcement officer is considered a government witness.*

Rule 12.1. Notice of an Alibi Defense

*(a) **Government's Request for Notice and Defendant's Response.***

*(1) **Government's Request.** An attorney for the government may request in writing that the defendant notify an attorney for the government of any intended alibi defense. The request must state the time, date, and place of the alleged offense.*

*(2) **Defendant's Response.** Within 10 days after the request, or at some other time the court sets, the defendant must serve written notice on an attorney for the government of any intended alibi defense. The defendant's notice must state:*

(A) each specific place where the defendant claims to have been at the time of the alleged offense; and

(B) the name, address, and telephone number of each alibi witness on whom the defendant intends to rely.

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

*(1) **Disclosure.** If the defendant serves a Rule 12.1(a)(2) notice, an attorney for the government must disclose in writing to the defendant or the defendant's attorney:*

(A) the name~~, address, and telephone number~~ of each witness <u>and the address and telephone number of each witness (other than a victim) that</u> the government intends to rely on to establish the defendant's presence at the scene of the alleged offense; and

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

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

(c) Continuing Duty to Disclose. *Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name of each additional witness, and the address, and telephone number of each additional witness (other than a victim) if:*

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

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

(d) Exceptions. *For good cause, the court may grant an exception to any requirement of Rule 12.1(a)–(c).*

(e) Failure to Comply. *If a party fails to comply with this rule, the court may exclude the testimony of any undisclosed witness regarding the defendant's alibi. This rule does not limit the defendant's right to testify.*

(f) Inadmissibility of Withdrawn Intention. *Evidence of an intention to rely on an alibi defense, later withdrawn, or of a statement made in connection with that intention, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.*

Rule 12.2. Notice of an Insanity Defense; Mental Examination

(a) Notice of an Insanity Defense. *A defendant who intends to assert a defense of insanity at the time of the alleged offense must so notify an attorney for the government in writing within the time provided for filing a pretrial motion, or at any later time the court sets, and file a copy of the notice with the clerk. A defendant who fails to do so cannot rely on an insanity defense. The court may, for good cause, allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders.*

(b) Notice of Expert Evidence of a Mental Condition. *If a defendant intends to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on either (1) the issue of guilt or (2) the issue of punishment in a capital case, the defendant must—within the time provided for filing a pretrial motion or at any later time the court sets—notify an attorney for the government in writing of this intention and file a copy of the notice with the clerk. The court may, for good cause, allow the defendant to file the notice late, grant the parties additional trial-preparation time, or make other appropriate orders.*

(c) Mental Examination.

(1) Authority to Order an Examination; Procedures.

(A) The court may order the defendant to submit to a competency examination under 18 U.S.C. § 4241.

(B) If the defendant provides notice under Rule 12.2(a), the court must, upon the government's motion, order the defendant to be examined under 18 U.S.C. § 4242. If the defendant provides notice under Rule 12.2(b) the

court may, upon the government's motion, order the defendant to be examined under procedures ordered by the court.

(2) Disclosing Results and Reports of Capital Sentencing Examination. *The results and reports of any examination conducted solely under Rule 12.2(c)(1) after notice under Rule 12.2(b)(2) must be sealed and must not be disclosed to any attorney for the government or the defendant unless the defendant is found guilty of one or more capital crimes and the defendant confirms an intent to offer during sentencing proceedings expert evidence on mental condition.*

(3) Disclosing Results and Reports of the Defendant's Expert Examination. *After disclosure under Rule 12.2(c)(2) of the results and reports of the government's examination, the defendant must disclose to the government the results and reports of any examination on mental condition conducted by the defendant's expert about which the defendant intends to introduce expert evidence.*

(4) Inadmissibility of a Defendant's Statements. *No statement made by a defendant in the course of any examination conducted under this rule (whether conducted with or without the defendant's consent), no testimony by the expert based on the statement, and no other fruits of the statement may be admitted into evidence against the defendant in any criminal proceeding except on an issue regarding mental condition on which the defendant:*

(A) has introduced evidence of incompetency or evidence requiring notice under Rule 12.2(a) or (b)(1), or

(B) has introduced expert evidence in a capital sentencing proceeding requiring notice under Rule 12.2(b)(2).

(d) Failure to Comply. *If the defendant fails to give notice under Rule 12.2(b) or does not submit to an examination when ordered under Rule 12.2(c), the court may exclude any expert evidence from the defendant on the issue of the defendant's mental disease, mental defect, or any other mental condition bearing on the defendant's guilt or the issue of punishment in a capital case.*

(e) Inadmissibility of Withdrawn Intention. *Evidence of an intention as to which notice was given under Rule 12.2(a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.*

Rule 12.3. Notice of a Public-Authority Defense

(a) Notice of the Defense and Disclosure of Witnesses.

(1) Notice in General. *If a defendant intends to assert a defense of actual or believed exercise of public authority on behalf of a law enforcement agency or federal intelligence agency at the time of the alleged offense, the defendant must so notify an attorney for the government in writing and must file a copy of the notice with the clerk within the time provided for filing a pretrial motion, or at any later time the court sets. The notice filed with the clerk must be under seal if the notice identifies a federal intelligence agency as the source of public authority.*

(2) Contents of Notice. *The notice must contain the following information:*

(A) the law enforcement agency or federal intelligence agency involved;
(B) the agency member on whose behalf the defendant claims to have acted; and
(C) the time during which the defendant claims to have acted with public authority.

(3) Response to the Notice. *An attorney for the government must serve a written response on the defendant or the defendant's attorney within 10 days after receiving the defendant's notice, but no later than 20 days before trial. The response must admit or deny that the defendant exercised the public authority identified in the defendant's notice.*

(4) Disclosing Witnesses.

(A) Government's Request. An attorney for the government may request in writing that the defendant disclose the name, address, and telephone number of each witness the defendant intends to rely on to establish a public-authority defense. An attorney for the government may serve the request when the government serves its response to the defendant's notice under Rule 12.3(a)(3), or later, but must serve the request no later than 20 days before trial.

(B) Defendant's Response. Within 7 days after receiving the government's request, the defendant must serve on an attorney for the government a written statement of the name, address, and telephone number of each witness.

(C) Government's Reply. Within 7 days after receiving the defendant's statement, an attorney for the government must serve on the defendant or the defendant's attorney a written statement of the name, ~~address,~~ and telephone number of each witness, and the address of each witness (other than the victim) that the government intends to rely on to oppose the defendant's public-authority defense.

(5) Additional Time. *The court may, for good cause, allow a party additional time to comply with this rule.*

(b) Continuing Duty to Disclose. *Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name of any additional witness, and the ~~address,~~ and telephone number of any additional witness (other than a victim) if:*

(1) the disclosing party learns of the witness before or during trial; and
(2) the witness should have been disclosed under Rule 12.3(a)(4) if the disclosing party had known of the witness earlier.

(c) Failure to Comply. *If a party fails to comply with this rule, the court may exclude the testimony of any undisclosed witness regarding the public-authority defense. This rule does not limit the defendant's right to testify.*

(d) Protective Procedures Unaffected. *This rule does not limit the court's authority to issue appropriate protective orders or to order that any filings be under seal.*

(e) Inadmissibility of Withdrawn Intention. *Evidence of an intention as to which notice was given under Rule 12.3(a), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.*

Rule 12.4. Disclosure Statement

(a) Who Must File.

(1) Nongovernmental Corporate Party. *Any nongovernmental corporate party to a proceeding in a district court must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.*

(2) Organizational Victim. *If an organization is a victim of the alleged criminal activity, the government must file a statement identifying the victim. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 12.4(a)(1) to the extent it can be obtained through due diligence.*

(b) Time for Filing; Supplemental Filing. *A party must:*

(1) file the Rule 12.4(a) statement upon the defendant's initial appearance; and

(2) promptly file a supplemental statement upon any change in the information that the statement requires.

Rule 13. Joint Trial of Separate Cases

The court may order that separate cases be tried together as though brought in a single indictment or information if all offenses and all defendants could have been joined in a single indictment or information.

Rule 14. Relief from Prejudicial Joinder

(a) Relief. *If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant, or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.*

(b) Defendant's Statements. *Before ruling on a defendant's motion to sever, the court may order an attorney for the government to deliver to the court for in camera inspection any defendant's statement that the government intends to use as evidence.*

Rule 15. Depositions

(a) When Taken.

(1) In General. *A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice. If the court orders the deposition to be taken, it may also require the deponent to produce at the deposition any designated material that is not privileged, including any book, paper, document, record, recording, or data.*

(2) Detained Material Witness. *A witness who is detained under 18 U.S.C. § 3144 may request to be deposed by filing a written motion and giving notice to the parties. The court may then order that the deposition be taken and may discharge the witness after the witness has signed under oath the deposition transcript.*

(b) Notice.

*(1) **In General.** A party seeking to take a deposition must give every other party reasonable written notice of the deposition's date and location. The notice must state the name and address of each deponent. If requested by a party receiving the notice, the court may, for good cause, change the deposition's date or location.*

*(2) **To the Custodial Officer.** A party seeking to take the deposition must also notify the officer who has custody of the defendant of the scheduled date and location.*

(c) Defendant's Presence.

*(1) **Defendant in Custody.** The officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant:*

(A) waives in writing the right to be present; or

(B) persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion.

