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To Rules_Comments@ao.uscourts.gov
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bcc
Subject Comments Due Feb. 15, 2007

Barbara Adkins, Director
Jordan Center For Criminal Justice
and Penal Reform

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Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States

February 14th, 2007

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

Dear Mr. McCabe:

Please accept the enclosed comments submitted on behalf of the Jordan Center, myself, and Mark Jordan, our Honorary Chairperson,
in response to the proposed amendments published for comment August 2006 regarding the Crime Victims' Rights Act.

Sincerely,

S/Barbara Adkins
Barbara Adkins, Director
Jordan Center for Criminal Justice
and Penal Reform.

cc: Mark Jordan, H.C.

Proposed Amendments to Federal Rules of Criminal Procedure
The Crime Victims' Rights Act: Proposed Amendments to Rules 1, 12.1, 17, 18, 32, and new Rule 43.1

Comments of
Jordan Center for Criminal Justice and Penal Reform
and
Mark Jordan

INTRODUCTION

The Jordan Center for Criminal Justice and Penal Reform was established in January 2006 by the supporters of Mark Jordan, largely as a response to his wrongful conviction in federal court in August 2005 on charges of assault and homocide. The Jordan Center seeks to foster and advance progressive criminal justice and penal reforms consistent with the innovative and developed values of our honorary chairperson and namesake, Mark Jordan. One way that we fulfil that mission is through the submissions of comments on matters of concern to and affecting the federal criminal justice and penal systems.

The following comments are submitted in response to the Advisory Committee's publication for comment of proposed amendments to Rules 1, 12.1, 17, 18, 32, as well as new Rule 60, which it asserts implement the Crime Victims' Rights Act. Rather than rehash the obvious or that which is already in the record, we will largely focus our comments to practical considerations, experiential, anecdotal, and hypothetical situations which we believe pose serious legal and Constitutional problems no less.

We thank the Committee for this opportunity to comment and its thoughtful consideration.

COMMENTS

Proposed Amendment to Rule 1

In its proposed amendment to Rule 1, the Committee seeks to incorporate the statutory definition of "crime victim" found in the CVRA. However, the proposed amendment goes much further than the CVRA in two important respects.

First, the proposed language would equate a "crime victim" under the CVRA with "victim" for all purposes under the Rules, present and future, independent of the CVRA. We strongly disagree with that approach.

18 U.S.C. section 3771(e) was clearly intended to define "crime victim" for the limited purposes of that section only. The United States Code Service has so corrected its editions by bracketing "this section" after "this chapter" each place it appears in the statute. The proposed amendment, with its attempt to adopt this definition of "crime victim" to also define "victim" generally throughout the Rules, goes much further than necessary to procedurally implement the CVRA and will have the direct effect of disparaging and enlarging other substantive rights, in violation of the Rules Enabling Act, 28 U.S.C. section 2072, which prohibits rules to abridge, enlarge or modify any substantive right.

To universally define "victim" based on the CVRA definition of "crime victim" would operate to affect various rights and priveleges through application of the Victim and Witness Protection Act (Pub.L. 97-291), the Victims of Crime Act (Pub. L. 98-473), the Victims' Rights and Restitution Act (Pub. L. 101-647), the Violent Crime Control and Law Enforcement Act (Pub. L. 103-322), the Antiterrorism and Effectively Death Penalty Act (Pub. L. 104-132), and Victims'

Rights Clarification Act (Pub. L. 105-6). These acts were not codified in the section containing the CVRA, many are not even in Title 18, and "victim" cannot be so loosely and universally redefined as "crime victim" using the CVRA. The two simply are not the same in all circumstances or for all laws and rules, and where they may be it cannot fairly be said they will remain so in the future.

The Committee's attempt to adopt a universal definition of "victim" based on the CVRA definition of "crime victim" goes well beyond promulgation of a rule "for practice and procedure," but creates new law that abridges, enlarges, and modifies existing substantive rights of a defendants and "victims" for purposes other than the CVRA. See, e.g., Hanna v. Plumer, 380 U.S. 460 (1965). For example, does every "crime victim" now become a "victim" for mandatory restitution purposes even though they would not be considered such under current law? See 18 U.S.C. section 3663A(c) (expanding mandatory restitution to exclusive list of enumerated offenses). See also United States v. Reichow, 416 F.3d 802, 805-06 (8th Cir. 2005) (bank teller victims who did not suffer physical injury could not recieve therapy restitution); Rule 32(a)(2) (defining "victim").