*(2) **Defendant Not in Custody.** A defendant who is not in custody has the right upon request to be present at the deposition, subject to any conditions imposed by the court. If the government tenders the defendant's expenses as provided in Rule 15(d) but the defendant still fails to appear, the defendant— absent good cause—waives both the right to appear and any objection to the taking and use of the deposition based on that right.*

***(d) Expenses.** If the deposition was requested by the government, the court may—or if the defendant is unable to bear the deposition expenses, the court must—order the government to pay:*

(1) any reasonable travel and subsistence expenses of the defendant and the defendant's attorney to attend the deposition; and

(2) the costs of the deposition transcript.

***(e) Manner of Taking.** Unless these rules or a court order provides otherwise, a deposition must be taken and filed in the same manner as a deposition in a civil action, except that:*

(1) A defendant may not be deposed without that defendant's consent.

(2) The scope and manner of the deposition examination and cross-examination must be the same as would be allowed during trial.

(3) The government must provide to the defendant or the defendant's attorney, for use at the deposition, any statement of the deponent in the government's possession to which the defendant would be entitled at trial.

***(f) Use as Evidence.** A party may use all or part of a deposition as provided by the Federal Rules of Evidence.*

***(g) Objections.** A party objecting to deposition testimony or evidence must state the grounds for the objection during the deposition.*

***(h) Depositions by Agreement Permitted.** The parties may by agreement take and use a deposition with the court's consent.*

***(i) Victim Attendance.** Victims can attend any public deposition taken under this rule under the same conditions as govern a victim's attendance at trial.*

Rule 16. Discovery and Inspection

(a) Government's Disclosure.

(1) Information Subject to Disclosure.

(A) Defendant's Oral Statement. Upon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial.

(B) Defendant's Written or Recorded Statement. Upon a defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following:

(i) any relevant written or recorded statement by the defendant if:

- *the statement is within the government's possession, custody, or control; and*
- *the attorney for the government knows—or through due diligence could know—that the statement exists;*

(ii) the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and

(iii) the defendant's recorded testimony before a grand jury relating to the charged offense.

(C) Organizational Defendant. Upon a defendant's request, if the defendant is an organization, the government must disclose to the defendant any statement described in Rule 16(a)(1)(A) and (B) if the government contends that the person making the statement:

(i) was legally able to bind the defendant regarding the subject of the statement because of that person's position as the defendant's director, officer, employee, or agent; or

(ii) was personally involved in the alleged conduct constituting the offense and was legally able to bind the defendant regarding that conduct because of that person's position as the defendant's director, officer, employee, or agent.

(D) Defendant's Prior Record. Upon a defendant's request, the government must furnish the defendant with a copy of the defendant's prior criminal record that is within the government's possession, custody, or control if the attorney for the government knows—or through due diligence could know—that the record exists.

(E) Documents and Objects. Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:

(i) the item is material to preparing the defense;

(ii) the government intends to use the item in its case-in-chief at trial; or

(iii) the item was obtained from or belongs to the defendant.

(F) Reports of Examinations and Tests. Upon a defendant's request, the government must permit a defendant to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

(i) the item is within the government's possession, custody, or control;

(ii) the attorney for the government knows—or through due diligence could know—that the item exists; and

(iii) the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial.

(G) Expert Witnesses. At the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) and the defendant complies, the government must, at the defendant's request, give to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subparagraph must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

(2) Information Not Subject to Disclosure. *Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.*

(3) Grand Jury Transcripts. *This rule does not apply to the discovery or inspection of a grand jury's recorded proceedings, except as provided in Rules 6, 12(h), 16(a)(1), and 26.2.*

(b) Defendant's Disclosure.

(1) Information Subject to Disclosure.

(A) Documents and Objects. If a defendant requests disclosure under Rule 16(a)(1)(E) and the government complies, then the defendant must permit the government, upon request, to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to use the item in the defendant's case-in-chief at trial.

(B) Reports of Examinations and Tests. If a defendant requests disclosure under Rule 16(a)(1)(F) and the government complies, the defendant must permit the government, upon request, to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to use the item in the defendant's case-in-chief at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony.

(C) Expert Witnesses. The defendant must, at the government's request, give to the government a written summary of any testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial, if—

(i) the defendant requests disclosure under subdivision (a)(1)(G) and the government complies; or

(ii) the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition. This summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications[.]

(2) Information Not Subject to Disclosure. *Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of:*

(A) reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense; or

(B) a statement made to the defendant, or the defendant's attorney or agent, by:

(i) the defendant;

(ii) a government or defense witness; or

(iii) a prospective government or defense witness.

(c) Continuing Duty to Disclose. *A party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other party or the court if:*

(1) the evidence or material is subject to discovery or inspection under this rule; and

(2) the other party previously requested, or the court ordered, its production.

(d) Regulating Discovery.

(1) Protective and Modifying Orders. *At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal.*

*(2) **Failure to Comply.** If a party fails to comply with this rule, the court may:*

(A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions;

(B) grant a continuance;

(C) prohibit that party from introducing the undisclosed evidence; or

(D) enter any other order that is just under the circumstances.

Rule 17. Subpoena

***(a) Content.** A subpoena must state the court's name and the title of the proceeding, include the seal of the court, and command the witness to attend and testify at the time and place the subpoena specifies. The clerk must issue a blank subpoena—signed and sealed—to the party requesting it, and that party must fill in the blanks before the subpoena is served.*

***(b) Defendant Unable to Pay.** Upon a defendant's ex parte application, the court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness's fees and the necessity of the witness's presence for an adequate defense. If the court orders a subpoena to be issued, the process costs and witness fees will be paid in the same manner as those paid for witnesses the government subpoenas.*

(c) Producing Documents and Objects.

***(1) In General.** A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.*

***(2) Quashing or Modifying the Subpoena.** On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.*

***(d) Service.** A marshal, a deputy marshal, or any nonparty who is at least 18 years old may serve a subpoena. The server must deliver a copy of the subpoena to the witness and must tender to the witness one day's witness-attendance fee and the legal mileage allowance. The server need not tender the attendance fee or mileage allowance when the United States, a federal officer, or a federal agency has requested the subpoena.*

(e) Place of Service.

***(1) In the United States.** A subpoena requiring a witness to attend a hearing or trial may be served at any place within the United States.*

***(2) In a Foreign Country.** If the witness is in a foreign country, 28 U.S.C. § 1783 governs the subpoena's service.*

(f) Issuing a Deposition Subpoena.

***(1) Issuance.** A court order to take a deposition authorizes the clerk in the district where the deposition is to be taken to issue a subpoena for any witness named or described in the order.*

***(2) Place.** After considering the convenience of the witness and the parties, the court may order—and the subpoena may require—the witness to appear anywhere the court designates.*

*(g) **Contempt.** The court (other than a magistrate judge) may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by a federal court in that district. A magistrate judge may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by that magistrate judge as provided in 28 U.S.C. § 636(e).*

*(h) **Information Not Subject to a Subpoena.***

(1) No party may subpoena a statement of a witness or of a prospective witness under this rule. Rule 26.2 governs the production of the statement.

(2) After indictment, no record or document containing personal or confidential information about a victim may be subpoenaed without notice to the victim, given through the attorney for the government or for the victim. On motion made promptly by the victim, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.

Rule 17.1. Pretrial Conference

On its own, or on a party's motion, the court may hold one or more pretrial conferences to promote a fair and expeditious trial. When a conference ends, the court must prepare and file a memorandum of any matters agreed to during the conference. The government may not use any statement made during the conference by the defendant or the defendant's attorney unless it is in writing and is signed by the defendant and the defendant's attorney.

TITLE V. VENUE

Rule 18. Place of Prosecution and Trial

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

Rule 19. [Reserved]

Rule 20. Transfer for Plea and Sentence

*(a) **Consent to Transfer.** A prosecution may be transferred from the district where the indictment or information is pending, or from which a warrant on a complaint has been issued, to the district where the defendant is arrested, held, or present if:*

(1) the defendant states in writing a wish to plead guilty or nolo contendere and to waive trial in the district where the indictment, information, or complaint is pending, consents in writing to the court's disposing of the case in the transferee district, and files the statement in the transferee district; and

(2) the United States attorneys in both districts approve the transfer in writing, after consultation with any victim. If any victim objects to the transfer, the United States attorney in the transferring district or the victim's attorney shall advise the court where the indictment or information is pending of the victim's concerns.

(b) Clerk's Duties. *After receiving the defendant's statement and the required approvals, the clerk where the indictment, information, or complaint is pending must send the file, or a certified copy, to the clerk in the transferee district.*

(c) Effect of a Not Guilty Plea. *If the defendant pleads not guilty after the case has been transferred under Rule 20(a), the clerk must return the papers to the court where the prosecution began, and that court must restore the proceeding to its docket. The defendant's statement that the defendant wished to plead guilty or nolo contendere is not, in any civil or criminal proceeding, admissible against the defendant.*

(d) Juveniles.

(1) Consent to Transfer. *A juvenile, as defined in 18 U.S.C. § 5031, may be proceeded against as a juvenile delinquent in the district where the juvenile is arrested, held, or present if:*

(A) the alleged offense that occurred in the other district is not punishable by death or life imprisonment;

(B) an attorney has advised the juvenile;

(C) the court has informed the juvenile of the juvenile's rights—including the right to be returned to the district where the offense allegedly occurred—and the consequences of waiving those rights;

(D) the juvenile, after receiving the court's information about rights, consents in writing to be proceeded against in the transferee district, and files the consent in the transferee district;

(E) the United States attorneys for both districts approve the transfer in writing, after consultation with any victim; and

(F) the transferee court approves the transfer.

If any victim objects to the transfer, the United States attorney in the transferring district or the victim's attorney shall advise the transferring court of the victim's concerns

(2) Clerk's Duties. *After receiving the juvenile's written consent and the required approvals, the clerk where the indictment, information, or complaint is pending or where the alleged offense occurred must send the file, or a certified copy, to the clerk in the transferee district.*

Rule 21. Transfer for Trial

(a) For Prejudice. *Upon the defendant's motion, the court must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.*

(b) For Convenience. *Upon the defendant's motion, the court may transfer the proceeding, or one or more counts, against that defendant to another district for the convenience of the parties and witnesses and in the interest of justice.*

(c) Proceedings on Transfer. *When the court orders a transfer, the clerk must send to the transferee district the file, or a certified copy, and any bail taken. The prosecution will then continue in the transferee district.*

(d) Time to File a Motion to Transfer. *A motion to transfer may be made at or before arraignment or at any other time the court or these rules prescribe.*

(e) Victims' Views. *The court shall not transfer any proceeding without giving any victim an opportunity to be heard. The court shall consider the views of the victim in making any transfer decision.*

Rule 22. [Transferred]

TITLE VI. TRIAL

Rule 23. Jury or Nonjury Trial

(a) Jury Trial. *If the defendant is entitled to a jury trial, the trial must be by jury unless:*

(1) the defendant waives a jury trial in writing;

(2) the government consents; and

(3) the court approves after considering the views of any victims.

(b) Jury Size.

(1) In General. *A jury consists of 12 persons unless this rule provides otherwise.*

(2) Stipulation for a Smaller Jury. *At any time before the verdict, the parties may, with the court's approval, stipulate in writing that:*

(A) the jury may consist of fewer than 12 persons; or

(B) a jury of fewer than 12 persons may return a verdict if the court finds it necessary to excuse a juror for good cause after the trial begins.

(3) Court Order for a Jury of 11. *After the jury has retired to deliberate, the court may permit a jury of 11 persons to return a verdict, even without a stipulation by the parties, if the court finds good cause to excuse a juror.*

(c) Nonjury Trial. *In a case tried without a jury, the court must find the defendant guilty or not guilty. If a party requests before the finding of guilty or not guilty, the court must state its specific findings of fact in open court or in a written decision or opinion.*

Rule 24. Trial Jurors

(a) Examination.

(1) In General. *The court may examine prospective jurors or may permit the attorneys for the parties to do so.*

(2) Court Examination. *If the court examines the jurors, it must permit the attorneys for the parties to:*

(A) ask further questions that the court considers proper; or

(B) submit further questions that the court may ask if it considers them proper.

(b) Peremptory Challenges. *Each side is entitled to the number of peremptory challenges to prospective jurors specified below. The court may allow additional peremptory challenges to multiple defendants, and may allow the defendants to exercise those challenges separately or jointly.*

(1) Capital Case. *Each side has 20 peremptory challenges when the government seeks the death penalty.*

*(2) **Other Felony Case.** The government has 6 peremptory challenges and the defendant or defendants jointly have 10 peremptory challenges when the defendant is charged with a crime punishable by imprisonment of more than one year.*

*(3) **Misdemeanor Case.** Each side has 3 peremptory challenges when the defendant is charged with a crime punishable by fine, imprisonment of one year or less, or both.*

(c) Alternate Jurors.

*(1) **In General.** The court may impanel up to 6 alternate jurors to replace any jurors who are unable to perform or who are disqualified from performing their duties.*

*(2) **Procedure.***

(A) Alternate jurors must have the same qualifications and be selected and sworn in the same manner as any other juror.

(B) Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror has the same authority as the other jurors.

*(3) **Retaining Alternate Jurors.** The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew.*

*(4) **Peremptory Challenges.** Each side is entitled to the number of additional peremptory challenges to prospective alternate jurors specified below. These additional challenges may be used only to remove alternate jurors.*

(A) One or Two Alternates. One additional peremptory challenge is permitted when one or two alternates are impaneled.

(B) Three or Four Alternates. Two additional peremptory challenges are permitted when three or four alternates are impaneled.

(C) Five or Six Alternates. Three additional peremptory challenges are permitted when five or six alternates are impaneled.

Rule 25. Judge's Disability

***(a) During Trial.** Any judge regularly sitting in or assigned to the court may complete a jury trial if:*

(1) the judge before whom the trial began cannot proceed because of death, sickness, or other disability; and

(2) the judge completing the trial certifies familiarity with the trial record.

(b) After a Verdict or Finding of Guilty.

*(1) **In General.** After a verdict or finding of guilty, any judge regularly sitting in or assigned to a court may complete the court's duties if the judge who presided at trial cannot perform those duties because of absence, death, sickness, or other disability.*

*(2) **Granting a New Trial.** The successor judge may grant a new trial if satisfied that:*

(A) a judge other than the one who presided at the trial cannot perform the post-trial duties; or

(B) a new trial is necessary for some other reason.

Rule 26. Taking Testimony

In every trial the testimony of witnesses must be taken in open court, unless otherwise provided by a statute or by rules adopted under 28 U.S.C. §§ 2072–2077.

Rule 26.1. Foreign Law Determination

A party intending to raise an issue of foreign law must provide the court and all parties with reasonable written notice. Issues of foreign law are questions of law, but in deciding such issues a court may consider any relevant material or source—including testimony—without regard to the Federal Rules of Evidence.

Rule 26.2. Producing a Witness's Statement

*(a) **Motion to Produce.** After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, must order an attorney for the government or the defendant and the defendant's attorney to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter of the witness's testimony.*

*(b) **Producing the Entire Statement.** If the entire statement relates to the subject matter of the witness's testimony, the court must order that the statement be delivered to the moving party.*

*(c) **Producing a Redacted Statement.** If the party who called the witness claims that the statement contains information that is privileged or does not relate to the subject matter of the witness's testimony, the court must inspect the statement in camera. After excising any privileged or unrelated portions, the court must order delivery of the redacted statement to the moving party. If the defendant objects to an excision, the court must preserve the entire statement with the excised portion indicated, under seal, as part of the record.*

*(d) **Recess to Examine a Statement.** The court may recess the proceedings to allow time for a party to examine the statement and prepare for its use.*

*(e) **Sanction for Failure to Produce or Deliver a Statement.** If the party who called the witness disobeys an order to produce or deliver a statement, the court must strike the witness's testimony from the record. If an attorney for the government disobeys the order, the court must declare a mistrial if justice so requires.*

*(f) **"Statement" Defined.** As used in this rule, a witness's "statement" means:*

(1) a written statement that the witness makes and signs, or otherwise adopts or approves;

(2) a substantially verbatim, contemporaneously recorded recital of the witness's oral statement that is contained in any recording or any transcription of a recording; or

(3) the witness's statement to a grand jury, however taken or recorded, or a transcription of such a statement.

(g) Scope. *This rule applies at trial, at a suppression hearing under Rule 12, and to the extent specified in the following rules:*

(1) Rule 5.1(h) (preliminary hearing);

(2) Rule 32(i)(2) (sentencing);

(3) Rule 32.1(e) (hearing to revoke or modify probation or supervised release);

(4) Rule 46(j) (detention hearing); and

(5) Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255.

Rule 26.3. Mistrial

Before ordering a mistrial, the court must give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and
to suggest alternatives.

Rule 27. Proving an Official Record

A party may prove an official record, an entry in such a record, or the lack of a record or entry in the same manner as in a civil action.

Rule 28. Interpreters

The court may select, appoint, and set the reasonable compensation for an interpreter. The compensation must be paid from funds provided by law or by the government, as the court may direct.

Rule 29. Motion for a Judgment of Acquittal

(a) Before Submission to the Jury. *After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.*

(b) Reserving Decision. *The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.*

(c) After Jury Verdict or Discharge.

(1) Time for a Motion. *A defendant may move for a judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict or after the court*

discharges the jury, whichever is later, or within any other time the court sets during the 7-day period.

(2) Ruling on the Motion. *If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal.*

(3) No Prior Motion Required. *A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.*

(d) Conditional Ruling on a Motion for a New Trial.

(1) Motion for a New Trial. *If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed. The court must specify the reasons for that determination.*

(2) Finality. *The court's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal.*

(3) Appeal.

(A) Grant of a Motion for a New Trial. If the court conditionally grants a motion for a new trial and an appellate court later reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise.

(B) Denial of a Motion for a New Trial. If the court conditionally denies a motion for a new trial, an appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of acquittal, the trial court must proceed as the appellate court directs.

Rule 29.1. Closing Argument

Closing arguments proceed in the following order:

(a) the government argues;

(b) the defense argues; and

(c) the government rebuts.

Rule 30. Jury Instructions

(a) In General. *Any party may request in writing that the court instruct the jury on the law as specified in the request. The request must be made at the close of the evidence or at any earlier time that the court reasonably sets. When the request is made, the requesting party must furnish a copy to every other party.*

(b) Ruling on a Request. *The court must inform the parties before closing arguments how it intends to rule on the requested instructions.*

(c) Time for Giving Instructions. *The court may instruct the jury before or after the arguments are completed, or at both times.*

(d) Objections to Instructions. *A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate. An opportunity must be given to object out of the jury's hearing and, on request, out of the jury's*

presence. Failure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b).