Equating "victim" with "crime victim" under the CVRA will effect these and other rights, both now and likely in the future. Notably, the Rules Enabling Act limitations are jurisdictional. See, e.g., Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 498 U.S. 533 (1991); Semtek Int'l. Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001).

Our second objection is that there is nothing in the CVRA to support the Committee's proposed language that "A person accused of an offense is not a victim of that offense." Rather, the CVRA is much more limited, providing only that: 1) A person accused of the crime may not obtain any form of relief under this chapter [this section], and 2) in no event shall the defendant be named as such guardian or representative. 18 U.S.C. sections 3771(d)(1)(a) and (e). Neither provision supports what we see as a leap to excluding the accused from ever being a victim for purposes other than asserting rights of "crime victims" under the CVRA. Again the problem lies in confusing "victim" with "crime victim" for CVRA purposes.

Indeed, in a multidefendant case where the defendants are accused of victimizing each other, application of such a Rule may well result in depriving certain victims their lawful right to restitution from codefendants even when the victimized defendant is himself or herself eventually acquitted. Such an accused victim, be it wrongfully or rightfully and irrespective of whether acquitted or convicted, would be barred from asserting their rights under laws that would otherwise recognize that individual as a "victim," even if unable to assert rights as a "crime victim" under the CVRA. This is one example of how the proposed amendment would go further than permitted by law or required by the CVRA, abridging and modify the rights of accused victims without due process of law and in violation of the Rules Enabling Act.

We also concur with the comments submitted by the Federal Public and Community Defenders and NACDL that, assuming the Constitutionality of the CVRA, a procedure is necessary for determining whether one claimed as a "victim," i.e. "crime victim," actually qualifies as such. Our concern, however, centers less around the chaos and disruption in criminal proceedings but around the Constitutional rights of the mere accused, who are presumptively and all too often actually innocent. For there to be a "crime victim," there must first be a crime and, it necessarily follows, a criminal, none of which can exist under our Constitutional scheme absent constitutionally sufficient process that includes notice and competently admitted evidence and findings based thereon; in other words, due process. There is no crime victim without a crime,

and there is no crime without a finding based on the requisite level of process due under our Constitution.

Moreover, it need not require a leap of imagination to envision a plethora of ways in which a savvy prosecutor or defendant can collude with self-proclaimed or even de facto "crime victims" to gain tactical and procedural advantages. The unscrupulous prosecutor might feign broad interpretation of the already overbroad defintion to withhold discovery and other obligatory disclosures or postpone proceedings. An equally unscrupulous defendant may likewise collaborate with sympathetic "crime victims" to create procedural violations or errors warranting or mandating dismissal.

We also agree with the Federal Public and Community Defenders that the rule, if adopted, should specify with particularity those Rules of Criminal Procedure in which the defintion applies, limited to those rules implementing specific provisions of the CVRA. However, we suggest a different remedy to these problems.

We reiterate our suggestion that the term "crime victim" and, where appropriate, "or his or her guardian or representative," be used in place of "victim" in each provision intended to implement the CVRA. Rule 1 (or Rule 60) then need only provide the following definition: "crime victim" means a person directly and proximately harmed as a result of the commission of a federal offense or an offense in the District of Columbia. Alternatively, the Rule might simply refer to the CVRA: "crime victim" means a person harmed as a result of the commission of an offense as defined in 18 U.S.C. section 3771(e). If the Committee's intent is to incorporate, but not go beyond, the rights created by statute, any rule amendments should stay true to the plain language of the legislation. We also believe the amended Rule 60 should be titled "Rights of Crime Victims" or "Rights of Victims and Crime Victims" to clarify that "crime victim" under the CVRA may be d isting uishible from "victim" as used elsewhere in the United States Code and Federal Rules.

Proposed Amendments to Rule 12.1

The Committee proposes exempting the government from the automatic address and phone number (but not name) disclosures of alibi-rebuttal witnesses if the witness is, in some undesignated person's view, a "victim." The Committee asserts that this change implements the CVRA provision recognizing crime victims' right to be reasonably protected from the accused, and to be treated with respect for dignity and privacy.

We have several objections to adoption of such an amendment. First and foremost we do not believe such a rule fairly flows from the CVRA, and consequently amounts to an unlawful modification and abridgement of an accused's rights under existing law in violation of the Rules Enabling Act. If Congress meant to modify and abrogate such existing rules through the CVRA, we must presume it would have done so explicitly.