Rule 31. Jury Verdict

(a) Return. *The jury must return its verdict to a judge in open court. The verdict must be unanimous.*

(b) Partial Verdicts, Mistrial, and Retrial.

(1) Multiple Defendants. *If there are multiple defendants, the jury may return a verdict at any time during its deliberations as to any defendant about whom it has agreed.*

(2) Multiple Counts. *If the jury cannot agree on all counts as to any defendant, the jury may return a verdict on those counts on which it has agreed.*

(3) Mistrial and Retrial. *If the jury cannot agree on a verdict on one or more counts, the court may declare a mistrial on those counts. The government may retry any defendant on any count on which the jury could not agree.*

(c) Lesser Offense or Attempt. *A defendant may be found guilty of any of the following:*

(1) an offense necessarily included in the offense charged;

(2) an attempt to commit the offense charged; or

(3) an attempt to commit an offense necessarily included in the offense charged, if the attempt is an offense in its own right.

(d) Jury Poll. *After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury.*

TITLE VII. POST–CONVICTION PROCEDURES

Rule 32. Sentencing and Judgment

~~***(a) Definitions.*** *The following definitions apply under this rule:*~~

~~*(1) "Crime of violence or sexual abuse" means:*~~

~~*(A) a crime that involves the use, attempted use, or threatened use of physical force against another's person or property; or*~~

~~*(B) a crime under 18 U.S.C. §§ 2241–2248 or §§ 2251–2257.*~~

~~*(2) "Victim" means an individual against whom the defendant committed an offense for which the court will impose sentence.*~~

(b) Time of Sentencing.

(1) In General. *The court must impose sentence without unnecessary delay.*

(2) Changing Time Limits. *The court may, for good cause, change any time limits prescribed in this rule.*

(c) Presentence Investigation.

(1) Required Investigation.

(A) In General. The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless:

(i) 18 U.S.C. § 3593(c) or another statute requires otherwise; or

(ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.

(B) Restitution. If the law ~~requires~~ permits restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.

(2) Interviewing the Defendant. *The probation officer who interviews a defendant as part of a presentence investigation must, on request, give the defendant's attorney notice and a reasonable opportunity to attend the interview.*

(3) Victim Information. *The probation officer must determine whether any victim wishes to provide information for the presentence report.*

(d) Presentence Report.

(1) Applying the Sentencing Guidelines. *The presentence report must:*

(A) identify all applicable guidelines and policy statements of the Sentencing Commission;

(B) calculate the defendant's offense level and criminal history category;

(C) state the resulting sentencing range and kinds of sentences available;

(D) identify any factor relevant to:

(i) the appropriate kind of sentence, or

(ii) the appropriate sentence within the applicable sentencing range; and

(E) identify any basis for departing from the applicable sentencing range.

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

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

(i) any prior criminal record;

(ii) the defendant's financial condition; and

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

(B) verified information, stated in a nonargumentative style, that assesses the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;

(C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;

(D) when the law provides for restitution, information sufficient for a restitution order;

(E) if the court orders a study under 18 U.S.C. § 3552(b), any resulting report and recommendation; and

(F) any other information that the court requires.

(3) Exclusions. *The presentence report must exclude the following:*

(A) any diagnoses that, if disclosed, might seriously disrupt a rehabilitation program;

(B) any sources of information obtained upon a promise of confidentiality; and

(C) any other information that, if disclosed, might result in physical or other harm to the defendant or others.

(e) Disclosing the Report and Recommendation.

(1) Time to Disclose. *Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty.*

(2) Minimum Required Notice. *The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period. The attorney for the government shall, if any victim requests, communicate the relevant contents of the presentence report to the victim.*

(3) Sentence Recommendation. *By local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence.*

(f) Objecting to the Report.

(1) Time to Object. *Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report. The attorney for the government or for the victim shall raise for the victim any reasonable objection by the victim to the presentence report.*

(2) Serving Objections. *An objecting party must provide a copy of its objections to the opposing party and to the probation officer.*

(3) Action on Objections. *After receiving objections, the probation officer may meet with the parties and the victim to discuss the objections. The probation officer may then investigate further and revise the presentence report as appropriate.*

(g) Submitting the Report. *At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them.*

(h) Notice of Possible Departure from Sentencing Guidelines. *Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission or in a victim impact statement, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure. The attorney for the government or the victim shall advise defense counsel and the court of any ground identified by the victim that might reasonably serve as a basis for departure.*

(i) Sentencing.

(1) In General. *At sentencing, the court:*

(A) must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report;

(B) must give to the defendant and an attorney for the government a written summary of—or summarize in camera— any information excluded from the presentence report under Rule 32(d)(3) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information;

(C) must allow the parties' attorneys and any victim to comment on the probation officer's determinations and other matters relating to an appropriate sentence; and

(D) may, for good cause, allow a party to or any victim make a new objection at any time before sentence is imposed.

(2) Introducing Evidence; Producing a Statement. *The court may permit the parties or the victim to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)–(d) and (f) applies. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.*

(3) Court Determinations. *At sentencing, the court:*

(A) may accept any undisputed portion of the presentence report as a finding of fact;

(B) must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and

(C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.

(4) Opportunity to Speak.

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

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

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

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

(B) By a Victim. Before imposing sentence, the court must address any victim of a the crime ~~of violence or sexual abuse~~ who is present at sentencing and must permit the victim to speak or submit any information about the sentence. ~~Whether or not the victim is present, a victim's right to address the court may be exercised by the following persons if present:~~

~~(i) a parent or legal guardian, if the victim is younger than 18 years or is incompetent; or~~

~~(ii) one or more family members or relatives the court designates, if the victim is deceased or incapacitated.~~

(C) In Camera Proceedings. Upon a party's motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).

(j) Defendant's Right to Appeal.

(1) Advice of a Right to Appeal.

(A) Appealing a Conviction. If the defendant pleaded not guilty and was convicted, after sentencing the court must advise the defendant of the right to appeal the conviction.

(B) Appealing a Sentence. After sentencing—regardless of the defendant's plea—the court must advise the defendant of any right to appeal the sentence.

(C) Appeal Costs. The court must advise a defendant who is unable to pay appeal costs of the right to ask for permission to appeal in forma pauperis.

(2) Clerk's Filing of Notice. *If the defendant so requests, the clerk must immediately prepare and file a notice of appeal on the defendant's behalf.*

(k) Judgment.

(1) In General. *In the judgment of conviction, the court must set forth the plea, the jury verdict or the court's findings, the adjudication, and the sentence. If the defendant is found not guilty or is otherwise entitled to be discharged, the court must so order. The judge must sign the judgment, and the clerk must enter it.*

(2) Criminal Forfeiture. *Forfeiture procedures are governed by Rule 32.2.*

Rule 32.1. Revoking or Modifying Probation or Supervised Release

(a) Initial Appearance.

(1) Person In Custody. *A person held in custody for violating probation or supervised release must be taken without unnecessary delay before a magistrate judge.*

(A) If the person is held in custody in the district where an alleged violation occurred, the initial appearance must be in that district.

(B) If the person is held in custody in a district other than where an alleged violation occurred, the initial appearance must be in that district, or in an adjacent district if the appearance can occur more promptly there.

(2) Upon a Summons. *When a person appears in response to a summons for violating probation or supervised release, a magistrate judge must proceed under this rule.*

(3) Advice. *The judge must inform the person of the following:*

(A) the alleged violation of probation or supervised release;

(B) the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel; and

(C) the person's right, if held in custody, to a preliminary hearing under Rule 32.1(b)(1).

(4) Appearance in the District With Jurisdiction. *If the person is arrested or appears in the district that has jurisdiction to conduct a revocation*

hearing—either originally or by transfer of jurisdiction—the court must proceed under Rule 32.1(b)–(e).

(5) Appearance in a District Lacking Jurisdiction. *If the person is arrested or appears in a district that does not have jurisdiction to conduct a revocation hearing, the magistrate judge must:*

(A) if the alleged violation occurred in the district of arrest, conduct a preliminary hearing under Rule 32.1(b) and either:

(i) transfer the person to the district that has jurisdiction, if the judge finds probable cause to believe that a violation occurred; or

(ii) dismiss the proceedings and so notify the court that has jurisdiction, if the judge finds no probable cause to believe that a violation occurred; or

(B) if the alleged violation did not occur in the district of arrest, transfer the person to the district that has jurisdiction if:

(i) the government produces certified copies of the judgment, warrant, and warrant application; and

(ii) the judge finds that the person is the same person named in the warrant.

(6) Release or Detention. *The magistrate judge may release or detain the person under 18 U.S.C. § 3143(a) pending further proceedings. The burden of establishing that the person will not flee or pose a danger to any other person or to the community rests with the person.*

(b) Revocation.

(1) Preliminary Hearing.

(A) In General. If a person is in custody for violating a condition of probation or supervised release, a magistrate judge must promptly conduct a hearing to determine whether there is probable cause to believe that a violation occurred. The person may waive the hearing.

(B) Requirements. The hearing must be recorded by a court reporter or by a suitable recording device. The judge must give the person:

(i) notice of the hearing and its purpose, the alleged violation, and the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel;

(ii) an opportunity to appear at the hearing and present evidence; and

(iii) upon request, an opportunity to question any adverse witness, unless the judge determines that the interest of justice does not require the witness to appear.