The proposal is contrary to the history of this Rule, which has been riddled with debate from long before its adoption. Prior to the Rules adoption, the government had no right to notice of alibi defense. And as recent as 2002 the Committee recognized the need for mutual disclosure of witness phone numbers, in addition to names and addresses, in order to "facilitate locating and interviewing those witnesses." See 2002 Amendment Notes.

Moreover, information about crime victims will often be in the exclusive possession of the government. Thus, any attempt to draft a rule that applies equally to the government and the defense will nonetheless almost invariably operate to the prejudice of the defendant. In addition,

each prosecutor will apparently get to decide for him or herself, without any procedure, which witnesses constitute "crime victims" so as to invoke non-disclosure.

The rule would operate unfairly in other senses. It assumes all "crime victims" would not want to have their addresses and phone numbers disclosed, and provides no procedural mechanism to challenge prosecutorial misrepresentations that they do. Also, names would not be exempt. A wealthy defendant will undoubtedly have the investigative resources to locate any witness based on the name disclosure and circumstances of a case, whereas the majority of average and statistically underpriveleged defendants will not. As a practical matter the proposed amendment merely targets non-wealthy defendants for discrimination.

We also take issue with the fact that the proposed amendment does not act reciprocally. The Committee makes no suggestion that crime victim witnesses' dignity and privacy be likewise protected from disclosure by the defense to the government. See Rule 12.1(a)(2)(B). The defendant should also be permitted to withhold disclosure of intended alibi witnesses' phone and address information when the witness is also believed to be a "crime victim," presumably in the considered judgment of the party withholding the information. It would seem the otherwise lopsided disclosure operates unconstitutionally. See Williams v. Florida, 399 U.S. 78, 82 n.11 (1970).

With respect to the proposed amendment to Rule 12.1(b)(1)(B), assuming constitutionality, non-disclosure should be the exception and not the rule, and suggest that the burden of demonstrating by clear and convincing evidence the need for nondisclosure be on the government, or the "crime victim" asserting any such right. The government should also be required to demonstrate not only that the information is that of an actual "crime victim" but also that nondisclosure is consistent with the wishes of that "crime victim."

Again, we concur with the comments of the Federal Public and Community Defenders in terms of analysis, but not with its suggested alternative amendments. Instead, we suggest either withdrawing the proposed amendment or eliminating the alibi Rule 12.1 altogether. Nothing in the Constitution guarantees the government notice of alibi defense or otherwise affirmatively permits placing such a burden on a defendant. On the other hand, nothing in the CVRA requires the proposed amendment. The CVRA recognizes "respect" for the crime victims dignity and privacy, and provides no substantive rights in that regard vis-a-vis to any greater degree of dignity and privacy than entitled under existing law. Nor can the existing rules at all be deemed unreasonable so as to infringe on the rights of any person to be "reasonably protected from the accused" so as to require amendment.

Proposed Amendments to Rules 17, 18 and 32

We concur with the comments of the Federal Public and Community Defenders and the NACDL that this amendment is totally unnecessary, fails to implement any provison of the CVRA, and should be withdrawn. In any event, we again object to the more generic and amorphous "victim" as opposed to "crime victim" and, where appropriate, "or his or her guardian or representative," which ensure rules intended to implement the CVRA include the appropriate persons while not unnecessarily including or excluding others.

With respect to the "due regard for the convenience of "any victim language of proposed amendment to Rule 18, we must note the judicial inefficiency and potential chaos in cases involving numerous self-proclaimed victims advocating different venues. Moreover, the question is raised of how much regard is due. However, the CVRA recognizes a qualified right of crime

victims to attend proceedings open to the public. While that might require some restraint in the court's authority to sequester crime victim, it does not require the courts bring such proceedings to their living rooms.

We also strongly oppose the deletion of the existing requirement in Rule 32 that information in the PSR be "verified" and "stated in a nonargumentative style." While it is widely recognized that probation officers have essentially become hand puppets ofthe United States Attorney's Office, that should not mean that we discontinue to strive for neutrality and accuracy, atleast preserving the ideal. The proposed deletions instead encourages the current practice of biased and inaccurate reporting, turning the probation offices into victim advocacy groups.