(C) Referral. If the judge finds probable cause, the judge must conduct a revocation hearing. If the judge does not find probable cause, the judge must dismiss the proceeding.

(2) Revocation Hearing. *Unless waived by the person, the court must hold the revocation hearing within a reasonable time in the district having jurisdiction. The person is entitled to:*

(A) written notice of the alleged violation;
(B) disclosure of the evidence against the person;
(C) an opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear; and
(D) notice of the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel.

(c) Modification.

(1) In General. *Before modifying the conditions of probation or supervised release, the court must hold a hearing, at which the person has the right to counsel.*

(2) Exceptions. *A hearing is not required if:*

(A) the person waives the hearing; or
(B) the relief sought is favorable to the person and does not extend the term of probation or of supervised release; and
(C) an attorney for the government has received notice of the relief sought, has had a reasonable opportunity to object, and has not done so.

(d) Disposition of the Case. *The court's disposition of the case is governed by 18 U.S.C. § 3563 and § 3565 (probation) and § 3583 (supervised release).*

(e) Producing a Statement. *Rule 26.2(a)–(d) and (f) applies at a hearing under this rule. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.*

Rule 32.2. Criminal Forfeiture

(a) Notice to the Defendant. *A court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute.*

(b) Entering a Preliminary Order of Forfeiture.

(1) In General. *As soon as practicable after a verdict or finding of guilty, or after a plea of guilty or nolo contendere is accepted, on any count in an indictment or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute. If the government seeks forfeiture of specific property, the court must determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay. The court's determination may be based on evidence already in the record, including any written plea agreement or, if the forfeiture is contested, on evidence or information presented by the parties at a hearing after the verdict or finding of guilt.*

(2) Preliminary Order. *If the court finds that property is subject to forfeiture, it must promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment or directing the forfeiture of specific property without*

regard to any third party's interest in all or part of it. Determining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).

(3) Seizing Property. *The entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the specific property subject to forfeiture; to conduct any discovery the court considers proper in identifying, locating, or disposing of the property; and to commence proceedings that comply with any statutes governing third-party rights. At sentencing—or at any time before sentencing if the defendant consents—the order of forfeiture becomes final as to the defendant and must be made a part of the sentence and be included in the judgment. The court may include in the order of forfeiture conditions reasonably necessary to preserve the property's value pending any appeal.*

(4) Jury Determination. *Upon a party's request in a case in which a jury returns a verdict of guilty, the jury must determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.*

(c) Ancillary Proceeding; Entering a Final Order of Forfeiture.

(1) In General. *If, as prescribed by statute, a third party files a petition asserting an interest in the property to be forfeited, the court must conduct an ancillary proceeding, but no ancillary proceeding is required to the extent that the forfeiture consists of a money judgment.*

(A) In the ancillary proceeding, the court may, on motion, dismiss the petition for lack of standing, for failure to state a claim, or for any other lawful reason. For purposes of the motion, the facts set forth in the petition are assumed to be true.

(B) After disposing of any motion filed under Rule 32.2(c)(1)(A) and before conducting a hearing on the petition, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure if the court determines that discovery is necessary or desirable to resolve factual issues. When discovery ends, a party may move for summary judgment under Federal Rule of Civil Procedure 56.

(2) Entering a Final Order. *When the ancillary proceeding ends, the court must enter a final order of forfeiture by amending the preliminary order as necessary to account for any third-party rights. If no third party files a timely petition, the preliminary order becomes the final order of forfeiture if the court finds that the defendant (or any combination of defendants convicted in the case) had an interest in the property that is forfeitable under the applicable statute. The defendant may not object to the entry of the final order on the ground that the property belongs, in whole or in part, to a codefendant or third party; nor may a third party object to the final order on the ground that the third party had an interest in the property.*

(3) Multiple Petitions. *If multiple third-party petitions are filed in the same case, an order dismissing or granting one petition is not appealable until rulings are*

made on all the petitions, unless the court determines that there is no just reason for delay.

(4) Ancillary Proceeding Not Part of Sentencing. *An ancillary proceeding is not part of sentencing.*

(d) Stay Pending Appeal. *If a defendant appeals from a conviction or an order of forfeiture, the court may stay the order of forfeiture on terms appropriate to ensure that the property remains available pending appellate review. A stay does not delay the ancillary proceeding or the determination of a third party's rights or interests. If the court rules in favor of any third party while an appeal is pending, the court may amend the order of forfeiture but must not transfer any property interest to a third party until the decision on appeal becomes final, unless the defendant consents in writing or on the record.*

(e) Subsequently Located Property; Substitute Property.

(1) In General. *On the government's motion, the court may at any time enter an order of forfeiture or amend an existing order of forfeiture to include property that:*

(A) is subject to forfeiture under an existing order of forfeiture but was located and identified after that order was entered; or

(B) is substitute property that qualifies for forfeiture under an applicable statute.

(2) Procedure. *If the government shows that the property is subject to forfeiture under Rule 32.2(e)(1), the court must:*

(A) enter an order forfeiting that property, or amend an existing preliminary or final order to include it; and

(B) if a third party files a petition claiming an interest in the property, conduct an ancillary proceeding under Rule 32.2(c).

(3) Jury Trial Limited. *There is no right to a jury trial under Rule 32.2(e).*

Rule 33. New Trial

(a) Defendant's Motion. *Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.*

(b) Time to File.

(1) Newly Discovered Evidence. *Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.*

(2) Other Grounds. *Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilty, or within such further time as the court sets during the 7-day period.*

Rule 34. Arresting Judgment

(a) In General. Upon the defendant's motion or on its own, the court must arrest judgment if:

(1) the indictment or information does not charge an offense; or

(2) the court does not have jurisdiction of the charged offense.

(b) Time to File. The defendant must move to arrest judgment within 7 days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere, or within such further time as the court sets during the 7-day period.

Rule 35. Correcting or Reducing a Sentence

(a) Correcting Clear Error. Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

(b) Reducing a Sentence for Substantial Assistance.

(1) In General. Upon the government's motion made within one year of sentencing, the court may reduce a sentence if:

(A) the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person; and

(B) reducing the sentence accords with the Sentencing Commission's guidelines and policy statements.

(2) Later Motion. Upon the government's motion made more than one year after sentencing, the court may reduce a sentence if the defendant's substantial assistance involved:

(A) information not known to the defendant until one year or more after sentencing;

(B) information provided by the defendant to the government within one year of sentencing, but which did not become useful to the government until more than one year after sentencing; or

(C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant.

(3) Evaluating Substantial Assistance. In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant's presentence assistance.

(4) Below Statutory Minimum. When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.

(c) "Sentencing" Defined. As used in this rule, "sentencing" means the oral announcement of the sentence.

Rule 36. Clerical Error

After giving any notice it considers appropriate, the court may at any time correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission.

Rule 37. [Reserved]

Rule 38. Staying a Sentence or a Disability

(a) Death Sentence. *The court must stay a death sentence if the defendant appeals the conviction or sentence.*

(b) Imprisonment.

(1) Stay Granted. *If the defendant is released pending appeal, the court must stay a sentence of imprisonment.*

(2) Stay Denied; Place of Confinement. *If the defendant is not released pending appeal, the court may recommend to the Attorney General that the defendant be confined near the place of the trial or appeal for a period reasonably necessary to permit the defendant to assist in preparing the appeal.*

(c) Fine. *If the defendant appeals, the district court, or the court of appeals under Federal Rule of Appellate Procedure 8, may stay a sentence to pay a fine or a fine and costs. The court may stay the sentence on any terms considered appropriate and may require the defendant to:*

(1) deposit all or part of the fine and costs into the district court's registry pending appeal;

(2) post a bond to pay the fine and costs; or

(3) submit to an examination concerning the defendant's assets and, if appropriate, order the defendant to refrain from dissipating assets.

(d) Probation. *If the defendant appeals, the court may stay a sentence of probation. The court must set the terms of any stay.*

(e) Restitution and Notice to Victims.

(1) In General. *If the defendant appeals, the district court, or the court of appeals under Federal Rule of Appellate Procedure 8, may stay—on any terms considered appropriate—any sentence providing for restitution under 18 U.S.C. § 3556 or notice under 18 U.S.C. § 3555.*

(2) Ensuring Compliance. *The court may issue any order reasonably necessary to ensure compliance with a restitution order or a notice order after disposition of an appeal, including:*

(A) a restraining order;

(B) an injunction;

(C) an order requiring the defendant to deposit all or part of any monetary restitution into the district court's registry; or

(D) an order requiring the defendant to post a bond.

(f) Forfeiture. *A stay of a forfeiture order is governed by Rule 32.2(d).*

(g) Disability. *If the defendant's conviction or sentence creates a civil or employment disability under federal law, the district court, or the court of appeals under Federal Rule of Appellate Procedure 8, may stay the disability pending appeal on any terms considered appropriate. The court may issue any order reasonably necessary to protect the interest represented by the disability pending appeal, including a restraining order or an injunction.*

Rule 39. [Reserved]

TITLE VIII. SUPPLEMENTARY AND SPECIAL PROCEEDINGS

Rule 40. Arrest for Failing to Appear in Another District

(a) In General. *If a person is arrested under a warrant issued in another district for failing to appear—as required by the terms of that person's release under 18 U.S.C. §§ 3141–3156 or by a subpoena— the person must be taken without unnecessary delay before a magistrate judge in the district of the arrest.*

(b) Proceedings. *The judge must proceed under Rule 5(c)(3) as applicable.*

(c) Release or Detention Order. *The judge may modify any previous release or detention order issued in another district, but must state in writing the reasons for doing so.*

Rule 41. Search and Seizure

(a) Scope and Definitions.