If, however, such a rule is to be adopted, it should be seconded by a rule prohibiting the court from relying on any non-verified information as prima facie evidence at sentencing. Ideally, the Due Process Clause forbids judges from relying on unreliable information. See United States v. Pugliese, 805 F.2d 1117, 1124 (2d Cir. 1986), We think that the sincere and honest thing to do is recognize reality and take one of these three actions: 1) eliminate reliance on PSRs, 2) require the information be verified and reliable, revealing the source and basis, or 3) admit that the judiciary will no longer pretend to recognize a Due Process right to be sentenced based only on reliable and accurate information while actually relying on PSR information.

Also, while we think the Constitution restricts Congress from exercising jurtisdiction to create criminal offenses against any person or entity other than the United States, we object to the language of te proposed amendment to Rule 32(i)(4)(B). First, we believe some provision must be made to provide a defendant advance notice of all information any person or entity, including a crime victim, intends to submit to the court that the defendant may inelligently rebut it with contrary or mitigating evidence or information. The crime victim, if otherwise permitted to speak at sentencing, should then be limited to that information for which notice was fairly provided the defense. Moreover, the information should be limited and no information accepted that is not material and relevant to the particular proceeding for which proffered. Additionally, the court should not automatically address victims as some may desire not to be addressed. See, e.g ., Che ryl Hanna, No Right to Choose: Mandated Victim Participation in Domestic Violence Persecutions, 109 Harv. L. Rev. 1849 (1996). Finally, the court must be permitted to keep courtroom decorum and protocol and protect the accused from the prejudice of obstinate, unruly, and incorrigible crime victims.

We suggest a rule reflective of these concerns and believe such provison contained in new Rule 60 rather than Rule 32.

In either event, we propose the following:

> "At or before any public proceeding in the district court concerning release, plea, or sentencing, the court shall reasonably permit a crime victim, or his or her legal guardian or authorized representative, to be heard on any matter relevant and material to the proceeding provided, however, that the defendant is afforded advance notice and a fair opportunity to object and respond. The court may impose such limits as deemed reasonable to protect the interity of proceedings, the rights of any defendant, and prevent undue delay."

Proposed Amendment/New Rule 60

Again, we concur with those comments of the Federal Public and Community Defenders and NACDL, but in analyses and not necessary recommended alternatives. We also offer some

anecdotal and hypothetical observations.

Throughout any Rule adopted, we again suggest the term "victim" to be replaced with "crime victim" and, where appropriate, "or his or her legal guardian or authorized representative."

One of our greatest concerns surround proposed Rule 60(a)(2). We understand that the right of a crime victim to attend certain public proceedings is found in the CVRA with only one exception. We believe this provision of the CVRA and, consequently the proposed amendment, is so clearly unconstitutional, violating the separation of powers and Due Process rights of the accused, that it must be abandoned.

The recent trial of our own Honorary Chairperson is illustrative (United States v. Mark Jordan, Cr. No. 04-229-LTB, D. Colo.). In that case Mr. Jordan, while serving on unrelated federal sentence, was wrongfully charged and convicted of killing a fellow inmate. The wife of the deceased was present throughout trial except for when, during the governments' case in chief she bursted into tears and hurried from the courtroom before the jury. While that conviction is pending appeal, should a new trial be granted, the proposed rule would bar the court from excluding this proven prejudicial crime victim representative from the courtroom to protect Mr. Jordan from further prejudicial outbursts and from being wrongfully convicted a second time. While we certainly cannot fault crime victims and their loved ones for being human and expressing human emotion, we nonetheless cannot create and accomodate absolute rights of third parties to a litigation t hat re sult in the conviction of the innocent.

Consider too the disruptive and/or prejudicial presence of a "crime victim" or guardian or represntative who acts not on involuntary emotional outbursts but purposely to prejudice the accused. Under the Rule, there will be nothing either defendant or the court can do to prevent such prejudice through exclusion. Under the notice provision of the CVRA, the crime victim will undoubtedly be aware of this power he or she possesses over the court and accused.

Consider also a case such as that rsulting in the recent conviction of several officials of the Federal Bureau of Prisons who terrorized a large portion of the female prison population incarcerated at the Federal Correction Institution in Tallahassee, Florida. The conspiracy involved rape, fraud, extortion, assaults and blackmail. One of the prison officials shot and killed an FBI agent inside the Bureau of Prisons facility. Under the proposed rule, it owuld appear theUnited States Marshal Service would be required to bring the entire prison population to the courthouse for all specified proceedings to be heard on each offense for which there is one victim.