(1) Scope. *This rule does not modify any statute regulating search or seizure, or the issuance and execution of a search warrant in special circumstances.*

(2) Definitions. *The following definitions apply under this rule:*

(A) "Property" includes documents, books, papers, any other tangible objects, and information.

(B) "Daytime" means the hours between 6:00 a.m. and 10:00 p.m. according to local time.

(C) "Federal law enforcement officer" means a government agent (other than an attorney for the government) who is engaged in enforcing the criminal laws and is within any category of officers authorized by the Attorney General to request a search warrant.

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

(1) a magistrate judge with authority in the district—or if none is reasonably available, a judge of a state court of record in the district—has authority to issue a warrant to search for and seize a person or property located within the district;

(2) a magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move or be moved outside the district before the warrant is executed; and

(3) a magistrate judge—in an investigation of domestic terrorism or international terrorism (as defined in 18 U.S.C. § 2331)—having authority in any district in which activities related to the terrorism may have occurred, may issue a warrant for a person or property within or outside that district.

(c) Persons or Property Subject to Search or Seizure. *A warrant may be issued for any of the following:*

(1) evidence of a crime;

(2) contraband, fruits of crime, or other items illegally possessed;

(3) property designed for use, intended for use, or used in committing a crime; or

(4) a person to be arrested or a person who is unlawfully restrained.

(d) Obtaining a Warrant.

*(1) **Probable Cause.** After receiving an affidavit or other information, a magistrate judge or a judge of a state court of record must issue the warrant if there is probable cause to search for and seize a person or property under Rule 41(c).*

*(2) **Requesting a Warrant in the Presence of a Judge.***

(A) Warrant on an Affidavit. When a federal law enforcement officer or an attorney for the government presents an affidavit in support of a warrant, the judge may require the affiant to appear personally and may examine under oath the affiant and any witness the affiant produces.

(B) Warrant on Sworn Testimony. The judge may wholly or partially dispense with a written affidavit and base a warrant on sworn testimony if doing so is reasonable under the circumstances.

(C) Recording Testimony. Testimony taken in support of a warrant must be recorded by a court reporter or by a suitable recording device, and the judge must file the transcript or recording with the clerk, along with any affidavit.

*(3) **Requesting a Warrant by Telephonic or Other Means.***

(A) In General. A magistrate judge may issue a warrant based on information communicated by telephone or other appropriate means, including facsimile transmission.

(B) Recording Testimony. Upon learning that an applicant is requesting a warrant, a magistrate judge must:

(i) place under oath the applicant and any person on whose testimony the application is based; and

(ii) make a verbatim record of the conversation with a suitable recording device, if available, or by a court reporter, or in writing.

(C) Certifying Testimony. The magistrate judge must have any recording or court reporter's notes transcribed, certify the transcription's accuracy, and file a copy of the record and the transcription with the clerk. Any written verbatim record must be signed by the magistrate judge and filed with the clerk.

(D) Suppression Limited. Absent a finding of bad faith, evidence obtained from a warrant issued under Rule 41(d)(3)(A) is not subject to suppression on the ground that issuing the warrant in that manner was unreasonable under the circumstances.

(e) Issuing the Warrant.

*(1) **In General.** The magistrate judge or a judge of a state court of record must issue the warrant to an officer authorized to execute it.*

*(2) **Contents of the Warrant.** The warrant must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned. The warrant must command the officer to:*

(A) execute the warrant within a specified time no longer than 10 days;

(B) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution at another time; and

(C) return the warrant to the magistrate judge designated in the warrant.

(3) Warrant by Telephonic or Other Means. *If a magistrate judge decides to proceed under Rule 41(d)(3)(A), the following additional procedures apply:*

(A) Preparing a Proposed Duplicate Original Warrant. The applicant must prepare a "proposed duplicate original warrant" and must read or otherwise transmit the contents of that document verbatim to the magistrate judge.

(B) Preparing an Original Warrant. The magistrate judge must enter the contents of the proposed duplicate original warrant into an original warrant.

(C) Modifications. The magistrate judge may direct the applicant to modify the proposed duplicate original warrant. In that case, the judge must also modify the original warrant.

(D) Signing the Original Warrant and the Duplicate Original Warrant. Upon determining to issue the warrant, the magistrate judge must immediately sign the original warrant, enter on its face the exact time it is issued, and direct the applicant to sign the judge's name on the duplicate original warrant.

(f) Executing and Returning the Warrant.

(1) Noting the Time. *The officer executing the warrant must enter on its face the exact date and time it is executed.*

(2) Inventory. *An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person.*

(3) Receipt. *The officer executing the warrant must:*

(A) give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken; or

(B) leave a copy of the warrant and receipt at the place where the officer took the property.

(4) Return. *The officer executing the warrant must promptly return it—together with a copy of the inventory—to the magistrate judge designated on the warrant. The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant.*

(g) Motion to Return Property. *A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the*

court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

(h) Motion to Suppress. *A defendant may move to suppress evidence in the court where the trial will occur, as Rule 12 provides.*

(i) Forwarding Papers to the Clerk. *The magistrate judge to whom the warrant is returned must attach to the warrant a copy of the return, of the inventory, and of all other related papers and must deliver them to the clerk in the district where the property was seized.*

Rule 42. Criminal Contempt

(a) Disposition After Notice. *Any person who commits criminal contempt may be punished for that contempt after prosecution on notice.*

(1) Notice. *The court must give the person notice in open court, in an order to show cause, or in an arrest order. The notice must:*

(A) state the time and place of the trial;

(B) allow the defendant a reasonable time to prepare a defense; and

(C) state the essential facts constituting the charged criminal contempt and describe it as such.

(2) Appointing a Prosecutor. *The court must request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires the appointment of another attorney. If the government declines the request, the court must appoint another attorney to prosecute the contempt.*

(3) Trial and Disposition. *A person being prosecuted for criminal contempt is entitled to a jury trial in any case in which federal law so provides and must be released or detained as Rule 46 provides. If the criminal contempt involves disrespect toward or criticism of a judge, that judge is disqualified from presiding at the contempt trial or hearing unless the defendant consents. Upon a finding or verdict of guilty, the court must impose the punishment.*

(b) Summary Disposition. *Notwithstanding any other provision of these rules, the court (other than a magistrate judge) may summarily punish a person who commits criminal contempt in its presence if the judge saw or heard the contemptuous conduct and so certifies; a magistrate judge may summarily punish a person as provided in 28 U.S.C. § 636(e). The contempt order must recite the facts, be signed by the judge, and be filed with the clerk.*

TITLE IX. GENERAL PROVISIONS

Rule 43. Defendant's Presence

(a) When Required. *Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:*

(1) the initial appearance, the initial arraignment, and the plea;

(2) every trial stage, including jury impanelment and the return of the verdict; and

(3) sentencing.

(b) When Not Required. *A defendant need not be present under any of the following circumstances:*

(1) Organizational Defendant. *The defendant is an organization represented by counsel who is present.*

(2) Misdemeanor Offense. *The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and sentencing to occur in the defendant's absence.*

(3) Conference or Hearing on a Legal Question. *The proceeding involves only a conference or hearing on a question of law.*

(4) Sentence Correction. *The proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c).*

(c) Waiving Continued Presence.

(1) In General. *A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:*

(A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial;

(B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or

(C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.

(2) Waiver's Effect. *If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.*

Rule 43.1 Victim's Presence

(a) Victim's Right to Attend. *A victim has the right to attend any public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding. Before making any determination to exclude a victim, the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision to exclude a victim shall be clearly stated on the record.*

(b) Proceeding With and Without Notice. *The court may proceed with a public proceeding without a victim if proper notice has been provided to that victim under Rule 10.1. The court may proceed with a public proceeding (other than a trial or sentencing) without proper notice to a victim only if doing so is in the interests of justice, the court provides prompt notice to that victim of the court's action and of the victim's right to seek*

reconsideration of the action if a victim's right is affected, and the court insures that notice will be properly provided to that victim for all subsequent public proceedings.
(c) Numerous Victims. *If the court finds that the number of victims makes it impracticable to according all of the victims the right to be present, the court shall fashion a reasonable procedure to facilitate victims' attendance.*
(d) ***Right to be Heard on Victims' Issues.*** *In addition to rights to be heard established elsewhere in these rules, at any public proceeding at which a victim has the right to attend, the victim has the right to be heard on any matter directly affecting a victim's right.*

Rule 44. Right to and Appointment of Counsel

(a) Right to Appointed Counsel. *A defendant who is unable to obtain counsel is entitled to have counsel appointed to represent the defendant at every stage of the proceeding from initial appearance through appeal, unless the defendant waives this right.*

(b) Appointment Procedure. *Federal law and local court rules govern the procedure for implementing the right to counsel.*

(c) Inquiry Into Joint Representation.

(1) Joint Representation. *Joint representation occurs when:*

(A) two or more defendants have been charged jointly under Rule 8(b) or have been joined for trial under Rule 13; and

(B) the defendants are represented by the same counsel, or counsel who are associated in law practice.

(2) Court's Responsibilities in Cases of Joint Representation. *The court must promptly inquire about the propriety of joint representation and must personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless there is good cause to believe that no conflict of interest is likely to arise, the court must take appropriate measures to protect each defendant's right to counsel.*

Rule 44.1 Counsel for Victims.

When the interests of justice require, the court may appoint counsel for a victim to assist the victim in exercising their rights as provided by law.

Rule 45. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules, any local rule, or any court order:

(1) Day of the Event Excluded. *Exclude the day of the act, event, or default that begins the period.*

(2) Exclusion from Brief Periods. *Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days.*

(3) Last Day. *Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the*

next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.

(4) "Legal Holiday" Defined. *As used in this rule, "legal holiday" means:*

(A) the day set aside by statute for observing:

(i) New Year's Day;
(ii) Martin Luther King, Jr.'s Birthday;
(iii) Washington's Birthday;
(iv) Memorial Day;
(v) Independence Day;
(vi) Labor Day;
(vii) Columbus Day;
(viii) Veterans' Day;
(ix) Thanksgiving Day;
(x) Christmas Day; and

(B) any other day declared a holiday by the President, the Congress, or the state where the district court is held.

(b) Extending Time.

(1) In General. *When an act must or may be done within a specified period, the court on its own may extend the time, or for good cause may do so on a party's motion made:*

(A) before the originally prescribed or previously extended time expires; or

(B) after the time expires if the party failed to act because of excusable neglect.

(2) Exceptions. *The court may not extend the time to take any action under Rules 29, 33, 34, and 35, except as stated in those rules.*

(c) Additional Time After Service. *When these rules permit or require a party to act within a specified period after a notice or a paper has been served on that party, 3 days are added to the period if service occurs in the manner provided under Federal Rule of Civil Procedure 5(b)(2)(B), (C), or (D).*

Rule 46. Release from Custody; Supervising Detention

(a) Before Trial. *The provisions of 18 U.S.C. §§ 3142 and 3144 govern pretrial release.*

(b) During Trial. *A person released before trial continues on release during trial under the same terms and conditions. But the court may order different terms and conditions or terminate the release if necessary to ensure that the person will be present during trial or that the person's conduct will not obstruct the orderly and expeditious progress of the trial.*

(c) Pending Sentencing or Appeal. *The provisions of 18 U.S.C. § 3143 govern release pending sentencing or appeal. The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant.*

(d) Pending Hearing on a Violation of Probation or Supervised Release. *Rule 32.1(a)(6) governs release pending a hearing on a violation of probation or supervised release.*

(e) Surety. *The court must not approve a bond unless any surety appears to be qualified. Every surety, except a legally approved corporate surety, must demonstrate by affidavit that its assets are adequate. The court may require the affidavit to describe the following:*

(1) the property that the surety proposes to use as security;

(2) any encumbrance on that property;

(3) the number and amount of any other undischarged bonds and bail undertakings the surety has issued; and

(4) any other liability of the surety.

(f) Bail Forfeiture.

(1) Declaration. *The court must declare the bail forfeited if a condition of the bond is breached.*

(2) Setting Aside. *The court may set aside in whole or in part a bail forfeiture upon any condition the court may impose if:*

(A) the surety later surrenders into custody the person released on the surety's appearance bond; or

(B) it appears that justice does not require bail forfeiture.

(3) Enforcement.

(A) Default Judgment and Execution. If it does not set aside a bail forfeiture, the court must, upon the government's motion, enter a default judgment.

(B) Jurisdiction and Service. By entering into a bond, each surety submits to the district court's jurisdiction and irrevocably appoints the district clerk as its agent to receive service of any filings affecting its liability.

(C) Motion to Enforce. The court may, upon the government's motion, enforce the surety's liability without an independent action. The government must serve any motion, and notice as the court prescribes, on the district clerk. If so served, the clerk must promptly mail a copy to the surety at its last known address.

(4) Remission. *After entering a judgment under Rule 46(f)(3), the court may remit in whole or in part the judgment under the same conditions specified in Rule 46(f)(2).*

(g) Exoneration. *The court must exonerate the surety and release any bail when a bond condition has been satisfied or when the court has set aside or remitted the forfeiture. The court must exonerate a surety who deposits cash in the amount of the bond or timely surrenders the defendant into custody.*

(h) Supervising Detention Pending Trial.

(1) In General. *To eliminate unnecessary detention, the court must supervise the detention within the district of any defendants awaiting trial and of any persons held as material witnesses.*

*(2) **Reports.** An attorney for the government must report biweekly to the court, listing each material witness held in custody for more than 10 days pending indictment, arraignment, or trial. For each material witness listed in the report, an attorney for the government must state why the witness should not be released with or without a deposition being taken under Rule 15(a).*

*(i) **Forfeiture of Property.** The court may dispose of a charged offense by ordering the forfeiture of 18 U.S.C. § 3142(c)(1)(B)(xi) property under 18 U.S.C. § 3146(d), if a fine in the amount of the property's value would be an appropriate sentence for the charged offense.*

*(j) **Producing a Statement.***

*(1) **In General.** Rule 26.2(a)–(d) and (f) applies at a detention hearing under 18 U.S.C. § 3142, unless the court for good cause rules otherwise.*

*(2) **Sanctions for Not Producing a Statement.** If a party disobeys a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony at the detention hearing.*

*(k) **Victims' Right to Be Heard.** Victims have the right to be heard regarding any decision to release the defendant. The court shall consider the views of victims in making any release decision, including such decisions in petty cases. In a case where the court finds that the number of victims makes it impracticable to accord all of the victims the right to be heard in open court, the court shall fashion a reasonable procedure to facilitate hearing from representative victims.*

Rule 47. Motions and Supporting Affidavits

*(a) **In General.** A party applying to the court for an order must do so by motion.*

*(b) **Form and Content of a Motion.** A motion—except when made during a trial or hearing—must be in writing, unless the court permits the party to make the motion by other means. A motion must state the grounds on which it is based and the relief or order sought. A motion may be supported by affidavit.*

*(c) **Timing of a Motion.** A party must serve a written motion—other than one that the court may hear ex parte—and any hearing notice at least 5 days before the hearing date, unless a rule or court order sets a different period. For good cause, the court may set a different period upon ex parte application.*

*(d) **Affidavit Supporting a Motion.** The moving party must serve any supporting affidavit with the motion. A responding party must serve any opposing affidavit at least one day before the hearing, unless the court permits later service.*

Rule 48. Dismissal

*(a) **By the Government.** The government may, with leave of court, dismiss an indictment, information, or complaint. The government may not dismiss the prosecution during trial without the defendant's consent. In deciding whether to grant the government's motion to dismiss, the court shall consider the views of any victims.*

*(b) **By the Court.** The court may dismiss an indictment, information, or complaint if unnecessary delay occurs in:*

(1) presenting a charge to a grand jury;
(2) filing an information against a defendant; or
(3) bringing a defendant to trial.

Rule 49. Serving and Filing Papers

(a) When Required. *A party must serve on every other party any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper.*

(b) How Made. *Service must be made in the manner provided for a civil action. When these rules or a court order requires or permits service on a party represented by an attorney, service must be made on the attorney instead of the party, unless the court orders otherwise.*

(c) Notice of a Court Order. *When the court issues an order on any post-arraignment motion, the clerk must provide notice in a manner provided for in a civil action. Except as Federal Rule of Appellate Procedure 4(b) provides otherwise, the clerk's failure to give notice does not affect the time to appeal, or relieve—or authorize the court to relieve—a party's failure to appeal within the allowed time.*

(d) Filing. *A party must file with the court a copy of any paper the party is required to serve. A paper must be filed in a manner provided for in a civil action.*

Rule 50. Prompt Disposition

(a) Scheduling Preference. *Scheduling preference must be given to criminal proceedings as far as practicable.*

(b) Defendant's Right Against Delay. *The court shall assure that the defendant's right to a speedy trial is protected, as provided by the Speedy Trial Act.*

(c) Victims Right Against Delay. *The court shall assure that the victim's right to proceedings free from unreasonable delay is protected. The victim has the right to be heard regarding any motion to continue any proceeding. If the court grants a motion to continue over the objection of the victim, the court shall state its reasons in the record.*

[All of Rule 54 was moved to Rule 1.]

Rule 51. Preserving Claimed Error

(a) Exceptions Unnecessary. *Exceptions to rulings or orders of the court are unnecessary.*

(b) Preserving a Claim of Error. *A party or a victim may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party or a victim does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.*

Rule 52. Harmless and Plain Error

*(a) **Harmless Error.** Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.*

*(b) **Plain Error.** A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.*

Rule 53. Courtroom Photographing and Broadcasting Prohibited

*(a) **General Rule.** Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.*

*(b) **Closed-Circuit Transmission for Victims.** In order to permit victims of crime to watch criminal trial proceedings, the court may authorize closed-circuit televising of the proceedings for viewing by victims or other persons the court determines have a compelling interest in doing so.*

Rule 54. [Transferred] 1

Rule 55. Records

The clerk of the district court must keep records of criminal proceedings in the form prescribed by the Director of the Administrative Office of the United States Courts. The clerk must enter in the records every court order or judgment and the date of entry.