Additionally, crime victims should be excludable where good cause exist to believe that the testimony of any witness might be affected by their presence, such as collusion between a crime victim and otherwise excludable witnesses.

Inlight of the foregoing, the proposal should be abandoned.

With respect to proposed Rule 60(b)(2), we do not believe the government should be permitted to assert the rights of a crime victim without authorization of the victim or against the wishes of that crime victim, and vice versa. Moreover, allowing or even mandating that a prosecuting attorney take on the additional often conflicting role of victim advocate will invariably lead to a variety of ethical and other conflicts.

As to proposed Rule 60(b)(s), nothing in the CVRA directs or even encourages yet alone authorizes reopening of a plea or sentence. The provison therefore should not be adopted. If such a provision were mandated, the defendant should be permitted the option of withdrawing a plea where the motion to reopen the plea or sentence bases thereon is granted. Also, it would seem to

us that a plea operates as an adjudication of facts to which jeopardy attaches, the retrial of which would be barred by the Double Jeopardy Clause. A provision should also be added to make clear and certain that in no case will the assertion of rights by a crime victim or the grant of any relief thereon operate to prejudice the rights of the accused or contrary to the ends of justice. Such addition is necessary to ensure that in situations where the rights of a defendant and crime victim are in conflict under the CVRA the rights of the accused will prevail. We must not "balance " away the Constitutional rights of defendants against non-constitutional rights of others.

CONCLUSION

We cannot end our comments here without bringing attention to what we believe to be grave and fundamental problems with both the CVRA and proposals and authority and jurisdiction.

We first question the authority of Congress and the judiciary to enact and give effect to the CVRA. See, e.g., Hanna v. Plumer, 380 U.S. 460 (1965). While it is clear Congress has jurisdiction over offenses against the laws on the United States which it has passed to the judiciary, and to provide for the penalties for such offenses, it is not clear that any branch of federal government can enact laws displacing or supplementing the United States as a victim and yet maintain jurisdiction over the criminal process.

Is the Constitutional powers of the United States to enact laws governing matters over which it exercises jurisdiction and to punish offender of those laws through criminal process exclusive, or may it permissably create offenses against private citizens and extend the powers of criminal process to prosecute offenses by one citizen against another? If the former, it would seem that the United States is without constitutional authority to create extragovernment victims or rights therefor through invocation of criminal process. We believe that the federal governments power to criminalize activity and invoke the power of criminal process is jurisdictionally limited to offenses against none other than the United States.

If the United States is not a victim, or the victim, in a criminal matter, then we are left with a dispute between private citizen and the state, over which federal criminal process enjoys no jurisdiction to resolve. We believe that the only constitutionally permissable plaintiff in any case invoking the criminal process of the federal government is the United States. In sum, where the victim is not the United States we believe the constitution does not authorize the United States to invoke criminal process. All other victims must seek and satisfy themselves with any available remedies.

We would strongly suggest that these fundamental constitutional questions be settled, ideally through litigation but atleast through advancement of some arguably permissable constitutional consruction, before any rules are adopted respecting the CVRA and acknowledging thereby jurisdiction over criminal offenses against any person or entity other than the United States. Other constitutional questions abound in the realm of separation of powers that should be resolved. As Mr. William Clark writes so concisely in his letter to the Secretary, "there is nothing in the constitution which provides for the protection of 'victims' rights." (Doc. No. 06-cr-004).

In all other respects we concur with the analyses but not necessarily alternate suggestions of the Federal Public and Community Defenders and the NACDL. We believe most of the proposed amendments go beyond prescribing general rules of practice and procedure, but instead abridges, enlarges and modifies substantive rights.

While we appreciate the difficult task with which the Committee is charged, we encourage it

to give greater weight and consideration to the Constitutional implications of its proposals, the rights of the presumptively and actually innocent, and the need to maintain judicial authority to manage proceedings to serve the ends of justice (i.e. curtail the convictions of innocents). As so honestly acknowledged by Mr. Clark, "statutes and court decisions have already watered down the constitutional protection intended by the Fifth Amendment."

We must take care not to make more victims by increasing the already bulging net of innocent and wrongfully convicted citizens in a wayward effort to create and enforce rights of those harmed by crime. And we fear that is exactly the result the proposed amendments will achieve. Are the vast numbers of innocent and wrongfully convicted defendants not also "crime victims" whose rights we should consider?

Respectfully submitted this 14th day of February, 2007

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