Rule 56. When Court Is Open

*(a) **In General.** A district court is considered always open for any filing, and for issuing and returning process, making a motion, or entering an order.*

*(b) **Office Hours.** The clerk's office—with the clerk or a deputy in attendance—must be open during business hours on all days except Saturdays, Sundays, and legal holidays.*

*(c) **Special Hours.** A court may provide by local rule or order that its clerk's office will be open for specified hours on Saturdays or legal holidays other than those set aside by statute for observing New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.*

Rule 57. District Court Rules

*(a) **In General.***

*(1) **Adopting Local Rules.** Each district court acting by a majority of its district judges may, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice. A local rule must be consistent with—but not duplicative of—federal statutes and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.*

*(2) **Limiting Enforcement.** A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of an unintentional failure to comply with the requirement.*

*(b) **Procedure When There Is No Controlling Law.** A judge may regulate practice in any manner consistent with federal law, these rules, and the local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator was furnished with actual notice of the requirement before the noncompliance.*

*(c) **Effective Date and Notice.** A local rule adopted under this rule takes effect on the date specified by the district court and remains in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of local rules and their amendments, when promulgated, must be furnished to the judicial council and the Administrative Office of the United States Courts and must be made available to the public.*

Rule 58. Petty Offenses and Other Misdemeanors

*(a) **Scope.***

*(1) **In General.** These rules apply in petty offense and other misdemeanor cases and on appeal to a district judge in a case tried by a magistrate judge, unless this rule provides otherwise.*

*(2) **Petty Offense Case Without Imprisonment.** In a case involving a petty offense for which no sentence of imprisonment will be imposed, the court may follow any provision of these rules that is not inconsistent with this rule and that the court considers appropriate.*

*(3) **Definition.** As used in this rule, the term "petty offense for which no sentence of imprisonment will be imposed" means a petty offense for which the court determines that, in the event of conviction, no sentence of imprisonment will be imposed.*

*(b) **Pretrial Procedure.***

*(1) **Charging Document.** The trial of a misdemeanor may proceed on an indictment, information, or complaint. The trial of a petty offense may also proceed on a citation or violation notice.*

*(2) **Initial Appearance.** At the defendant's initial appearance on a petty offense or other misdemeanor charge, the magistrate judge must inform the defendant of the following:*

(A) the charge, and the minimum and maximum penalties, including imprisonment, fines, any special assessment under 18 U.S.C. § 3013, and restitution under 18 U.S.C. § 3556;

(B) the right to retain counsel;

(C) the right to request the appointment of counsel if the defendant is unable to retain counsel—unless the charge is a petty offense for which the appointment of counsel is not required;

(D) the defendant's right not to make a statement, and that any statement made may be used against the defendant;

(E) the right to trial, judgment, and sentencing before a district judge—unless:

(i) the charge is a petty offense; or

(ii) the defendant consents to trial, judgment, and sentencing before a magistrate judge;

(F) the right to a jury trial before either a magistrate judge or a district judge—unless the charge is a petty offense; and

(G) if the defendant is held in custody and charged with a misdemeanor other than a petty offense, the right to a preliminary hearing under Rule 5.1, and the general circumstances, if any, under which the defendant may secure pretrial release.

(3) Arraignment.

(A) Plea Before a Magistrate Judge. A magistrate judge may take the defendant's plea in a petty offense case. In every other misdemeanor case, a magistrate judge may take the plea only if the defendant consents either in writing or on the record to be tried before a magistrate judge and specifically waives trial before a district judge. The defendant may plead not guilty, guilty, or (with the consent of the magistrate judge) nolo contendere.

(B) Failure to Consent. Except in a petty offense case, the magistrate judge must order a defendant who does not consent to trial before a magistrate judge to appear before a district judge for further proceedings.

(c) Additional Procedures in Certain Petty Offense Cases. *The following procedures also apply in a case involving a petty offense for which no sentence of imprisonment will be imposed:*

(1) Guilty or Nolo Contendere Plea. *The court must not accept a guilty or nolo contendere plea unless satisfied that the defendant understands the nature of the charge and the maximum possible penalty.*

(2) Waiving Venue.

(A) Conditions of Waiving Venue. If a defendant is arrested, held, or present in a district different from the one where the indictment, information, complaint, citation, or violation notice is pending, the defendant may state in writing a desire to plead guilty or nolo contendere; to waive venue and trial in the district where the proceeding is pending; and to consent to the court's disposing of the case in the district where the defendant was arrested, is held, or is present.

(B) Effect of Waiving Venue. Unless the defendant later pleads not guilty, the prosecution will proceed in the district where the defendant was arrested, is held, or is present. The district clerk must notify the clerk in the original district of the defendant's waiver of venue. The defendant's statement of a desire to plead guilty or nolo contendere is not admissible against the defendant.

(3) Sentencing. *The court must give the defendant an opportunity to be heard in mitigation and then proceed immediately to sentencing. <u>The court must also give victims an opportunity to be heard</u>. The court may, however, postpone sentencing to allow the probation service to investigate or to permit either party to submit additional information.*

(4) Notice of a Right to Appeal. *After imposing sentence in a case tried on a not-guilty plea, the court must advise the defendant of a right to appeal the conviction and of any right to appeal the sentence. If the defendant was convicted on a plea of guilty or nolo contendere, the court must advise the defendant of any right to appeal the sentence.*

(d) Paying a Fixed Sum in Lieu of Appearance.

(1) In General. *If the court has a local rule governing forfeiture of collateral, the court may accept a fixed-sum payment in lieu of the defendant's appearance and end the case, but the fixed sum may not exceed the maximum fine allowed by law.*

(2) Notice to Appear. *If the defendant fails to pay a fixed sum, request a hearing, or appear in response to a citation or violation notice, the district clerk or a magistrate judge may issue a notice for the defendant to appear before the court on a date certain. The notice may give the defendant an additional opportunity to pay a fixed sum in lieu of appearance. The district clerk must serve the notice on the defendant by mailing a copy to the defendant's last known address.*

(3) Summons or Warrant. *Upon an indictment, or upon a showing by one of the other charging documents specified in Rule 58(b)(1) of probable cause to believe that an offense has been committed and that the defendant has committed it, the court may issue an arrest warrant or, if no warrant is requested by an attorney for the government, a summons. The showing of probable cause must be made under oath or under penalty of perjury, but the affiant need not appear before the court. If the defendant fails to appear before the court in response to a summons, the court may summarily issue a warrant for the defendant's arrest.*

(e) Recording the Proceedings. *The court must record any proceedings under this rule by using a court reporter or a suitable recording device.*

(f) New Trial. *Rule 33 applies to a motion for a new trial.*

(g) Appeal.

(1) From a District Judge's Order or Judgment. *The Federal Rules of Appellate Procedure govern an appeal from a district judge's order or a judgment of conviction or sentence.*

(2) From a Magistrate Judge's Order or Judgment.

(A) Interlocutory Appeal. Either party may appeal an order of a magistrate judge to a district judge within 10 days of its entry if a district judge's order could similarly be appealed. The party appealing must file a notice with the clerk specifying the order being appealed and must serve a copy on the adverse party.

(B) Appeal from a Conviction or Sentence. A defendant may appeal a magistrate judge's judgment of conviction or sentence to a district judge within 10 days of its entry. To appeal, the defendant must file a notice with the clerk specifying the judgment being appealed and must serve a copy on an attorney for the government.

(C) Record. The record consists of the original papers and exhibits in the case; any transcript, tape, or other recording of the proceedings; and a certified copy of the docket entries. For purposes of the appeal, a copy of

the record of the proceedings must be made available to a defendant who establishes by affidavit an inability to pay or give security for the record. The Director of the Administrative Office of the United States Courts must pay for those copies.

(D) Scope of Appeal. The defendant is not entitled to a trial de novo by a district judge. The scope of the appeal is the same as in an appeal to the court of appeals from a judgment entered by a district judge.

(3) Stay of Execution and Release Pending Appeal. *Rule 38 applies to a stay of a judgment of conviction or sentence. The court may release the defendant pending appeal under the law relating to release pending appeal from a district court to a court of appeals.*

Rule 59. [Deleted]

Rule 60. Title

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

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

April 11, 2005

The Honorable Paul G. Cassell
United States District Judge
350 S. Main Street
Salt Lake City, UT, 84101

Dear Judge Cassell:

Your article and proposed amendments to the Federal Rules of Criminal Procedure based on the Crime Victims' Rights Act was on the Agenda at the Committee's April 4- 5, 2005 meeting. There was a consensus among the committee members that the matter be given further study by the committee and be put back on the Agenda for the October meeting.

If you have any questions, feel free to contact me or Professor Sara Beale, who is the committee's reporter.

Sincerely,

Susan C. Bucklew
United States District Judge
Chair, Advisory Committee on the Criminal Rules

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Sara Sun Beale, consultant**

RE: **Rules Affected by the Crime Victims Rights Act, Judge Cassell's Proposals**

DATE: **March 14, 2005**

On October 30, 2004, President Bush signed into law P.L. 108-405, the Justice for All Act 2004. Title I of the act, the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act (CVRA), contains provisions on victim allocution and other rights. The relevant provisions are codified as 18 U.S.C. § 3771.

Judge Paul G. Cassell, of the District of Utah, has provided the Committee with an memorandum analyzing the CVRA and proposing 25 changes throughout the rules (including two new rules) to implement the legislation and carry forward its goals. As noted in his memorandum, Judge Cassell has written extensively on victim's rights. He also served as counsel to the victims of the Oklahoma City bombings before his nomination to the bench.

Judge Cassell's memorandum (including appendices incorporating the text of the act and legislative history) are attached.

This item is on the agenda for the April meeting in Charleston.